Study on Establishing a Financial Consumer Alternative Dispute Resolution Scheme in China

Feifan GUO

A thesis submitted for the degree of PhD in Law

School of Human Rights & Law

University of Essex

2021/01

Content Table

Abstract

The thesis aims to answer two research questions. The first is whether it is good to introduce a consumer ADR scheme that is specially designed for China's financial service market and the second is what this financial consumer ADR scheme for China's financial service market may look like. The two research questions are important, because there has been no work discussing why a special designed financial consumer ADR scheme is good for Chinese financial service market in the Chinese context and how this should be designed, this is the gap the thesis tries to fill. For the first research question, the thesis argues that a financial consumer ADR scheme is good for Chinese financial service market. Because a financial consumer ADR scheme that is specially designed for China can provide consumers with a place to resolve their disputes in a cheap, fast, and efficient way. A good designed financial consumer ADR scheme may also have functions such as consumer advice, collect and feedback data and improve the market behaviour. These functions may balance the imbalance of power between financial firms and consumers and increase confidence on Chinese financial service market. For the second research question, the thesis argues that the government or regulators may impose such new financial consumer ADR scheme through legislation or establish such scheme firstly and then seek for a legislation later. An independent ADR body may be established to operate the scheme. It may have compulsory jurisdiction on most financial firms and financial service. A multilayer working process used in sequence could be the working procedure of the scheme. The outcome produced by the new ADR scheme may be binding while providing the consumer with a full or limited unilateral opt-in right. The new ADR scheme may provide the consumer with a free service and collect its funds mainly form the financial industry by charging a levy and case fee.

Chapter I Introduction

Mapping the Introduction

1. The thesis aims to study whether it is good to introduce a special designed financial consumer ADR scheme in China and what this scheme should look like. The financial consumer ADR scheme is an important place for consumers to access to justice and can also protect the financial service market. The practice of financial consumer ADR can be observed in many leading financial service markets such as UK, Hong Kong, Australia, Japan, and Singapore[1]. In the introduction chapter, the thesis will discuss the two core research questions, the methodology of the thesis, and the structure of the thesis.
2. The main research questions here are two, the first question here is whether it is good to introduce an ADR scheme specially designed for financial service market in China[2]. And the second is what it should look like in China. Currently there are already many researches on why an ADR scheme is important for consumers in

[1] Ali, Shahla F, *Consumer Financial Dispute Resolution in a Comparative Context, Principles, Systems and Practice* (Cambridge University Press, 2013); Christopher Hodges, Iris Benohr and Naomi Creutzfeldt-Banda, *Consumer-to-business Dispute Resolution: the Power of CADR* (Hart Publishing 2012)

[2] Currently there are already some ADR practice in China's financial service market, such as a financial mediation practice and a consumer hotline operated by China's central bank, as we will fully discussed in chapter III, these existing financial consumer ADR practice does not work well, they can only cover very limited scope, cannot produce binding result and only little consumers know or use it.

general[3], and particular in financial service market[4], and there has been some rather general work suggesting the idea of a financial consumer ADR system in China.[5] However, there has been no work doing what the thesis doing here: discussing why it is good to introduce a special designed financial consumer ADR scheme in the Chinese context and considering in detail how it should be designed. These are the important gaps being filled here.

3. For the first research question, the thesis argues that it is good to introduce an ADR scheme that is specially designed for financial service market in China. Some previous work made similar conclusion on this question[6], however, none of these works give a good analysis on why it is good. In another word, these works did not give a good explain on how a special designed financial consumer ADR scheme can protect the consumer and benefit the financial service market. The

[3] Christopher Hodges, Iris Benohr and Naomi Creutzfeldt-Banda, *Consumer-to-business Dispute Resolution: the Power of CADR* (Hart Publishing 2012); Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to Justice Movement' (1993) Vol.56, No.3 *The Modern Law Review* 282; Deborah R. Hensler, 'Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System' (2003) 108 PENN ST. L. REV. 165, 170; Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007)

[4] Ali, Shahla F, *Consumer Financial Dispute Resolution in a Comparative Context, Principles, Systems and Practice* (Cambridge University Press, 2013); Ali, Shahla F, 'Globalization and Financial Dispute Resolution: Examining Areas of Convergence and Informed Divergence in Financial ADR' (2013) vol.331 *Journal of Dispute Resolution* 213; Merricks, W, 'The Financial Ombudsman Service: not just an alternative to court' (2015) Vol. 15 No. 2 *Journal of Financial Regulation and Compliance* 135

[5] Li Jingwei & Zhou Zhongfei, 'The UK's financial service supervision and its meaning for China' (2002) Vol. 2002 (2) *Foreign Economy and Management* 78; Xu Huijuan, 'Financial Ombudsman System in UK and Protection of Consumers' Rights and Interests – Comment on Our Financial Regulations' (2005) Vol.1 *Finance Forum*; Yang Xiaoxing & Liu Yue, 'Research on the Protection of Financial Consumers in the Context of Globalization' (2008) Vol.2008 (6) *Modern Management Science* 37

[6] Li Jingwei & Zhou Zhongfei, 'The UK's financial service supervision and its meaning for China' (2002) Vol. 2002 (2) *Foreign Economy and Management* 78; Liu Yingshuang, 'Research on the Protection of Financial Consumers' Rights, and Interests in China--- Also on the Protection of Financial Consumers in American Financial Supervision Reform' (2011) Vol. 33 (3) *Modern Law Science,*116; Liu Yizhan, 'Some Ideas on Constructing the Protection Mechanism of Financial Consumers in China-Based on the Experience of UK, Australia and America' (2011) Vol.27 (2) *Consumer Economics*

research here is filling this gap. The research here would provide with reasons why it is good to introduce a special designed financial consumer ADR scheme in China's financial service market, by analysing how this scheme would protect the consumer and benefit the financial service market. The analysing is, there is a gap of bargaining ability between consumers and financial firms, financial firms are much stronger than consumers.

4. When there are disputes between consumer and financial firms happen, if disputes are resolved only by financial firms and consumers, financial firms can easily get a solution in favour of them or left disputes unresolved. Therefore, there should be a place to provide consumers with an opportunity to access to justice and let an independent third person to join the dispute resolution process to balance the gap. Usually, the court should be the place to provide consumers with such opportunity and the judge should be the independent third person. However, in financial service market, many consumers are reluctant to go to the court due to the cost, time and efficient of the litigation. Therefore, it is good to introduce a financial consumer ADR scheme to provide the consumer with a cheap, fast and efficient alternative to access to justice. By doing so, the consumer receive protection and the confidence on financial service market is increased[7].

[7] The reason why an effective and comprehensive financial consumer ADR scheme can benefit not only financial consumers but also financial service market as whole is because just as we will fully discussed in later of this chapter and Chapter II, for many reasons, consumers choose to not bring their disputes to court and financial firms stand in an advantaged position if disputes were resolved only between financial firms and consumers. This may lead to an abuse of this advantage and bad practice in financial service market, which can reduce consumers' confidence in this market and decrease consumers' willingness to use service in this market. This will finally damage the financial service market. An effective and comprehensive financial consumer ADR scheme can reduce the above risk by balance the gap of ability in dispute resolution process between financial firms and consumers and provide consumers with an opportunity to access to an alternative justice. Consumers

5. For the second research question, currently there are some works on researching financial consumer ADR in different jurisdictions[8], and some works on establishing a special designed financial consumer ADR in China by learning overseas experience[9]. However, these works did not give a discussion on what an advanced model that China may learn from and what a financial consumer ADR scheme in China may look like. This is the gap that the thesis aims to fill. Here the thesis argues that China can learn from an advanced model of financial Ombudsman used for example, by UK and Australia. The government or regulators may impose a new financial consumer ADR scheme through or not through legislation, with merging existing relevant ADR practices into it. It may be operated by an independent public institute. A multilayer working process where, negotiation procedure, mediation procedure, and Ombudsman, are used in

will then feel that the financial service market is a generally fair market and their interests are secured in this market. This will enhance their confidence in the market and increase their willingness to use the service in this market. Therefore, the financial consumer ADR scheme benefit the financial service market. More arguments about this idea can be seen in Christopher Hodges, Iris Benohr and Naomi Creutzfeldt-Banda, *Consumer-to-business Dispute Resolution: the Power of CADR* (Hart Publishing 2012); Li Jingwei & Zhou Zhongfei, 'The UK's financial service supervision and its meaning for China' (2002) Vol. 2002 (2) *Foreign Economy and Management* 78; Yang Xiaoxing & Liu Yue, 'Research on the Protection of Financial Consumers in the Context of Globalization' (2008) Vol.2008 (6) *Modern Management Science* 37

[8] Ali, Shahla F, *Consumer Financial Dispute Resolution in a Comparative Context, Principles, Systems and Practice* (Cambridge University Press, 2013); Christopher Hodges, Iris Benohr and Naomi Creutzfeldt-Banda, *Consumer-to-business Dispute Resolution: the Power of CADR* (Hart Publishing 2012); Ali, Shahla F, 'Globalization and Financial Dispute Resolution: Examining Areas of Convergence and Informed Divergence in Financial ADR' (2013) vol.331 *Journal of Dispute Resolution* 289 and Alan Ewins, Catherine Husted, Juliana Lee, & Joyce Woo, 'The Lehman Aftermath: Hong Kong and Singapore Regulatory Reforms in the Structured Product' (2010) *5 CAPITAL MARKETS LAW J. 301, 303*.

[9] Li Jingwei & Zhou Zhongfei, 'The UK's financial service supervision and its meaning for China' (2002) Vol. 2002 (2) *Foreign Economy and Management* 78; Yang Xiaoxing & Liu Yue, 'Research on the Protection of Financial Consumers in the Context of Globalization' (2008) Vol.2008 (6) *Modern Management Science* 37; Yang Ziqiang, 'Perfecting the protection framework of financial consumers' rights and interests' (2012) Vol.2012 (7) *China Finance* 89

sequence may be the working procedure of the scheme. It may have characteristics as follow: compulsory jurisdiction on most financial firms and financial service, ability to produce binding and enforceable results while consumers have unilateral opt-in right, easy to use, transparent, fast, having a close relationship with financial authority, and provide free or almost free service to consumers.

6. The reason is there is a significant imbalance of power between financial firms and consumers, public authority needs to be involved to balance this gap and financial industry seems no motivation to spontaneously create a financial consumer ADR scheme in China. The existing ADR practices may be merged because by doing so existing ADR resources such as their staff and experience can be used. The scheme may be operated by an independent institution instead of be operated by financial authority as it may help to secure independence and impartiality. The multilayer working process may be used because it can fully use different advantages of different kinds ADR techniques and it may also save the time and cost, if many cases could be resolve in the early stage. The scheme may have these characteristics because these characteristics could encourage consumers to use the scheme and enhance consumers' confidence on the scheme.

Research Methodology

7. There are two main research methodologies are used in this thesis to answer the two research questions. The first is the doctrinal method including literature review. We will go through many literatures of the financial consumer ADR scheme and its practice, including but not limited to relevant legal instruments, policy documents, academic papers, cases, reports, and statistics. For example, regarding the UK's FOS, we use books and papers written by scholars[10], legal instruments[11], the annual reports and statistics published by the FOS company, and cases reported by the scheme. And regarding the Hong Kong's FDRC scheme, we use the white paper book published by Hong Kong's financial authority, the constitution of FDRC, papers, annual reports and sample cases reported by FDRC itself. These literatures will become the basis and main materials of the research. Further, we use both deductive and inductive reasoning to give a logical analysis on these materials with considering those existed principles, theories, and common sense in the area of financial consumer sector and ADR to illustrate and prove our conclusions.
8. The other main research method we use here is the comparative method. We will compare financial consumer ADR scheme and practice in three different jurisdictions, namely UK, Hong Kong, and Australia. These three jurisdictions

10 For example, Christopher Hodges, Iris Benohr and Naomi Creutzfeldt-Banda, *Consumer-to-business Dispute Resolution: the Power of CADR* (Hart Publishing 2012); Sharon Gilad, 'Juggling Conflicting Demands: The Case of the UK Financial Ombudsman Service' (2009) *Journal of Public Administration Research and Theory*, Volume 19, Issue 3, 661; Merricks, W, 'The Financial Ombudsman Service: not just an alternative to court' (2015) Vol. 15 No. 2 *Journal of Financial Regulation and Compliance* 135

11 Such as the Financial service market regulation (2000) and the hand book of dispute resolution published by the FCA, *FCA Hand Book, insurance ombudsman scheme*

were picked for their typical characteristics. The comparative study will cover many aspects of the scheme which are relevant with our research questions, for example, who will establish the scheme and who will operate them, what working process they will use, what characteristics of their program design, what principles they are following, etc. We hope this comparative study could help us to find out and prove what an ideal financial consumer ADR scheme should looks like. For example, the coherence of practice in these three jurisdictions may suggest that there are golden rules and principles that should be followed by all financial consumer ADR schemes, and for the difference, we will analyse why there is a difference and find out which is a better model by considering their effect in practice.

9. UK' financial ombudsman service (FOS) was chosen because it's currently most used financial consumer ADR scheme in the world, a few hundred thousand cases were submitted to the FOS in every year[12]. And the UK's FOS is a very typical representative of the ombudsman approach of financial consumer ADR scheme.
10. The Hong Kong's Financial Dispute Resolution Scheme (FDRS) was chosen because the Hong Kong is a popular financial centre in Asia and also part of China, therefore, the context of Hong Kong is very similar to the China (mainland), for example, the financial consumer live in Hong Kong and China mainland shares similar culture background, economic situation and understanding on what is fairness or justice, therefore can contribute much value

12 FOS *Financial Ombudsman Service | annual review 2016/2017* 33

when we discuss on establishing a financial consumer ADR scheme in China. Another reason to choose Hong Kong is because of its dispute resolution techniques.

11. The Australia was chosen because this jurisdiction just reformed its financial consumer ADR scheme, therefore, the research on Australia's financial consumer ADR scheme will help us to find out some new trends of the development of the financial consumer ADR scheme.

Brief introduction of following chapters

12. The following chapters of the thesis will focus on answering the two main research questions we give in this introduction chapter. The next chapter, Chapter II will demonstrate the development of ADR and history of ADR's development in general. It would also try to analysis why ADR is popular and widely accepted in some jurisdictions. Then in Chapter III, the thesis will discuss the criteria of a quality ADR scheme. These criteria includes both constitutional criteria such as independence, impartiality, and transparency and performance criteria such as cost, time, and efficiency. This discussion would set up criterion to further comparison study on the three chosen financial consumer ADR schemes.
13. In Chapter IV, the thesis will discuss many different ADR techniques and models, which show the diversity of ADR. The thesis will try to classified ADR schemes according to techniques and models of them and discuss advantages and disadvantages for each category of them. In chapter V, The thesis will discuss

why a special designed consumer ADR scheme is needed in financial service market. The thesis will examine current situation of consumer ADR scheme in regulated markets, such as energy, telecom, and financial service market and then analysis why there is a trend to introduce consumer ADR in these regulated markets especially the financial service market. In Chapter VI, the thesis will give a detailed examination on the three chosen financial consumer ADR schemes, namely the UK' FOS, the Hong Kong's FDRC and the Australian AFCA. The thesis will then give a comparison on these schemes to find a probably current best model which can be learnt by China.

14. In Chapter VII, the thesis will discuss ways that ADR schemes may be created. The thesis will examine possible ways to create an ADR scheme, and advantages and disadvantages of these ways. This discussion will the further discussion on how to introduce a financial consumer ADR scheme with an advanced model of financial Ombudsman in China. Chapter VIII, the thesis will discuss China's features, that is to say discussing why introducing a financial consumer ADR scheme in China is good, and how to introducing a financial consumer ADR scheme with an advanced model of financial Ombudsman in China in the context of China. After these Chapters, there is a short conclusion to summary the thesis and give answers to the two main research questions.

Chapter II The Development of ADR and Possible Reasons for the Development

Development of ADR

1. ADR has an extremely long history in relation to dispute resolution between people, and was used by pre-historic and tribal communities[13]. However, in the evolution of all modern and industrialised states, courts are assumed to be the exclusive, or at least dominant, role in dispute resolution[14]. As a result, ADR had largely disappeared from dispute resolution until it was rediscovered in the late twentieth century[15]. After been rediscovered in the late of the last century, the ADR experienced a rapid development and becomes popular and widely accepted in many jurisdictions.
2. For example, in UK, one of the first ADR schemes was the arbitration scheme established by the travel sector trade association in the 1950s[16], which was aim to resolve disputes between travel traders and consumers. By 2012, at least 40 such ADR schemes existed in the UK administered by the Centre for Effective Dispute Resolution (CEDR)[17]. Besides, there are many sectoral ADR schemes operating

[13] Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making* (3rd edn, Cambridge University Press 2020)
[14] Fukuyama F, *The Origins of Political Order. From Prehuman Times to the French Revolution* (New York: Farrar, Strauss and Giroux 2011)
[15] C Hodges, 'The private sector Ombudsman' in Marc Hertogh and Richard Kirkham (eds) *Research Handbook on the Ombudsman* (Edward Elagar Publishing 2018)
[16] C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012); C Hodges and A Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Edward Elgar, 2013)
[17] C Hodges, *Delivering dispute resolution a holistic review of models in England and Wales* (Hart

under sectoral codes of practice, and may be approved as self-regulatory schemes under the Consumer Codes Approval Scheme if they conform to the requirements of the Chartered Trading Standards Institute[18]. A major development of ADR in UK is the creation of Financial Ombudsman Service (FOS) in 2000. The government merged several sectoral private Ombudsmen into a single ADR scheme and placed the entity firmly within the new architecture of the regulatory system for financial service firms[19]. Other examples of national Ombudsmen created by statute are the Pensions Ombudsman[20] and Legal Ombudsman[21].

3. The ADR in UK was also regarded as an important part of civil procedure reform. The model of dispute resolution adopted by Lord Woolf placed significant emphasis on encouraging parties to settle cases through ADR before and during litigation[22]. While ADR was also encouraged in administrative justice[23]. Further Jackson LJ requires all small claims were automatically referred to mediation, on the basis that this is not compulsory mediation, but a requirement to engage with a small claim mediator in his reform in 2013[24]. In 2017 a Civil Justice Council

Publishing 2019)

[18] C Hodges, *Delivering dispute resolution a holistic review of models in England and Wales* (Hart Publishing 2019)

[19] C Hodges, *Delivering dispute resolution a holistic review of models in England and Wales* (Hart Publishing 2019); C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing 2012) 272 – 281.

[20] Established under the Pension Schemes Act 1993, s 145(3).

[21] Established as the Office for Legal Complaints under the Legal Services Act 2007, s 114.

[22] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1995); Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1996).

[23] A Le Sueur, 'Administrative justice and the resolution of disputes' ch 10 in J Jowell and D Oliver, T*he Changing Constitution* (7th edn, OUP, 2011). The courts have tried to push mediation and other forms of ADR in preference to litigation: Re Cowl (Practice Note); Cowl v Plymouth City Council [2001] EWCA Civ 1935; [2002] 1 WLR 803.

[24] *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: a consultation on reforming civil justice in England and Wales – The Government Response* (The

(CJC) ADR Working Group issued a report that called for wider use of ADR before and during court processes,[25] The CJC also recognized the 'enormous success' of Ombudsman processes, and suggested 'exploring the wider use of conciliation and Ombudsmen within or alongside the civil justice'[26].

4. The development of ADR in the UK is the epitome and of its development in the EU. The EU highly appreciate the value of ADR and has issued some directives and regulations on it. For example, in 2013 the European Union recognised that ADR provided huge advantages for resolving disputes between consumers and traders, which involve many small claims that no rational consumer or trader would wish to litigate them[27] even in a small claims process, and created an EU-wide system of consumer ADR entities[28], in which recognised ADR bodies are subject to a regulatory regime, and an e-portal for cross-border C2B disputes between Member States[29].

5. The trend of using ADR may also be observed in jurisdictions out of EU. For example, in China, for a long time, the Chinese judge were strongly encouraged

Stationery Office, 2012) Cm. 8274.

[25] C Hodges, Delivering dispute resolution a holistic review of models in England and Wales (Hart Publishing 2019)

[26] *ADR and Civil Justice. Interim Report* (Civil Justice Council, 2017).

[27] A 2004 EU survey found that only 29% of European citizens would be prepared to bring a claim of less than € 500 to court: *Special Eurobarometer, European Union citizens and access to justice* (European Commission, 2004), 28. See also *Special Eurobarometer 342. Consumer empowerment* (European Commission, 2011).

[28] Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR). See P Cortes, 'A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward' (2015) 35 (1) *Legal Studies* 114 – 41.

[29] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online
dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L165/1.

to resolve cases submitted to them by using mediation[30]. The Hong Kong has a culture to highly support arbitration which makes the Hong Kong becomes an arbitration center in Asia[31]. In Australia, the ADR scheme has a long history to be used to resolve consumer complaint in financial service market, which is know as External Dispute Resolution (EDR)[32]. One reason for the development of ADR may be the detriments of litigation were noticed by more and more jurisdictions.

6. For a long time, in the western world and especially in those leading jurisdictions, the civil litigation was regarded as the nominate method, or at least, the main method to access to justice. The court was praised as the place, sometimes even the only place in a state, which produces the justice. The judicial independence was enthroned and for many people, the civil litigation and the independent judicial system are symbols of liberalism and the rule of law.
7. However, some criticism points out that the promise of liberalism brought by civil litigation and judicial system may be a failure promise as due to the economic, social, and cultural obstacles, some people have no capacity to access and to benefit from the justice brought by the court and the liberties linked to this justice[33]. The criticism towards the accessibility of the civil justice is never rare to see. As early as 1850, Abraham Lincoln said that "Never encourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them

[30] Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007)
[31] Ali, Shahla F, 'Approaching the global arbitration table: comparing advantages of arbitrations seen by practitioners in east Asia and the west; (2009) 28 REv. LITIG. 791, 793.
[32] Ali, Shahla F. (2013). 'Globalization and Financial Dispute Resolution: Examining Areas of Convergence and Informed Divergence in Financial ADR' (2013) Vol.2013 *J. Disp. Resol.* 331
[33] Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to Justice Movement' (1993) *Vol.56, No.3 The Modern Law Review* 282

how the nominal winner is often a real loser-in fees, and expenses, and waste of time.[34] ” These words from Lincoln, a lawyer and an enthusiastic advocate of liberties and rule of law, indicate that the civil litigation may be not the best way, or even a sensible way to resolve particular ‘justiciable’[35] problems, especially when these problems come from everyday life[36].

8. The high level of legal cost of litigation procedure or other corresponding adjudicative procedure is a frequent observed and discussed problem. According to a survey made by the Europe Union, the estimated cost to resolve a dispute valued about 200,000 euros in UK’s court is 51,536 euros[37], which is about 25.8% of the case value. The legal cost in other member states can be even higher, for example, the estimated cost in Sweden is 65,710 euros. Although the estimated cost is not such high in some member states with civil law tradition[38], the average estimated cost is still 25,337 euros, which counts 13% of the case value[39].

9. In UK the Legal Services Board asserted in 2012[40]: ‘A range of research between 2007 and 2010 has repeatedly reported a general perception that legal services are

---

[34] Abraham Lincoln, ‘Fragment: Notes for a Law Lecture’ (1850), in Roy P. Basler (ed) *The Collected Works of Abraham Lincoln: Supplement 1832-1865* (Greenwood Publishing Group 1974)

[35] ‘*A matter experienced by a respondent which raised legal issues, whether or not it was recognised by the respondent as being “legal” and whether or not any action taken by the respondent to deal with the matter involved the use of any part of the civil justice system*’: H. Genn *Paths to Justice: What People Do and Think About Going to Law* (Hart Publishing1999) 12.

[36] For example, those ‘bread and butter issues’ described by the Consortium on Legal Services and the Public (1996) *Agenda for Access: The American People and Civil Justice*, Chicago: American Bar Association, p.vii.

[37] ADR Centre *The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial (Rome, 2010)* p.49 accessed at https://mediatorsfederatienederland.nl/content/uploads/sites/2/2014/05/Cost_of_Non_ADR.pdf

[38] For example, the estimated cost in France is 20,500 euros and in Germany is 9,854 euros. Ibid.

[39] *Ibid*.

[40] *Evaluation: How can we measure access to justice for individual consumers? A discussion paper* (Legal Services Board, 2012).

expensive and unaffordable.[41]' Briggs LJ observed that wildly disproportionate expenditure still occurs, albeit not at the claimant's risk[42]. The Lord Chief Justice reported in 2016, 'costs issues continued to be the subject of dispute between parties, and to generate litigation in their own right.[43]' Briggs LJ also confirmed that the introduction of costs management had not led to a reduction in the costs[44]. And average costs in cases involving under £ 25,000 still vastly exceed sums in dispute[45].

10. The high cost of litigation makes the litigation becomes a cost choice for people to use to resolve disputes, especially when there is no much value involved in the case. When the plaintiff did not get a judgement in favour of himself/herself in the litigation, the whole litigation may become a waste of money which will make the plaintiff suffer the extreme financial loss. Even when the plaintiff was win, whether the compensation received can cover the cost may be still questionable.

11. In addition, the litigation is also time consuming. The duration of litigious court proceedings in the first instance courts is: Austria, 129 days; Norway, 158 days; Germany 184 days; France, 279 days; and Italy 493 days[46]. And this is only for

---

[41] *Evaluation: How can we measure access to justice for individual consumers? A discussion paper* (Legal Services Board, 2012), quoting: GfK, *Consumer attitudes towards the purchase of legal services* (Solicitors Regulation Authority 2010); *Study of Defendants in Magistrates' Courts* (Legal Services Research Centre 2009); *Legal Advice for Small Businesses: Qualitative Research* (AIA Research Ltd, 2010); IPSOS MORI, *Perceptions of barristers – Research study conducted for the Bar Standards Board* (Bar Standards Board 2007).

[42] Lord Justice Briggs, *Civil Court Structure Review: Interim Report* (Judiciary, 2016) para 5.46.

[43] *The Lord Chief Justice's Report 2015* (Lord Chief Justice, 2016).

[44] Lord Justice Briggs, *Civil Court Structure Review: Final Report* (Judiciary, 2016) para 5.23.

[45] C Hodges, *Delivering dispute resolution a holistic review of models in England and Wales* (Hart Publishing 2019) 169

[46] Council of European (The European Commission for the Efficiency of Justice*), European Judicial Systems – Edition 2018 (Data 2016)*

the first instance, considering that most cases can be appealed twice, and the duration for an appealed case may longer than the first instance, the duration for finally resolving a case may take years. For example, the estimated time to finally resolve a dispute valued 200,000 euros is 2205 days in Italy, 700 days in Netherlands and 540 days in Austria[47]. The long period of litigation leaves the dispute in a pending position in a long time, which leave the parties in an uncertain position and may put negative influence on their other issues or transactions[48]. Further, the long duration of litigation may also mean a long term economic and mentality burden of parties.

12. Besides, the time and cost, parties who participate a litigation may also need to endure the bureaucratic procedure, the endless cross-examination, publication of their privacies relevant with the dispute, and the antagonistic atmosphere in the court. All of these may put a serious mentality burden on parties and make them suffer anxiety, depression, anger or put them mental state in an unstable and uncomfortable position. That is probable explain why large percentages of people believe that the civil litigation or other formal legal processes are usually expensive[49], terrifying, frustrating, infuriating, humiliating, time-consuming, perhaps all-consuming[50]. With these problems, there is no wonder that radical critics believe that "formal legal institutions, including the courts, are

[47] Council of European (The European Commission for the Efficiency of Justice), *European Judicial Systems – Edition 2018 (Data 2016)*

[48] For example, a pending litigation will be regarded as a potential risk by banks and thus increased the parties cost for a loan.

[49] An American report shows that "two-third of surveyed Americans agree that it is 'not affordable to bring a case to court." See Deborah L. Rhode, *Access to Justice* 43

[50] David Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83 GEO. L.J. 2621

mechanisms for maintaining the power of elite groups," and that these institutions "impose dispute resolution norms that may be alien—or even harmful—to other members of the community."[51]

The effort of the first and the second wave of access-to-justice movement

13. As a response to these problems and criticism of civil litigation and civil justice, scholars hope to find methods to improve the accessibility of the civil litigation, and this effort results to the first and second wave of access-to –justice movement. In the first and second wave of the movement, scholars aim to resolve the economic and organizational obstacles of civil justice[52]. Answers found by scholars in the first wave are legal aid system and legal advice mechanism, which aims to resolve the economic obstacle of access-to –justice[53]. The legal aid system aims to provide the poor people with free or almost free legal service by using public funds or legal aid lawyers, while the legal advice mechanism aims to provide the poor with opportunity to obtain legal advice as "the lack of access to reliable legal advice can be a contributing factor in creating and maintaining social exclusion."[54] The aim of the legal aid system and the legal advice mechanism is to rebalance the unfairness of legal resources and they do play a positive role to a certain extent. However, they also bring states' economic

[51] Deborah R. Hensler, 'Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System' (2003) 108 PENN ST. L. REV. 165, 170

[52] Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to Justice Movement' (1993) Vol.56, No.3 *The Modern Law Review 282*

[53] *Ibid*.

[54] Lord Chancellor's Department and Law Centres Federation (2001*) Legal and Advice Services: A Pathway out of Social Exclusion* (London: Lord Chancellor's Department) 11.

burden and then may influenced by governments' budget. For example, in UK, by 2014, the National Audit Office (NAO) found that the Ministry of Justice was going to meet its main objective of significantly reducing, in a short time, spending on civil legal aid[55]. Legal aid and advise may be not the fundamental solution for the unfairness of legal resources, especially the unfairness due to the gap of ability of people[56].

14. The second wave of the access-to-justice movement aims to provide weaker persons in the society, such as children, racial or linguistic minorities, disabilities, women, old people, consumers, and people who suffer environmental damages a method to effectively access to justice[57]. The main approaches risen in the second wave are class action and citizen action. The idea of class action is, although the individual alone is usually in capable of vindicating the rights involved effectively, they can manage that as a group[58].This approach do change the traditional way of civil litigation, by forging individuals' power to a group's or class's power, which may influence the decision-making of government and save the individual cost. Further, every successful class action may change the policy and practices towards corresponding issues[59]. Although the class action was criticism by some scholars for "breach" the traditional "due process" in some

[55] *Implementing reforms to civil legal aid* (National Audit Office, 2014).
[56] Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007) 167. Also see, Atiyah, P. S. *Law and Modern Society* (Chinese translation version, Liaoning Education Publishing2010) 67
[57] Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to Justice Movement' (1993) Vol.56, No.3 *The Modern Law Review* 282
[58] *Ibid.*
[59] Yu Fan, *The Research on Class Action Issues* (Peking University Press 2005)

cases,[60]the Kenneth Scott's slightly harsh appraisal[61] shows that the value of class action is significantly higher than the value of due process it sometimes has to damage.

15. However, the case-based civil litigation is hard to change the situation of legal resources allocating and imbalance power between different social members fundamentally, on contrary, it may result to conflict between different groups' rights and the confusion of policy[62]. Another problem of class action is that the action is usually dominated by some representatives or general lawyers, the legitimacy of such representation may be questionable, especially when individuals join the class without have a clear idea about their rights[63]. Besides, we should notice that the civil litigation, even under the class action approach, it is sometimes too extravagant to solve some disputes in daily life[64].
16. Legal aid may help here, as legal aid service can provide consumers with free or almost free legal representative service. However, there are also problems of legal aid. Not all people are eligible to use or apply for the legal aid service. Legal aid

[60] Sometimes the traditional due process is just impracticable in the class action. For example, in the case *Eisen V Carlise & Jacquellin,* due notification to even limited "absent" parties whose address was relatively easy to find, would have cost US$225,000: an impossible cost to bear for any plaintiff. See (1974) 417 US 156.

[61] The Kenneth's comment is "it is a landmark in judicial sophistry to use the due process concept in the name of protecting the interests of class members, to reject the only litigation procedure capable of doing so." See K. Scott, 'Two Models of the Civil Process' in J.H.Merryman (ed), *Stanford Legal Essays* (Stanford 1975) 413,420

[62] Yu Fan, *The Research on Class Action Issues* (Peking University Press 2005)

[63] For example, lawyers may find some individuals, told them that their interests are damaged and thus are capable to join a class action. Those individuals are told that they do not need to pay or do anything except to give an authorization to those lawyers to recognize them as representatives and they will receive compensation if the class action success. In this situation, interests of weak persons may become a profit-making tool of lawyers as the lawyer fee may significantly higher than the compensation.

[64] Yu Fan, *The Research on Class Action Issues* (Peking University Press 2005)

is not a real "free" service, it is free to parties because the government or the society pay for it. Therefore, the legal aid service cannot cover all cases, usually it only covers criminal cases[65] or civil cases which involved people in extremely poor situation or have significant social impact, such as labor case[66].

17. However, sometimes, parties who need help, such as financial consumers, are usually not people in extremely poor situation, if they are, they properly would not buy financial products. Financial consumers are at a poor situation when against financial institutions, but they may be still not eligible to apply to the legal aid. For example, in China, only people under poverty line and criminal suspect would be covered by the legal aid, which leaves most financial consumers could not rely on the legal aid[67]. Also, most financial consumer disputes are small claims, so that they may not significant enough to apply to the legal aid.

18. Another problem of legal aid is the quality of legal aid service. For many reasons, people can sometimes observe that lawyers who provide legal aid service are less experienced or motivated that their hiring peers, which may decrease people's confidence on legal aid service.

19. Critics may argue that these problems are not problems of legal aid but problems of the development of legal aid. In another word, with the development of legal aid, these problems can be resolved. It may be true that the development of legal

---

[65] *Research Report on China's legal aid development (2017)* accessed at http://www.moj.gov.cn/Directly_subordinate_unit/content/2019-06/25/888_3226583.html last visited 23/08/2021

[66] *Ibid.*

[67] *Ibid.*

aid could relieve these problems, the legal aid could cover more cases and more experienced and motivated lawyers will join this cause. However, just as mentioned above, the legal aid is not real "free". The government and society pay for it. Therefore, an excessive legal aid may bring heavy economic burden to the government and society.

Alternative justice and the third wave of access-to-justice movement

20. The legal aid system, legal advice mechanism and the class action risen in the first and second wave of access-to-justice movement improved the accessibility of the civil justice, however, as many reasons discussed above, they cannot resolve the accessibility problem of civil justice fundamentally. In the third and the last wave of the access-to-justice movement, scholars move their eyes on the emerging ADR and the alternative justice[68] brought by ADR.
21. The key point of the third wave of access-to-justice movement is to argue that the civil litigation is not the only way that can provide justice. The scholars in this movement argue that there is an alternative justice besides the formal justice. Comparing to the formal justice produced by the courts, the alternative justice is argued as a more specific and more practicable justice. And it is also argued that

[68] The alternative justice is also known as co-existential justice or conciliatory justice to emphasize the most significant characteristics of this justice, as informal justice to emphasize it is not as formal as civil justice. We use the term alternative justice here to emphasize it is an alternative of civil justice produced by civil litigation (judicial system). Regard to the co-existential justice and conciliatory justice, see Mauro Cappelletti, Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to Justice Movement, The Modern Law Review, Vol.56, No.3 Dispute Resolution. Civil Justice and Its Alternatives. (May,1993), 287,289. Regard to the informal justice see Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making (Second Edition)*, Cambridge, Cambridge University Press, 2005, p.10.

people have right, namely "the right of dispute resolution"[69], to access to the alternative justice. M. Grant then further demonstrate this idea. He wrote, the main contribution of court should be providing the society with a legal background of negotiation and order; that is to say, the court just provides people with a starting point of dispute resolution, and then most disputes should be resolved by people through negotiation from this starting point[70].

22. After that, ADR experienced a rapid development in many jurisdictions and, just as discussed above, become more and more popular in many jurisdictions, and there is a trend that ADR may replace some functions of courts in some jurisdictions like UK[71]. Reasons of this trend could be advantages of ADR.

23. The first advantage of ADR (alternative justice) always been argued is the high accessibility to ordinary people. It is argued that ADR can help to remove bureaucratic obstacle in dispute resolution processes, making process of dispute resolution more relative to social life and more familiar by common people. This argument is supported by facts that some ADR scheme does not dependent on the services of those expensive legal professionals, but by staff who experienced a special training. Some supports of ADR believe that this makes alternative justice is more affordable to the ordinary people[72]. Although some observers may notice

---

[69] M Grant, 'Dispute Resolution, and the Alternative Policy of litigation – the Third Wave of Access-to-Justice Movement' in Mauro Cappelletti (ed) *Welfare State and Access-to-Justice* (Chinese translation version, Legal publishing, 2000) 125

[70] *Ibid.*

[71] C Hodges, 'The private sector ombudsman' in M Hertogh and R Kirkham (eds), *The Research Handbook on Ombudsman* (Edward Elgar, 2018)

[72] Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007)

that some kinds of ADR scheme, such as international commercial arbitration may even more complex than most litigation processes.

24. It is also be argued sometimes that ADR is more fast, more user-friendly, and familiar to people than litigation processes, and therefore, more accessible than litigation processes. A further argument is that with the development and widely used of administrative ADR, ADR can help more disputes which used to be invisible become visible[73]. This will help the government and the lawmaker realize the real situation in these fields and then help them to develop more practicable policies and laws.

25. Another advantage of ADR always been argued is the flexibility. It is argued that some ADR schemes do not need to rigidly follow those hard law, these ADR processes may refer to soft law such as virtues and principles of law, relevant codes of conduct, general understanding of fairness or common-sense thinking[74]. It is argued that the alternative justice usually based on "substantive and procedural 'rules' that are flexible and good common sense – so that 'the law' does not stand in the way of achieving substantive justice in the 'instant' case.[75]"This may be an advantage of ADR process in certain areas, where relevant

[73] These disputes may be ignored because victims tend to endure these disputes due to the problem of accessibility of civil litigation but they may enter into public sight if victims can use more accessible administrative ADR schemes. For example, after the establishment of the Financial Ombudsman Service (FOS) in 2001, complaints dealt by the FOS increased form 22,100(2001-2002) to 336,381 (2016-2017). It is hard to image that reasons for this significant increase is the number of UK's financial consumer disputes increased 10 times during this period of time. A reasonable interpretation is that more and more financial consumer were encouraged to bring their disputes to the FOS which results to more and more financial consumer disputes were brought into the public sight. Regard to the data of FOS, see FOS *Annual Review 2001-2002* 13,17 and FOS *annual review 2016/2017* p9.

[74] Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007)

[75] *Ibid.*

hard laws are not well developed or the development of law cannot catch the rapid development of practice, such as the fields of internet and digital content. Considering the rapid development of techniques in these fields, law-maker may find it is hard to follow the pace. As consequence, observers may sometimes find that some practices in these fields fall into the vacuum of law. In this situation, ADR may be helpful to resolve these problems by using already existing virtues of law, good common-sense and general understanding of fairness. Experience gained through these ADR practices may help the law-maker to draft relevant law later.

26. Besides these advantages above, it is also argued that one of ADR advantages is ADR may resolve disputes in a 'peace' way. To be specific, it is argued that litigation processes could lead to an adversarial atmosphere, which could seriously damage the relationship between parties. Comparing to litigation processes, ADR processes may lead to a more friendly atmosphere between parties, which can maintain or even restore the relationship between parties to a certain extent. It is believed that this maintenance and restoring of relationship between parties could benefit both the development of markets and harmonious of society[76]. It is also believed that this "peace" and "autonomy" brought by ADR may help to create and maintain a code of conduct, a moral system, and an identity in a community, which could increase the cohesion, autonomy, and self – discipline in a community[77]. Further, ADR may be able to increase the autonomy

[76] *Ibid*
[77] *Ibid.*

ability of a community; reduce the extent of need of public power involved and reduce the need of public resources such as budgets for legal aid system and free legal advice.

27. Besides these advantages above, it is also argued that ADR can help to explore the new model of judicial system. People who argue that believe that the aim of ADR is never replacing the role of judicial system and civil litigation in general, instead ADR is a part of the reform of modern judicial system[78]. It is believed that as increasing accessibility and flexibility of litigation processes is also an aim of modern judicial reform, experience of ADR could be introduced to judicial system to help judicial system reform itself. It is true that some ADR techniques, such as mediation and negotiation, was already be emerged into some jurisdiction's legal system and are encouraged by court and judges[79]. In future, ADR may have more close connection with judicial system, which may create a new negotiable or harmonious judicial model[80].

28. Some scholars have criticised ADR, described ADR as a place can only produce 'Second-Class' justice[81], essentially on the basis that ADR does not have as good mechanism as courts' to protect procedural justice and hence may put the weaker party in a danger position. However, the focus of those criticisms was on those traditional ADR models such as mediation and arbitration and was irrelevant with

---

[78] *Ibid.*

[79] Loukas A. Mistelis, 'ADR in England and Wales' (2012) 12 Am. Rev. Int'l Arb. 167; also see Harry T. Edwards, 'Commentary: Alternative Dispute Resolution: Panacea or Anathema?' (1999) 99 Harv. L. Rev. 671, 672

[80] Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007)

[81] Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making* (3rd edn, Cambridge University Press 2020)

new ADR models such as Ombudsman. It also fails to address the empirical evidence that consumer, who are widely accepted as weaker party in consumer disputes, tend to use ADR like consumer Ombudsman instead of courts-including small claims procedure[82].

29. Just like observed by Prof. Hodges, justice is not the only criterion on which people wish to live, and resolve their disputes: many people apply cost-proportionality and various other factors[83]. From this aspect, rather than say ADR produce 'Second-Class' justice, it may better to say ADR provides people with a more specific, more practicable, and more accessible justice – an alternative (informal) justice. Although this alternative justice sometimes may not as justice as a civil (formal) justice, it may still be a good justice and is better than no justice[84].

30. Another criticism of ADR is that ADR may lead to unfairness and misleading of laws. [85]This criticism focus on sometimes ADR may issue a solution or an award referring to its own rules, principles, and virtues instead of state's law. However, as observed by Mnookin and Kornhauser, those rules, principles, or virtues an ADR scheme often refer to, if not law itself, is still the 'shadow of law'[86].

---

[82] C Hodges, 'The private sector Ombudsman' in Marc Hertogh and Richard Kirkham (eds) Research Handbook on the Ombudsman (Edward Elagar Publishing 2018)

[83] *Ibid.*

[84] Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making* (3rd edn, Cambridge University Press 2020)

[85] Rex R. Perschbacher & Debra Lyn Bassett, 'The End of Law' (2004) 84 B.U.L. REV. 1 13,14

[86] R.H. Mnookin and L.Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1988)

[88] *Yale Law Journal I* 950.

31. A good example is the UK's FOS scheme. The rules of the FOS said that Ombudsman will resolve disputes according to the general understanding of fairness. It seems that the FOS refer to common sense instead of law, however, one may notice that it is also in UK's law that financial firms are required to treat their consumers fairly, so it is possible to argue that the FOS also refer to law, virtues and principles of law[87]. From this aspect, supporters of ADR may argue that an ADR resolve disputes also by following law, the only difference between ADR and litigation processes is that ADR follows a more flexible form of laws, or virtue of laws, which may broad the application of law.
32. In summary, although situations are different in different jurisdiction and the advantages and disadvantages of ADR and litigation processes depending on local conditions, it seems possible to identify a general trend that ADR is more and more popular in some leading jurisdictions and in some advanced jurisdictions people using ADR more often than classic litigation. It seems suggest that ADR may have already be widely accepted by many jurisdictions as a useful part of diversity dispute resolution system in modern society and a useful alternative of litigation processes.
33. A possible explain may be that ADR have some advantages than litigation processes. These advantages could be accessibility, flexibility, fast, easy-to-use, friendly atmosphere, and sometimes help to achieve substantive justice. With

[87] C Hodges, 'The private sector Ombudsman' in Marc Hertogh and Richard Kirkham (eds) Research Handbook on the Ombudsman (Edward Elagar Publishing 2018); C Hodges, 'Consumer Ombudsman: Better Regulation and Dispute Resolution' (2014) Volume 15, Issue 4 *ERA Forum* 593

these advantages, ADR may produce results which, far from being "second-class", are better, even qualitatively, than the results of contentious litigation[88]. This may explain why ADR is popular now in some jurisdictions and sections. However, a man should bear in mind that these advantages of ADR and weakness of litigation processes also depending on local condition. ADR may not suitable for all jurisdictions and a successful ADR scheme in one jurisdiction may fail in another as their social condition and context could be significantly different.

[88] Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to Justice Movement' (1993) Vol.56, No.3 *The Modern Law Review* 282

Chapter III Criteria of a Quality ADR Scheme

1. Before the thesis begin to discuss whether an ADR scheme specially designed for financial service market, it is necessary to discuss criteria of dispute resolution firstly. By discussing criteria of dispute resolution, a standard of quality ADR scheme could be set up as a basement for further discussion about comparing between litigation and ADR and comparing between financial consumer ADR practice in different jurisdictions.
2. In continuous development of ADR, there are many criteria were used to examine whether an ADR scheme is quality or not. For the sake of discussion, these criteria would be divided into two categories in this thesis, namely constitutional criteria, and performance criteria.

Constitutional Criteria of a Quality ADR Scheme

3. Constitutional criteria are those criteria established by law or constitution of an ADR scheme, which aim to secure an ADR scheme works in line with general understanding of virtues of dispute resolution system, to prevent an ADR scheme to produce a poor solution, and to keep people's trust and confidence on an ADR scheme.
4. An often-mentioned constitutional criteria of ADR is independence and impartiality. It is argued that independence and impartiality are key criteria for all dispute resolution system including ADR and litigation processes[89]. Without independence and impartiality people would hardly to believe that an ADR scheme can provide

[89] Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007)

them with a fair solution, even in the situation that solution may generally fair indeed.

5. To fulfil the criteria of independence and impartiality, means to fulfil many relevant requirements. For example, the governance. The ADR scheme should ensure that it is governed and operated by an independent body which has no significant interest's connection with its main users. Directors of the scheme should have no conflict interests and should be selected in an appropriate way through due process. A separate supervision board or an administrative office can be established to oversee the activities of ADR entities to secure their independence and impartiality.
6. The ADR scheme should also ensure that the sources of funds would not influence its independence and impartial. If an ADR scheme collects its funds from a certain industry, and the industry is highly relevant with disputes resolved by this scheme, the designer of the scheme should make an appropriate arrangement to ensure it would not suffer, or seems to suffer, improper influence from this industry. For example, the UK's FOS collects most of its funds from financial service industry, but this funds mainly comes from a levy required by law and was collected by the UK's financial authority (FCA), and then give to FOS by the FCA[90]. With this arrangement, the FOS has no directly economic connection and the number of funds would not link to the outcome of the procedure. A (Financial) Consumer ADR scheme governed by financial firms' society and funded mainly by financial firms would always trigger consumers' concern about independence and impartiality and

[90] Christopher Hodges, Iris Benohr and Naomi Creutzfeldt-Banda, *Consumer-to-business Dispute Resolution: the Power of CADR* (Hart Publishing 2012)

decrease consumers' confidence on it and willingness to use it.

7. The scheme should also ensure that people in charge of ADR process should be appointed for a term of sufficient duration and are not liable to be relieved from their duties without just cause. It also requires to ensure that these people are not subject to any instructions from either party or their representatives and are remunerated in a way that is not linked to the outcome of the procedure. Further, these people should have a continuing obligation to disclose to the ADR body any circumstances that may, or may be seen to, affect their independence and impartiality or give rise to a conflict of interest with either party to the dispute they are asked to resolve[91].
8. Another important constitutional criterion is the transparency. It is also a criterion required by EU directive.[92]To be specific, the EU directive requires Member States ensure that ADR entities make publicly available clear and easily understandable information on many essential issues, such as contact details, the natural persons in charge and their expertise, impartiality and independence, details of working procedure and enforceability of result.
9. This publicity may help people who hope to use ADR scheme access it and use it in a correct way. There are many methods to fulfil this requirement, for example, ADR institutions may provide users with free consultation service online or on phone and publish all information on its website.

[91] Directive 2013/11/EU on alternative dispute resolution for consumer disputes Art.6
[92] Directive 2013/11/EU on alternative dispute resolution for consumer disputes

10. By fulfil this criterion, an ADR scheme could deliver correct information of itself, such as procedure rules, the scope of jurisdiction, whether the result is binding or not, and other key information to the public. This could be useful to help parties receive the clear and accessible information they need to help them made an informed decision before engaging in an ADR procedure. [93]"
11. Fairness is another important constitutional criterion which is also be emphasized by EU directive[94]. This criterion mainly emphasizes that parties should be treated fairness during the whole process of dispute resolution procedure, including the notice of accepting solution or not. For example, *Directive 2013/11/EU on alternative dispute resolution for consumer disputes* requires member states to ensure that a consumer ADR scheme would provide both parties opportunity to express their point of view and been provided with arguments, evidence, documents, and facts put forward by the other party.
12. The directive also requires member states to ensure that both parties would receive a writing notice of the outcome produced by a consumer ADR scheme with a statement of the grounds on which the outcome is based. Besides, parties should also be fully noticed that they have right to choose to accept the outcome or not, with knowledge that only participating in the procedure does not preclude possibility to seeks remedy through litigation processes and the outcome produced

93 Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC section 39.

94 Directive 2013/11/EU on alternative dispute resolution for consumer disputes, Art.9

by a consumer ADR scheme may be different with the outcome determined by a court applying legal rules.

13. It could be observed from the above that the criterion of fairness mainly concerns whether parties received a generally fair treatment in procedure. This procedural fairness was argued as very important because parties would tend to believe the outcome is generally fair if they receive generally fair treatment in the procedure[95]. While the procedural fairness would also help parties to believe the ADR scheme and dispute resolution process is independent and impartiality[96].
14. In summary, fulfil criterion of fairness may increase users' confidence on ADR scheme and make the outcome or solution easier to be accepted, as procedural fairness making the outcome more likely to be fair, too. However, observers may notice that some consumer ADR scheme gives consumer a little better treatment in procedure. For example, in UK's FOS scheme, if consumer choose to accept the outcome, the outcome would become binding for both parties. Whether this practice would trigger a concern of fairness would be discussed later in chapter VI.
15. Another constitutional criterion emphasized by EU directive is liberty[97]. This criterion mainly includes two aspects. The first is an agreement between a consumer and a business to submit disputes to an ADR scheme before the disputes were occurred and would depriving consumer's right to bring the disputes to the

[95] Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007) 195
[96] *Ibid.*
[97] Directive 2013/11/EU on alternative dispute resolution for consumer disputes, Art.10

court is not binding. The second is an outcome produced by an ADR scheme may be binding of parties only if they were informed of this binding force in advance and specifically accept it.

16. The aim of this requirement could be to protect parties, especially consumers' rights to bring disputes to court. Reasons behind this requirement may be the litigation was regarded as the last defense of social justice and seeking justice through litigation was regarded as a part of human right. However, it should be noticed that this special protection was mainly towards consumers, an agreement made before disputes occurring would be binding if it only depriving traders' right to bring the case to the court. And, it is accepted by the directive that specific acceptance by the trader is not required if national rules provide those solutions are binding on traders. Reasons of these exception may be that consumers are in a weaker position and therefore deserve a special protection.
17. Besides those constitutional criteria required by EU directive above, legality is also a constitutional criterion required by EU directive[98]. This criterion mainly requires that a solution or outcome produced by an ADR scheme should not deprive any special protection to consumers provided by laws of consumers' resident.
18. This criterion could be observed combing with the criterion of liberty, as the criterion of liberty aims to ensure that special protection to consumers provided by procedure law would not be deprived by an ADR scheme, the criterion of legality

[98] Directive 2013/11/EU on alternative dispute resolution for consumer disputes, Art.11

aim to ensure that special protection to consumers provided by substantive law of consumers' resident would not be deprived by an ADR scheme.

19. These two constitutional criteria of consumer ADR scheme put forward by EU directive seems to imply that the law-maker of EU believe that the aim of consumer ADR scheme is to provide consumers with a protection beyond or at least no worse than a protection provided by national laws.

20. Confidentiality may be considered as another constitutional criterion, as confidentiality was sometimes regarded as one main advantage of ADR[99]. Reasons behind could be an ADR scheme usually tries to encourage parties to reach a both accepted settlement by communicating with each other with no reservation. In this case, confidentiality and privacy are crucial as parties cannot have an open and honest conversation if they know what they said may become unfavourable evidence in further procedure or may be realised to the public. Thus, unless required by law to make it public, a quality ADR entity should always pay attention to confidentiality and privacy protection.

21. However, it should be noticed that in some consumer ADR scheme, disclosure information about cases could become deterrence to those traders refusing to enforce a settlement. And in some ADR schemes, information of disputes would be published with a pseudonym. However, in almost all consumer ADR schemes, information of consumers is usually kept confidentiality.

99 EU regulations on online dispute resolution for consumer disputes article 12, 13 and 14; EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters section 16,23 and article 7; EU Directive 2013/11/EU on alternative dispute resolution for consumer disputes section 29 and EU commission implementing regulation (EU)2015/1051 article 6.

22. Besides those constitutional criteria discussed above, expertise could be also an important constitutional criterion of an ADR scheme. A quality ADR scheme should always be operated by competent staff with code of conduct. IT would be hard to regard an ADR scheme as quality if its staff are not component and well trained. Although people in charge of ADR processes are not obliged to be qualified legal professionals, it reasonable to say that they should at least possess the necessary knowledge, including a general understanding of law and relevant knowledge in dispute occurred fields[100]. Besides that, it may also important for a quality ADR scheme to establish a code of conduct and relevant ethical rules for its staff and make sure these rules are also available for the public so that parties can reasonably expect ADR staff's act and complaint when ADR staff breach the code of conduct[101].

Performance Criteria of a Quality ADR Scheme

23. Comparing to constitutional criteria of an ADR scheme using to test whether an ADR scheme is constituted well or not, performance criteria of an ADR scheme are those criteria using to test whether an ADR scheme is performed well. For example, whether an ADR scheme can deal with disputes submitted to it in a reasonable time, whether an ADR scheme could provide its service with charging a cheap fee, and whether an ADR scheme can produce a general fair outcome.

100 Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC section 36.
101 Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters section 17.

24. Comparing to constitutional criteria which are usually care about by legal professionals, it could be say that performance criteria are more care about by users and common people. It could say that an ordinary person who never receive legal education may not know a dispute resolution process is independent or not but it is sure thing that he could know a dispute resolution process is fast or slow.
25. An always mentioned performance criterion of an ADR scheme is fast or slow. This criterion is also used to test litigation process. For example, European Commission for the Efficiency of Justice (CEPEJ) uses the figure of disposition time in its report as a performance indicator on court efficiency[102]. According to the report, the average disposition time of litigation process is 233 days in 2016[103].
26. Comparing to litigation processes, it could be saying that an ADR scheme was hoped to resolve disputes in a much faster way than litigation processes. For example, in EU, an ADR scheme was required to make their outcomes available within a period of 90 calendar days after the ADR scheme has received the complaint file[104]. This high criterion of disposition time of ADR scheme may imply that there is a common understanding that an ADR scheme should and could resolve a case much faster than litigation processes.
27. Besides time, cost is another important performance criterion. When people bring their disputes to court or to an ADR institution, most people would take cost into

[102] CEPEJ, *European judicial systems - Efficiency and quality of justice - CEPEJ Studies No. 26*, 239
[103] CEPEJ, *European judicial systems - Efficiency and quality of justice - CEPEJ Studies No. 26*, 251
[104] Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC article 8 (c) and article8(e) and Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters section 15 and 16.

considering. After all, in most cases, people who bring their disputes to court or ADR institution hope to seek economic remedy. Therefore, if cost of a dispute resolution process is higher than claims, most people may decide to not use it as it would become economic unreasonable.

28. The cost could be another important criterion, a quality ADR would be supposed to be able to provide dispute resolution in a reasonable cost. This could be even more correct in consumer ADR, as data clearly shows that most consumer disputes involve very small sums[105], and consumer ADR systems is supported to provide speedy and fair dispute resolution at very low cost[106]. Therefore, a quality consumer ADR scheme should try its best to control consumers' cost of using it. That could be why the EU directive requires ADR schemes should be free of charge or only charge a nominal fee for consumers. Besides, controlling cost of consumer does not only mean reducing consumers' case fee, it may also include reduce other cost which may occur in the process. For example, to reduce the travelling cost and salary lose of consumers, an ADR scheme may hold its meeting online or in weekend. To control cost of hiring a professional legal representative, a consumer ADR scheme may require business cannot use a legal professional representative in the process like we can observe in UK's FOS.
29. Besides time and cost, accessibility is another important performance criterion of an ADR scheme. This criterion mainly cares about whether the information of an

[105] C Hodges, 'Consumer Redress: Ideology and Empiricism' in K Purnhagen and P Rott (eds), *Varieties of European Economic Law and Regulation. Festschrift for Hans Micklitz*, (Springer, 2014).
[106] C Hodges, 'Consumer Ombudsman: Better Regulation and Dispute Resolution' (2014) *Volume 15 Issue 4 ERA Forum* 593

ADR scheme is easy to access by potential users and whether the service provided by an ADR scheme is easy to use.

30. The publicity of information is essential, because no matter how good an ADR scheme are, people would not use it if they do not know it. On the other hand, people may tend to use an ADR scheme, if they always hear of it and can easily find sufficient information of it. An ADR scheme may use many methods to publicity its information, for example, it can publish its information online, advertising online or on TV, providing free consulting service, and hold public campaigns.
31. Easy to use is also an essential part of accessibility criterion. This criterion could be tested by what users need to do during the dispute resolution processes. For example, if a person uses a litigation process or an ADR scheme using adversarial model such as arbitration, this person may need to submit formal application in a certain form and claims in written. The user then needs to produce relevant evidence according to relevant rules of evidence, submit this evidence to the court or arbitrator and then produce copies according to the number of other parties and forward these copies to other parties. If the user cannot submit enough evidence to fulfil his duty of proving, he may suffer unfavourable consequence.
32. However, if a user uses a, for example, ombudsman service, which uses investigation model. The user may only need to submit a simple application form stating his claims, statement of fact, prima facie evidence and willingness to submit his complaint to ADR institution. After that, the institution will investigate

the case and collect evidence positively to suggest a solution or produce a result. In this situation, it could be said that the ADR scheme using investigative approach provide a service with a higher accessibility.

33. In this thesis, the level of accessibility would be tested by the data of total enquires and complaints received and the data of enquires and complaints received per ten thousand people. The logic behind is that the concept of accessibility is intended to indicate the difficulty level for users to discover and use a dispute resolution system. Therefore, the scheme with higher accessibility would have more users while the scheme with less accessibility would have less users. As the two data mentioned above have a positively correlated with the number of users of a scheme, it would be able to indicate the level of accessibility to some extent.

34. Besides those performance criteria discussed above, effectiveness is also an important performance criterion. Whether an ADR scheme could be regarded as effective or not could be test by some figures. The first figure is caseload per year, which means how many complaints can be resolved in one year. Usually, it could argue that an ADR scheme with high caseload per year is more effective. However, it should also be noticed that sometimes an ADR scheme has a high caseload figure because the jurisdiction that scheme located has higher population. Therefore, the figure of caseload per year per person should be taking into considering. It should also notice that in case that caseload of an ADR scheme is

significantly low, problems may be not come from effectiveness but other criteria such as time, cost, and accessibility.

35. Another figure that needs to be looked here could be clearance rate per year. The clearance rate is a simple ratio, obtained by dividing the number of resolved cases by the number of incoming cases, expressed in a percentage. A clearance rate per year close to 100 % indicates the ability of an ADR scheme to resolve approximately as many cases as the number of incoming cases within the given year. A Clearance Rate per year above 100 % indicates the ability of the scheme to resolve more cases than those received, thus reducing the number of pending cases at the end of the year, including any existing backlog. Finally, a Clearance Rate per year below 100 % appears when the number of incoming cases is higher than the number of resolved cases. In this case, the total number of pending cases will increase. Essentially, the clearance rate shows how an ADR scheme is coping with the in-flow of cases.

36. Another data may be used to test efficiency criterion is cost per case. This data could be obtained by dividing the expenditure of an ADR scheme in one year by all disputes the scheme resolved in this year. This data could show how much money was spent to resolve one dispute. In theory, an ADR scheme with a lower cost per case is more efficient than a scheme with a higher cost per case, as the former may resolve disputes with less expenditure.

Chapter IV The Diversity of ADR

1. In last two chapters, the thesis discussed reasons of development of ADR and criteria of quality ADR schemes. In this chapter, the diversity of ADR would be mainly discussed to show readers a comprehensive image of many different models, techniques, and policies about ADR. This discussion of the diversity of ADR would establish a basement for further comparison in models, techniques, and policies in financial consumer ADR schemes in UK, Hong Kong, and Australia. This comparison would be made in chapter VI.
2. ADR comes in many different types and contexts: arbitration, mediation and so on. Much of the early literature on ADR was about different types of mediation, mainly because when this term was firstly been used in America, it did mean different mediation practices in or out of litigation procedure which aims to help both parties to enter a settlement and end the litigation[107]. However, with the development of ADR in these years, ADR in more recent context includes many different practices such as arbitration, mediation, early neutral evaluation, and Ombudsman. In this situation, referring to ADR without being more specific could lead to confusion and irrelevance, this would be one of reasons why the diversity of ADR would be discussed here.
3. In the modern context, ADR could be divided into different categories according to different standard. For example, according to whether the ADR is part of litigation, ADR could be divided into ADR in court and ADR out of court. An

[107] Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007)

ADR in court could happen before a litigation as a part of mandatory preceding procedure of litigation[108], or during the process of litigation[109]. While an ADR out of court usually does not have directive relation with litigation processes.

4. Another example is that, according to whether judicial power or administrative power was involved, ADR could be divided into private ADR, judicial ADR, and administrative ADR. An example of private ADR could be an International Chamber of Commerce (ICC) arbitration, it holds by an international non-government institution, which has no significant relation with legal or administrative power.
5. An example of judicial ADR could be judicial mediation in China, judicial mediation happens during the process of litigation and is chaired by a judge. Judges could make a judgement according to the content of settlement made in judicial mediation to make it binding and enforceable.
6. Administrative ADR is ADR where administrative power is involved. An example of administrative ADR could be financial consumer hotline in China. This service was hold by People Bank of China (PBC), which is China's national bank and one of financial authorities. Financial consumer could phone this

[108] For example, in China, there is a mandatory arbitration procedure before an employment litigation. Employer and employee who hopes to start a litigation must firstly apply for an employment arbitration. Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007) 127

[109] For example, in China, both parties could agree to enter in a mediation hold by judge during the process of litigation. Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007) 127

hotline to complaint banks' service, and staff of PBC would try to mediate disputes[110].

7. Among many ways to classify ADR, an important way is to classify ADR according to techniques. Techniques of ADR are those decision-making methods used in ADR schemes to resolve disputes. Techniques of ADR is keeping evolving, in late of last century, when ADR firstly appears in America, mediation was regarded as main and almost only technique of ADR, at that time, mediation was considered as another name of ADR[111]. With the development of ADR, helped negotiation and arbitration become widely used in ADR, and become techniques of ADR. In later years, Ombudsman were introduced into ADR and become another main techniques of ADR[112]. According to techniques used, ADR could be divided into four different models, helped negotiation model, mediation model, arbitration model and Ombudsman model.

8. These four techniques could be further divided into two categories, consultative techniques, and adjudicative techniques[113]. Helped negotiation and mediation belong to consultative techniques. They try to provide parties with help such as a friendly atmosphere and legal professional advice to help parties reach an

[110] See, People Bank of China, *12363 guidelines for the use of financial consumer rights protection hotline*, access at http://www.huainan.gov.cn/wap/public/content/1258311715 last visited 9/8/2021
[111] Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making* (3rd edn, Cambridge University Press 2020); Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007) 15
[112] Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making* (3rd edn, Cambridge University Press 2020)
[113] Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007) 270

agreement or settlement of disputes. Procedure of helped negotiation and mediation could be very flexible and there is usually no mandatory procedural requirement or evidence rules applied to these procedures.

9. Advantages of consultative procedures are flexibility, friendly atmosphere, informality, and possibility to resolve disputes at the early stage. However, the main problem of consultative procedure is that whether an agreement or a settlement could be reached or not is not secured. And if there is no agreement and settlement achieved, time and money spend in these procedures could be wasted. Another problem of these procedure is that it is concerned that as these techniques may be too flexible, there is a risk that agreement or settlement would 'in practice be forced on parties—especially weaker parties such as individual consumers—irrespective of the merits of their case, and without proper advice or consent'[114].

10. Arbitration and Ombudsman belong to adjudicative techniques. These techniques usually have a procedure to secure a binding award or decision would be made at the end of the procedure. However, approaches used in these procedures could be different. For example, most arbitration procedures use an adversarial approach like litigation processes, and arbitrators stand in a passive position. On the contrary, many Ombudsman procedures use an investigative approach, where Ombudsman will investigate disputes and collect evidence proactively.

[114] See C Hodges, 'The private sector ombudsman' in M Hertogh and R Kirkham (eds), *The Research Handbook on Ombudsman* (Edward Elgar, 2018)

11. In the early time of ADR, even very knowledge legal professionals would believe, only consultative processes such as negotiation and mediation are ADR processes and adjudicative process is not a part of ADR.[115]However, the modern concept of ADR is broad and is not rare to see an adjudicative process is used in the ADR practice[116]. For example, there are many kinds of arbitration, such as 'commercial arbitration', 'court-annexed arbitration[117]', 'final offer arbitration[118]'and 'rent a judge[119]'.
12. Besides those different kinds of arbitration, a technique introduced from public law sector, namely Ombudsman, was also introduced to ADR.[120]The term 'Ombudsman' is a word ordinarily used to name an official appointed by government to receive and examine complaints made by citizens against the administration[121]. But it later walks into the private sector to serve as an institution for investigating and dealing with complaints made by members of the public against individuals or bodies in particular areas of commercial and

---

[115] Owen M. Fiss, 'Against Settlement' (1993) 93 Yale L.J. 1073,1983; Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to Justice Movement' (1993) *Vol.56, No.3 The Modern Law Review* 282; Deborah R. Hensler, 'Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System' (2003) 108 PENN ST. L. REV. 165

[116] Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making* (3rd edn, Cambridge University Press 2020) 331; Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007) 270

[117] R J Broderick, 'Court-annexed Compulsory Arbitration: It Works' (1972) 72 4 *Judicature* 219

[118] R Posner, 'The Summary Trial and Other Alternative Methods of Dispute Resolution: Some Cautionary Observations' (2012) 53 *University of Chicago Law Review* 366, 387

[119] A S Kim, 'Rent-a-Judge and the Cost of Selling Justice'(2015) 44 *Duke Law Journal* 166

[120] M Adler (eds), *Administrative Justice in Context* (Hart Publishing 2010)

[121] Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making* (3rd edn, Cambridge University Press 2020)

professional activity – energy, insurance, banking, media, etc. in some jurisdictions such as UK[122].

13. The Ombudsman not only offer an informal and cost-free alternative to courts but they possess other advantages, including a freedom to arbitrate, negotiate and redress the balance of power between individuals and large institutions[123]. Initially, Ombudsman listen to the complaint. Then they investigate. Then if they find the complaint legitimate, they engage others in resolution of the dispute. They may require the production of records and witness from anyone in the organization, including the top officers[124]. Unlike litigation, the role of an Ombudsman office is not viewed as a battle of adversaries. And unlike a mediator, ombudsman person can take sides, not in favour of the complaint and against the respondent, but in favour of honesty, integrity, legality, and principle[125].
14. However, it is true that sometimes, the line between these techniques, models, procedures, and approaches are ambiguous, especially the line between the helped negotiation and mediation[126]. But that it is not to say this distinction does not have any value, the basic analytical value of the distinction can never be ignored. Just like observed by Gulliver, even in those marginal cases, the distinction is still both valid and usefully suggestive if careful observation and

---

122 C Harlow and R Rawlings, *Law and Administration* (3rd edn Cambridge 2009) 401,404

123 *Ibid.*

124 S A Weigand, 'A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model' (2012) 12 1 *Ohio State Journal and Dispute Resolution* 120

125 *Ibid.*

126 P Gulliver, Disputes and Negotiations: A Cross-Cultural Perspective (Academic Press 1979) 29

analysis were given, therefore, it would be more so in other cases where the contrast is more marked[127]. Further, the aim of this discussion here is to help readers knowing that there are many kinds of ADR in the world, and this classification does provide readers an aspect to know the difference between different ADR schemes.

15. However, it should also be noticed that ADR techniques and models are not static, they are keep evolving. There are many tries to innovate new ADR techniques and models which now regard as vanguard of the ADR development[128]. For example, under the idea of helped negotiation, there are some innovations aiming to encourage the parties to achieve an agreement or further enter a mediation to make a settlement.

16. In the area of mediation, processes have developed around attempts to reinforce mediation by infusing or jointing it with other forms of dispute resolution. One of principal forms of this development is mediation-arbitration[129]. The hybrid can be regarded as two-layer or multi-layer process where different techniques are used in sequence, parties will move on from one process to another only where attempts to achieve an outcome through the first have been exhausted[130]. A typical mediation-arbitration process is that the parties will first chair by a mediation to try to achieve a settlement, and if there is no settlement achieved, or

---

[127] *Ibid.*

[128] Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making* (3rd edn, Cambridge University Press 2020) 277

[129] Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making* (3rd edn, Cambridge University Press 2020) 287.

[130] J L Comaroff and S Roberts, *Rules and Processes* (University of Chicago Press 1981) 108.

the chair believe that there is no opportunity to achieve a settlement, the mediation will end with an arbitration start, the mediator will become the arbitrator and deliver an arbitration award.

17. Although suffered many doubts and criticisms,[131]the mediation-arbitration is currently be accepted widely as a good process for an ADR scheme. This provides us with one very important information. That is, it is possible to use a multi-layer process, which consultative process and adjudicative process are used in sequence, in one single ADR scheme, after resolving some key problems and concerns[132]. This multi-layer process has at least two advantages. The first is that considering not every consultative process can achieve a settlement, an adjudicative process followed can make sure that there is a result produced by the ADR scheme to avoid the ADR scheme becomes a waste of time and money[133]. The second is that for those parties who hope to use an adjudicative process at the first, the use of a multi-layer process provide parties an opportunity to rethink the

[131] For example, fully argued that mediation and arbitration are essentially different in their perpose and morality – the morality of mediation is optimum settlement, while the morality of arbitration is to be found in the contractual agreement to enter arbitration. L L Fuller, 'Collective Bargaining and the Arbitration' (2003)18 3 *Wisconsin Law Review* 39. Spencer and Zammit argued that in no event should the mediator ever serve as arbitrator, even if requested to by the parties. Because the possibility that the mediator might later become the arbitrator would tend to make the parties less open and candid during mediation. In addition, the arbitrator must be impartial. His activities as a mediator in the same dispute may easily have an adverse effect on this necessary characteristic. J M Spencer and J P Zammit, 'Mediation-Arbitration: A Proposal for Private Resolution of Dispute between Divorced or Separated Parents' (2005) 911 *Duke Law Journal*, 932. Newman doubts the neutral's capacity legally to act in an adjudicative capacity while at the same time undermining the efficacy of the initial mediation where the mediator should seek to create an atmosphere of trust and a willingness to impart confidences to him in the caucus sessions. P Neman, 'Mediation –Arbitration (MedArb): Can it Work Legally?' 60 3 *Arbitration* 174 And Elliot concerns the natural justice and lack of control. D C Elliot, 'Med/arb: Fraught with Danger or Ripe with Opportunity' 62 3 *Arbitration* 175

[132] Such as whether the same person can act as both mediator and the arbitrator.

[133] Although, actually, even there is no agreement achieved in the consultative process and there is adjudicative process followed, the consultative process should not be regarded as a pure waste of time and money as parties can get better understanding on their legal positions and the other parties' argument during the process and sometimes, no settlement is better than a bad settlement.

possibility of achieving a settlement, which is highlight one of advantages of ADR scheme.

18. Although this mediation-arbitration model would be regarded as an arbitration model in the standard of this thesis, as it can be seen as just an arbitration procedure which provide the parties an opportunity to first have a mediation. It may become a new technique or model in future if it is keep evolving.
19. The evolution of ADR techniques makes the classification of ADR techniques and models becomes even harder. As this evolution shows that techniques are generic and an ADR scheme may use more than one techniques, it put a question that how could classify them. For example, if an ADR scheme using mediation-arbitration procedure, which model should it belong to? The answer of this question has not be determined, but in this thesis, for the purpose of facilitating discussion and comparison, if an ADR uses different techniques in sequence, it would be classified according to the technique used in the final stage. For example, UK's FOS scheme uses mediation and Ombudsman in sequence. As discussed above, when a consumer complaint to the FOS, staff of FOS will firstly try to mediate consumers and financial firms in a mediation procedure, and then if a settlement cannot be made, disputes would be moved to an Ombudsman for the final decision. So, FOS scheme would be classified as using Ombudsman model, because although FOS using a mediation in its procedure, the technique used in its final stage is Ombudsman.

20. And, if different techniques were used parallelly by one ADR institution, it may be classified as two ADR service using two ADR models. For example, the ICC provides both mediation and arbitration service, but there is no significant connection between these two services. If parties using ICC mediation and fail to make a settlement, hope to use ICC arbitration, they have to make a separate arbitration agreement and start the arbitration procedure all from the beginning. Therefore, ICC mediation and ICC arbitration would be classified as two ADR services using mediation model and arbitration model in this thesis. This method of distinguish was used in this thesis only to avoid confusion, it certainly not the only method to distinguish ADR.
21. Another place may lead confusion is that sometimes many different names used to call ADR using same model and technique. For example, people may see lawyer negotiation[134], mini-trial[135] and early neutral evaluation,[136]but in view of this thesis, they are all ADR using helped negotiation model and using helped negotiation as their main technique. In summary, the four-model classification

[134] Lawyer negotiation means that the negotiation occurs mainly between lawyers of both parties instead of parties themselves. It is argued that lawyers usually have better understanding about the main points and possible legal consequence of the dispute and it is easier to keep claim, therefore, it will easier to reach an agreement.

[135] The mini-trail is described as an 'alternative' device invoked in aid of settlement during lawyer negotiation. It first developed in North America in the context of commercial disputes. The mini-trial will let the lawyers discuss with their clients, to tell them their strengths and weakness of the case and provide them with an indication of the likely outcome of adjudication to promote the settlement. J K Lieberman and J F Henry, 'Lessons from the Alternative Dispute Resolution Movement' (1986) 53 424 *University of Chicago Law Review* 427

[136] The early neutral evaluation is a procedure that the respective legal teams put a case, at a relatively early point, to a neutral or group of neutrals to obtain for the client a forecast of the possible judicial outcomes to encourage the settlement. Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making* (3rd edn, Cambridge University Press 2020)

could be a helpful starting point, although variations, overlaps and hybrids can be found.

Negotiation Model

22. Negotiation represents the primary and the universal route to decision and action in the social world. It means a process that information flows in both directions are bilaterally exchanged, position and arguments from both parties are understood and on the base of that, an outcome is achieved[137].The fundamental characteristic of negotiation is the absence of a third-party decision-maker.[138]A significant advantages of helped negotiation is easy-to-use, as there is almost no threshold of ability of using. Ordinary people without any training may use negotiation smoothly to resolve disputes in their daily lives. At the meantime, the cost of helped negotiation could be lower than mediation and arbitration. Another advantage of helped negotiation is that it could be very flexible as it is wholly controlled by parties themselves. They are free to quickly reach agreement without having to consider many procedural requirements. Also, there is no concern about the rigid application of state's law which means that parties can free to give up something they do not care about to exchange something they want. An agreement achieved by this way may be acceptable by both parties and in line with the common sense.

[137] Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making* (3rd edn, Cambridge University Press 2020)

[138] P Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (Academic Press 1979)

23. However, the problem here is that although helped negotiation has many advantages, it could be hard in a helped negotiation process to rebalance the gap of bargain ability between parties. In negotiation, a stronger party may abuse its advantages to force the weaker party to give up legitimate or reasonable demands[139]. Besides, when the stronger party gains benefits in the event where disputes raise from, the stronger party could simply refuse to negotiate.

24. To address this problem, many mechanisms were introduced to negotiation. In practice, most disputes need a dispute resolution scheme to deal with are those disputes cannot achieve an agreement through negotiation or the stronger party just refuse to negotiate. However, it may be appropriate to be used as the first process in a multi-layer process. Because, it can help to filter out those disputes that do not really need the involvement of dispute resolution scheme, providing financial firms with a second opportunity to actively resolve disputes without the involvement of third parties, and contribute to the aim of low cost of dispute resolution, easy to use, high flexibility and produce result more in line with common sense.

Mediation Model

25. Mediation is a very broad concept which is difficult to define[140]. It is often described as a process of facilitating agreement between the parties, presided over

[139] *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007)

[140] Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making* (3rd edn, Cambridge University Press 2020) 153

by a mediator[141]. While the mediator is defined as a non-aligned, non-determinative role who participates a process to facility parties to achieve an agreement, while a contrast with the partisan supporter and the arbitrator helps to provide an identity for the mediator in rough and ready terms[142]. In this sense, mediation can be used to refer to the broad middle zone between negotiation and arbitration. Therefore, the fundamental characteristic of the mediation is that there is a mediator involved into the process and the mediator could not deliver any determinative opinions, such as an award in arbitration.

26. Mediation has long been regarded as the main model of ADR[143]. It is said that there are many advantages of mediation, for example, informality; the parties autonomy; the process is confidential so the parties can make admissions without legal consequences; the parties could be more focused on finding solutions than resolution of one or more points of law or rights; outcomes can be more flexible than the remedies available to courts; the process can restore trust or relationships.[144]. Mediation is a very popular model of ADR and experience a good development. It is regarded as "shadow of the court" that applies to the

---

[141] G Simmel, 'The Sociology of Georg Simmel' in K Wolff (eds) (Free Press 1950) 148,149

[142] *Ibid.*

[143] Owen M. Fiss, 'Against Settlement' (1993) 93 1073 Yale L.J. 1983,1984; Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to Justice Movement' (1993) *Vol.56, No.3 The Modern Law Review* 282

[144] J Zekoll, M Bälz and I Amelung (ed), *Dispute Resolution: Alternatives to Formalization – Formalization of Alternatives?* (Brill Publishing 2014); M Palmer, 'The Revival of Mediation in the People's Republic of China: Extra-judicial Mediation' in W E Butler (ed) *Yearbook on Socialist Legal systems 1987 Transnational Books* (Dobbs Ferry 1988) 244; P Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (Academic Press 1979) 272

concept of ADR[145], and were supported and regulated by the EU Mediation Directive[146].

27. Recently, with the development of ADR, mediation has been introduced to the context of litigation procedures, to assist in dispute resolution before or during a court's decision[147]. An example of how mediation was integrated into a central position within the civil justice system can be seen in England and Wales from 1998[148], following Lord Woolf's recognition that the result of almost all of the formal disputes commenced in the state's litigation system was not judicial adjudication but settlement between the parties[149]. The English system was re-focused to encourage parties to settle earlier. The scope of this encouragement comes from pre-action protocols for sharing information, costs, rules, and case management[150]. Settlement of legal disputes appears to be an important phenomenon that is manifesting itself not only in Europe but also worldwide[151].

28. Comparing to helped negotiation, mediation can somehow rebalance the gap of bargain ability between parties while let the process remain in the scope of consultative procedure and thus enjoy those advantages attached to consultative

---

145 J Zekoll, M Bälz and I Amelung (ed), *Dispute Resolution: Alternatives to Formalization – Formalization of Alternatives?* (Brill Publishing 2014)

146 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, [2008] O.J. L 136/3.

147 C Hodges, *Delivering dispute resolution a holistic review of models in England and Wales* (Hart Publishing 2019)

148 *Ibid.*

149 Lord Woolf, *Access to Justice: Interim Report* (1995) and *Access to Justice: Final Report* (1996).

150 Civil Procedure Rules, reformed in 1998 after Lord Woolf, *Access to Justice: Final Report* (HMSO 1996).

151 Christopher Hodges, Iris Benohr and Naomi Creutzfeldt-Banda, *Consumer-to-business Dispute Resolution: the Power of CADR* (Hart Publishing 2012)

process[152]. As there is a mediator involved in the process, the mediator can help the weaker party fully understand its legal rights as well as help the weaker party to make full use of the process. The mediator can also help both parties to fully understand what is the potential result if the disputes go further to the arbitration or court process and therefore facility parties to achieve a settlement bearing this potential result in mind. The mediator also helps when both parties have willingness to make a settlement but fail to reach agreements in details, as the mediator can advice them on details and help to draft a settlement[153].

29. However, there are two problems of mediation. The first is that there is no secure to achieve a settlement in a mediation procedure. Therefore, the whole effort spend in a mediation procedure may become waste of time and money. It is also suggesting that a failure mediation procedure may exacerbate the hostility between the two parties and may make the follow-up efforts to resolve disputes in other procedures become difficult[154].

30. The other problem is that the settlement made from a mediation procedure may be not binding and enforceable in some jurisdictions. It is true that in some ADR-friendly jurisdictions such as UK and Netherlands, the settlement made from a mediation procedure would be respected by the court and could be recognized

---

[152] Mauro has a great analysis on the advantages of using a consultative procedure to resolve disputes and achieve a consultative justice in his article. Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to Justice Movement' (1993) *Vol.56, No.3 The Modern Law Review* 282

[153] For example, there is a case report on a mediation hold by the Hong Kong's Financial Dispute Resolution Centre, which help parties enter into an agreement with excellent imagination. See Hong Kong FDRC, *Case Study: There is more to a mediated settlement than just money* access at https://www.fdrc.org.hk/en/html/publications/casestudies_15081298.php

[154] Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007)

and enforced easily[155]. However, in some other jurisdictions such as China, settlement achieved from a mediation procedure may only be seen as a contract[156]. Therefore, if a party hopes to apply to enforce the settlement through court, he must start an action for breach of contract.

31. These two problems may make the single mediation model becomes not attractive in the context of financial consumer ADR. Consumers may find it is not attractive if they realize that the whole effort, they spend in a mediation procedure may become waste of time and money. And this is clearly conflict with the aim of the financial consumer ADR to reduce the consumer's cost of dispute resolution[157]and attract consumers to use the scheme[158]. Perhaps, experience can be learned from those hybrids, for example, it may good to use the mediation as a part of a multi-layer process, just behind the negotiation as the first step and before the arbitration or Ombudsman as a final step. Therefore, mediator can help parties who cannot achieve an agreement by themselves to find a solution if possible, and if the second try of achieving a settlement still not success, the case can then be moved to the arbitration or Ombudsman to secure an outcome.

[155] C Hodges, *Delivering dispute resolution a holistic review of models in England and Wales* (Hart Publishing 2019)

[156] Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007)

[157] Because when the whole effort of the financial consumer ADR scheme goes nowhere, even the scheme is free to use to consumers, it will still increase the time cost of consumers.

[158] Consumers may believe that a ADR scheme which cannot secure a result finally is waste of time and energy and thus refuse to use it even it is free.

Arbitration Model

32. An arbitration is a process where an arbitrator or a panel of arbitrators involving into the process and the power of decision is surrendered to the arbitrator or arbitrators[159]. Arbitration has a long history and became a developed industry long before the idea of ADR appeared in late of last century. Currently there are many arbitration institutions providing arbitration service all over the world. For example, there is ICC arbitration which is famous all around the world. In 2020, there are 946 new cases has been filled in ICC arbitration, which is quite considerable for an international arbitration institution[160]. Besides, ICC arbitration, there is London Court of International Arbitration (LCIA) who based in London but providing arbitration service globally. This can be proved by the fact that over 80% of parties in pending LCIA cases are not of English nationality[161].

33. Arbitration is not only active in the commercial field, as a successful ADR model, arbitration can be seen in many different sectors. For example, there is Court of Arbitration for Sport (CAS), which aims to resolve those disputes in sport. And there is also Hong Kong's Financial Consumer Dispute Resolution Centre (FCDRC) uses arbitration model to try to resolve disputes between financial consumers and financial firms to protect consumers' interests. The American

---

[159] Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making* (3rd edn, Cambridge University Press 2020) 153

[160] ICC, *ICC Dispute Resolution Statistics: 2020*, access at https://iccwbo.org/media-wall/news-speeches/2020-icc-dispute-resolution-statistics-published/ last visited 12/08/2021

[161] LCIA, Introduction of LCIA, access at https://www.lcia.org/LCIA/introduction.aspx last visited 12/08/2021

Arbitration Association (AAA) also provides consumers with consumer arbitration service which is significantly cheaper than its commercial arbitration service[162].

34. Comparing to the mediation, a significant advantage of arbitration is that it can secure an outcome. However, it is also argued that the most important value of ADR is to produce a consultative justice[163], which an arbitration usually cannot help to achieve it[164].however, with the development of the modern ADR, especially with the development of Ombudsman, it is more and more accepted that consultative justice is not the only value of ADR, adjudicative techniques are also important and should be regarded as an important part of the modern ADR[165].

35. In the context of the consumer ADR, the advantage of using an arbitration process is that it can secure an outcome. If there is no such secure, consumers may worry that the whole scheme is meaningless, especially for those consumers have already decide not to bring their disputes to the court anyway[166]. Consumers

---

[162] AAA, Consumer Arbitration Rules, access at https://www.adr.org/sites/default/files/Consumer%20Rules.pdf last visited 12/08/2021.

[163] Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to Justice Movement' (1993) *Vol.56, No.3 The Modern Law Review* 282

[164] Actually, during the early period of the ADR, the arbitration procedure is even do not be considered as possible choice for ADR, as at that time, the scope of ADR is limited in consultative procedure such as negotiation and mediation. Jerome T. Barrett with Joseph P. Barrett, *A History of Alternative Dispute Resolution – The Story of a Political, Cultural, and Social Movement* (Published in Affiliation with the Association for Conflict Resolution 2009)

[165] Simon Roberts & Michael Palmer, *Dispute Processes – ADR and the Primary Forms of Decision-Making* (3rd edn, Cambridge University Press 2020); Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007)

[166] For example, in a survey hold by EU commission in 2011, there are 8 percent consumers said that they would never take the business to court, no matter what the sum involved. See J Zekoll, M Bälz and I Amelung (ed), *Dispute Resolution: Alternatives to Formalization – Formalization of Alternatives?* (Brill Publishing 2014)

will ask why bring their disputes to ADR, if ADR can only tell them at the end like “we are sorry, but it is impossible to achieve a settlement. So how about bring the case to the court?”. So, if an ADR scheme cannot secure an outcome, the whole scheme becomes less attractive to consumers.

36. However, using arbitration model in consumer ADR may also lead to some problems. A frequently mentioned concern of consumer arbitration is that it may deprive consumers right to bring their cases to the court. In almost all consumer ADR using arbitration model, consumers need to agree to be bound by the award or the arbitration[167]. In some but not all situations, consumers may able to appeal the award to the court, but many courts would only examine limited issues, such as issues of procedure and law in this situation[168].

37. Another concern of arbitration model is user-friendly. As most arbitration processes have a certain extend of formality and use the adversarial approach, it could make the process difficult for consumers to use. For example, Consumers may need to choose and appoint an arbitrator, collect and submit evidence by themselves, and express their views on legal issues. It is questionable that whether consumers can achieve enough professional help and advice on these issues when they need.

38. Arbitration model may also lead to concern of cost. Just as discussed above, arbitration could be difficult to use for consumers so consumers would have to

[167] J Zekoll, M Bälz and I Amelung (ed), *Dispute Resolution: Alternatives to Formalization – Formalization of Alternatives?* (Brill Publishing 2014)
[168] Yu Fan, *Research on Non-litigation Dispute Resolution Mechanism* (China Renmin University Press 2000)

seek help from legal professionals or hire a professional legal representative, all these would significantly increase the cost of consumers to use the arbitration process. Besides, arbitrators were usually chosen from those experienced and reputational people in legal professional or relevant industries, which may lead to a high arbitration fee. Although consumer arbitration is usually cheaper than arbitration in other sectors, it could still too high to a consumer.

Ombudsman Model

39. The Ombudsman model, was introduced form public sector. It was introduced firstly into Scandinavian countries, such as Sweden, Denmark, Finland, and Norway[169], and then European countries such as UK and German. With the development in these years, Ombudsman bodies can now be observed in many countries all around the world and in many different sectors such as consumer, energy, telecom, and health, etc.

40. In consumer sector, some Ombudsman are public schemes established by law, such as the U. K's (FOS) or the Irish Financial Services Ombudsman, while some are private sector bodies, such as the German Insurance and Transport Ombudsmen. No matter public or private, those quality Ombudsman bodies pay high attention to those criteria such as impartiality, independence, expertise, and performance. There is a notable absence of complaints that such values are not observed, or that the Ombudsman have conflicts of interest or are biased. Just as observed by the Prof. C Hodges, almost all Ombudsman in the U.K are subject to

[169] C Hodges, 'Delivering Redress through Alternative Dispute Resolution and Regulation' in WH van Boom and G Wagner (eds), *Mass Torts in Europe: Cases and Reflections* (De Gruyter, 2014)

oversight by regulatory bodies, which have issued standards and exercise strong control, with reports being reviewed by the media, consumer bodies and parliament[170].

41. Comparing to private Ombudsman, those public Ombudsman established by law could have additional advantages. These additional advantages providing by legislation are usually three. First, legislation could give the Ombudsman a compulsory jurisdiction over a given scope of traders. So, if consumers hope bring their disputes to the Ombudsman, traders cannot refuse. This is important, as lacking traders' agreement to use is one of main reasons why a consumer ADR procedure close[171].

42. Second, legislation can specify that all traders of a given scope are bound by the decisions of the ombudsman if consumers accept the decisions. This approach preserves the consumers rights, since the consumer is not bound by a decision unless he or she accepts it. With this unilateral opt-in policy, consumers can always take their cases to court, either before or after the ombudsman's decision[172].

43. Third, legislation can require traders to pay the fees of the ombudsman, by requiring traders to pay an annual standing fee to cover general budgets and a case fee, which is usually payable as soon as a particular stage is reached[173].

---

[170] *Ibid.*

[171] Yu Fan, *Research on Non-litigation Dispute Resolution Mechanism* (China Renmin University Press 2000)

[172] C Hodges, 'Delivering Redress through Alternative Dispute Resolution and Regulation' in WH van Boom and G Wagner (eds), *Mass Torts in Europe: Cases and Reflections* (De Gruyter, 2014)

[173] *Ibid.*

44. Besides, these advantages in dispute resolution, a consumer Ombudsman model could also offer several additional advantages such as the ability to give advice and assistance to consumers, ability to give collective redress, collecting data on case types and incidence, and to provide feedback that lead to improvement of general practice[174].Just like what is fully discussed in Prof. C. Hodges's work[175], there are five functions of consumer Ombudsman model; including, consumer advice, dispute resolution, collecting and analysis data, publication of above data, and improving market behaviour. And besides the dispute resolution, the other four functions are only possessed by Ombudsman model, which makes Ombudsman model could play a better role in field of consumer protection[176].

[174] C. Hodges, 'The Consumer as Regulator' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing, 2016)

[175] C. Hodges, 'Consumer Ombudsmen: Better regulation and dispute resolution' (2014) 15(4) ERA Forum 593; C. Hodges, 'The Consumer as Regulator' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing, 2016)

[176] C Hodges, 'Consumer Ombudsmen: Better regulation and dispute resolution' (2014) Volume 15, Issue 4 *ERA Forum* 593

Chapter V Reasons for Establishing a Consumer ADR Scheme in Financial Service Market

1. The consumer market involves imbalances of power and many possibilities for abuse of consumers in different methods. This is even more true in those regulated consumer markets such as financial service, energy, communication, medicines and so. Common characteristics of these regulated markets are first, with the development of economic and global trading, the trend of business concentration became more and more obvious in these markets. Therefore, those traders who eventually survive in these markets usually become large multinational companies which have much bigger power than those traders in other markets.
2. Second, many products and service provided by these markets are necessary for consumers' daily life, which leaves consumer no choice but to deal with these businesses. For example, even if a consumer is dissatisfied with all these businesses, he still needs to buy food produced by a food company or open a bank account in a bank. The consumer's choice in these markets is limited. Therefore, the imbalances of power are more significant and possibilities for abuse of consumers are bigger in these regulated markets.
3. Taking financial service market as an example. It is an essential market for most people's daily life in many countries. In modern society, people usually have at least one bank account to receive the salary. Besides this basic financial service, people also use credit cards, deposit account, loan, mortgage, property insurance,

stock exchange, life insurance, investment service and many financial services. Even people who live in isolation may need financial service, as they need a bank account or credit card to pay anything they buy through e-business. It is observed in Europe that the financial service and products are increasingly be regarded as an essential part to the daily life[177]. The similar trend can also be observed in other developed countries in the world such as America, Japan, and Australia[178], as well as emerging countries such as China[179].

4. Besides, the financial products and services have a long-lasting and significant influence on consumers' life. For example, a mortgage service or an investment product may last for decades, which means that any potential risks and problems in these long-term transactions may have long-term negative effect on consumer's and their family's wellbeing, leading to, for example, over-indebtedness, unexpected financial difficulty, and financial exclusion[180]. Besides, the risk of financial products could high, especially those high-stake investment products combined with high-risk transaction such as futures. For example,

---

[177] World Bank, *Finance for All? Politices and Pitfalls in Extending Access (World Bank 2008)* access at: http://siteresources.worldbank.org/INTFINFORALL/Resources/4099583-1194373512632/FFA_book.pdf; Elaine Kempson, Sharon Collard, *Developing a vision for financial inclusion (Friends Provident Foundation 2012)* access at: https://www.fincan.co.uk/repository/uploads/sectionpdfs/95%20Developing%20a%20Vision%20for%20Financial%20Inclusion%20-%20Kempson%20&%20Collard%20March%202012.pdf

[178] World Bank, *Finance for All? Politices and Pitfalls in Extending Access (World Bank 2008)* access at: http://siteresources.worldbank.org/INTFINFORALL/Resources/4099583-1194373512632/FFA_book.pdf

[179] IResearch *The Report for Chinese financial markets* (2017)

[180] Reseau Fina cement Alternative, *Financial Services Provision and Prevention of Financial Exclusion (EU Commission 2008)* access at: https://www.bristol.ac.uk/medialibrary/sites/geography/migrated/documents/pfrc0807.pdf and also see Civic Consulting, *The Over-indebtedness of European Households (EU Commission 2013)* access at: https://ec.europa.eu/info/sites/info/files/final-report-on-over-indebtedness-of-european-households-synthesis-of-findings_december2013_en.pdf

recently in China, due to the price of oil in futures slump to even negative, 600,00 Chinese consumers suffer ¥ 4,200,000,000 (£477,234,660) loss[181], this could be an un bearable disaster for those people and families involved.

5. Besides, the financial service market is also a complex market, where is full of frightening terminologies, lengthy and confused standard terms, complex interest calculation and unclear and cumbersome procedures. These makes consumers in financial market sometimes can hardly understand the contract they signed, which left a hidden trouble. Moreover, financial service market usually dominates by those giant financial institutions, multi-national banks, huge insurance group and their subsidiaries and those professionals who know much more of financial knowledge than ordinary consumers. Consequently, there is a huge gap of bargain ability between financial consumers and financial firms in this market., which lead to a significant imbalance of power.
6. Therefore, many countries try to provide consumers with protection partly by setting rules and rights, and partly by providing regulatory systems. For example, the EU published *Markets in financial instruments (MiFID) - Directive 2004/39/EC, Markets in financial instruments (MiFID 2) - Directive 2014/65/EU and Markets in financial instruments (MiFIR) - Regulation (EU) No 600/2014* to protect financial consumers' substantive rights and interests and consumer's trust on law and the market by requiring financial firms to provide with enough information before the decision-making, to make sure that consumers understand the risks and benefits

[181] BBC News, access at https://www.bbc.com/zhongwen/simp/chinese-news-52566029

of the transactions[182]. Some more protective EU financial consumer law provide financial consumers with more directive protection, for example, the Mortgage Credit Directive requires Member States to have measures in place to limit consumer exposure to exchange rate risk.[183]

7. Among these responses to protect consumers, an important act is to establish consumer ADR schemes to help consumers resolve their disputes with traders. For example, in Sweden, there is a national CADR scheme funded by the state covering consumer disputes in all consumer sectors namely "ARN" (*Allmanna reklamationsnamnden*). Besides it, there are also some sectoral ADR bodies operated by sectoral associations in financial services and insurance. [184]
8. In the UK, there are a variety of CADR schemes covering a lot of different consumer sectors. Some of these CADR schemes are statutory, such as FOS, pensions Ombudsman and lawyers Ombudsman, some of them are private Ombudsman schemes (travel, motor, vehicles) and some of them are private sectoral disputes resolution schemes operated by sectoral associations[185].
9. In Netherlands, a single national private sector foundation (DGS) administrates an extensive network of CADR bodies (*geschillencommissie*), which covers more than 50 consumer sectors[186]. Besides this, there is also a separate CADR scheme

---

[182] Chris Willett, 'Competing Ethics of European Consumer Law in the UK' (2012) *71 Cambridge Law Journal 412*, 425-429; Iain Ramsay, *Consumer Law and Policy* (3rd ed, Hart publishing 2012) Chapter 2

[183] Andrea Fejős, 'Mortgage Credit in Hungary'(2017), *6 Journal of European Consumer and Market Law* 139

[184] Hodges, C., Benöhr, I. & Creutzfeldt-Banda, 'N. Consumer-to-business dispute resolution: the power of CADR'(2012) 13 ERA Forum 199

[185] *Ibid.*

[186] *Ibid.*

operating in financial markets namely KiFiD. The KiFiD works in a three-tier structure, cases going first to an ombudsman, then to a *geschillencommissie*, and finally to an appeal board.

10. Even in those jurisdictions which have an efficient court system operating based on reasonable and predicted costs, combined with a wide insurance coverage for legal expenses, such as Germany. Observers could still find some complaints schemes in insurance, telecoms, financial services, energy, and transport areas operated by Germany regulators or sectoral self - discipline organizations. [187] As a part of the popularity of Consumer ADR in European, the EU published a Directive to require member states to ensure that there is a Consumer ADR scheme in their territories to help consumers resolve disputes with traders[188].
11. A reason why Consumer ADR is popular in EU, may be the consumer's reluctance to bring their disputes to the court. When consumers faced with a surcharge levied by a bank or energy provider which may be higher than a reasonable sum, or when an online trader fails to deliver a book purchased online, consumers may not bother to start court proceedings, if the amount of money involved is small which is disproportionate to the contract sum, and if the consumer does not have the time to consult a lawyer or start a small claim[189].

[187] *Ibid.*

[188] Directive 2013/11/EU on alternative dispute resolution for consumer disputes

[189] C. Hodges, 'Unlocking Justice and Markets: The Promise of Consumer ADR' in Joachim Zekoll, Moritz Bälz, and Iwo Amelung (eds), *Formalisation and Flexibilisation in Dispute Resolution* (Brill Publishing, 2014)

12. According to a survey in EU, in 2011, more than one in five (21%) of consumers surveyed had encountered a problem with a good, a service, a retailer or a provider in the previous 12 months, for which they had a legitimate cause to complain[190]. Among these consumers, more than three-quarters took some form of action in response (77%) while 22 percent took no action. Those consumers who took action were most likely to have made a complaint to the trader (65%), 16 percent complained to a public authority, 13 percent to the manufacturer, 5 percent contacted an ADR body, and only 2 percent started court proceedings[191].
13. Reasons for not making a court claim were that the consumer had already received a satisfactory response from the trader (40%), the sum involved was too small (26%), it would have taken too much effort (16%), or it would have been too expensive (13%) or too long (12%)[192]. Thus, 67 percent of the sample thought that a court process was unattractive and unresponsive to their problems.
14. Some people may believe that using of small claim procedures could resolve this problem, however, a 2007 study concluded that small-claims procedures would only be used by European consumers if the amount involved exceeded around €500.[193] The Commission's 2011 survey found that 53 percent people would go to court if they suffer a financial loss between €101 and €2,500, 5 percent said they would go to court for a loss under €20, and 3 per cent would only go to court

[190] *Special Eurobarometer 342. Consumer empowerment* (European Commission, 2011), access at : http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf.last visited 16/08/2021
[191] *Ibid.*
[192] *Ibid.* QA36, p. 204.
[193] Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing 2012) 381

over a financial loss in excess of €5,000,[194] while 8 percent said they would never take the business to court, no matter what the sum involved[195]. Considering that EU 2011 figures estimated the average value of consumer losses as €375, and median €18.5, it is safe to assume that many consumers would not go to the court with knowing or not the existence of small claim procedures.

15. Comparing to consumers in other sectors, consumer in financial service market may more reluctant to go to court. As mentioned above, many consumers reluctant to go to the court because it takes too much effort, money, and time. A litigation in financial service market may take more effort, money, and time than consumer litigation in others. Because, just like mentioned above, financial service market is a highly professional and complex market. Consumers may find that it is difficult to participate in a financial litigation and therefore must hire a legal representative which may significantly increase the cost. Further, financial firms usually have enough money for better lawyers and are motivated to win to reduce the possibility of being sued for similar reasons in future. Therefore, consumers may lose in the first instance and have to appeal, this will also increase the cost, the time and the effort. Besides, even consumers win in the first instance, financial firms could appeal and then appeal again if they lose in second instance, which leads to the increase of cost, time, and effort.

---

[194] *Special Eurobarometer 342. Consumer empowerment* (European Commission, 2011), access at: http://ec.europa.eu/consumers/consumer_empowerment/docs/report_euro barometer_342_en.pdf. Last visited 16/08/2021.

[195] *Ibid.*

16. Thus, data and analysis above seem suggest that existing procedures might not suitable for many consumer disputes. The access-to-justice gap leaves a lot of customers with unresolved complaints which may lead to negative consequences. Recalling the examples at the beginning of this Chapter, the amount of money involved may be small on an individual basis, but if the same trader is benefiting from similar behaviour in relation to many other consumers, and the activity is illegal, the illicit profit could add up to a significant amount. Further, it may lead to a bad atmosphere and practice in the market and then damages the consumer's confidence in this market, which may lead to economic recession. All these call for the emergence of a dispute resolution method other than litigation in (financial) consumer sector.
17. To answer this call, more and more countries introduced ADR schemes to (financial) consumer sector. Some scholars tend to follow Cappelletti in the thinking that governments have gradually extended consumer access to justice, and that Consumer ADR is part of this trend[196]. This may be true in relation to one of the motivations for the European Commission's Directorate-General for Consumer Affairs (DG SANCO), which has certainly been acting on the policy that increasing consumer access to justice will drive and improve market development and growth[197].

[196] Mauro Cappelletti and Bryant G. Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181

[197] C. Hodges, 'Unlocking Justice and Markets: The Promise of Consumer ADR' in Joachim Zekoll, Moritz Bälz, and Iwo Amelung (eds), *Formalisation and Flexibilisation in Dispute Resolution* (Brill Publishing 2014)

18. However, it does not describe how it happens on the ground in different countries. Taking EU as an example, the Oxford research found that there are usually two motivations for introducing (Financial) Consumer ADR schemes[198]. First, traders or associations of traders established (Financial) Consumer ADR systems because they want cheaper and faster ways of resolving their disputes with consumers than were being provided by courts[199].

19. A quality ADR scheme may benefit not only consumers but also traders. The cost of litigation including lawyer fee is not only high for consumers, it is also a heavy burden for businesses, especially those small and medium ones. A quality ADR scheme provides businesses an effective way to resolve their disputes with consumers in a much more reasonable price. Although, businesses may need to pay more than consumers to use the ADR scheme[200], what they need to pay could still lower than the litigation fee. For example, in UK, the FOS charges financial institutions £550 for every case and charge free for the first 25 cases in a year and some financial firms who use this scheme frequently may get an even better price by achieving a group-account fee agreement[201]. A good example of these ADR schemes are Germany Insurance Ombudsman and those private Ombudsman scheme in UK[202].

---

198 Naomi Creutzfeldt-Banda, 'The Origins and Evolution of Consumer Dispute Resolution Systems in Europe' in Christopher Hodges and Astrid Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims*, (Cheltenham, Edward Elgar Publishing 2013)

199 C. Hodges, 'Unlocking Justice and Markets: The Promise of Consumer ADR' in Joachim Zekoll, Moritz Bälz, and Iwo Amelung (eds), *Formalisation and Flexibilisation in Dispute Resolution* (Brill Publishing 2014)

200 Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing 2012)

201 *Ibid.*

202 C. Hodges, 'Unlocking Justice and Markets: The Promise of Consumer ADR' in Joachim Zekoll,

20. Second, some (Financial) Consumer ADR schemes, were established by governments, which aim to provide an efficient, speedy, and cheap informal way of dispute resolution for consumer disputes in the context of regulation[203]. An ADR scheme could provide consumers with cheap and sometimes even free service of dispute resolution by charging annual fee and cease fee from businesses to cover its budget. For example, the UK's FOS charges only from financial institutions, by annual levy and case fee[204], and is free to use for consumers. The Australian Financial Complaints Authority (AFCA) also charges no fee from consumers. Financial firms through three ways pay all operating expenditure of AFCA: a member levy, user charge and complaint fees. In Hong Kong, the Financial Dispute Resolution Centre (FDRC) charges both consumers and financial institutions, but fee paid by financial institutions is five times of consumer's payment[205].
21. Besides, many (Financial) Consumer ADR schemes provide consumers with free advice and reduce consumers' potential cost on hiring legal representatives[206].

Moritz Bälz, and Iwo Amelung (eds), *Formalisation and Flexibilisation in Dispute Resolution* (Brill Publishing, 2014)

[203] *Ibid.*

[204] The FOS charges levy fee from every financial firms under its compulsory jurisdiction and £550 case fee for every individual case. The FOS will not charge the first 25 cases of a financial firm. In the financial year 2017-2018, the total income of the FOS is £249m, the levy fee and the case fee from firms excluding Lloyds, Barclays, HSBC, RBS, Nationwide, Santander, Aviva and Direct Line contribute 11% and 29% separately. For the eight business groups mentioned above, the FOS has a group-account fee arrangement with them, and this group-account fee contributes 58% to the total income. See FOS *Annual review 2017-2018* 18

[205] See *the Fee Charging Table of FDRC*, access at https://www.fdrc.org.hk/en/html/resolvingdisputes/resolvingdisputes_scheduleoffees.php

[206] For example, the UK's FOS booklet said that "we do not suggest consumers rely on legal representatives or claim management companies", and they do not allow paid legal representatives participate their processes while they welcome consumers' friends or relationships provide free help. The AFCA website said that "our staff will help you (consumers) to deal with your complaints".

For example, the UK's FOS suggests consumers not rely on legal representatives or claim management companies, and does not allow paid legal representatives participate the processes while they welcome consumers' friends or relationships provide free help. In Australia, the staff of AFCA would help consumers to deal with their complaints.

22. Those ADR schemes using an investigation approach can further help consumers to reduce their cost. In this approach, if there is a necessity to find out the truth, the ADR institution will start an investigation by themselves while consumers only need to provide with some basic evidence, such as their bank account details or relevant contracts[207]. This approach would help to reduce the consumer's cost of employing lawyers and collecting evidence, as well as narrow the imbalance of legal resources (lawyers and ability of collecting evidence) between consumers and financial firms.

23. A (Financial) Consumer ADR scheme can also resolve disputes in a faster way than courts. This was even true in those jurisdictions where courts are generally considered as fast and cheap—they were just not fast or cheap enough[208]. For example, the UK's private Ombudsman schemes responsible for energy, telecoms and various other types of disputes now disposes of 30 percent of contacts that

[207] For example, the UK's FOS has an admission team to help consumers at the early stage and if consumers and financial firms cannot achieve a settlement in the early stage, the FOS will start its own investigation hold by an adjudicator. See FOS Your complaint and the ombudsman, access at https://www.financial-ombudsman.org.uk/publications/consumer-leaflet.htm#e and Ombudsman News March 2001 p34. The AFCA uses a similar working process. See AFCA The Process We Follow, access at https://www.afca.org.au/what-to-expect/the-process-we-follow/

[208] See C. Hodges, 'Unlocking Justice and Markets: The Promise of Consumer ADR' in Joachim Zekoll, Moritz Bälz, and Iwo Amelung (eds), *Formalisation and Flexibilisation in Dispute Resolution* (Brill Publishing 2014)

have crystallised into disputes within 48 hours, which is far beyond the possibility of the court.[209]

24. The ability of resolving disputes in a fast way may also make a (Financial) Consumer ADR scheme more efficient than courts. For example, in UK, the FOS scheme receive 642,556 enquiries and 271,468 complaints in 2020, while 325,342 complaints were resolved,[210] the clearance rate was around 120 percent. As a contrast, in 2019, county courts of England and Wales received 2.03 million claims, while 1.32million cases were resolved, the clearance rate was around 65 percent. Although cases received by FOS all from financial consumer sector while case received by county courts comes from many different sectors, so this comparison cannot draw any definite conclusion, these data may still suggest that the (Financial) Consumer ADR scheme could be more efficient than the court.

25. Further, besides providing consumers a fast, cheap, and efficient way of disputes resolution, a (Financial) Consumer ADR scheme established in context of regulatory could have additional functions. For example, a well-designed (Financial) Consumer ADR scheme could have advice function[211]. For example, the UK's FOS scheme provide consumers with a advice service as an initial stage, before complaints are triaged and allocated to internal process tracks[212]. Its data shows that the number of requests for information or advice is generally

---

[209] *Ibid.*

[210] *Annual complaints data and insight 2019/20*, access at https://www.financialombudsman.org.uk/data-insight/annual-complaints-data last visited 17/08/2021

[211] C Hodges, 'Consumer Ombudsmen: Better regulation and dispute resolution' (2014) Volume 15 Issue 4 ERA Forum 593 (2015)

[212] *Ibid.*

larger than the number of complaints submit to them[213], which suggest that the advice service is welcome by consumers. This advice function could help to educate consumers as the advice provided by the staff of ADR scheme could help consumers to understand the legal nature and possible results of their disputes. This could help them to decide what they hope to do follow and help them prevent similar situations in the future. Besides, if the consumer advice work can be done well be a well-designed (Financial) Consumer ADR scheme, funds spent on similar advice bodies could be saved in those countries, where a such consumer advice body is existing[214].

26. Another function that a well-designed (Financial) Consumer ADR scheme may have is feeding back aggregated data on market trading conditions[215]. Well-designed (Financial) Consumer ADR schemes could monitor the nature of trends in the cases that they receive. This information enables them both to adopt a consistent response to similar groups of claims, and to pass on the information to traders, customers, regulators, the media, and markets, so that responses can be taken[216]. Thus, emerging mass problems can be identified and noticed by the regulators, so that regulators can intervene in time. The combination of (Financial) Consumer ADR entities and public regulators that possess powers to intervene and

[213] *Annual complaints data and insight 2019/20*, access at https://www.financialombudsman.org.uk/data-insight/annual-complaints-data last visited 17/08/2021

[214] C Hodges, 'Consumer Ombudsmen: Better regulation and dispute resolution' (2014) Volume 15 Issue 4 ERA Forum 593 (2015)

[215] *Ibid.*

[216] *Ibid.*

order mass redress could be powerful[217].

27. In summary, it is good to establish an ADR scheme specially designed for (financial) consumer sector, as a well-designed (Financial) Consumer ADR scheme could not only provide consumers with a cheap, fast, and efficient way to resolve their disputes with traders, but also provide additional functions such as consumer advice, collecting data, publishing these data as a feed back to traders, consumers, competitions, regulators, and investors and improving market behaviour[218].

[217] C Hodges, 'Consumer Ombudsmen: Better regulation and dispute resolution' (2014) Volume 15, Issue 4 *ERA Forum* 593

[218] C Hodges, 'Consumer Redress: Implementing the Vision' in Pablo Cortés (eds), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford Publishing 2016)

Chapter VI Financial Consumer ADR Schemes in Practice and Comparison in Three Chosen Schemes

1. As fully discussed in the last Chapter, many ADR schemes were created by businesses or associations of businesses, or introduced by governments in the financial service market to provide consumers with a fast, cheap, and efficient means of dispute resolution. For example, there are UK's FOS scheme, which is established by legislation, and using an Ombudsman model to provide consumers with free service. In Singapore, the Financial Industry Disputes Resolution Centre Ltd (FIDReC), was established by the Monetary Authority of Singapore (MAS) in 2004, to provide consumers with a one-stop center for the resolution of all retail disputes with financial institutions[219]. In Ireland, the government decided to merge the offices of the Financial Services Ombudsman Bureau and the Office of the Pensions Ombudsman to form the Financial Services and Pensions Ombudsman (FSPO) in 2017. The FSPO was then established formally by the Financial Services and Pensions Ombudsman Act 2017 and opened for business on 1 January 2018, funded by levies on financial firms and by a grant from the government[220].

2. In Japan, "dispute resolution organizations" were required to be established in every financial service sector by the amendment to the Financial Instruments and

[219] *Overview and Background of FIDReC*, access at https://www.fidrec.com.sg/website/background.html 18/08/2021
[220] *Introduction of FSPO*, access at https://www.fspo.ie/about-us/ last visited 18/08/2021

Exchange Act (FIEA). This new ADR system aims to deal with every stage of financial-related disputes, strives to resolve disputes before they become significant and acts to ameliorate any post-ADR issues that may remain[221]. In Malta, there is Arbiter for Financial Services (AFS), established by the Arbiter of the Financial Services Act to provide advice and dispute resolution service to consumers[222]. In Canada, there are External Complaints Body, namely the Ombudsman for Banking Services and Investments (OBSI) and ADR Chambers Banking Ombuds (ADRBO) providing consumers with free ADR service[223].

3. In Netherlands, there is Dutch Institute for Financial Disputes (Kifid), a private financial consumer ADR scheme which helps consumers to resolve their disputes with financial firms by using a mediation-arbitration model. In Italy, there is Banking and Financial Ombudsman (ABF), which worked as an independent and impartial body, assisted in its work by the Bank of Italy[224]. In Australia, there is a Financial Complaints Authority (AFCA) scheme using the Ombudsman model to provide free service including consumer advice and dispute resolution. This scheme was born on 1st November 2018 by merging three existing financial consumer ADR schemes after a very recently reform. In Hong Kong, the

---

[221] *Japan's New Financial ADR System*, published by Bloomberg Finance L.P in the Vol. 1, No. 2 edition of the Bloomberg Law Reports—Alternative Dispute Resolution, access at https://www.hugheshubbard.com last visited 18/08/2021

[222] AFS *Annual Report of AFS 2016*, access at https://www.financialarbiter.org.mt/sites/default/files/OAFS-Annual_Report_2016-FINAL.PDF last visited 18/08/2021

[223] H*ow to make a complaint to a financial institution* published by Financial Consumer Agency of Canada, access at https://www.canada.ca/en/financial-consumer-agency/services/complaints/file-complaint-financial-institution.html last visited 18/08/2021

[224] *About the ABF* access at https://www.arbitrobancariofinanziario.it/abf/index.html 18/08/2021

Financial Dispute Resolution Centre scheme (FDRC) was established by the Securities and Futures Commission ("SFC") and the Hong Kong Monetary Authority ("HKMA") after 2008 to answer the increased need for an effective system of dispute resolution in financial service market. This scheme uses an arbitration model to try to make full use of Hong Kong's status as one of the international arbitration centers[225].

4. There are many highlights of individual elements of these special designed ADR schemes for financial service market. For example, the Irish Financial Service Ombudsman found it was needed to include mediation in its arbitration model recently to fully use advantages of ADR techniques, the Irish government merged the Financial Services Ombudsman Bureau and the Office of the Pensions Ombudsman to form the Financial Services and Pensions Ombudsman (FSPO) to provide consumers with one-stop service, the Australian government reform their traditional separate External Dispute Resolution (EDR) system to a comprehensive Financial Ombudsman system to improve the performance, and Japan's innovation on decentralization ADR system.

5. There is also criticism towards these ADR schemes, especially for those dispute resolution function is in the regulator such as Singapore's FIDReC and Italian ABF. Putting dispute resolution function in regulators has its advantages, for example, financial firms may have more willingness to comply a

[225] Andrew Kwok-Nang Li, Chief Justice, *Speech at the Hong Kong Mediation Conference* (Nov. 30, 2007), access at http://www.info.gov.hk/gia/general/200711/ 30/P200711300131.htm last visited 18/08/2021

recommendation or decision made by regulators. It could also make the process of transferring the collected data to regulators smoothly. Besides, in countries in which financial regulators have a good reputation, it may increase consumers' confidence on the scheme. However, it also triggered concern of independence and impartiality, which is a key constitutional criterion of ADR. Critics may argue that ADR schemes in regulators may influenced by the position and policy of regulators and therefore lose its independence and impartiality, while similar criticism could also be observed from aspects of transparency and fairness.

6. As demonstrated above, there are many ADR schemes in the financial service market in the world and there is much discussion on each of them, but this thesis would only give an examination and comparison in detail on three chosen Financial Consumer ADR schemes, namely UK's FOS, Hong Kong's FDRC and Australian AFCA. The UK's FOS was chosen because it's currently the scheme handling the largest number of cases in financial service market, a few hundred thousand cases were resolved by the FOS in every year. And the UK's FOS is a very typical representative of the Ombudsman model and investigation approach.
7. The Hong Kong's FDRC was chosen because the Hong Kong is a popular financial center in Asia and part of China, therefore, the context of Hong Kong is very similar to the China (mainland), for example, the financial consumer live in Hong Kong and China mainland shares similar culture background, economic situation and understanding on what is fairness or justice, therefore can contribute much value when we discuss on establishing a financial consumer ADR scheme in China.

Another reason to choose Hong Kong is a typical representative of arbitration model and adversarial approach. The Australian AFCA was chosen because this scheme is just reformed, therefore, the research on Australia's AFCA would help to find out some new trends of the development of the financial consumer ADR scheme.

Detailed examination in UK's FOS

8. The practice of financial consumer ADR schemes in England has a long history. The insurance industry has already introduced an ADR scheme for disputes with private- sector bodies with the Insurance Ombudsman Scheme in 1981[226]. This scheme is a private Ombudsman scheme, on a voluntary basis, to handle complaints against those insurance companies, which subscribed to it[227]. In 1986, the Banking Ombudsman was established, as the Building Societies Act 1986, requires every authorized building society shall be a member of a recognized ADR scheme for member complaints[228]. Adjudicators in these recognized schemes would investigate complaints from members and make a binding decision. One important principle that still apply today: decision would be based on what was 'fair and reasonable",[229] could already been observed at that time[230].

[226] Christopher Hodges, Iris Benohr and Naomi Creutzfeldt-Banda, *Consumer-to-business Dispute Resolution: the Power of CADR* (Hart Publishing 2012) 275

[227] FCA, *FCA Hand Book, insurance ombudsman scheme*, access at https://www.handbook.fca.org.uk/handbook/glossary/G567.html last visited 19/08/2021

[228] Building Societies Act 1986, part IX

[229] Christopher Hodges, Iris Benohr and Naomi Creutzfeldt-Banda, *Consumer-to-business Dispute Resolution: the Power of CADR* (Hart Publishing 2012) 275

[230] At that time, this principle is described as "determinations of complaints under recognised schemes shall be made by reference to what is, in the adjudicator's opinion, fair in all the circumstances of the case and any direction given to a building society or associated body by an adjudicator may (if the complainant accepts the determination) require it or the complainant not to exercise or require the performance of any of the contractual or other obligations or rights subsisting

Later, some other financial consumer ADR schemes, such as the Personal Investment Authority Ombudsman and the Investment Ombudsman were established to answer the requirement of the Financial Service Act 1986 for investments[231].

9. All these Ombudsman schemes were merged into the Financial Ombudsman Service on 1 December 2001, with rationalization of differences in time limits and eligibility criteria,[232]making the FOS becomes the main body of UK's financial consumer ADR scheme. The FOS was established by the requirement of Financial Service Market Act 2000 (FSMA 2000)[233], to protect financial consumers' interests and prevent from bad practice by trying to overcome the clear reluctance of consumers to bring the disputes to court[234] and problems such as the cost of litigation, the strange feeling about the law and lack of legal knowledge and professional help in comparison to a financial institution[235], by providing consumers with a cheap, fast, and efficient one stop dispute resolution service for almost all financial service sectors[236].

10. The establishment of the FOS was also influenced by an increasing interest in the UK in ADR techniques, including arbitration, mediation, conciliation, expert

between them". See Building Societies Act 1986, s. 84.

[231] Christopher Hodges, Iris Benohr and Naomi Creutzfeldt-Banda, *Consumer-to-business Dispute Resolution: the Power of CADR* (Hart Publishing 2012) 275

[232] H Davies, 'Reforming Financial Regulation: Progress and Priorities' in E Ferra and CAE Goodhart (eds), *Regulating Financial Services and Markets in the 21st Century* (Hart Publishing 2001).

[233] In the FSMA 2000, the FOS is referenced as "the Ombudsman scheme".

[234] *Banking Services and the Consumer, A Report by the National Consumer Council*, (London NCC 1983),106.

[235] I Ramsay, *Consumer Protection, Text and Materials* (Weidenfeld and Nicolson,1989)140.

[236] According to the FSMA, the FOS has compulsory jurisdiction on most kinds of financial services, including banking, security, insurance, electronic money, and payment service. See FSMA 2000, s. 226.

determination, and early neutral evaluation. [237]These techniques are promoted as alternatives to courts, including the small claims procedure,[238]and to try to resolve consumer disputes quickly and with minimum formality by an independent person[239].

11. To encourage consumers to use the FOS scheme, the FOS hold a consumer-free policy. FOS does not charge any fee to consumers. It is funding comes from government's subsidiary (in the first years), levies and case fee paid by financial institutions covered by FOS according to the law[240]. All businesses covered by the ombudsman service pay a general levy to contribute to FOS's costs. The Financial Conduct Authority (FCA) collects the levy while it collects both its own regulatory fees. The amount of levy that each FCA-regulated business pays ranges from around £100 a year for a small business to over £300,000 for a high-street bank or major insurance company[241].

12. The FOS scheme provides every financial institution a free service for the first 25 cases every year (previously the first three cases every year) and charges £550 for the 26th and each subsequent case[242]. However, not all enquires and initial complaints become chargeable cases. According to the FOS, there is only fewer than one in six of the initial complaints and enquiries finally become chargeable

---

[237] E Ferran, *Dispute Resolution Mechanisms in the UK Financial sector* (Cambridge UP, 2002) 12
[238] R James, *Private Ombudsmen and Public Law* (Dartmouth Publishing,1997) 3
[239] See FSMA2000, s.225 (1).
[240] FOS *A Quick Guide to Funding and Case Fees* access at https://www.financial-ombudsman.org.uk/publications/technical_notes/QG1.pdf
[241] *Ibid.*
[242] *Ibid.*

cases. The others are issues not covered by the FOS or cases that can be sort out informally at a very early stage[243]. The case fee is a little lower than the unit cost around £684 to £753,[244]which shows that the FOS also tries to provide financial institutions an affordable service. Just like the previous chief ombudsman Walter Merricks said, in the long term, harmonized Ombudsman arrangements should prove beneficial for the financial services industry, in terms of cost efficiency[245].

13. Besides the cost issue, the FOS also tries to encourage consumers to use the ombudsman service by proving consumers with as much convenience as possible. In 2000, the first chief ombudsman of FOS clearly demonstrates that resolving disputes quickly and with minimum formality is the FOS's main responsibility according to the law and minimizing the formality that the procedures will necessarily involving is one of the most priority issues they take into consideration when designing the complaint process of FOS[246]. To resolve disputes with minimum formality, FOS deals with consumers as far as possible using their preferred medium of communication – by phone, letter, or email as appropriate – only formalizing matters when it is necessary to avoid confusion or for a final recorded decision[247].

---

[243] *Ibid.*
[244] FOS *Annual Review 2001-2002* 17 access at https://www.financialombudsman.org.uk/publications/ar02/Annual-Review-2002.pdf
[245] FOS *Annual Report of the Financial Ombudsman Service 1999 – 2000* 8 access at https://www.financial-ombudsman.org.uk/publications/first-annual-report/ar-1999-2000.pdf
[246] FOS *Annual Report of the Financial Ombudsman Service 1999 – 2000* p6 access at https://www.financial-ombudsman.org.uk/publications/first-annual-report/ar-1999-2000.pdf
[247] *Ibid.*

14. The effort of encouraging consumers to have awareness of FOS and encourage them to use FOS made significant results. In the first three years (2000-2002) of the FOS, FOS received 305,094, 414,722and 388,239 enquiries while 25,000, 31,347 and 43,330 complaints referred to its case-handling team[248]. Also, in this period, the number of cases resolved and closed by the FOS is 22,100, 28,400, and 39,194,[249]which is quite considerable for a new established ADR scheme. And after 15 years good operation, the number of resolved complaints increased to 336,381, the growth rate is almost 1000%[250]. By 2017, 89% English people said that they had some awareness of the FOS scheme, while 76% public said they trust the FOS[251].

15. The FOS scheme is operated by a "body corporate" as the "scheme operator" (under s225 of the Financial Services and Markets Act) takes the form of a company "limited by guarantee and not having share capital". The name of the company is the Financial Ombudsman Service Limited. It works on a not-for-profit basis and the only aim of the company is to operate the FOS[252]. The company operate by a board of directors; however, the members of the board are non-executive, which means that they don't get involved with considering individual complaints. The main responsibility of the board is to oversee the strategy of the FOS and to make sure that it have the resources needed to work

[248] FOS, *Annual Review 2001-2002* 13,17
[249] *Ibid.*
[250] FOS, *Annual review 2016/2017* 9
[251] FOS, *Annual review 2016/2017* 33
[252] FOS, *How We Are Governed*, access at https://www.financial-ombudsman.org.uk/who-we-are/governance-funding

effectively and independently[253]. Other responsibilities of the board include appoint panel of Ombudsman, who are responsible for considering individual complaints; approve annual report and accounts; update the information board and forms subcommittees[254].

16. The Financial Ombudsman Service Limited has a special relationship with the Financial Conduct Authority (FCA). As the regulator of most financial services in the UK, the FCA is responsible for regulating the conduct of businesses and setting rules for businesses to follow, including the rules on how financial businesses handle complaints. The FCA is responsible to publish the company's official rules, appoint the chairman of the company and appoint members of non-executive board of directors[255]. The FOS responds to regulation, by closely understanding any changes made by the FCA, the FOS limited shall make sure that it is ready for any changes in the types and numbers of complaints received[256]. Besides, the FCA and the FOS limited also share information and data with each other[257]. The FCA and the FOS limited meet and communicate regularly to discuss matters of mutual interest and they will consult on one another on any issues that may have significant influence on the other organization or share draft documents that my affect the other's function at an

[253] *Ibid.*
[254] *Ibid.*
[255] *Memorandum of Understanding between the Financial Conduct Authority (the FCA) and the scheme operator, the Financial Ombudsman Service Limited* s(7).
[256] FOS, *Our work with other organisations*, access at https://www.financial-ombudsman.org.uk/who-we-are/work-other-organisations
[257] *Ibid.*

early stage[258]. They also are members of the Coordination Committee, where emerging risks that have the potential to cause wide-ranging problems amongst financial services consumers are identified and considered.

17. Further, the FOS limited will disclose information to the FCA when it believes that this information would or might be helpful to the FCA in advancing one or more optional objectives of the FCA, while the FCA must regard to this information in giving effect to its consumer protection objective[259]. Subject to any restrictions on disclosure of information (confidential or otherwise) at law, the FOS limited and the FCA shall disclose information which is helpful to the other to discharge its own functions and purposes, which including the information about the number and types of complaints handled by the FOS and proposed changes to rules or guidance on complaints-handling made by the FCA.

18. The FOS limited is an independent organization, instead of an agent or a subsidiary of the FCA. It works independently. Memorandum of Understanding between the FOS limited and the FCA clearly shows that they have different responsibilities. The FCA operates as the financial conduct regulator. Its strategic objective is ensuring that the relevant markets function well. While the main role of the FOS is to operate a scheme to resolve disputes, as an alternative to the civil courts. The scheme's statutory purpose is to resolve certain disputes quickly and

[258] *Memorandum of Understanding between the Financial Conduct Authority (the FCA) and the scheme operator, the Financial Ombudsman Service Limited* s. 14,15 & 16.
[259] *Memorandum of Understanding between the Financial Conduct Authority (the FCA) and the scheme operator, the Financial Ombudsman Service Limited* s.17.

with minimum formality based on what is fair and reasonable in all the circumstances. The FCA regulates financial institutions by setting standards that these institutions must meet and acting where such institutions may be breaching those standards. The FCA does not investigate individuals' complaints against the institutions it regulates, this is the role of the FOS[260].

19. In addition, although the FCA makes the official rules for the FOS, the FOS is responsible for fixing standard terms and making rules for the voluntary jurisdiction and making scheme rules or standard terms for the compulsory and voluntary jurisdictions on: Ombudsman procedures; awards of costs and interest; and case fees[261].

20. The FSMA 2000 grants the FOS two kinds of jurisdiction. The first one is compulsory jurisdiction. The compulsory jurisdiction applies to those disputes if (a) the complainant is a consumer and wish to have the complaint dealt by the scheme (the complainant is eligible); (b) disputes relates to an act or omission by a firm in carrying on one or more of the following activities provided by the FCA in the handbook. (c) the related acts or omissions are carried on from an establishment in the United Kingdom; or are ancillary to, regulated claims management activities; and (d)the act or omission to which the complaint relates occurred at a time when compulsory jurisdiction rules were in force in relation to

[260] *Memorandum of Understanding between the Financial Conduct Authority (the FCA) and the scheme operator, the Financial Ombudsman Service Limited* s.6 (c).
[261] *Memorandum of Understanding between the Financial Conduct Authority (the FCA) and the scheme operator, the Financial Ombudsman Service Limited* s.9 (b)&(c).

the activity in question, even the financial firms in question do not wish to use the FOS scheme and complainants refer disputes to the FOS scheme in time. Besides the compulsory jurisdiction, there is also a voluntary jurisdiction applies to those disputes which are out of the scope of the compulsory jurisdiction but the respondent participating this scheme.

21. When the FOS was established in 2000, the FOS follows different procedure according to the rules of original schemes. At that time, all complaints were firstly sent to a common point of entry, namely customer contact division, and then were divided into three categories according to their nature. Complaints under the previously Banking Ombudsman Scheme and Building Society Scheme were sent to the banking and loans division, while complaints under other schemes were send to the Insurance division and the investment division.

22. After 2001, when the FOS ‘s own rules come into force, an Ombudsman-based comprehensive multi-layer compliant handling procedure was established and all complaints would be dealt with through this procedure. The principle of this procedure is to try to resolve disputes at as early stage as possible. To use the FOS, financial consumers were told to firstly complain to the financial institutions to give them a chance to realize the problems and to correct them.

23. When financial firms’ internal complaint-handling scheme has received consumer complaints, they have eight weeks to deal with them, produce and let consumers know the final response of the complaint. In the final response, the firms must tell

consumers that they have right to refer the complaints to the FOS. If the financial firms is not able to send a final response in eight weeks, they still must tell consumers that they can refer the complaint to the FOS.

24. In case there is no final response after eight weeks, the consumer may directly bring the complaint to the FOS, however, the FOS may decide to not look at the complaint immediately if they believe there are some special features in the complaint and thus the financial firm deserves more time to process the complaint. However, this extension of time would not be given as a matter of routine[262].

25. In general situation, when the final response is not satisfactory or there is no a final response after eight weeks, consumers can then access to the FOS by visiting its website or by phone within six months. The complaint will be sent to the assessment team where the complaint will be examined whether belongs to the FOS's jurisdiction. If it is something that cannot be dealt with by the FOS then the FOS will explain to consumers why they cannot provide with help. If the dispute is belonging to the FOS's jurisdiction, the assessment team will try to resolve the dispute in an early stage by, for example, allocating a caseworker seeking to broker a settlement by mediation, or perhaps taking a firmer approach and giving the consumer making the complaint or the firm (or sometimes both) a

[262] FOS *Ombudsman News March 2013* access at https://www.financialombudsman.org.uk/publications/ombudsman-news/3/3.pdf last visited 19/08/2021

written initial view of the complaint and its likely outcome[263]. Most complaints were resolved in this step, for example, the Ombudsman scheme resolved 89 percent of all complaints before Ombudsman in 2019-2020[264] while 92 percent complaints were resolved in this early step in 2020-2021[265]. A financial firm then may give the consumer a compensation according to the informal view and the consumer would give up to seek other remedies such as the civil litigation.

26. If the complaint cannot be resolved in this step, the complaint will be allocated to an adjudicator for a formal investigation. The investigation would be carried over the phone and in writing, both parties would not be asked to present themselves in person. The consumer has no duty to prove evidence to the adjudicator proactively, the adjudicator will decide what documents or record he would likely to know to find out what happens and what is reasonable and fair. The adjudicator can directly request the firm to submit evidence, what the consumer needs to do is to provide the personal details, claims and some key details such as account number or policy number[266]. If during the process of the investigation, the adjudicator finds that it is likely to foster a settlement, the adjudicator will try to persuade parties to make a settlement. However, if the attempt of achieving a settlement failed, the adjudicator will then give a report to summarize the complaint and to demonstrate the outcome of the investigation.

---

263 *Ibid.*

264 FOS *The FOS Annual complaints data 2019/2020*, access at https://www.financial ombudsman.org.uk/data-insight/annual-complaints-data last visited 19/08/2021

265 *Ibid.*

266 FOS *Your complaint and the ombudsman* access at https://www.financial-ombudsman.org.uk/publications/consumer-leaflet.htm#e last visited 19/08/2021

27. In the report, the adjudicator will give conclusion about whether the complaint should be upheld and a recommendation for compensation or other redress[267].This report would be sent to both parties and if both parties decide to accept this report, the case is end. If not, the case will then be transferred to the Ombudsman. The Ombudsman will then review the complaint according to the adjudicator's report and any other further information that he may think is necessary. During this step, a face-to-face hearing may arrange in public or private if the Ombudsman believes a case cannot be fairly decided based on the documentary evidence and the material that the two sides have already provided[268].

28. However, the hearing is rare to see. The firm or consumer may ask for a hearing, and the Ombudsman would carefully consider whether the hearing is value enough. No private meeting with the Ombudsman would be held to either party during this step. After that, the ombudsman will give a decision according to "what is fair and reasonable". This decision would be the outcome of the Ombudsman scheme. Where the ombudsman has decided in favor of the complainant, the ombudsman's decision can include a money award, a n interest award, a costs award against the respondent and a direction to the respondent[269]. The amount of money award can be decided by the ombudsman according to what he/she believe is fair. The money award can cover loss from financial loss,

---

[267] FOS *Ombudsman News March 2001* 34
[268] FOS *Annual review 2011-2012*
[269] DISP 3.7.1

pain and suffering, damage to reputation and distress or inconvenience, no matter whether a court would award compensation[270]. Although the ombudsman can decide the amount of money award according to his discretion, the discretion is not unlimited, there is a cap of money award exists in the FOS scheme. Currently, the maximum money award which the ombudsman may make is: £350,000 for a complaint concerning an act or omission which occurred on or after 1 April 2019; and £160,000 for a complaint concerning an act or omission which occurred before 1 April 2019[271], exclude possible interest and cost.

29. Besides the monetary award, the ombudsman may also make a direction to the respondent in the decision. A direction may require the respondent to take such steps in relation to the complainant as the ombudsman considers just and appropriate[272] (whether a court could order those steps to be taken)[273]. While the ombudsman may also ask the respondent to take certain actions as he determines the respondent should take (or should have taken) under the scheme[274].If the consumer decides to accept this decision, the decision becomes binding and enforceable just like a court judgement. If not, the decision becomes void, both parties free to bring the case to court for a civil litigation or to other ADR schemes. No matter whether the consumer accept the Ombudsman decision or

[270] DISP 3.7.1
[271] DISP 3.7.4.
[272] For example, the ombudsman may require the respondent to make a formal apologize to the complainant.
[273] DISP 3.7.11
[274] DISP 3.7.11A

not, the procedure of the FOS will close and the FOS will not review this complaint.

Detailed examination in Hong Kong's FDRC

30. The HK's FDRC is a new financial consumer ADR scheme proposed by the Securities and Futures Commission ("SFC") and the Hong Kong Monetary Authority ("HKMA") in 2008 to answer the increased need for an effective system of dispute resolution in financial service market[275], in which more and more disputants are turning to alternative dispute resolution mechanism to resolve their disputes[276]. Another important reason of this proposal is the 2008 financial crisis. At that time, the Hong Kong has a developed financial market and comparing to other lead financial markets, small and medium individual investors account for a high proportion in Hong Kong's financial market[277]. Due to the global financial crisis triggered by the collapse of the Lehman Brothers, Hong Kong's financial authorities and financial institutions must face a large group of anger and panic small individual investors, who are trying seek damages against those financial institutions selling them drastically depreciating investment products[278]. Under this background, the SFC and HKMA believe that establishing such a financial consumer ADR scheme would help to provide financial consumers a place to

[275] Andrew Kwok-Nang Li, Chief Justice, *Speech at the Hong Kong Mediation Conference* (Nov. 30, 2007), access at http://www.info.gov.hk/gia/general/200711/ 30/P200711300131.htm.
[276] Michael J. Moser & Yeoh Friven, 'Choosing an Arbitral Institution in Cross Border Commercial Arbitration' in Michael J. Moser (eds) Busness Disputes in China (2d ed, Hong Kong Publishing 2009).
[277] Ali, Shahla F. & Kwok, J. K. W. 'After Lehman: International Response to Financial Disputes – a Focus on Hong Kong' (2011) Vol.10(2) Richmond Journal of Global Law and Business
[278] *Ibid.*

protect their interests and resolve their disputes arising from the 2008 financial crisis[279].

31. After the proposal, the government launched a public consultation on it in February 2010 which received general support[280],while many legal professionals suggest the government should fully use the Hong Kong's advantage as an international arbitration centre and a place with abundant arbitration resource[281]. The supporting of the consultation paper leads to the establishment of the FDRC on 18 November 2011 as a non-profit making company limited by guarantee with seed funding from the government, the HKMA and the SFC. The Role of the FDRC is to operate a financial consumer ADR scheme aiming to provide consumers with an alternative avenue which is independent and affordable for resolving monetary disputes with the financial institution amicably and in a timely manner by way of primarily "mediation first and arbitration next"[282].

32. The operator of Hong Kong's FDRC scheme is the FDRC, which is a non-profit company limited by guarantee and obtained charitable status for tax exemption

---

[279] Financial Services and the Treasury Bureau, Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre (2010), access at http://www.legco.gov.hk/yr09-10/english/panels/fa/papers/facbl-l127-1-e.pdf, last visited 19/08/2021; Ali, Shahla F. & Kwok, J. K. W. 'After Lehman: International Response to Financial Disputes – a Focus on Hong Kong' (2011) Vol.10(2) Richmond Journal of Global Law and Business

[280] H.K. MONETARY AUTH., REPORT OF THE HONG KONG MONETARY AUTHORITY ON ISSUES CONCERNING THE DISTRIBUTION OF STRUCTURED PRODUCTS CONNECTED TO LEHMAN GROUP COMPANIES, (Oct. 26, 2009), access at www.info.gov.hk/hkma/ eng/new/lehman/lehman report.pdf last visited 19/08/2021

[281] H.K. MONETARY AUTH., REPORT OF THE HONG KONG MONETARY AUTHORITY ON ISSUES CONCERNING THE DISTRIBUTION OF STRUCTURED PRODUCTS CONNECTED TO LEHMAN GROUP COMPANIES, (Oct. 26, 2009), access at www.info.gov.hk/hkma/ eng/new/lehman/lehman report.pdf last visited 19/08/2021

[282] *Financial Dispute Resolution Scheme (FDRS) Objectives* access at https://www.fdrc.org.hk/en/html/aboutus/aboutus_fdrs.php 19/08/2021

purpose[283]. There is a memorandum of understanding between FDRC and the SFC and the HKMA to set out relationship between them. According to the memorandum, the SFC and the HKMA would respect FDRC's principle of impartiality and confidentiality, while the FDRC will also work close with the SFC and HKMA for the good of financial service market[284].

33. The FDRC scheme has no compulsory jurisdiction on Hong Kong's financial institutions. It only has voluntary jurisdiction which requires both parties' agreement to set up. However, as all financial institutions which are authorized by the HKMA or licensed by/registered with the SFC (except those institutions which only provide credit rating services) are required to join the FDRC scheme as members, there is no need for consumers to gain a separate agreement from financial institutions in every single complaint.

34. The FDRC has jurisdictions on two groups of disputes. The first group is standard eligible disputes and the second is extended eligible disputes. A standard eligible dispute is a monetary nature dispute between an eligible compliant and a financial institution arise out of a contract entered or enforced in Hong Kong, which is brought to the FDRC by an eligible complaint or a financial institution with signed consent by the Parties[285]. The FDRC defined eligible complaint as an individual, a sole proprietor or a small enterprise, who received financial service from a financial

283 FDRC, *Annual report 2012*
284 FDRC, *Annual report 2012*
285 Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.12.1.1.

institution[286]. A financial consumer (eligible complaint) can bring the dispute to the FDRC without a separate agreement of financial institution, however, if a financial institution hopes to let the FDRC deal with its disputes with financial consumers, the financial institution must firstly achieve an agreement from the consumer.

35. Another issue which influences the jurisdiction is the amount of claim. The FDRC set a maximum claimable amount for itself and the dispute which claim higher than the cap will not be consider as standard eligible dispute. The current cap for the FDRC is 1,000,000 Hong Kong dollars[287]. Besides the cap of claimable amount, there is also a limit of time, an eligible complaint must fill his/her application to the FDRC within the 24 months from the date that he/she realized there is a loss. The rules of jurisdiction also require consumers first to fill a written complaint to the relevant financial institution and received a final written reply issued by the financial institution before they use the FDRC scheme. If consumers filed a written complaint to the financial institution but never received a final written reply from the institution after 60 days passed, consumers can then directly go to the FDRC[288].

36. The extended eligible dispute is a dispute exceeds the maximum claimable amount and/or is beyond the limitation period or including an individual financial institution claim or individual financial individual counterclaim. In the circumstance of extended eligible dispute, the consent from both parties were need

[286] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.13.
[287] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.12
[288] *Ibid.*

to establish the jurisdiction over the case[289].

37. When an eligible consumer or a financial institution hopes to use the FDRC scheme to resolve a dispute between them, the consumer will be required to first prove that he has already filed a written complaint to the relevant financial institution through that institution's internal complaint handling scheme and received a final written reply from the institution or did not receive such reply after 60 days from the data of filed[290], while the financial institution needs to prove it has gained consents from relevant consumers[291].

38. When the applicant success to do that, the applicant will then be required to fill an application form set up by the FDRC. To file this application form, the consumer is required to clearly listing out the issues in dispute and the amount of monetary loss suffered, as well as attaching the relevant correspondence with the relevant party[292]. When submitting the application form, the applicant was also required to pay the application fee at the same time[293].

39. After an application form was submitted, the case will then be assigned to a case officer, the case officer may require an applicant to provide further information that is considered necessary to assess whether the dispute is under the jurisdiction of FDRC. The applicant was required to comply with the request within the timeframe

[289] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.12.1.2.
[290] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.15.2.
[291] *Ibid.*
[292] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.17.1.1.
[293] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.17.1.3.

specified by the FDRC.

40. After gained all necessary information he/she needs, the case officer will then consider, having regard to the rules of jurisdiction with due reference to the definitions of eligible disputes, eligible complaints, and financial institutions, whether to accept or reject the application. An application will be rejected or decided to discontinue handling in some certain circumstances, even the relevant dispute is an eligible dispute and under the jurisdiction of FDRC[294]. After the case officer made his decision on whether accept this case or not, the officer will take appropriate measures to let both parties to know his/her decision. If the applicant believes that the decision made by the case manager is inappropriate, the applicant may make a written representation to the FDRC within 21 days[295]. Then a senior staff of the FDRC will review the decision and make his own decision, this decision made by senior staff of FDRC will be final and conclusive and cannot be challenged anymore[296].

41. After an application was accepted by the FDRC, the case will be referred to mediation and arbitration according to the sequence known as "mediation first, arbitration next", if it is a standard eligible case. Otherwise, the case may be

[294] These circumstances include: if, after the Application is lodged with the FDRC, the eligible complaint lodges a complaint against the financial institution with the ICB or one of the parties commences legal proceedings against the other party while the claim is being processed by the FDRC unless the court has ordered a stay of the proceedings or has been provided with proper notifications for mediation and/or arbitration. Or if, after the application is lodged with the FDRC, it comes to the knowledge of the FDRC that the claim has been the subject of court proceedings where there is a decided judgment.

[295] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.18.3.2

[296] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.18.3., and 18.3.4.

referred either to "mediation first, arbitration next", "mediation only" or "arbitration only", provided that the parties have given their signed consent[297].

42. The acceptance of the case also means that from that time, the FDRC has power to require a party to an eligible dispute to do anything else that the FDRC consider may assist the conduct of mediation and/or arbitration, including requiring a party to attend a pre-mediation session, provide a translator at his own cost or provide further information except in some special circumstances[298]. The timeframe to provide this information will be decided and extended by the FDRC.

43. If the case was referred to a mediation, the mediator will be appointed depends on the number of claims involved. If the amount of claim is within the prescribed level of HK$200,000, the FDRC shall assign the case to an in-house mediator or a mediator from the list of mediators[299]. Otherwise, the parties may agree on the appointment of the mediator from the list of mediators. If the parties fail to agree on the appointment of the mediator, the FDRC will be required to appoint the mediator. Then, the FDRC shall appoint a mediator from the list of mediators as soon as practicable, considering the parties' preference so far as practicable[300]. The FDRC has sole authority to set up and maintain a list of mediators as well as the power to remove, at its sole discretion, any mediator from the list of mediators who

[297] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.18.3., and 18.4.1.

[298] These may include, to provide the information would breach a court order, to provide the information would breach a duty of confidentiality to a third party, to provide the information would prejudice an ongoing investigation by the police, the regulators or other law enforcement agencies, the information does not exist or no longer exists or is not within the party's reasonable possession or control or the information is irrelevant to the eligible dispute. See Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.18.4.2.

[299] Financial Dispute Resolution Scheme (FDRS) Mediation and Arbitration Rules, art.2.1.1(a).

[300] Financial Dispute Resolution Scheme (FDRS) Mediation and Arbitration Rules, art.2.1.1(b).

fails to adhere to the terms of reference and/or the FDRS mediation and arbitration rules and/or ethics codes for FDRC mediators and arbitrators[301].

44. After the mediator is decided, the mediator shall commence and conduct the mediation as soon as possible after his/her appointment. And his/her first job is to ensure that the parties made a separate agreement of mediation before the substantive mediation is started[302]. During the process of the substantive mediation, the mediator was required to help the parties to identify the issues in the dispute, explore each party's needs and interests, communicate with one another, explore, and generate options, reach an agreement regarding the resolution of the whole, or part, of the dispute, according to the mediation and arbitration rules[303]. To facilitate the mediator to do his job, the mediator has power to request the parties to provide all relevant data, information and materials relating to and necessary for the mediations, except where the party satisfies the mediator that there are some certain circumstances prohibit the party to do[304]. The mediator's role is only to mediate the dispute with a view to reach an agreement between parties and in no situation has power to adjudicate or make any binding decisions on the substance of the dispute

[301] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.19.1.1.

[302] Financial Dispute Resolution Scheme (FDRS) Mediation and Arbitration Rules, art.2.1.

[303] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.19.4.1

[304] For example, these circumstances may include to provide the information would breach a court order, to provide the information would breach a duty of confidentiality to a third party, to provide the information would prejudice an ongoing investigation by the police, the regulators or other law enforcement agencies, the information does not exist or no longer exists or is not within the party's reasonable possession or control or the information is irrelevant to the eligible dispute. See Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.19.5.1.

or make any monetary awards or impose any penalties on the Parties[305].

45. The mediation may end because a settlement between parties was made. Otherwise, the mediation may also end if the consumer submits a written notification to the mediator that he wants to end the mediation or if the mediator, after consultation with parties, believe that further mediation is no longer practicable and thus give a written advice to terminate the mediation[306]. The mediator will try to finish the mediation working in the given specified mediation time, which currently is four hours[307]. The mediator may conclude his mediation even after the specified mediation time. The specified mediation time may be extended by the mediator and the FDRC with the agreement of parties. When the specified mediation time was extended, the FDRC will charge parties an extra fee according to its fee structure[308].

46. After the end of the mediation, the FDRC shall issue each party a certificate of mediation to prove that they have already finish the mediation procedure. If there is no settlement was made through the mediation, the claimant can then request an arbitration administrated by FDRC within 60 days from the date of mediation certificate[309]. There is only a single arbitrator in the arbitration. The parties can make an agreement to choose one arbitrator from the lists of arbitrators. If they cannot achieve an agreement, the FDRC shall appoint an arbitrator from the lists.

[305] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.19.5.2 &19.5.3.
[306] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.19.8.
[307] In general situation if a settlement cannot made after the specified mediation time is complete and the parties cannot achieve an agreement to extend the mediation time, the mediator will issue this advice and then terminate the mediation.
[308] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.19.9.2.
[309] Financial Dispute Resolution Scheme (FDRS) Mediation and Arbitration Rules, art.3.2.1.

Before appointing an arbitrator, the FDRC will notify the potential arbitrator(s) of the nature of the dispute and the identities of the parties. Each potential arbitrator must make a reasonable effort to learn of, and disclose to the FDRC, if there are any circumstances might preclude himself from rendering an objective, independent and impartial determination in the proceeding.

47. Generally, the arbitration is "documents-only", which means that the arbitrator shall conduct and decide the case based on the documents submitted and evidence provided, while each party shall bear the burden of proof for its own case[310]. No legal representative will be allowed in the "documents-only" arbitration[311]. However, if the arbitrator determines, in his sole discretion, that an in-person hearing is necessary for deciding the case, and both parties agree to take on and pay the corresponding fees, there shall be an in-person hearing[312]. If there is an in-person hearing, the legal representative may be allowed according to the discretion of the arbitrator.

48. During the whole process of the arbitration procedure, the arbitrator has power to make enquiries to both parties, order any party to make any property or thing available for inspection, order any party submit documents in their possession, receive and consider such written or oral evidence as he/she shall determine to be relevant and shall not be bound by the rules of evidence[313]. However, the power

[310] Financial Dispute Resolution Scheme (FDRS) Mediation and Arbitration Rules, art.3.8.1.
[311] Financial Dispute Resolution Scheme (FDRS) Mediation and Arbitration Rules, art.3.8.3.
[312] Financial Dispute Resolution Scheme (FDRS) Mediation and Arbitration Rules, art.3.9.1.
[313] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.20.4.2.

and discretion of arbitrator must be limited by the FDRC's mediation and arbitration rules, the ethics codes for FDRC mediators and arbitrators and the Hong Kong's arbitration ordinance (Cap.609) other than section 32 and 33[314], while the arbitrator also has obligation to always act fairly and impartially in the whole process of arbitration procedure[315].

49. The applicable law that will be applied in the arbitration procedure to determine substantive issues is the law governing the relevant contract, while the law which governs the procedural issues of the arbitration procedure is the Hong Kong's arbitration ordinance (Cap.609) other than section 32 and 33[316]. There is no evidence showing that the FDRC uses an extended interpretation method here to include those soft laws such as code of industry or good practice in the industry as part of laws governing the contract.

50. The arbitrator can issue and only issue a monetary award at the end of the arbitration, subject to the maximum claimable amount for each individual standard eligible dispute and extended eligible amount. The arbitrator may also issue an award on monetary awards on interests and costs in extended eligible disputes. However, the arbitrator cannot issue awards on interests and costs in standard eligible disputes, the parties must bear their own costs[317].

51. The settlement achieved through the mediation has no legal binding force and

[314] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.20.3.1.
[315] *Ibid.*
[316] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.20.4.1.
[317] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.20.4.2.

cannot be enforced directly by the court. However, as members of the FDRC scheme, financial institutions have the obligation to fulfil the terms of mediated settlement agreement and arbitration award[318]. If a financial institution failed to fulfil the obligation of enforcing the settlement, the FDRC may issue a non-compliance letter/notice to the financial institution, with a copy to the regulators for follow-up actions[319]. Although, in theory, the financial institution can refuse to enforce the settlement, the negative consequences followed makes it almost impossible in practice.

52. The award made by the arbitrator through the arbitration procedure is final and binding to both parties. The award cannot be appealed except it is an appeal against award on question of law according to the sections 3, 5, 6 and 7 of Schedule 2 of the Arbitration Ordinance (Cap. 609)[320]. Just like the settlement achieved through the mediation, the financial institution has obligation to enforce the award proactively as member of the FDRC scheme and may face negative consequences issued by the regulator if it failed to do that. Unlike the settlement, the award of the arbitration can also be directly enforced by the Hong Kong's court,[321] while it may also be enforced by courts in other jurisdictions who are members of the New York

[318] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.9.3.
[319] Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme s.10.2.
[320] Financial Dispute Resolution Scheme (FDRS) Mediation and Arbitration Rules, art.3.12.1.
[321] Although it is quiet confusing here whether the award will be enforced as a judgement of court or as a contractual debt. According to the art. 84 of Hong Kong's arbitration ordinance, the arbitration award shall be enforced as same as a judgement of court. However, the FDRC's terms of reference said that the monetary award can be recovered or enforced through the courts as a contractual debt, which is conflict to the arbitration ordinance as well as FDRC's own demonstration on enforceability of arbitration award. See FDRC *Advantages of arbitration*, access at https://www.fdrc.org.hk/sc/html/resolvingdisputes/resolvingdisputes_mediationarbitration.php

Convention[322].

53. The FDRC charges to both eligible complaints (consumers) and financial institutions. The FDRC provides free enquiry service to consumers but consumers need to pay HK$200 to file an application form for the purpose of further service. The mediation fee and arbitration fee will be charged according to the claim amounts of disputes. The mediation fee for consumers is from HK$1,000 to HK$2000 in a specified mediation time (4hours), if extended mediation time is needed, the charge will vary from HK$750 per hour to HK$1500 per hour. The mediation fee for a financial institution is five times the mediation fee of consumers in the specified mediation time and as same as the fee of consumer in extended time. The mediation fee is not refundable no matter there is a settlement achieved or not.

54. The arbitration fee is charged according to whether there is an in-person hearing. If there is only a documents-based arbitration, the FDRC shall charge consumers HK$5,000 per case and charge financial institutions HK$20,000. However, if there is an in-person hearing was involved in the arbitration, the FDRC will charge both consumers and financial institutions HK$12,500. Information in details can be find in

55. The funding of the FDRC mainly comes from contributions from founder members and investment interests. The total operating expenditure of FCDR was HK$ 9,974,339 in financial year 2020, which was a little lower than last year,

[322] FDRC *Advantages of arbitration*, access at https://www.fdrc.org.hk/sc/html/resolvingdisputes/resolvingdisputes_mediationarbitration.php

HK$11,580,187. The funds were spent on staff costs (HK$5,395,720), depreciation and amortisation (HK$ 1,921,085) and other administrative and operating expenses (HK$ 2,657,534). The total income of FDRC in financial year 2020 was HK$459,804, but only a small part of this income comes from case fee paid by consumers and financial institutions. In the whole year, the FDRC charges HK$ 20,000 from its dispute resolution. The main revenue comes from its investment interests (HK$ 459,804)[323].

Detailed examination in Australian AFCA

56. The Australian AFCA scheme is a broad new financial consumer ADR scheme only established on 1st November 2018. However, the history of Australia's financial consumer ADR scheme is quite long and the new AFCA scheme is just established based on this history. Before the AFCA, the practice of financial consumer ADR schemes in Australia are known as the "External Dispute Resolution" (EDR) schemes. They are called "external" to distinguish those "internal" complaint schemes or redress schemes operated by financial individual financial firms. In Australian financial markets, the Corporations Act 2001 required all insurance companies, insurance brokers, financial advisers and related entities providing financial services must hold a financial services license and the National Consumer Credit Protection Act 2009 required all firms that provide consumer credit and loans must hold an Australian credit license[324].

[323] FDRC Annual Report 2020, access at https://www.fdrc.org.hk/en/annualreport/2020/files/download/FDRC_annual_report.pdf last visited 19/08/2021

[324] Complaints against banking, financial services, insurance companies and super funds published by

57. All above licensees are required to have suitable internal schemes to deal with disputes by consumers under the standard set by the Australian Securities and Investments Commission (ASIC) Regulatory Guide 165. Besides these internal dispute resolution schemes, Australian laws also require every financial firm, which holds either of these licenses or is an authorized credit representative to join an EDR scheme approved by the ASIC. Financial firms can only provide retail financial products and services in Australia after the two requirements have been fulfilled.

58. Before 1st November 2018, there are three ASIC-approved EDR schemes in Australia. The first and the biggest one is the Australian Financial Ombudsman Service (FOS), which is established in 2008 by merger of the Financial Industry Complaints Service (FICS), the Banking and Financial Services Ombudsman (BFSO) and the Insurance Ombudsman Service (IOS), which are self –regulatory organizations[325]. Two other pre-existing EDR schemes approved by the ASIC, namely the Credit Union Dispute Resolution Centre (CUDRC) and the Insurance Brokers Disputes Limited (IBDL), also joined the FOS after its establishment[326].The FOS deals with complaints across a diverse range of financial and credit products and services - including complaints against banks, credit unions, foreign exchange dealers, deposit takers, credit providers, mortgage brokers,

legal services commission of south Australia https://lawhandbook.sa.gov.au/ch09s04.php

[325] ASIC-approved dispute resolution schemes https://asic.gov.au/regulatory-resources/financial-services/dispute-resolution/asic-approved-dispute-resolution-schemes/

[326] *Ibid.*

general insurers, insurance brokers, life insurers, fund's managers, financial advisers and planners, stockbrokers, and some superannuation providers.

59. The two other ASIC-approved EDR schemes are the Credit and Investment Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT). The CIO focuses on resolving complaints about credit unions, building societies, non-bank lenders, mortgage and finance brokers, financial planners, lenders and debt collectors, credit licensees and credit representatives, while the SCT deals with complaints about superannuation funds, annuities and deferred annuities, and retirement savings accounts.

60. From 1st November 2018, all the three ASIC-approved EDR schemes were merged into a new comprehensive EDR scheme namely the Australian Financial Complaints Authority (AFCA). All existing complaints with the FOS and the CIO were transferred to the AFCA but the unresolved complaints with the SCT would remain in the SCT, while new complaints will be received and dealt by the AFCA[327].

61. The AFCA is now the only ASIC- approved EDR scheme in Australia that aims to provide financial consumers with an alternative place to resolve their disputes with financial firms. The scheme is operated by an independent not-for profit limited by

[327] Because of this new reform, the author will mainly introduce and discuss the information of AFCA as materials of comparative study in further chapters, however, the author may also refer to some data and statistics produced or collected by the FOS, CIO and SCT, as the AFCA's operation is still too short to produce or collect such data.

guarantee that was authorized by the responsible Minister under the Corporations Act to do so[328]. The dispute resolution activities of the AFCA will be governed by the AFCA rules, which can be regarded as part of a contract between the AFCA and financial firms and consumers[329], and the Operational Guidelines draft by the AFCA. The dispute resolution service provided by the AFCA is free for consumers and the AFCA suggests consumes that there is generally no need to hire a legal or other paid representation to submit or pursue a complaint through the AFCA[330].

62. The AFCA is not a compulsory pre-procedure for financial consumers to seek remedies. Consumers are free to use civil litigation procedure or other ADR services such as mediation or arbitration provided by other institutions to resolve their disputes. Consumers who submit their complaints to AFCA can withdraw their complaints at any time. However, a financial firm, as a member of the AFCA, must enter the AFCA procedure to deal with its disputes with consumers if consumers hope to do so[331].

63. While a complaint is considering by the AFCA, the financial firm shall not begin legal proceedings against the complainant, anyone else joined as a party to the complaint or other affected party about any aspect of the subject matter of the complaint. The financial firm shall also not to seek judgement or take action to pursue debt recovery legal proceedings which was started before the complaint submitted to the AFCA. A financial firm that refuses to do so breaches the member

[328] The Terms of Reference of the AFCA, A1.1
[329] AFCA Complaint Resolution Scheme Rules section (A) 1.2.
[330] AFCA Complaint Resolution Scheme Rules section (A) 1.3.
[331] AFCA Complaint Resolution Scheme Rules section (A) .

rules of the AFCA and thus will be punished by the AFCA according to relevant rules.

64. There are two kinds of jurisdictions, compulsory jurisdiction and submitting jurisdiction, under the rules of the AFCA. The compulsory jurisdiction applies to those complaints arising from customer relationship, or other circumstances specified by the AFCA rules, between an individual consumer or a small enterprise and a financial firm that is member of the AFCA when the complaint was brought to the AFCA[332]. The disputes must relate to the financial consumer relationship in nature and must has sufficient connection with Australia. The AFCA then further explain what disputes can be regarded as related to financial consumer relationship in nature by giving detail examples such as a guarantee or security for, or repayment of, financial accommodation provided by the financial firm to a financial consumer, an entitlement or benefit under a life insurance policy, and a legal or beneficial interest arising out of a financial investment etc.

65. Concerning the sufficient connection with Australia, the AFCA demonstrates that a complaint arising from 'a contract or obligation arising under Australian law, including but not limited to privacy obligations', 'an offer to invest that was received in Australia by a complainant in relation to a recognized foreign collective investment scheme; or a 'direct or indirect investment in a product through a platform which was offered in Australia' shall be regarded as has sufficient connection with Australia. In summary, to have a sufficient connection with

[332] It does not matter if the financial firm is not a member of the AFCA when dispute arising.

Australia, the complaint must arise from a financial service received in Australia, or a financial service contract governing by the Australian laws.

66. A complaint will not be considered if submitted to the AFCA after the time limit even when it is under the AFCA's compulsory jurisdiction. The AFCA provides different time limits for different complaints, for example, the time limit for a complaint that the National Credit Code applying is two years after the credit contract is rescinded, discharged, or otherwise comes to an end. However, the general time limit for complaints is six years after the date when the complainant first became aware (or should reasonably have become aware) that they suffered the loss[333].

67. The AFCA further clarifies its compulsory jurisdiction by listing complaints will not be dealt with by the AFCA in a list. There are two groups of complaints would not be accepted by the AFCA, one is known as mandatory exclusion and the other is exclude by the AFCA's discretion. The general mandatory exclusion includes a) complaints related to businesses' discretion, such as the level of a fee, premium, charge, rebate or interest rate and decisions about how to allocate the benefit between the potential beneficiaries, under some exceptions; b) complaints that have been previously dealt with by the AFCA without sufficient new facts and events to be considered as new complaints; c) complaints have been dealt with by court or

[333] The Terms of Reference of the AFCA, B4.3.1.

other dispute resolution tribunals; and d) complaints that value of claim exceeds $1 million, etc. Besides the general exclusion, the AFCA also list special mandatory exclusion applying to credit complaint, insurance complaints, investment complaints and traditional trustee service complaints.

68. Besides the mandatory exclusion, the AFCA may also refuse a complaint in its own discretion when the AFCA believes it is appropriate. Reasons for this exclusion includes a) the AFCA believes that there is a more suitable place to deal with the complaint, such as a court; b) the subject matter of the complaint has been previously dealt with by the AFCA or a predecessor scheme; c) complaints are considered to be frivolous, vexatious, misconceived or lacking in substance; and d) complaints or subject matter of complaints have been brought to a legal procedure by consumers, unless the consumers discontinues the legal procedures or promised in writing that will not take further steps in the legal procedure, etc.

69. The submit jurisdiction applies to disputes which both parties agree to use the AFCA to resolve. It may also apply to those complaints exclude by the mandatory exclusion as a such complaint can be accepted by the AFCA if both parties and the AFCA itself agree to consider this complaint[334].

70. When the AFCA receives a complaint and decides to consider it, the AFCA will give a writing notify to the relevant financial firm to let them know the existence

[334] The Terms of Reference of the AFCA, C1.1.

of the complaint. Then the AFCA will transfer back the complaint to the financial firm to provide the financial firm to either resolve the complaint by themselves or explain their position in relation to the complaint in a timeframe set by the AFCA. However, if the AFCA believes that it is appropriate to start the investigation or deal with the complaint directly or the complaint is a complaint related to payment of a death benefit of superannuation, the AFCA may in general do not provide financial firm with such opportunity.

71. If the complaint is not resolved by the financial firm within the time frame, the complaint will be transferred back to the AFCA. In general circumstances, the AFCA will first try to resolve the complaint through informal methods. For example, the AFCA may hold a mediation, [335] to help the consumer and the financial firm to achieve settlements. In the mediation, the AFCA may help to exchange settlement proposals and advice each party about these proposals. To further help parties to achieve a settlement, the AFCA may also provide both parties with a guide of possible outcome that may be given by AFCA if there is no settlement was achieved and the complaint moves the final step of AFCA's working procedure[336].Besides holding a mediation conference in person, the AFCA may also hold a telephone conciliation conference with both parties during this stage.

72. If a settlement is not achieved after a mediation or a conciliation, the complaint will then move to the "determination procedure". This "determination procedure"

[335] It is known as "Negotiation" in AFCA's Terms of Reference.
[336] AFCA The Process We Follow https://www.afca.org.au/what-to-expect/the-process-we-follow/

will be hold by an AFCA's staff, and he will firstly try to collect information and submission from both parties, before he starts to consider the merits of the complaint. A party to a complaint must comply with requirements to provide information within the timeframe specified by AFCA. Only some very special excuses would be accepted when parties refuse to provide required information, such as providing information would breach a duty of confidentiality to a third person or a court order[337]. If a party failed to provide with required information without these acceptable reasons, the AFCA may then proceed with the resolution of the complaint on the basis that an adverse inference will generally be drawn, unless some special circumstances apply[338]. If the party who failed to provide such information is the complainant, the AFCA may refuse to continue considering the complaint[339].

73. The AFCA may also require a party to do anything else that it considers may assist its consideration of the complaint[340]. For example, the AFCA may ask a party to attend an interview or ask the financial firm to further investigate the complaint or to appoint an independent expert to report back to the AFCA on something relating to the complaint.

74. The information gathered by the AFCA from a party will generally be shared with

[337] The Terms of Reference of the AFCA, A 9.1.
[338] The Terms of Reference of the AFCA, A 9.5.
[339] *Ibid.*
[340] The Terms of Reference of the AFCA, A 9.3.

the other party unless the party who provides the information does not consent to the sharing, However, if an information is not shared, the AFCA's decision maker cannot decide rely on this information unless special circumstances apply. The AFCA also promise that before any decision is made, the parties will be provided at least one opportunity to make submissions.

75. After the AFCA collecting the information and submissions from parties, AFCA may choose to provide the parties with a preliminary assessment of the complaint. This preliminary assessment will demonstrate reasons for any conclusions made about the merits of the complaint and will provide a recommendation as to how the complaint should be resolved. The parties have 7days (for fast-track complaints) or 30 days (for other complaints) to consider whether they are willing to accept this preliminary assessment or not. If both parties decide to accept it, the complaint will be resolved on this basis. If either party clearly shows disagree with the preliminary assessment, the complaint will proceed to the final stage - Determination. If the Financial Firm accepts AFCA's preliminary assessment but the complainant does not respond within the timeframe specified by AFCA, the complaint may be closed without producing any binding results.
76. When a complaint proceeds to the Determination, the complaint will be decided by an Ombudsman, an adjudicator, or a panel according to the chief ombudsman or its delegate's discretion with considering the complexity, the amount of possible compensation, whether the complaint involving a system issue or new issue of law

or good practice, and efficiency.

77. The decision maker should determine the complaint, excepting a superannuation complaint, rely on what he/she considers is fair in all the circumstances that having regard to legal principles, applicable industry codes and guidance, good industry practice and previous relevant determinations made by the AFCA[341]. When deciding, the decision maker is not bounded by evidence rules or predecessor scheme decisions.

78. Excepting superannuation complaint and traditional trustee service complaint, a determination made by the AFCA's decision maker is final and binding if the consumer choose to accept it within 30 days. If the consumer chooses to accept the determination, the financial firm may ask the complainant to provide it with a binding release from liability in respect of the matters resolved by the determination. This release will be effective from the date on which the financial firm fulfils all its obligations under the determination. If the consumer chooses to not accept the determination, the consumer is not bound by the determination and may bring an action in the courts or take any other available action against the financial firm.

79. In the final award produced by the AFCA, the AFCA may provide complainant a diversity range of remedies if the decision maker decides to uphold the complainant. On one hand, the decision maker may require financial firms to do some specific

[341] The Terms of Reference of the AFCA, A 14.2.

performance. For example, the determination may require the financial institution to forgive or variate a debt, to release security of a debt, to refund, waive or variate a fee that need to be paid to the financial firm or its agent, reinstate, variate, or set aside a contract, to correct, add or delete information about privacy issue, and to make an apology to the complainant. Some of these specific performances (or non-performance), involves monetary value while some are not, which shows that the AFCA's consideration is not limited to monetary issues.

80. On the other hand, the decision maker may also order the financial firm to make a compensation to the complainant for direct financial loss and indirect financial loss[342]. In some circumstances, for example, if an unusual degree of extent of physical inconvenience time taken to resolve the situation or interference with the complainant's expectation of enjoyment or peace of mind has occurred, the decision maker may even order the financial firm to compensate for complainant's non-financial loss. The amount of value of the compensation shall not beyond the cap set by the AFCA. There are several caps for complaints in different natures, for example, the cap for a general insurance broking complaint is $ 250,000, while the cap for general complaints is $500,000. The cap for in-direct financial loss and for non-financial loss is $ 5, 000[343].

[342] Compensation for indirect financial loss will not be considered in general insurance policy complaints and another person's motor vehicle insurance policy complaints.

[343] AFCA Terms of Reference 35

81. Besides the compensation, the costs used by complainant to seek remedies through the AFCA, such as legal professional cost and the travel cost and the interests may also be issued by the decision maker. The amount of costs and interests will not be taking into consider when calculating whether the compensation beyond the cap.

82. The AFCA is designed to deal with financial consumers' complaints on an individual basis, so there currently is no collective or mass redress procedure involved in the AFCA. However, when the AFCA investigate a complaint or a group of complaints, the AFCA may find that there are some issues that may have wider influence on other consumers or on the whole financial market. These issues will then be noticed as potential systemic issues. Potential systemic issues will be sent to the financial firm to give it a reasonable opportunity to respond to it, at the meantime, the AFCA shall continue its own investigation and may require the financial firm to submit any information or document that AFCA considering is necessary to the investigation. If any systemic issue is identified through the investigation, the AFCA will refer this issue to relevant financial firms and ask them to produce a resolution for this issue. The AFCA will also refer this issue to relevant authorities including ASIC, the Australian Prudential Regulation Authority, the Commissioner of Taxation, the Office of the Australian Information Commissioner, and any other appropriate authorities.

83. Further, as a part of the investigation and referring to financial firms, the AFCA may require financial firms to do or refrain from doing any act to facilitate the

investigation, improve industrial practice and issue a mass redress, etc., if AFCA believe are reasonable and necessary[344].

84. The AFCA's service is free of charge for the financial consumers. All operating expenditure of AFCA is paid by financial firms through three ways: a member levy, user charge and complaint fees. The Australian laws require all financial firms to be a member of AFCA and the membership levy is the fee that all financial firms need to pay to be a member of the AFCA. The AFCA charges this membership fee according to the relative size of the member comparing to other members. A multinational bank group may need to pay $26,000 every year while a local financial adviser may only need to pay $350.

85. The user charge is a fee charged for the general use of the AFCA's service. The AFCA charges this fee to promote and rewards the financial firms, which have a high rate of resolution at the internal dispute resolution scheme. Members who always have no complaint or have only one complaint in last twelve month do not need to pay the user charge. For those members who have complaints, user charge shall be calculated according to the number and complexity of the complaints closed in last twelve months since the date of calculation.

86. The complaint fees are fees for individual complaints against financial firms. Complaint fee shall be calculated and charged on a case-by-case basis. Complex complaints and complaints, which are resolved after initial investigation procedure needs to pay more complaint fees than those simple complaints or complaints

[344] The Terms of Reference of the AFCA, A 17

resolved in an early stage.

Comparison the three chosen financial consumer ADR schemes in constitutional and performance criteria

87. To determine whether these three chosen financial consumer ADR schemes have a good design and performance well, the thesis would then test these schemes by using the criteria set up in Chapter III.

88. The first test is in constitutional criterion independence and impartiality. All these three schemes emphasized that they are independence and impartial in almost all documents they published including but not limited to their rules, advertising, and annual reports, etc. All these three schemes operated by independent institutions (non-profit company limited) which is governed by independent boards of directors. The directors of board are appointed through a due process and are not liable to be relieved from their duties without just cause. The FOS and the AFCA collects majority of its funds from financial firms, however, this mainly come from a levy required or secured by law, which is no link with the outcome of the procedure. The other source of funds is user fee and case fee, which is calculated by the number of cases and is also no link with the outcome. The FDRC charges from both financial firms and consumers, and it accounts for only a small part of its income. For example, in year 2020, the FDRC totally charge financial firms and consumers HK$ 20,000 while the whole income is HK$ 459,804[345]. Most revenue of the FDRC comes from the interests of its investment.

[345] FDRC, *Annual Report* 2020 access at https://www.fdrc.org.hk/en/html/publications/annualreport.php last visited 20/08/2021

89. People in charge of these ADR schemes, such as the Ombudsman in the FOS, the mediator and arbitrator in the FDRC, and the Ombudsman, the adjudicator, and the panel in the AFCA, are not subject to any instructions from either party or their representatives and are paid in a way that is not linked to the outcome. They also have a continuing obligation to disclose any circumstances that may, or may be seen to, affect their independence and impartiality or give rise to a conflict of interest with either party to the dispute they are asked to resolve. For example, before appointing an arbitrator, the FDRC will notify the potential arbitrator(s) of the nature of the dispute and the identities of the parties. Each potential arbitrator must make a reasonable effort to learn of, and disclose to the FDRC, if there are any circumstances might preclude himself from rendering an objective, independent and impartial determination in the proceeding.

90. Concern may rise from the fact that all the three schemes have a special relationship with local financial authorities. For example, the directors of the FOS were appointed by the FCA and the FDRC receives money from SFC and HKMA as its seed funds. With these relationships, people may concern that these schemes may improper influenced by regulators or governments' policy interests and lose their independence and impartiality. For example, financial firms may be afraid that when governments want to win public popularity, the scheme may be favour of consumers, while consumers may be afraid that when governments want to protect domestic financial firms from international competition, the scheme may take financial firms' side.

91. However, the existence of such relationship mainly because these schemes were established in the context of regulatory from the very beginning, and some of these relationships are even admitted by law[346]. And there is no evidence proving that these schemes suffered any improper influence from the regulators or governments. The user's satisfaction of the FOS and the FDRC is high[347] and there is no any significant compliance on these schemes' independence and impartiality. It is true that regulators or governments may have policy interests here, otherwise, they would not use public funds or promote legislation to establish these schemes. However, no matter their policy aims are consumer protection, improving markets' behaviours, or both, wise regulators and governments would know that the only way to make their purposes come true through an ADR scheme is to let the scheme works independently and impartially, so wise regulators and governments would have no motivation to put improper influence on the scheme.

92. The concern of impartial may also arise from the fact that all the three schemes provide consumers and consumers only with free advice service. Some people, such as Canadian OBSI, believe that to keep impartial, the financial consumer ADR scheme should not give advice[348]. However, the advice given to the consumer by the FOS, the FDRC, and the AFCA is only to help the consumer understand the nature of his/her complaint and the potential result in further process. And this

[346] For example, the UK's FSMA 2000 requires FCA to establish a financial consumer ADR scheme. So the FCA established the FOS, during the process, appointing directors is a necessary step.
[347] FDRC *Annual Report 2020*, access at https://www.fdrc.org.hk/en/annualreport/2020/files/download/FDRC_annual_report.pdf last visited 19/08/2021
[348] *About OBSI* access at https://www.obsi.ca/en/about-us/about-OBSI.aspx last visited 20/08/2021

advice is necessary to rebalance the imbalance of power between consumers and financial firms, and help consumers to make a settlement with financial firms. The three schemes would not give any advice on financial issues or how to manage consumers' claims, so it is hard to see there is an impartial. Besides, all these advices, happens in the initial stage of the process, when the case moves to the Ombudsman or arbitration, there would be no such advice.

93. Another constitutional criterion needs to be test is transparency. The transparency criterion requires the ADR scheme to make the information of itself, such as its jurisdiction, procedural rules, types of rules may use as a basis for the dispute resolution, cost, and average length of the ADR procedure, etc. publicity available in a clear and understandable way. The information mentioned above and other relevant information can be found on the websites by using 'search', and majority of these information can be found on home page. The three schemes also publish reports to publish relevant data, such as their caseload, average length of procedure, categories of complaints, and their budgets, etc. The FOS and the FDRC publish annual reports while the AFCA publish one six-month report, two annual reports and one two-year report.

94. The criterion of fairness cares about whether the parties receive a general fair treatment during the whole process of the procedure. Although the three schemes use different techniques and approaches, the FOS and the AFCA use mainly Ombudsman model and investigation approach, while the FDRC use arbitration model and adversarial approach, the procedural fairness of the parties in these

procedures were generally protected. Both parties in these procedures have opportunity to express their point of view and submit evidence; both parties are informed that in some situation, they cannot use a legal representative, but they can always seek a professional legal advice; and both parties are notified of the outcome of the ADR procedure in writing, and are given a statement of the grounds on which the outcome is based.

95. However, concern may rise from the consumer's unilateral opt-in rights before or after the dispute resolution procedure. For example, the FOS provides that only the consumer can be the complaint, the financial firm cannot complaint the consumer through the procedure. While the FDRC and AFCA provide that if the consumer hopes to start the procedure, the financial firm as members of these schemes must agree, no individual agreement is needed in this situation; however, if the financial firm hopes to use the scheme, an individual agreement must be gained from the consumers. Furthermore, the FOS and the AFCA also provide the consumer with a unilateral opt-in right on the outcome. In these two schemes, if the consumer decides to accept the outcome, the outcome is on both parties. And if the consumer refuses to accept the outcome, the outcome is not binding.

96. This may lead to criticism that the three schemes do not treat financial firms in fairness, especially the FOS and the AFCA as they let the consumer unilaterally decide whether the outcome is binding. However, defence can be made by arguing that as there is a significant imbalance of power between the consumer and the financial firm, the consumer's unilateral opt-in right is a tool to rebalance and to

achieve a substantive fairness between the consumer and the financial firm. Another defence is the specific criterion of fairness should be decided by considering the law in corresponding jurisdictions and the unilateral opt-in right provided by the three schemes is either required by law (the FOS), or approved by law (the FDRC and the AFCA).

97. The liberty and legality criteria aim to ensure that the consumer's right to bring the case to the court and special protection provided by law would not be deprived by the ADR scheme. Considering that these three schemes provided the consumer with unilateral opt-in right in starting the procedure and the FOS and the AFCA even provide the consumer with unilateral opt-in right to accept the outcome or not, the consumer's right to bring the case to the court is protected well. Regarding the legality criterion, the FDRC use Hong Kong's law as applicable law, which means that the special consumer protection provided by Hong Kong's law would be applied. The special consumer protection provided by law is also likely to be applied in the FOS and the AFCA, as these two schemes would deal with the case according to 'what is fair' by considering all relevant principles, rules, and requirements of law. Besides, as the FOS and the AFCA provide the consumer with unilateral opt-in right to accept the outcome or not, the consumers could just refuse to accept the outcome if he/she believed that the special protection provided to the consumer was not applied.

98. The Confidentiality criterion is also respected by the three schemes. The is no specific name would be mentioned in all data, analyse and case study they

published, and parties' argument and evidence submitted during the procedure would not be published. In the AFCA, a financial firm's name may be disclosed but only when this financial firm breach the member rules.

99. After the constitutional criteria, the performance criteria would also be tested. The first test is about the time. The FOS resolved 37 percent complaints in 45 days and 87 percent complaints in no more than 12 months in 2018-2019, the ratio of disputes resolved in 45 days decrease to 23 percent in next year but the ratio of disputes resolved in 12 months increased to 90 percent[349]. This performance is generally fine, but comparing to the average time and the media used by EU member states' court in first instance, 233 days, and 192 days[350], the advantage of the FOS is not that obvious. The AFCA seems performance better in time, as it can resolve 60 percent complaints in 60 days[351]. There is no published data about the time used by the FDRC to resolve the complaints, but from the data on the clearance rate below, 25 percent to 50 percent complaints may be resolved in more than 12 months.

100. The FOS and the AFCA provides free advice and dispute resolution service to the consumer; thus, it is safe to say these two schemes pass the cheap criterion. Th FDRC provides the consumer with free advice service but charged dispute resolution service. The consumer needs to pay the FDRC HK$ 200 to when he/she

[349] FOS, The FOS *Annual Report and Accounts for the year ended 31 March 2020*, access at https://www.financial-ombudsman.org.uk/files/287580/Annual-Report-and-Accounts-for-the-year-ended-31-March-2020.pdf last visited 23/08/2021

[350] *European judicial systems Efficiency and quality of justice CEPEJ STUDIES No. 26*

[351] AFCA, *Annual Review 2019-2020* access at https://www.afca.org.au/sites/default/files/2020-11/Annual%20review%202019-20%20.pdf last visited 23/08/2021

filled the application form. The application fee of HK$200 is not refundable even if the application is later rejected by the FDRC. The mediation fee was HK$1000 or HK$ 2000 according to the amount of claim. If the mediation could not finish in the specified mediation time (4 hours), it could be extended. The fee rate for extended time is HK$ 750 or HK$1500 per hour, also according to the amount of claim. The total mediation costs are capped at HK$ 20000. If the mediation was failed and the consumer hopes to start the arbitration, the consumer needs to pay HK$ 5000 for a documents-only arbitration and an additional HK$ 12,500 if there is an in-person hearing.

101. Therefore, the total costs of the consumer to use the FDRC is between HK$ 6200 and HK$39,500. Although the extended mediation and arbitration with in-person hearing are just in special case, so the cost for the majority of cases should no more than HK$ 6200, and if the consumer could achieve a settlement in the mediation, the cost was no more than HK$ 2,200, the cost was still high the standard of consumer dispute as the thesis discussed in Chapter II and III. The practice charging HK $ 200 not refundable application fee is also questionable. The policy could make the consumer whose complaint was rejected in extremely unpleasant as he/she pay HK$ 200 and receive nothing. There is also a danger that such policy would also reduce the consumer's enthusiasm to use the scheme, as they may be afraid that their complaints would be rejected. The possibility of this danger is significant as the rejection rate is not insignificant. In 2020, among all 35 complaint

applications, there are 5 complaints were rejected, the rejection rate is 14 percent[352].

102. The performance in cost may also link to performance in accessibility. In 2019, the FDRC only received 707 enquires (0.94 enquiry per ten thousand people) and 20 complaints (0.03 complaint per ten thousand people)[353], while the number in 2020 was 1159 enquires (1.54 enquiries per ten thousand people) and 35 complaints (0.05 complaint per ten thousand people)[354]. On the contrary, the FOS received 970,000 enquires (145.54 enquires per ten thousand people), and 569,738 complaints (85.48 complaints per ten thousand people) in 2019[355], and 454,259 enquires (68.16 enquires per ten thousand people) and 278,033 complaints (41.72 complaints per ten thousand people) in 2020[356]. At the same time, the AFCA received 80,546 complaints (31.76 complaints per ten thousand people) in 2019[357] and 72,700 complaints (28.67 complaints per ten thousand people) in 2020[358]. The data clearly shows that the FOS performance best in the total enquires and complaints received and enquires and complaints received per ten thousand people,

---

[352] FDRC *Annual Report 2020*, access at https://www.fdrc.org.hk/en/annualreport/2020/files/download/FDRC_annual_report.pdf last visited 19/08/2021

[353] FDRC *Annual Report 2019*, access at https://www.fdrc.org.hk/en/annualreport/2019/files/download/FDRC_annual_report.pdf last visited 19/08/2021

[354] FDRC *Annual Report 2020*, access at https://www.fdrc.org.hk/en/annualreport/2020/files/download/FDRC_annual_report.pdf last visited 19/08/2021

[355] FOS, *The FOS Annual Report and Accounts for the year ended 31 March 2020*, access at https://www.financial-ombudsman.org.uk/files/287580/Annual-Report-and-Accounts-for-the-year-ended-31-March-2020.pdf last visited 23/08/2021

[356] FOS, *The FOS Annual complaints data and insight 2020/21*, access at https://www.financial-ombudsman.org.uk/data-insight/annual-complaints-data last visited 23/08/2021

[357] AFCA, Annual Review 2019-2020 access at https://www.afca.org.au/sites/default/files/2020-11/Annual%20review%202019-20%20.pdf last visited 23/08/2021

[358] AFCA, *Two Year Report 1 November 2018-31 October 2020* access at https://www.afca.org.au/about-afca last visited 23/08/2021

the AFCA lags slightly behind the FOS in both data, while the FDRC lags far behind the FOS and the AFCA in these two data, which implies the FOS and the AFCA's good performance in the accessibility and the FDRC's bad performance in the accessibility.

103. The next test is in efficiency, data would be examined in this criterion were caseload, which indicates how many complaints were resolved in one year. The case load per ten thousand people, the clearance rate, which is calculated by dividing the number of resolved complaints by the number of received complaints, expressed in a percentage, and the cost per complaint, which is calculated by dividing the whole expenditure of a scheme in one year by the complaints resolved in the same year, this figure aims to test whether the funds were used efficiently.

104. The FOS resolved 296, 712 complaints (44.52 complaints per ten thousand people) in 2019[359], and 247,916 complaints (37.20 complaints per ten thousand people) in 2020[360], while the clearance rate is 109 percent in 2019, and 89 percent in 2020. The clearance rate above 100 % indicates the ability of the FOS to resolve more cases than received, thus reducing the number of pending cases at the end of the year, including any existing backlog. The three data of the FOS in 2019 and 2020 shows the FOS's ability to resolved a large number of complaints and the ability to reducing backlog when there is any. The FOS resolved 76,681 complaints (30.24

[359] FOS, *The FOS Annual Report and Accounts for the year ended 31 March 2020*, access at https://www.financial-ombudsman.org.uk/files/287580/Annual-Report-and-Accounts-for-the-year-ended-31-March-2020.pdf last visited 23/08/2021

[360] FOS, *The FOS Annual complaints data and insight 2020/21*, access at https://www.financial-ombudsman.org.uk/data-insight/annual-complaints-data last visited 23/08/2021

complaints per ten thousand people) in 2019[361], the clearance rate is 95.2 percent, while the number of complaints resolved in 2020 is 67,042[362] (26.47 complaints per ten thousand people) and the clearance rate is 92.22 percent. The three data show that the AFCA also has ability to deal a large number of complaints every year, although there are some backlogs.

105. The FDRC resolved 15 complaints (0.02 complaints per ten thousand people) in 2019, the clearance rate is 75 percent[363]. In 2020, the FDRC resolved 17 complaints (0.02 complaints per ten thousand people) and received 35 complaints, the clearance rate is 49 percent[364]. The data shows that comparing to the FOS and AFCA, the FDRC resolved much less complaints, the number of complaints the FDRC resolved in one year is about one ten thousand of complaints resolved by the FOS in one year and about one thousand of complaints resolved by the AFCA. Besides, although the FDRC received much less complaints than the FOS and the AFCA, the clearance rate of FDRC is significantly lower than the FOS and the AFCA.

106. Until now, it seems that the data suggests that the FOS and the AFCA performance well in criterion of efficiency while the FDRC performance poor. However, there is still possibilities that the FDRC was a much smaller institution than the FOS and

---

[361] AFCA, *AFCA annual Review 2019-2020* access at https://www.afca.org.au/sites/default/files/2020-11/Annual%20review%202019-20%20.pdf last visited 23/08/2021

[362] AFCA, *Two Year Report 1 November 2018-31 October 2020* access at https://www.afca.org.au/about-afca last visited 23/08/2021

[363] FDRC, *The FDRC Annual Report 2019* access at https://www.fdrc.org.hk/en/annualreport/2019/files/download/FDRC_annual_report.pdf last visited 23/08/2021

[364] FDRC, *The FDRC Annual Report 2020* access at https://www.fdrc.org.hk/en/annualreport/2020/files/download/FDRC_annual_report.pdf last visited 23/08/2021

the AFCA, with much less budget, so it is may be already good enough for the FDRC to do with a small budget. To test this possibility, the thesis will then examine the cost per complaint of these three schemes. However, it needs to clarify here that as different schemes have different regulations on the start and end dates of the financial year, the compared data could only be roughly in the same time.

107. The over all expenditure of the FOS in the financial year ended on 31 March 2020 was £ 276.4 million, complaints resolved during this year was 296,712[365], the cost per complaint was about £ 930. Regard to the AFCA, in the financial year ended on 30 June 2020, the overall expenditure was Australian$ 129.3 million (£ 67.24 million), complaints resolved in this year was 76,681, the cost per complaint was Australian$ 1686 (£ 877). For the FDRC, in financial ended on 31 December 2020, the overall expenditure of the FDRC was HK$ 9.98 million (£ 0.94 million), in this year, number of complaints resolved by the FDRC was 17, the cost of per complaint was HK$ 55,152 (£ 5184). The data show that the cost per complaint of the FOS and the AFCA are similar, while the cost per complaint of the FDRC is about six times as much as the FOS and the AFCA.

108. In summary, all the three schemes fulfil the criteria of independence and impartial in a good way, the transparency is also not a problem. The fairness of these schemes may rise some concern, especially the FOS and the AFCA which gives consumers unilateral opt-in right in starting the procedure and accepting the outcome.

[365] FOS, *The FOS Annual Report and Accounts for the year ended 31 March 2020*, access at https://www.financial-ombudsman.org.uk/files/287580/Annual-Report-and-Accounts-for-the-year-ended-31-March-2020.pdf last visited 23/08/2021

However, a good defence can be made, and it has not caused any significant complaints in practice. There is also no significant concern in liberty, legality, and confidentiality. In performance, the FOS, and the AFCA performance well in time, cost, accessibility and efficiency, the FOS performances better than the AFCA in accessibility and the AFCA performances better than the FOS in time. The FDRC cannot performances as well as the FOS and the AFCA in all the four issues, especially in the accessibility and the efficiency.

Comparison on the program-design of the three schemes

109. The three schemes share many similarities in program-design, for example, they are all established in the context of regulatory, they all have compulsory jurisdiction to some extent, so that they can give the consumer unilateral opt-in right to start the procedure, they all use multilayer procedure which including mediation to try to resolve complaints at the early stage, etc. However, there are also three significant differences in their program-design, namely, fee policy, working procedure, and binding force of outcome, and these differences may lead to their different performance in practice.

110. Both the FOS and the AFCA provide the consumer with free service and collect their funds mainly from financial firms by charging a levy and case fee. One advantage of this fee policy is, the free service is attractive to consumers, consumers would be more likely to give it a try if they know they do not need to pay for it. This is not only the theory; it could be proved by the comparisons of data of complaints received and complaints received per ten thousand people between

the three schemes above. Considering four of the five functions of financial consumer ADR scheme, dispute resolution, data collected, data feedback, and market behaviour improvement[366], are all closely link to complaints received by a scheme[367], this advantage should be given due consideration. Another advantage of this fee policy is that it can provide the ADR scheme with a stable income. For example, the income of the FOS in 2019-2020 is £ 242.6 million, while the overall expenditure is £ 276.4 million[368], although there is still a small gap between the income and expenditure, the FOS can roughly achieve balance.

111. The FDRC holds a different fee policy, which charges no levy fee towards financial firms but to charge application fee from the consumer and charge mediation and arbitration fee from both sides. It is said that this fee policy could prevent vexatious actions [369] .However, considering that the FDRC only receives 20 complaint applications in 2019 and 35 applications in 2020, this theory does not seem convincing. Another claimed advantage is that this policy could help the scheme achieve a balance. However, this theory also seems not convincing considering that

[366] C. Hodges, 'Consumer Redress: Implementing the Vision' *No. 16-27 University of Leicester School of Law Research Paper*; C. Hodges, 'Consumer Ombudsmen: Better regulation and dispute resolution' *(2014) 15(4) ERA Forum* 593; C. Hodges, 'The Consumer as Regulator' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016)

[367] If there are only few people use the scheme, the function of dispute resolution would have few opportunities to be used, and it will also lead to the failure to collect enough amount of data; without these data, the function of feedback and market behaviour improvement would also become empty talk.

[368] FOS, *The FOS Annual Report and Accounts for the year ended 31 March 2020*, access at https://www.financial-ombudsman.org.uk/files/287580/Annual-Report-and-Accounts-for-the-year-ended-31-March-2020.pdf last visited 23/08/2021

[369] Ali, Shahla F. & Da Roza, A. M. 'Alternative Dispute Resolution in Financial Markets – Some More Equal than Others: Hong Kong's Proposed Financial Dispute Resolution Centre in the Context of Experience in the UK, US, Australia and Singapore' (2011) Vol.21, No.3 *Pacific Rim Law & Policy Journal* 171

the revenue from application fee, mediation fee, and arbitration in 2020 was only HK$ 20,000 while the overall expenditure was HK$ 9,974,339[370]. However, there is also a disadvantage of this fee policy that this policy could prevent the consumer from use the scheme, as the consumer may do not want to pay as high as HK$ 1000 or 2000 to use it, and the consumer may be afraid that the HK$ 200 application fee becomes meaningless if the application was rejected. This disadvantage could be proved by the small number of complaint applications received by the FDRC.

112. Another difference is in working procedure, an obvious difference is that the FOS and the AFCA use Ombudsman procedure at the final stage while the FDRC use arbitration after the mediation. However, this difference may not as important as it seems, because first, both the three schemes use mediation and other informal techniques at the early stage of procedure and most complaints would be resolved in the early stage. For example, in 2019-2020, FOS resolved 90 percent disputes before the Ombudsman procedure, while in the FDRC, only 14 percent complaints lead to an arbitration. And second, although the Ombudsman procedure use an investigation approach and the arbitration procedure use an adversarial approach in general, the FDRC's arbitration procedure learns a lot from the Ombudsman procedure by also granting the arbitrators power to investigate, so this difference is also become less significant.

113. The main difference between the FOS and the AFCA's procedure and the FDRC's

[370] FDRC, *The FDRC Annual Report 2020* access at https://www.fdrc.org.hk/en/annualreport/2020/files/download/FDRC_annual_report.pdf last visited 23/08/2021

procedure, is the former try to minimize the formality of their procedures and make their procedure as informal and flexible as possible, while the latter try to keep formality to certain extent. This difference can be observed in many places of the procedure-design, for example, the FOS and the AFCA do not make a clear distinction between different stages of the working procedure, while the FDRC makes a clear distinction between the preliminary review, the jurisdiction review, the mediation, and the arbitration. The FOS and the AFCA do not require any formal agreement was made during the working procedure, while the FDRC clearly require the parties reach a separate mediation agreement and a separate arbitration agreement. The FOS and the AFCA do not give a clear description on both parties' procedural rights and duties, while the FDRC gives a very clearly and detailed description on parties' procedure rights and duties such as right to choose mediator, choose arbitrator, and apply for avoidance and duty to provide corresponding copies for any submitted argument and evidence, etc.

114. These two models both have advantages and disadvantages. Minimum the formality could reduce the cost, make the procedure easy to use, and improve the efficiency, which can be proved by the high clearance rate mentioned above. However, it may also lead to criticism from traditional people who highly value the procedural fairness and may lead to many judicial reviews on procedural issues. On the contrary, keep certain extent of formality make the procedure easy to be accepted by legal professionals, receive less judicial reviews and make the outcome may be recognized and enforced out of the jurisdiction, however, it also leads o

problems such as increase the cost, increase the difficulty of use, and decrease the efficiency. However, these advantages and disadvantages are all about dispute resolution, which is only one of the five functions of financial consumer ADR scheme[371], if taking other functions such as data collection and feedback into consideration, it would be able to say that the FOS and AFCA's model bring more advantages to other functions as the exercise of these functions rely on the scheme's ability to receive and resolved massive complaints.

115. The difference between binding force of the outcome is the FOS and the AFCA provide the consumer with a unilateral opt-in right while the award produced by the FDRC binding both parties. Just like the difference between working procedure discussed above, both these policies have their advantages and disadvantages. A unilateral opt-in right can fully protect the consumer's right to the court and then attract the consumer to use the scheme, while it may also lead to criticism towards procedural unfairness. On the contrary, binding on both sides makes it looks fair, but may lead to criticism on damage the consumer's right to the court and discourage the consumer from using the scheme. However, the criticism towards the unilateral opt-in model may become less convincing, since financial firms may be willing to accept such arrangements. For example, there are 77 percent financial businesses said that they have confidence in the FOS's service[372]. On the contrary,

[371] C. Hodges, 'Consumer Redress: Implementing the Vision' No. 16-27 *University of Leicester School of Law Research Paper*; C. Hodges, 'Consumer Ombudsmen: Better regulation and dispute resolution' *(2014) 15(4) ERA Forum* 593; C. Hodges, 'The Consumer as Regulator' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing, 2016)

[372] FOS, *The FOS Annual Report and Accounts for the year ended 31 March 2020*, access at https://www.financial-ombudsman.org.uk/files/287580/Annual-Report-and-Accounts-for-the-year-

advantages brough by unilateral opt-in right may be more certain, considering the comparison of the number of complaints resolved between the three schemes made above. Besides, if considering other functions of a financial consumer ADR scheme, advantages brought by unilateral opt-in model could be more certain.

116. In summary, all the three schemes fulfil the constitutional criteria well, while the FDRC fulfil the fairness criterion a little better. However, the FOS and AFCA performance much better than the FDRC in all performance criteria including the cost, the time, the accessibility, and the efficiency. Besides, the FOS and the AFCA also perform better in giving the consumer advice, collecting data, publishing, and feedback data, and improve market behaviour. Considering all these issues, although the model of financial consumer ADR scheme is keep evolving, and is too early to say there is an ideal model of financial consumer ADR scheme, it is still possible to say the FOS and AFCA's Ombudsman model is currently a better model which can be learnt by the China.

ended-31-March-2020.pdf last visited 23/08/2021

Chapter VII The Generation and The Construction –Ways of Creating Financial Consumer ADR Scheme

1. In general, there are two ways of creating a financial consumer ADR scheme, the generation, and the construction. The generation means a financial consumer ADR scheme which is a crystallization of a long-term practice of community autonomy[373]. A financial consumer ADR scheme creating through the generation usually means a financial consumer ADR scheme spontaneously created by the industry, such as a bank association or an insurance association. The reasons why the industry is willing to establish such a scheme could be different. Sometimes it is because the industry believes that cost of dispute resolution is too high and they hope to reduce the cost by using ADR scheme. Sometimes, it is because they hope to improve the consumer's confidence on the financial service market and gain a competitive edge. Sometimes, it is because they need to respond to the national policies or pressure from regulators[374], and sometimes for a combination of the above reasons.
2. No matter what reasons are, these ADR schemes are not designed or intentionally established by the government, instead they are generated from the customs and practice of the industry, and meet the needs of the industry. They are regulated by their own codes or rules while their results generally have no binding force[375].A

[373] Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007) 234

[374] Yu Fan, *The Theory and Practice of Dispute Resolution* (Beijing Tsinghua University Press 2007)

[375] Jerome T. Barrett with Joseph P. Barrett, *A History of Alternative Dispute Resolution – The Story of a Political, Cultural, and Social Movement* (Published in Affiliation with the Association for Conflict

good example of a generated financial consumer ADR scheme is Netherlands KiFiD, which is a financial consumer ADR scheme spontaneously established by the association in financial service market. The cost of the KiFiD was covered by member fee paid by financial firms and registration fee paid by consumers. Financial firms' minimum yearly contribution to KiFiD was €170 for banks and insurers and the lowest contribution for other members was €163. The registration fee per case was €25 for traders and €50 for consumers[376]. Another example is the Sweden's sectoral boards in financial service and insurance, these boards are established and funded by traders in these industries[377]. Examples of ADR schemes created through the generation way could also be found in other sectors, such as the UK's private Ombudsman Services provides dispute resolution services in the energy, communications, property, and intellectual property sectors[378].

3. A financial consumer ADR scheme creating through the construction usually means a financial consumer ADR scheme imposed by the government. These ADR schemes could be directly created by the government or regulators through legislation or administrative order, such as the Hong Kong's FDRC or by modifying or merging already existing generated ADR schemes to a new constructed one.

Resolution 2009)

[376] C. Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, 'Consumer-to-business dispute resolution: the power of CADR' *(2012)* 13 *ERA Forum* 199

[377] *Ibid.*

[378] *Ibid.*

4. For example, the UK's FOS is required by the legislation, and then created by the regulator by merging some already existing ADR schemes created by industry into one new scheme. And the Australian AFCA is established by merging and reforming two existed ADR schemes. Reasons for the government or the regulator to establish these ADR schemes are usually consumer protection, improve the consumer's confidence on the financial service market, and keep the health of financial service market.
5. The constructed financial consumer ADR scheme is regulated by legislation or its constitution drafted by the government or the regulator. Outcomes produced by those schemes are binding and enforceable to some extent. The constructed scheme usually can receive a funds from the government as seed funds, but the follow-up funding sources can be diverse. A good example of this kind of ADR scheme is the administrative tribunals in UK[379]. A leading example of constructed financial consumer ADR scheme is the UK's FOS which has already be discussed in detail above, other examples including the Irish FSPO, the Italian ABF, and the Hong Kong's FDRC, etc.
6. Either the generation way and the construction way have its own advantages and disadvantages. To be specific, the generated scheme could include sector-specific expertise, which a judgement or consumer may not have. Generated ADR scheme comes from the actual needs of the community, so it may know better about the problems that the community hopes to resolve. Besides, it is easy to the generated

[379] Anthony, G., 'Administrative Justice in the United Kingdom' (2015) 7(1) *Italian Journal of Public Law* 9

scheme to use or accept innovations of ADR technique which may lead to better performance. This makes such scheme is usually welcome by the local communities and thus can be widely accepted and used. The results produced by this kind of ADR scheme are also more possible to satisfy the members of community[380].

7. However, the generated financial consumer ADR scheme also has some problems. The first problem is in jurisdiction. The generated financial consumer ADR scheme usually only has voluntary jurisdiction which means that the scheme needs agreement from both financial firms and consumers to start the procedure. The problem here is that the financial firms can simply refuse to use the scheme if they believe the consumer would not bring the case to the court.
8. There are two approaches to resolve this problem, the first is that the scheme can require financial firms become members of the scheme and regulated financial firms by member rules. For example, the scheme can set up a member rule said that when the consumer hopes to use the scheme, the corresponding trader as a member must agree. However, this leads to another problem that how to persuade financial firms to join as member.
9. The second approach is that the scheme can persuade traders that agree to use the scheme could improve their reputation in market and make them be regarded as responsible traders who really take care of their consumers, which will bring them competitive edge. This theory was also used to explain how to persuade

[380] Zhiping Liang, 'Tradition and Its Change: Law and Order under the Multi-Landscape' (2005) Vol. 2005 (1) *The application of law* 25

financial firms to join a membership in the first approach. However, whether these two approaches can work well depends on the context in each different market. It is true that these two approaches were widely accepted in the Nordic states, and in some sectors in other EU Member States, such as Netherlands, where there is a mature and competitive market and the culture supports a high value of business reputation[381]. However, whether these two approaches can be accepted and work in other jurisdictions, especially those developing jurisdictions without a mature market is still questionable.

10. Another problem is the binding force and the enforcement of the outcome. Many generated ADR schemes can only produce outcome without biding force and its enforcement rely on financial firms' proactive adherence to the outcome[382].Therefore, if the financial firm refuses to enforce the outcome produced by the ADR scheme or bring the same dispute to the court, the consumer would have no effective counter measures.
11. An approach to resolve this problem is that the ADR scheme could involve the arbitration procedure to produce a binding outcome which can be enforced by the court. However, starting an arbitration procedure needs an agreement of arbitration made by both sides, which is cannot be secured in all cases. Besides, an arbitration award is binding on both sides, so the consumer also cannot bring the same case to the court if he/she is not satisfied with the award. This may lead

[381] C. Hodges, and Stefaan Voet 'Consumer Dispute Resolution Mechanisms: Effective Enforcement and Common Principles', in Hess, Burkhard & Kramer, Xandra (eds) *From common rules to best practices in European Civil Procedure* (Nomos publishing 2017)
[382] *Ibid.*

to criticism towards depriving the consumer's right to access to the court. Another problem is that using arbitration procedure may increase the cost and complexity of the scheme.

12. The second approach to resolve this problem is Dutch approach. In Netherlands, the trader association will pay the consumer when the trader in question does not voluntarily complies with the decision (deliberately or as a result of insolvency)[383]. This could be a good solution as it secures the consumer's interests gained through the ADR scheme. However, it is questionable that whether trader associations in other jurisdictions have willingness and ability to take this obligation.
13. The third approach tries to resolve this problem can be observed in the Nordic states, where the culture supports a high level of adherence to decisions by (financial) consumer ADR schemes that are not legally binding. In these countries, the non-adherence to decisions by (financial) consumer ADR schemes would be published. The ADR scheme use this as a deterrence to secure an adherence to the outcome. However, this approach relays on a mature and competitive market, where the commercial advantages of behaving fairly are clear, and that non-adherence would be rare and quickly attract bad publicity[384].

[383]E. Verhage, "The Implementation of the Consumer ADR Directive in the Netherlands", in Cortes, supra n. 11, forthcoming and F. Weber and C. Hodges, "The Netherlands", in Hodges et al., supra n. 9, at 144.

[384] C. Hodges, and Stefaan Voet 'Consumer Dispute Resolution Mechanisms: Effective Enforcement and Common Principles' in Hess, Burkhard & Kramer, Xandra (eds) *From common rules to best practices in European Civil Procedure* (Nomos publishing 2017)

Whether the approach would work well in markets that do not meet the above conditions is questionable.

14. Another concern of generated financial consumer ADR schemes is as these schemes are usually regulated by their own rules, whether constitutional criteria for an ADR scheme, such as independence and impartiality, transparency, fairness, liberty, and legality[385] can be fulfilled[386]. Besides, ADR schemes created by trade sectors are often criticised as being biased in favour of traders rather than consumers[387]. Although whether that is true or not depends on analysis of an individual scheme, the generated ADR scheme created by traders has a disadvantage in gaining the consumer's trust.
15. On the contrast, the constructed ADR scheme is regulated by state's laws or regulations and is usually supervised by the government and subjects to judicial review. Therefore, the procedure fairness and the quality of results are secured to some extent. Established by the government may also bring the additional advantage in gaining the consumer's trust and confidence in jurisdictions where there is a strong confidence in governments.
16. The constructed ADR scheme also has advantages in jurisdiction. As established by the government or regulators, it is possible to the constructed ADR scheme to have compulsory jurisdiction to some extent. When the ADR scheme is

[385] These constitutional criteria were required by the Directive 2013/11/EU on alternative dispute resolution for consumer disputes

[386] See Baifeng Chen, 'Violence and Humiliation: Dispute Resolution in Chen Village' 2006 (1) *Law and Social Science* 275

[387] C. Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, 'Consumer-to-business dispute resolution: the power of CADR' *(2012)* 13 *ERA Forum* 199

established through the legislation, the compulsory jurisdiction can be given directly by the legislation like the UK's FOS. And when there is no legislation, the government can simply require all financial firms in a given scope must join the scheme as a member, and then the compulsory jurisdiction can be established by member rules, just like what happens in the Australian AFCA.

17. Another advantage of the constructed financial consumer ADR scheme is it can produce outcomes with binding force and enforceability without using arbitration procedure. Again, if there is a legislation, the binding force and enforceability of the outcome can be directly given by the legislation, such as what happens in the UK's FOS. And if there is no a legislation, the binding force and enforceability can be secured by member rules of the scheme just like what can be observed in the Australian AFCA.

18. Further, the constructed financial consumer ADR scheme can give the consumer a unilateral opt-in right, which means that if the consumer accepts the decision, the decision would be binding to both sides; but if the consumer chooses to not accept it, the decision would not be binding. This unilateral opt-in right would encourage the consumer to use the scheme and can protect the consumer's right to access to the court in a high level.

19. However, the constructed scheme also has problems. For example, there is a risk risk of being divorced from actual needs and beyond the ability of using of public, which may finally make them not accepted by the public[388]. It is also true

[388] For example, it is not rare to see that there are some ADR schemes were established or transferred from foreign jurisdictions by local law-maker without giving an examining of the actual needs in

that the constructed ADR scheme may lack of flexibility due to its rigid structure and resists innovation[389]. Therefore, which way is the better way to establish a financial consumer ADR scheme needs analysis in the context of individual jurisdiction, although an examination of recent established financial consumer ADR schemes may find that there seems a trend in leading jurisdictions to establish their financial consumer ADR schemes in a constructed way. A possible reason for this trend may be that currently the financial consumer ADR scheme is excepted to created in the context of regulatory and deliver more functions, such as consumer advice, data collection, publicity and feedback, and improve market behaviour, besides the dispute resolution.

20. However, sometimes, it is not these advantages and disadvantages decide, by what mean a financial consumer ADR scheme was created. A financial consumer ADR scheme was created by industry or imposed by the government depends on other elements such as funds, motivation, and market maturity. For example, in a mature and highly competitive market, financial firms could realize that establishing an ADR scheme to deal with consumer disputes would reduce their cost and bring them competitive edge, then they may be motivated to provide funds to establish such an ADR scheme. However, in a less mature market, the industry may be not motivated to establish such ADR schemes and the government is motivated to create such ADR schemes for consumer protection or

context, which soon makes them exist in names only. See Jing Ning, Reflections on ADR Trend, *The Application of Law*, 2005 (2).

[389] C Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England & Wales* (Hart publishing 2019).

improve market behaviour. In this situation, the government would provide funds or required the industry to provide funds to establish a financial consumer ADR scheme. Therefore, a more practicable approach is when a financial consumer ADR scheme is established in either generation or constructed way, try to learn advantages from the other model.

Chapter VIII Establishing Financial Consumer ADR Scheme with an Advanced Model in China—Reasons and Ways

1. The China's financial service market used to be very invisible. Before the 1980, there is no commercial banks in China, while banking service operated by the state-owned banks is very limited. There is no security market or commercial insurance market in China at that time. By current standard, the financial exclusion is a normality at that time[390].
2. However, with the rapid development since last 80's, China's financial service market has already become one of the biggest financial service markets in the world. Taking the banking service as an example, according to data from Chin Banking Regulation Commission (CBRC), in 2020 the total assets of Chinese commercial banks reached RMB 239.5 trillion (USD 37.12 trillion), while the total debt of Chinese commercial banks reached to RMB 237.3 trillion (USD 36.78 trillion). In 2019, the accumulated net profit of commercial banks reached about RMB 2 trillion (USD 0.31 trillion)[391].
3. While those traditional banking service such as deposition and loan experience a huge growth, many new kinds of financial services, such as credit card, mortgage,

[390] CBIRC, *The history of development of banking in China* access at http://www.p5w.ne/zt/dissertation/finance/200909/t2573834.htm last visited 20/06/2021
[391] KPMG, *Mainland China Banking Survey 2020* access at https://home.kpmg/cn/zh/home/insights/2020/11/2020-mainland-china-banking-survey.html last visited 20/06/2021

consumption loan, payday loan, a variety of financial products, investment insurance, third part payment service, and P2P lending form, etc. were introduced into or invented in China, making China's financial service market becomes not only one of the main financial markets in the world, but also a center of financial invention such as fin-tech (Internet finance) and blockchain currency[392].

4. However, the development of financial service market especially the development of financial products not only bring benefits but also bring more and more risks, especially to financial consumers. For most Chinese people, financial product is a new concept, it was only about 20 years ago that the idea of financial products came into people's lives. The public do not have a good understanding on it, however, in order to pursue profits, staff of financial firms tend to exaggerate the income of related financial products, deliberately ignore the risk hints such as investment direction, investment proportion, realization form of risk return and early redemption mechanism of products, thus misleading investors and induce them to buy a financial product that they do not really understand.
5. This mis-selling can be very dangerous for consumers, as they do not really understand the risk of financial products and once the risk is come true, they also have no ability to afford the possible loss. A similar problem can also be observed in the P2P lending forum business. As a financial innovation, the idea of P2P lending forum is to facility consumers to lend money to other consumers to gain

[392] Huabao Security *Annual report of Internet finance industry in 2020*, access at https://www.fxbaogao.com/pdf?id=2678646&query=%7B%22keywords%22%3A%22%E4%BA%92%E8%81%94%E7%BD%91%E9%87%91%E8%9E%8D%22%7D&index=0&pid= last visited 20/06/2021

profits. However, without regulation and fully understand about the risk, these new services became dangerous to Chinese consumers. In 2017-2018, there are about 6,000 P2P lending forum firms were involved into the big scandal of P2P lending forum's bad practice.

6. There is no specific statistics on how many consumers were influenced and how much loss were caused to consumers. However, there is data of one of these firms, "Aiqianjin". According to the report, there are 370 thousand consumers were influenced and the total loss of consumers can up to RMB 23 billion (£2.65 billion)[393]. The risk may also come from other financial products. Another example is the recent "Crude oil treasure" incident, in this event, due to the mis-selling and mis-conduct of the Bank of China (BOC), "Crude oil treasure", about 60,000 consumers suffered up to RMB 9 billion (£1.04 billion). Among all these 60,000 consumers, more than 66% are small consumers who invest less than RMB 50,000 (£5750)[394].

7. Further, consumers in financial service market usually has no enough bargain ability to negotiated with those large financial firms on the terms of their financial service. Considering the complexity and difficulty of financial transactions, some consumers even do not have enough knowledge to understand their financial transactions. Therefore, financial firms may take advantage of consumers by

[393] *370,000 people were cheated 23 billion, "Aiqianjin" two years late, but not unexpected*, access at https://tech.sina.com.cn/roll/2020-07-09/doc-iircuyvk2824840.shtml last visited 20/06/2021

[394] *Bank of China "oil treasure" incident: someone lost 800,000 margin, but still owed the bank 1.22 million*, access at https://new.qq.com/omn/20200505/20200505A0OW5V00.html last visited 20/06/2021

using standard terms which consumers cannot really understand. Besides, considering that some financial service such as credit card or mortgage may be indispensable for consumers' lives, consumers may have to enter a such contract even they do not understand.

8. Besides the huge gap of bargain ability, there is also a huge gap of ability of protecting themselves when things go wrong. Financial companies usually have good risk prediction and management systems, take security, and charge before they release money. Therefore, when things go wrong, they usually have enough methods to secure the safety of their money. When they can go to the court, they have experienced in-house lawyer team and are able to afford good external lawyer. Financial firms usually have enough ability to protect themselves in or out of the court, but this may be different to consumers. Consumers are usually ordinary people who do not have much financial knowledge and their economic strength is also limited. Once things go wrong, consumers usually do not have enough ability to protect themselves if financial firms take an un-cooperation attitude. When consumers go to the court, they may find that they are in a disadvantageous position in the litigation, because financial firms may have a contract term in favour of themselves and consumers do not have as many legal resources[395] as financial firms have.

9. All these facts and possibilities show that Chinese financial consumers are

[395] By that I mean, financial firms can usually hire better lawyers, have more people to deal with evidence collection, have a frequent-user's advantage and have more enthusiasm to appeal.

vulnerable and need special protection from the government. Currently, the legal responsibility of financial consumer protection is allocated to the three main financial authorities in China, namely the People's Bank of China (PBC), China Banking and Insurance Regulatory Commission (CBIRC) and the China Security Supervision Commission (CSSC).

10. The PBC is the central bank of China, which was established in 1948. Later, the *Law of the People's Republic of China on the People's Bank of China* in 1995 and its amendment in 2003, formally confirm the PBC's legal status as the central bank of China and become the constitution of PBC[396]. According to this law, the PBC mainly focuses on monetary policy and supervision of interbank activities.[397] The purpose of PBC is mainly to prevent and defuse financial risks and maintain financial stability[398]. The PBC is mainly responsible for supervising and regulating: (1) the deposit reserve of commercial banks and banking institutions;[399](2) Interbank borrowing market and bond market[400]; (3) foreign exchange market[401] and (4) the banking clearing system.[402]Besides these, the PBC also has a general duty to conduct macro-control and promote the coordinated development of the banking industry[403].

11. Before 2015, whether the PBC has legal responsibility to financial consumer

[396] The People's Bank of China, *The History of the People's Bank of China*, access from http://www.pbc.gov.cn/rmyh/105226/105433/index.html last visited 21/06/2022
[397] Law of the People's Republic of China on the People's Bank of China (2003) Art.4.
[398] Law of the People's Republic of China on the People's Bank of China (2003) Art.2.
[399] Law of the People's Republic of China on the People's Bank of China (2003) Art.32 (1).
[400] Law of the People's Republic of China on the People's Bank of China (2003) Art.4 (4).
[401] Law of the People's Republic of China on the People's Bank of China (2003) Art.4 (5).
[402] Law of the People's Republic of China on the People's Bank of China (2003) Art.4 (9).
[403] Law of the People's Republic of China on the People's Bank of China (2003) Art.31.

protection is unclear. On the one hand, the main purpose of the PBC seems to imply that it has duty to protect financial consumers, as mis-conducts of financial firms which will damage consumers' interests may also be argued as a behaviour which will cause financial risks or decrease financial stability, so people may argue that it is the PBC's legal responsibility to protect financial consumers to prevent this from happening. However, on the other hand, it is also true that the financial consumer protection is not a legal responsibility listed in the law and its amendment. Some people argue that if there is some mis-conducts of banks that will damage both financial consumers and financial stability or may lead to an increase of financial risks, the PBC may do something that protect financial consumers' interests, however, that is not to say the financial consumer protection is one of the PBC's legal responsibility.

12. This debate comes to an end in 2015, as the general office of the state council published the *Guiding opinions of the general office of the State Council on strengthening the protection of the rights and interests of financial consumers*, which clearly said in its article 2 that the PBC should conscientiously protect the rights and interests of financial consumers in accordance with its responsibilities[404].

13. In 2020, the PBC published the *Measures of the people's Bank of China for the protection of the rights and interests of financial consumers*, which further clarified that the PBC has legal responsibilities to protect financial consumers in

[404] Guiding opinions of the general office of the State Council on strengthening the protection of the rights and interests of financial consumers Art. 2

financial service market which is relevant with interest rate, currency, foreign exchange, gold, national treasury, payment and liquidation, money laundering, credit investigation, marketing propaganda and personal information, etc[405]. The publishing of these two legal instruments clearly prove that financial consumer protection is a legal responsibility of the PBC.

14. The CBIRC was established in 2018, by merging the former China Banking Regulatory Commission (CBRC) and the former China Insurance Regulatory commission into a single commission. The main purposes of this new regulatory commission are to deepen the reform of the financial regulatory system, resolve problems of unclear regulatory responsibilities, cross regulation and regulatory gaps existing in the former system, strengthen comprehensive supervision ability, optimize the allocation of regulatory resources, better coordinate the supervision of systemically important financial institutions, and gradually establish a modern financial regulatory framework that conforms to the characteristics of modern finance, prevent systemic financial risk from happening[406].

15. To fulfil these purposes, it is suggested by the state council that legal responsibilities of the CBIRC should include supervising banking and insurance industries in a unified way to maintain their legal and steady operation, prevent and resolve financial risks, protect the legitimate rights and interests of financial

[405] Measures of the people's Bank of China for the protection of the rights and interests of financial consumers Art. 2

[406] Xinhua News Agency, *Explanation on the institutional reform plan of the State Council*, access at http://www.xinhuanet.com/politics/2018lh/2018-03/14/c_1122533011.htm last visited 23/06/2021

consumers, and maintain financial stability[407]. Later, this suggestion was approved by the first session of the 13th National People's Congress[408], means that those responsibilities in the suggestion formally become legal responsibilities of the CBIRC. The China Security Regulatory Commission (CSRC) was established by the State Council in 1998[409].

16. When it was established the legal responsibilities of this commission clearly listed in law are :studying and drafting policies, laws and regulations about security and futures markets; supervising the issuing, transaction, hosting and clearing of securities, convertible bonds and security investment funds, supervising the behavior of listed companies and their shareholders with information disclosure obligations; and (4) supervising the security exchange companies, security investment fund companies and security clearing companies, etc.[410].

17. Like the PBC, whether the CSRC has legal responsibility to protect financial consumer is debated for a long time. Besides, there is also a theoretical argument about whether individual investors in security transaction market can be regarded as consumers[411]. Just like the debate of the PBC, this debate comes to an end in

---

407 *Ibid.*

408 Xinhua News Agency, *The first session of the 13th National People's Congress approved the institutional reform plan of the State Council* access at http://www.xinhuanet.com/politics/2018lh/2018-03/17/c_1122549771.htm last visited 23/06/2021

409 *State Council on the issuance of the functions of the China Securities Regulatory Commission configure internal organs and personnel to inform the preparation of regulations* access at http://www.gov.cn/zhengce/content/2010-11/19/content_7710.htm last visited 23/06/2021

410 Liu Yingshuang, 'On the Protection of Financial Consumers' Rights and Interests in China--- Also on the Protection of Financial Consumers in American Financial Supervision Reform' (2011) *Vol. 33 (3) Modern Law Science* 137

411 *Ibid.*

2015, after the general office of the state council published the *Guiding opinions of the general office of the State Council on strengthening the protection of the rights and interests of financial consumers*, which clearly said in its article 2 that the CSRC should conscientiously protect the rights and interests of financial consumers with [412].

18. The three main financial regulators fulfil their legal responsibility of financial consumer protection mainly by using regulatory methods. To be specific, financial authorities will supervise financial firms' conducts and practice and estimate whether these conducts and practices will damage financial consumers' rights and interests. Once financial authorities find that there are mis-conducts or bad practice significantly damaging financial consumers, financial authorities will then require relevant financial firms to stop and correct such conducts or practice while sometimes will also issue a formal punishment such as an official warn or fine.

19. A typical example of this kind of protection is supervision and regulation against petty consumer loan industry. In 2017, the PBC and the predecessor of CBRC, which is one of the predecessors of CBIRC, noticed that there are serious mis-conducts and bad practice in petty consumer loan industry includes excessive lending, repeated credit, improper collection, abnormally high interest rate, invasion of personal privacy, etc.[413]Besides there is a serious problem of lending

[412] Guiding opinions of the general office of the State Council on strengthening the protection of the rights and interests of financial consumers Art. 2

[413] PBC and CBRC, *The implementer of the special rectification of the risks in the network small loan business of small loan companies case*, access at

to ineligible consumers who have no or almost no ability to repay the loan, such as students in universities[414].

20. To protect consumers in this industry, the PBC and the CBRC jointly issued the *Notice on standardizing and rectifying the business of "cash loan"*, which clearly require all financial firms shall not issue or match loans that violate the relevant interest rate provisions of the law and shall not collect loans by means of violence, intimidation, insult, slander, harassment, etc.[415] Besides, this notice also requires financial firms to follow the principle of "know your customer", and shall not induce borrowers to borrow too much and fall into debt trap in any case, while also require all financial firms shall strengthen the security protection of customer information, shall not steal or abuse customer privacy information in the name of "big data", and shall not illegally trade or disclose customer information[416].

21. The notice also requires the departments and agents of the PBC and the CBRC to supervise relevant financial firms according to the notice. For those financial firms conduct business in violation of the provisions of this notice, relevant financial authorities shall take measures including suspending business, ordering correction, circulating a notice of criticism, and canceling business qualification

https://www.ganzhou.gov.cn/zfxxgk/c100475ns/2018-03/02/content_b9c8f752e1654841850d9fdef807e6c3.shtml last visited 23/06/2021

[414] Mo Cancan, 'Harmfulness, Causes and Avoiding Tactics of "Campus Loan " in Colleges and Universities' (2018) *Vol.20, No.1 Journal of Shenyang University (Social Science)* 92

[415] PBC and CBRC, *Notice on standardizing and rectifying the business of "cash loan",* access at https://www.sohu.com/a/208337905_116173 last visited 24/06/2021

[416] PBC and CBRC, *Notice on standardizing and rectifying the business of "cash loan",* derived from https://www.sohu.com/a/208337905_116173 last visited 24/06/2021

to urge them to rectify. For those serious cases, financial authorities can revoke the license[417].

22. Another good example of protect financial consumers using regulatory methods are Chinese financial authorities' supervision and regulation against the P2P lending platform scandal. From 2016-2018, There were about 6,000 P2P lending firms were involved in the big scandal of P2P lending form's bad practice[418]. After notice this scandal, Chinese financial authorities soon take measures trying to protect financial consumers and prevent further risks. In 2016, the CBRC published *Implementation plan for special rectification of P2P network lending risk*. In this document, the CBRC noticed that "Recently, there were a series of risk events broke out in P2P lending industry, which seriously damaged the legitimate rights and interests of investors, made a great negative impact on the reputation and healthy development of the Internet financial industry, and brought great harm to financial security and social stability.[419]"

23. To resolve these problems, the CBRC requires relevant authorities, departments, and agents to give a full investigation on all P2P lending corporates and divide all P2P lending corporates into three categories according to the investigation[420]. Corporates in the first category are corporates which are compliance with the law. These corporates are allowed to operate under stricter supervision. Corporates in

---

417 *Ibid.*

418 *Review of the P2P's way to death*, news access at https://new.qq.com/omn/20200719/20200719A08PQ700.html last visited 25/06/2021

419 CBRC, *Implementation plan for special rectification of P2P network lending risk*, access at http://www.gov.cn/xinwen/2016-10/13/content_5118615.htm last visited 25/06/2021

420 *Ibid.*

the second category are corporates not fully legal. These corporates usually have problems such as insufficient risk control, lacking self-discipline ability and hardly to maintain sustainable operation. These corporates were required to resolve their problems within a time limit. If the correction is not in place, they shall be ordered to continue correction or be merged by other financial firms[421]. Corporates in the third category are corporates which are suspected of engaging in illegal activities such as illegal fund-raising, these corporates will be required to quit form the market while relevant people may receive further administrative or criminal penalty[422]. By doing this, it is announced by the CBIRC in 2020 that the risk of P2P lending platform was substantially reduced[423].

24. Besides above, the Chinese financial authorities may also require relevant financial firms to arrange a collective redress for consumers damaged by their mis-conducts. For example, the CBRC requires all mis-conducted P2P lending firms return principal to its customers, firms failed to do that may face a criminal investigation. And in the above example of 'Crude oil treasure', the CBIRC requires the BOC to make a settlement with consumers and compensate consumers' economic lose. The BOC implemented this request and announced that it had reached a settlement with its customers and compensated for the losses.

25. The current protection for financial consumers provided by regulators has many

---

421 *Ibid.*
422 *Ibid.*
423 *21st Century Business Herald Report*, access at https://www.sohu.com/a/434949877_772337 last visited 25/08/2021

advantages. First, as regulators, financial authorities usually have enough power and tools to stop financial firms' mis-conducts and bad practice in a timely way to prevent consumers from further damages. Secondly, by using administrative power, financial authorities can require financial firms to change or correct their conducts or practice to compensate consumers lose or make financial consumers will not face similar damage in future.

26. Thirdly, it has wild range of influence, which can protect probably all consumers in financial service market in a single action. Forth, it is accessible to all consumers. Consumers almost do not need to do anything to gain this kind of protection, even a consumer does not realize he/she suffered a loss will be equally protected.

27. However, protecting financial consumers as supervisors and regulators also have deficiencies. Firstly, protecting consumers in this way has a certain threshold. Financial regulators usually tend to only notice those serious enough problems. So, mis-conducts and bad practice which are not serious may cannot be noticed and dealt with by financial authorities as supervisors and regulators.

28. Secondly, protecting consumers as supervisors and regulators tend to protect consumers as a whole and will not protect consumer in the individual case. And thirdly, protecting consumers as supervisors and regulators usually tend to focus on stopping and correcting financial firms' mis-conducts and bad practice instead of making consumers receive compensation. Ordering financial firms issue a collective redress is not the practice and it could only be observed in those

significant cases which influence a considerable number of consumers.

29. A possible way for the consumer to resolve the individual dispute is to go to the court. The cost of the litigation is charged according to the monetary value of the case. The court charges the litigation fee against the plaintiff, which is known as an acceptance fee. For those non-monetary disputes, the acceptance fee is from ¥50 (£5.68) to ¥500 (£56.8)[424]. For those monetary disputes, the acceptance fee depends on the amount of money that is claimed. Claims under ¥10,000 （£1,137） need to pay a fixed cost – ¥50 （£5.68. Claims above ¥10,000 （£1,137） will be charged on a floating rates basis[425]. Thus the litigation cost of a case is dependent on its monetary value, for example, the cost of a disputes which involves about ¥200,000 （£22,739） need to pay ¥4,300 （£488.9. Besides, if an enforcement is applying, the party who applies for it needs to pay an additional enforcement fee, which is usually a similar amount of the acceptance fee. The “loser pay” may be applied according to the judge’s discretion so when the plaintiff win the case, the burden of acceptance fee may be reversed to the defendant, while the plaintiff still need to pay an enforcement fee if a mandatory enforcement is applied. At first glance, the cost is not high, however, considering in 2019, the median per capita disposable income of Chinese residents is ¥26523(£3,015), the cost of litigation is not as cheap as it

[424] For example, the cost of divorce case without a dispute of properties division is from RMB 50 to RMB 300, the cost of case, which is relevant with personal right is from RMB 100 to RMB 500, the cost of other non-monetary case is from RMB 50 to RMB 100. The employment dispute is an exception, although it sometimes involves a large amount of money, the court only charges a nominate litigation fee to make sure that every employee is able to afford an employment litigation.

[425] A 2.5% rate to the part of 10,000 to 100,000 Yuan, a 2% rate to the part of 100,000 to 200,000 Yuan, a 1.5 % rate to the part of 200,000 to 500,000 Yuan and so on.

looks.

30. The acceptance fee and the potential enforcement fee only constitute a part of the litigation cost as a whole. After the reform of civil procedure, the Chinese civil procedure is no longer a simple thing that can be used by any ordinary person without the help of legal professionals, as it used to be. During the keeping process of legal reform, it becomes formal and complex. Consequently, a professional legal representative is now considered as necessary in many civil cases as people without legal professional training can hardly fully understand his/her case, correctly use his/her procedure rights, submit required documents and evidence, fulfil his/her procedure duties in time. The court and judge also encourage parties to hire one or more legal representatives as the work of experience lawyers can reduce the judge's workload[426]. Therefore, lawyer fee may also need to be considered in some cases.

31. The amount of lawyer fee depends on the level of lawyers the parties hire. An experienced lawyer in financial service sector can be very expensive while a junior associate may only charge RMB 2,000[427] (£222.4). However, lawyers in different price usually means service in different quality. Those good lawyers

[426] The workload of Chinese judge is huge. According to the data published by the supreme court , the average number of cases accepted and closed by a single judge in China is 121.4 and 74. Considering that there are 250 working days in one year, it means that the Chinese judge need to close a case in every 3.34 days. These high workload makes the Chinese judges place a great emphasis on the efficiency, thus a legal representative that can help parties to draft documents in legal language and reply to court's requirement of documents is encouraged by the judge. See Supreme Court, *Press Conference on the Situation of Judicial Enforcement of National Courts in the First Half of 2017,* access at http://www.court.gov.cn/fabu-xiangqing-54752.html lasted visited on 21 April 2019.

[427] https://www.vantageasia.com/zh-hans/%E5%BE%8B%E5%B8%88%E4%BA%8B%E5%8A%A1%E6%89%80%E8%B4%B9%E7%8E%87%E8%B0%83%E6%9F%A52017/

charge a higher fee for reasons, for their rich legal knowledge and experience, their excellent legal skills, or their good records. Hiring a good legal representative usually means a possible advantage in the civil procedure while hiring a junior legal representative can means a potential disadvantage in the litigation. As a result, the lawyer fee becomes a significant obstacle of access-to-justice for those people who cannot afford for a lawyer or a good lawyer, while those people who can afford will also think twice when they hope to initial a litigation[428].

32. The cost is not the only element influence the consumer's decision of whether go to the court, whether the litigation will take too much time and efforts will also be considered. In China, the first instance of a litigation usually takes up to six months to twelve months. And a plaintiff needs to wait up to seven days to know whether his complaint is accepted or not. After the first instance, if either party decides to appeal, the second instance will usually take up to three months.[429] There is no chance of second appeal so the judgement of the second instance is final.[430]

33. Six month or twelve month may be regarded as fast for those commercial cases or complicated civil cases, which involve many complicated legal relationships. Merchants may feel satisfy that their cases which involve much value can be

[428] People may argue here that legal aid service is a good idea to resolve this problem, however, legal aid may be not an appropriate answer here, we will discuss this in later of this chapter.
[429] See China Civil Procedure Law, Chapter XXII.
[430] See China Civil Procedure Law, Chapter XXIV.

finished in up to fifteen months. However, six month or twelve months may be too long to the consumer. Litigation sometimes means a long and painful experience. After filing a lawsuit, the parties, especially those parties who are natural people, may be in a state of long-term tension and pressure. A litigant in a lawsuit may need to meet with their lawyer regularly to discuss the case, timely response to court requests for submission of documents or evidence and attend the trial in court when it is required. These activities may consume a lot of energy of the parties concerned and keep them in constant tension and anxiety, which will finally put a negative influence on their work and family lives. This stress and mental distress may persist until the end of the lawsuit, or even continue to exist after the lawsuit is over. In this circumstance, six months may still too long to afford. Just like the legal maxim said, justice delated is justice denied[431]. A lengthy time of wait will bring all kinds of inconvenience to parties as well as much indirect loss, such as loss of work time and tension, depress anxiety. This may in turn enhance the negative image that the civil procedure is too long to afford an ordinary person may have.

34. As discussed above, the cost, time and efforts of the litigation may become barriers prevent consumers to bringing their disputes to the court. There is no evidence that the China's litigation system is more efficient than litigation system in EU member states and no evidence to show that Chinese consumers have a

[431] Suzy Platt (eds), *Entry 954. William Ewart Gladstone (1809–98). Respectfully Quoted: A Dictionary of Quotations Requested from the Congressional Research Service. Library of Congress, 1989.* (Attributed to William E. Gladstone. — Laurence J. Peter, Peter's Quotations, p. 276 (1977). Unverified.)

lower threshold of money involved to bring their disputes to the court. Therefore, the consumer's reluctance to go to the court existing in EU member states may also existing in China. Considering that the average income of Chinese consumers (€4,226 in 2020[432]) is lower than that of EU consumers (€13,996 in 2020[433]), the reluctance may be more significant in China. Therefore, it is good to introduce a financial consumer ADR scheme which provide financial consumers a cheap and fast way to resolve their individual disputes, just as what has happened in EU Member States. Besides, even the Chinese litigation system is cheap and fast, it may be not cheap and fast enough, introducing a financial consumer ADR scheme which can resolve disputes in a cheaper and faster way is still attractive to consumers and may encourage those consumers who do not take any action after disputes arising to act.

35. There are already some consumer ADR practices in China. For example, there is a free mediation service provide with consumers by the China Consumer Association, a consumer organization regulated by the Consumer Protection Law[434]. This mediation service aims to help consumers complaint to the businesses when things going wrong. A staff of the Consumer Association will organize and hold a communication between the consumer and the business to try to help them make a settlement.

[432] China Per capita disposable income of national residents in 2020, access at http://www.gov.cn/guoqing/2021-04/09/content_5598662.htm last visited 26/08/2021
[433] Average annual net earnings in the European Union (EU27) from 2013 to 2020(in euros) access at https://www.statista.com/statistics/1201068/annual-net-earnings-in-the-eu/ last visited 26/08/2021
[434] Law of the People's Republic of China on Protection of Consumer Rights and Interests, Art.30 and Art.37.

36. The service also includes free legal advice to the consumer about his/her problem. The service is widely accepted and used by Chinese consumers[435]. However, this service was not widely accepted and used by in financial consumer dispute resolution. A possible reason is that this ADR scheme is established to mainly deal with disputes arising from quality liability and therefore, lack of expertise and experience to deal with financial service disputes[436]. Another reason may be that financial consumers may not realize that these disputes is a kind of consumer disputes can thus can be covered by this mediation service, while the Consumer Association also does not clarify and give publicity to this point[437].

37. Besides the consumer mediation, there are also other ADR schemes provided by regulators. The Financial Consumer Protection Bureau (FCPB), which is one of departments of the PBC, established a financial consumer mediation scheme[438]. In this scheme, if a financial consumer dispute has occurred, the consumer may first complain to the financial institution. Later if the consumer is not satisfied with the response of the financial institution or the financial institution has not

[435] According to the China Consumer Association's data, in 2017 the China Consumer Association received 726,840 complaints, resolved 552,398 cases (resolution rate at 76 percent) and the compensation in total is RMB 516.39 million (60.22 million pounds). See China Consumer Associate, *Analysis on Complaints Handling Situation of National Consumers Association in 2017* access at http://www.cca.org.cn/zxsd/detail/27875.html last visited on 24/05/2018.

[436] Xing Huiqiang, 'A new way to resolve disputes arising out of financial consumption' Vol.31(5) *Modern Law Science* 173

[437] Yang Dong 'Typed Research on Financial Ombudsman Service Scheme' (2013) Vol.180(4) 2013 *Law Review*

[438] Measures for the Administration of Protection of Financial Consumer Rights of the People's Bank of China Art.12.

responded within a certain period, the consumer can complain to the PCB's local branch[439].

38. After receiving the complaint, the local branch will first examine whether there is any violation involved in the dispute. If the answer is positive, the local branch will deal with the violation according to the law or forward the case to corresponding authorities[440]. However, if there is violation, the dispute will be forwarded to the financial institution to give the institution a second chance to deal with the complaint.[441] If the consumer is still not satisfied with the result, the local branch of the PBC may organize a mediation[442].

39. Another example is the hotline "12378" host by the China Insurance Supervision Commission (CISC), which is one of predecessors of CBIRC. The hotline was established to receive consumers complains and try to mediate disputes happens between insurance corporates and consumers[443]. However, all these schemes have their problems. The mediation scheme provided by the PBC is operated by the regulator itself, and supervision on financial firms' violation was also involved in to the scheme, which makes the scheme is questionable on constitutional criteria such as independence and impartiality. For the hotline "12378", the rules and working procedure of this hotline were not published and thus may lead to

---

439 *ibid*

440 Measures for the Administration of Protection of Financial Consumer Rights of the People's Bank of China Art.17.

441 *Ibid.*

442 Measures for the Administration of Protection of Financial Consumer Rights of the People's Bank of China Art.20.

443 Measures for the Administration of Handling of Insurance Consumption Complaints

criticism on lack of transparency. Besides, they cannot cover all financial consumers in all sections of financial service market. Another problem is that they only use mediation model, which cannot produce a binding and enforceable result at the end, this will reduce consumer's confidence in using such services.

40. All these schemes are not well-publicity, which result many consumers even do not know their existence, not to mention use it. This lack of publicity is especially serious in the PBC's mediation scheme. There is no news, no advertising, no case report, and no data published about this scheme. There is even no evidence to show that this scheme handled any complaint. Just as discussed above, current financial consumer ADR disputes in China not have a good performance and a good programme-design. In summary, there appears to be a gap for Chinese financial consumers to access to justice. On one hand, the cost, time, and efforts of the litigation make consumers do not want to bring their disputes to the court. On the other hand, current financial consumer ADR schemes cannot provide consumers with a cheap, fast, and efficient way to dispute resolution and failed to attract consumers to use them. In this situation, introducing a comprehensive financial consumer ADR scheme with advanced model would helpful to fill the gap and increase the confidence of the financial service market.

41. There are two ways to introduce this new comprehensive financial consumer ADR scheme, one is spontaneously created by industry and the other is impose by the government or regulators. Currently there is no any consumer ADR schemes established by the industry. All consumer ADR schemes, including those

discussed above, are created by the government or regulators. The effort to persuade Chinese financial service industry to created a financial consumer ADR scheme started a long time ago[444], many scholars suggest that Chinese financial service industry should establish a financial consumer ADR scheme[445], but there is no positive response from the industry.

42. The reason may be that, just as demonstrated in the last Chapter, financial industry in a mature and highly competitive market tends to spontaneously created financial consumer schemes. However, just like observed by the chairman of the CBIRC, the Chinese financial service market has only about 30 years history, and there is still a long way to go before it develops a mature market[446]. Besides, the Chinese financial service market is a highly concerted market where dominate by those huge financial firms, for example, the four biggest commercial banks in China occupy 37.3% market share in banking while the top 5 insurance companies occupied 74.7% market share. [447]. Therefore, persuade Chinese

[444] Xu Huijuan(2005). 'On Financial Ombudsman System in UK and Protection of Consumers' Rights and Interests – Comment on Our Financial Regulations' (2005) Vol.1 (2005) *Finance Forum* 155

[445] Xu Huijuan(2005). 'On Financial Ombudsman System in UK and Protection of Consumers' Rights and Interests – Comment on Our Financial Regulations' (2005) Vol.1 (2005) *Finance Forum* 155; Xing Huiqiang, 'A New Way to Solve Disputes Arising Out of Financial Consumption' (2009) Vol.31(5) *Modern Law Science* 87; Yang Dong(2013), 'Typed Research on Financial Ombudsman Service Scheme' (2013) Vol.180(4) *Law Review* 231; Yin Jianmin, Huang Wei(2013). 'On Operating Mechanism and Inspiration of the Financial Ombudsman Institution in Tai Wan, China'(2013) Vol.7 *Shang Hai Finance* 105

[446] *Guo Shuqing: China's capital market is not yet mature* access at https://www.yicai.com/news/2234348.html last visited 26/08/2021

[447] China Bank Regulation Community Annual report of Chinese bank industry 2020 access at http://www.cbrc.gov.cn/chinese/home/docView/FDF4A782E9E34140B13ACFFE774FAB1A.html last visited 26/08/2021and Annual Report of the Chinese Insurance Market 2020. Available at http://bxjg.circ.gov.cn//Portals/0/wendang2020/2020%E4%B8%AD%E5%9B%BD%E4%BF%9D%E9%99%A9%E5%B8%82%E5%9C%BA%E5%B9%B4%E6%8A%A5%EF%BC%88%E8%8B%B1%E6%96%87%EF%BC%89.pdf last visited 26/08/2021

financial service industry to spontaneously create such a new comprehensive financial consumer ADR scheme may be not practicable.

43. A more practicable way is to persuade the government or regulators to establish a such ADR scheme. Just as demonstrated above, the government and regulators have legal responsibility to protect the consumers, so it is their legal responsibility to introduce a such new comprehensive financial consumer ADR scheme to fill the gap of access to justice. Further, introducing such an ADR scheme is in line with the policy interests of the government. A good design financial consumer ADR scheme can not only provide consumers with a cheap and fast way to resolve disputes, but also able to provide consumer advice, collect and feedback data, and improve the market behaviour. These functions would increase the confidence on the marker and provide the Chinese financial service market with a competitive edge in international market. Therefore, persuading the government or regulators to create a such ADR scheme is more inline with Chinese context.

44. The new financial consumer ADR scheme could be establishing by learning from the Ombudsman model used by the UK's FOS and the Australian AFCA, which is as discussed in the Chapter VI is the current best model in financial consumer ADR. Using the arbitration model in China could lead to problems. For example, there are already many arbitration commissions in China and all of them can theoretically handle financial consumer disputes if financial firms and consumers make agreements of arbitration. However, currently it is rare to see that any

financial consumer disputes are submitted to any arbitration commissions. The reason is that in China arbitration is usually more expensive and longer than the litigation. It is true that an arbitration commission specially designed for financial consumer disputes may be cheaper and faster than normal arbitration procedure but the existing impression in the public mind is not easy to change. Changing such image needs much funds and efforts on publicity and once it is not success, it would make negative influence on the scheme.

45. On the contrary, the Ombudsman model is familiar with Chinese people, although there is no 'Ombudsman' in China, there are many public organizations which receive and deal with people's complaints in China, such as Consumer Association. These public institutions perform just like 'Ombudsman' which makes Chinese people more familiar with this model[448]. Besides, as discussed in the Chapter VI, using the Ombudsman model can make the working procedure as informal as possible, which will significantly reduce the cost per complaint and improve the user-friendly. The study in Chapter VI also shows that with good-design, the reduce of formality would not lead concern in constitutional criteria. Meanwhile, the minimum of the formality could attract more consumers to use the scheme which is helpful for all functions of the financial consumer ADR scheme. Besides, as the Hong Kong's FDRC, which uses arbitration model, performs not well, whether the arbitration model can success in the mainland of

[448] According to China Consumer Association's data, in the year of 2018, it received 762,247 consumer complaints, solved 556,440 cases, and the complaint resolution rate was 73%. See *Analysis of the Acceptance of Complaints by the China Consumer Association in 2018* available at http://www.cca.org.cn/tsdh/detail/28383.html last visited 27/08/2021

China where share similar culture with Hong Kong but has no tradition to support arbitration, is questionable.

46. The financial consumer ADR scheme using Ombudsman may be created by the Chinese government and regulators in two ways. The first one is to establish such scheme by legislation. In this way, the legislation could set up the principles and basic rules of the scheme while delegate the details of the program-design to relevant financial regulators or to the ADR body. This is the way used in establishing the UK's FOS. The legislation required to establish a FOS institution to operate the scheme and delegate the institution to draft detail rules of the scheme. The second way is to establish a financial consumer ADR body by the government or regulators and then require all financial firms which in the certain scope to join the scheme as members. This is the way used in Australia, and Hong Kong, where the regulator creates a financial consumer ADR scheme not through the legislation and then require financial firms to join it.

47. Establishing a financial consumer ADR scheme directly by legislation grants the scheme many advantages, although it may also bring disadvantages such as the rigid structure may make it hard to accept new techniques. For example, the authority of the scheme is high as it is directly from the law, and the relationship between the scheme and the administrative agents and judicial system is easy to deal with as these issues can be directly dealt with by law. It also secures the scheme's independent position from the relevant administrative agents such as corresponding financial regulators. Further, establishing by law also makes it easy

to secure the binding force and enforceability of the result produced by such scheme in a high level. Comparing to those schemes, which must rely on contract obligation or administrative regulator's deterrence to secure the binding force and enforceability of their results, the binding force and enforceability of results of a scheme directly established by law is protected by law, which is stronger. Establishing such a scheme directly by law can also help consumers to establish the confidence of the scheme and promote them to try to use it.

48. The second way also has its advantages, making a new legislation in China is not an easy thing and it may take several years to wait. However, establishing an ADR body by the government or regulators could be much faster. In China, which ways would be used to establish such a scheme may depends on whether establishing a financial consumer ADR scheme can be done in reasonable time and the level of government's motivation to establish such a scheme. If the government has strong motivation to create such scheme by legislation and could make it in a reasonable time (for example, in 3-5 years), it would be good to establish a financial consumer ADR scheme through the legislation. However, if the government just want to give a try of the financial consumer ADR scheme or cannot publish such legislation in 5 years, it may be good to use the Australian way.

49. If the later way is used, the government or the regulator may further seek the legislation to give the scheme a better position in future. And no matter which way was used, the ADR scheme should be operated by an independent body to secure

the independence and the impartiality. Considering China's context, this body could be established as a 'Public Institute', just like the Consumer Association. Those already existing financial consumer ADR scheme such as the PBC mediation scheme and the insurance hotline may be merged into the new scheme.

Jurisdiction and scope of the scheme

50. The new scheme may have compulsory jurisdiction in a given scope of financial firms and in a given scope of services, because without compulsory jurisdiction, financial firms can easily choose not join the scheme in this situation, the scheme would become meaningless no matter how good the scheme was designed. Therefore, giving the new scheme such a compulsory jurisdiction through legislation or member rules is helpful.

51. The rules of compulsory jurisdiction may give the new scheme jurisdiction on most financial consumer disputes in China. Hereby, a possible draft may be "the scheme has compulsory jurisdiction on all disputes, which happens between a consumer and a financial firm which are licensed by Chinese authority or regulated by financial regulators as a financial institution. If these disputes arising from a financial service[449] provided by an above financial firm or its agent in the territory of China's mainland. And if the consumer makes a complaint towards the scheme."

52. Key issues here are first, the disputes must happen between a financial firm and consumer in the meaning of Chinese law as the aim of the scheme is to resolve financial consumer disputes and the authority of the scheme comes from the

[449] The rules may also specify or make some examples about the financial services under the scheme's jurisdiction.

Chinese law so it should consistent with other Chinese law. As we demonstrated above, financial firms in China are mainly commercial banks and commercial insurance companies and there is no a precise definition of financial consumers yet. A common idea of financial consumers is to regard them as those people who buy or receive financial services out of professional actions and not include small and medium businesses (SME)[450]. Further, the territory scope should be the China's mainland as Hong Kong and Macao become different jurisdictions which have different legal system. It should also make it clear that the compulsory jurisdiction can only happens if the consumer chooses to use the scheme as the scheme should not become an obstruction if the consumer hopes to directly make a litigation.

53. There is also a need to specify the scope of the jurisdiction. For example, whether the compulsory jurisdiction would cover all kinds of disputes or only cover those disputes with monetary nature. To make the compulsory jurisdiction only cover those disputes with monetary nature or occur monetary loss may help the scheme to focus its limited resources on resolving those most important disputes which the consumers are suffered economic loss instead of those disputes with no actual economic loss and consumers just, for example, feel unsatisfied with financial firm's unfriendly attitude. While accepting such disputes may increase the consumer's confidence on the scheme and may make the consumer like it.

[450] It would be good news to establish a comprehensive and efficient financial consumer ADR scheme if a law reform can be made to give a precious definition of financial consumer in Chinese law and can include SME into the scope of financial consumers but we will not discuss it in detail here as it is not the focus of the thesis.

54. It should also make it clear that the compulsory jurisdiction should exclude those disputes which has too much money involved, as demonstrated in Chapter VI, all the three financial consumer ADR schemes in UK, Hong Kong or Australia set a cap for the money involved. The reason behind is that, the theory basement of establishing a financial consumer ADR scheme is mainly two: first, there is a huge gap of bargain ability between consumers and financial firms that need to be balance by the third person and second, consumers incline to not go to the court to resolve their disputes, so it is good to provide the consumer with a cheap and fast way to resolve financial consumer disputes. But these two premises may not exist in consumer disputes involved much money. For the first situation, a consumer can invest a lot of money into a financial service shows that this consumer has a strong ability to protect himself. For example, the consumer could afford to expensive lawyer to litigation and could afford a financial professional to provide his an independent financial advice. In this situation, it is hard to see there is gap between the consumer and financial firm and thus the consumer deserves a special protection.

55. For the second, the main reason why consumer incline to not bring their cases to the court is that the money involved cannot cover the cost and time cost for a litigation. However, this is not true in a case which involves a lot of money. In this situation, a reasonable consumer should have enough motivation to bring his/her case to the litigation and therefore there is no need to provide him with a special

procedural protection such as a financial consumer ADR scheme. Besides, the working procedure of the financial consumer ADR scheme may be as informal as possible and it is questionable whether it is appropriate to handle a case involved that much money with such informal procedure.

56. For reasons above, a dispute with too much money involved may should not be considered as a consumer dispute, and thus should not be covered by the scheme under compulsory jurisdiction. Another reason is that, one important aim of the program-design of the scheme is to balance the imbalance of power between consumers and financial firms. However, if the value of the dispute is very high, then it is reasonable to assume that the imbalance between traders and consumer is not existing here. In this circumstance, their disputes may be resolved by litigation or other traditional ADR schemes instead of by this financial consumer ADR scheme. Therefore, the rules may draw a clear line on this issue, after considering the nature and characteristics of financial service and the average economic situation of Chinese financial consumers. The specific amount this line may should be decided after a careful study.

57. Besides the compulsory jurisdiction, it may also good to add a voluntary jurisdiction as a supplement of the compulsory jurisdiction to let those financial firms and financial service which are not covered by the compulsory jurisdiction have an opportunity to use the disputes resolution service. It does not matter if there is no or almost no practice of voluntary jurisdiction as it is only a supplement and

has almost no cost.

The working process of financial consumer ADR scheme in China

58. The potential Chinese financial consumer ADR scheme may use a multi-layer working process which including negation, mediation, and Ombudsman in sequence to fully use advantages of different kinds of ADR techniques. This multi-layer model is used by all the three schemes discussed in Chapter VI, with following the same sequence. First negotiation procedure (financial firms' internal redress scheme), then mediational procedure (a formal mediation procedure in Hong Kong and more informal mediational procedure in UK and Australia) and then Ombudsman or arbitration procedure. This model may also be used in China by adopting China's context.

59. In China, most financial firms were already be required to have and effectively operate an internal consumer redress system. The banking financial institutions' intern complaint scheme is regulated by the "*Notice of the China Banking Regulatory Commission on Improving the Client Complaint Handling Mechanisms of Banking Financial Institutions to Effectively Protect Financial Consumers*", a regulation published by CBRC in 2012[451]. In this regulation, the CBRC clarify that financial consumer protection is not only a social responsibility of commercial banks but also a legal obligation, therefore, the head office and branches at all

[451] http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=8d14b23cea467007bdfb&keyword=%E5%85%B3%E4%BA%8E%E5%AE%8C%E5%96%84%E9%93%B6%E8%A1%8C%E4%B8%9A%E9%87%91%E8%9E%8D%E6%9C%BA%E6%9E%84%E5%AE%A2%E6%88%B7%E6%8A%95%E8%AF%89%E5%A4%84%E7%90%86%E6%9C%BA%E5%88%B6%E5%88%87&EncodingName=&Search_Mode=accurate&Search_IsTitle=0

levels of a commercial bank shall appoint a senior manager who is responsible for protecting the legitimate rights and interests of financial consumers[452]. Meanwhile, the CBRC requires commercial banks to improve their existing complaints processing scheme[453], establish or designate complaints processing departments and equip these departments with qualified staff[454]. These staff shall be able to fully understand relevant law, and regulations published by the CBRC, familiar with the financial products and financial services, master relevant business practice, have the corresponding working ability and treat the financial consumer with fairness and sympathy [455].

60. Further, the CBRC requires commercial banks to provide financial consumers with 'fast track' for compliant handling. Commercial banks should at least accept complaints through phone, Internet and mailing while publish these channels on their official websites [456]. After accepting complaints, commercial banks are required to communicate with consumers through the above channels in a timely manner to inform acceptance, processing time limit and contact method[457] In the process of handling complaints, commercial banks should uphold the principle of high efficiency and speed. The time limit for processing shall not exceed 15

[452]Notice of the China Banking Regulatory Commission on Improving the Client Complaint Handling Mechanisms of Banking Financial Institutions to Effectively Protect Financial Consumers Art.1 and 2. http://www.china-cba.net/do/bencandy.php?fid=89&id=9183

[453] *Ibid* Art.2.

[454] *Ibid* Art.3

[455] *Ibid* Art.4

[456] *Ibid* Art.6.

[457] *Ibid* Art.7.

working days in principle. If the situation is complex or there are special reasons, the time limit for processing may be appropriately extended, but it shall not exceed a maximum of 60 working days. The time limit and reasons for extension shall be notified to the consumer by means of text messages, mails, letters, etc.[458]

61. In addition, the CBRC also requires commercial banks to conduct statistics and analysis on consumer complaints and report the information to the CBRC once every six months[459]. However, if a commercial bank receives a large-scale complaint or has a major complaint, which involves the interests of many financial consumers and may trigger a mass incident, it shall instantly report it to the CBRC or its dispatched offices[460].

62. The insurance company and institution's intern consumer compliant schemes are mainly regulated by the *Measures for the Administration of Handling of Insurance Consumption Complaints*, which is a regulation published by the China Insurance Regulatory Commission[461] (CIRC). The instrument provides that it is insurance company and institution's responsibility to establish intern consumer complaint scheme and allocate appreciate staff and budget to these schemes[462]. Besides, the legal instrument divides insurance consumer disputes into several categories and

[458] *Ibid* Art.9.
[459] *Ibid* Art.16.
[460] *Ibid* Art.15.
[461] The CIRC has already been merged into the BRCC in 2018.
[462] Notice of the China Banking Regulatory Commission on Improving the Client Complaint Handling Mechanisms of Banking Financial Institutions to Effectively Protect Financial Consumers Art.5 & Art.6.

provides that insurance companies and institutions have an obligation to deal with consumer complaints relevant with insurance contract terms, sales, underwriting, surrender, security, payment, and any other complaint rising from insurance consumption[463]. However, there is no detailed requirements for the intern consumer complaint scheme, thus the structure and performance of different insurance companies' intern complaint scheme may vary, mainly depends on their own business strategies and policies.

63. When establishing the new financial consumer ADR scheme, further requirement on details of those financial firms' internal consumer redress system may be made to improve the quality of intern complaint resolution system to a higher level. Then these internal consumer redress systems could be merged into the new scheme as the first stage. The new scheme should make it possible to accept complaints through all possible ways, such as phone, Internet, mailing and in person. As soon as it receives the complaint, the staff may provide free advice to the consumer and then tell the consumer to firstly contact with traders, and then back to the scheme if not satisfied with the trader's result or does not receive a result from traders in a given time (for example, 60 days). This stage could reduce the burden of workload of the new financial consumer ADR scheme and to provide financial firms with a second chance to deal with consumers' complaints without intervention of an independent third person. This internal redress first requirement is also accepted

[463] *Ibid.* Art.9.

by PBC in its *Measures for the Administration of Protection of Financial Consumer Rights of the People's Bank of China*, where the PBC requires consumers to first use financial firms' internal redress system before complaint their complaints to PBC to seek further help[464].

64. A mediation procedure hold by staff may then followed as the second step. Currently there are already some practices of mediation between consumers and businesses in China. For example, the PBC provided consumers with a mediation procedure if consumers complaint to their local branch[465] as mentioned above. These isolated and de-centralized practice of mediation may be merged into the new scheme while the experience comes from these practices may also be learned to establish the new mediational procedure. Unlike those formal mediation which happens in a meeting room, this mediational procedure may be as informal as possible. It may happen on phone, on line or through the exchanging of documents. The key points of this mediational procedure are to create both parties an easy place to communicate each other in their preferred way without take their too much time and effort, while also helps them to understand their position in the dispute and what a result may occur if there is no settlement achieved.

65. After the mediational procedure, if a settlement cannot be achieved, an Ombudsman may follow. This procedure may be as simple as possible and as

[464] Measures for the Administration of Protection of Financial Consumer Rights of the People's Bank of China Art.12
[465] *Ibid.*

informal as possible, to encourage consumers to use it and reduce the difficulty of using it by consumers, although most disputes may have already be resolved in the early stage. Further, to narrow the gap of bargain ability between consumers and traders, and reduce traders' advantages as a repeat user, the procedure may be dominated by the Ombudsman instead of using a party autonomy model. The theory behind is that the more freedom the parties get, the more advantage traders may gain as repeat users. However, if the process of the procedure is mainly controlled by the Ombudsman, and both parties just generally do what they required to do, it is less likely that financial firms will have big advantage even they have more money, better lawyers, and more professional knowledge than consumers as the Ombudsman may use his/her position and power to balance it.

Binding force and enforceability of the outcome made by the scheme.

66. The design of binding force and enforceability of the outcome made by the scheme may consider three issues. First, what kind of outcome can be made by the scheme, second, to what extent the outcome has binding force and enforceability of the outcome; and third, to what extent the court can review the award made by the scheme. For the first issues, the scheme may make a monetary award which requires the financial firm to compensate the consumer's loss and reasonable interests. However, it is questionable here whether the award can require the financial firm to do or not do something, for example, required a bank to provide consumers with certain service, to make formal and written apologize to the

consumer or remove the consumer from the ban list. Theoretically speaking, to force a party to do or not to do something may already beyond the scope of an ADR scheme, even if this ADR scheme is a public ADR scheme, as such award may relevant with the business decision of a financial firm which should not be directly influenced by an ADR scheme. However, sometimes, the financial firm may positively make offer on doing or stop doing something to reach a settlement with consumers. In this case, if the offer was accepted and a settlement did achieve, the award made according to the content of the agreement may include such content.

67. Another issue is the biding force. As discussed above, to be an effective financial consumer ADR scheme, it is good to give the award produced by the scheme a certain extent of binding force. The main questions that need to be discussed here is whether the consumer may be given a unilateral opt-in right to accept the award, such as the UK's FOS model and the Australia's AFCA model. To give the consumer a unilateral opt-in to accept the award is a good choice in theory. The main reason to establish an effective financial consumer ADR scheme is consumers usually do not bring their disputes to the court, so it is necessary to provide consumers with an alternative place to resolve their disputes and protect their interests. That is to say, the establishment and operation of the financial ADR scheme should never become an obstruction if a consumer decides to go to the court to seek remedy, and this is also inline with the liberty criterion of ADR scheme. That is why traditional arbitration model is controversial, as the

compulsory arbitration agreement will prevent consumers from seeking remedies from the court.

68. The innovation of unilateral opt-in right help to resolve this problem. On one hand, if the consumer feels unsatisfied with the award produced by the scheme, he/she can simply choose not to accept the result and then go to the court if he/she hopes to do that. On the other hand, if the consumer chooses to accept the award made by the scheme, then it is safe to assume that the consumer would not go to the court, with or without the award. Therefore, the right of consumer to seeking remedies from the court has not been damaged and even when the award does not fully protect the consumer's interests, a rough justice is still better to no justice.

69. However, to give consumer a such unilateral opt-in right seems not fair in procedure and may lead to concern on fairness criterion. Although, it is true that the huge gap between consumers and financial firms can be used as a defense for this unilateral opt-in right and the practice of UK' FOS scheme and many other schemes may prove that this unilateral opt-in right does not lead significant protest in fairness. Another noteworthy point is some scholars in China argued for introducing such right[466]. Besides, although this unilateral opt in right is not known

[466] See Ziqiang Yang, 'Learn from international experience to improve China's financial consumer protection supervision system' (2014) Vol 10 *Tsinghua Financial Review* 25 and Jianchen Ding, Xiaojie Sun and Yaxian Liu, 'Damage to China's financial consumer rights and interests: characteristic analysis and policy recommendations'(2016) Vol.2016 (03) *Journal of Beijing Jiaotong University (Social Sciences Edition)* 16

in consumer protection, there is a similar practice in employment protection in China. In China, there is a special arbitration scheme namely employment arbitration scheme, all employment disputes must firstly be dealt by this scheme before they are heard by the court. In this scheme, the employee can always appeal to the court if they are not satisfied with the award but employer can only appeal for several given reasons on given issues[467]. This practice shows that it is may good to introduce unilateral opt-in right in China, or like the practice in employment law, introducing a limited unilateral opt-in right.

70. The third issue is that to what extent the complaint has already been dealt with by the scheme can be reviewed by the court. In theory, to help the award made by the scheme to have actual binding force to both parties, the scope that can be reviewed by the court should be limited. Otherwise, the scheme may just become a first instant court or a compulsory in-advance procedure of litigation. An unlimited scope of legal review will also damage the consumer's interests. As comparing to the financial firms, consumers are less likely to bring their disputes to the court, and that is why a such financial consumer ADR scheme is needed. If financial firms are free to appeal all disputes to the court, the financial firm may appeal all award that in favor of consumers, by doing so, financial firms can bypass the scheme. This will reduce the consumers' confidence on the scheme as they may find that if they hope to get a result in favor of them, they will have to go to the court anyway.

[467] Quanxing Wang and Lingling Hou, 'The choice of labor dispute handling system mode in our country' (2002) Vol. 2002 (08) *Labor in China* 13

They may directly go to court or firstly go to the ADR scheme and waiting financial firms to appeal the case to the court and there is no difference. This will make the scheme become meaningless,[468] and could lead a serious waste of legal resources as many cases will be handled twice. Therefore, the scope of legal review may should be limited to only important procedural issues like legal review on arbitration award.

71. However, this may be not possible in China, as China has a strong faith that court should have the power to review all awards made by ADR bodies or even administrative agents. For example, according to the China's arbitration law, the party can appeal arbitration award to the court for both procedural issues and substantive issues. And this could also be observed in the compulsory employment ADR scheme. Another issue needs to consider is if we consumers have no unilateral opt-in right to accept the award made by the scheme, limitation on scope of legal review may also damage consumer's right to seek remedies from the court. For these reasons, a possible alternative here may be allowing the consumers to appeal the award to the court for both procedural and substantive reasons but allowing financial firms to appeal only for fundamental procedural or substantive mistakes.

[468] To be specific, if a consumer hopes to go to the court, he may already do that in the first position. To use a financial consumer ADR scheme usually means that the consumer does not want to use the litigation. In this situation, even the award made by the scheme is not in favor of the consumers, consumers are less likely to appeal it to the court, On the contrary, financial firms can appeal all disputes which they received an award in favor of consumers to the court, as they can safely assume that consumers in question may has no or less motivation to be involved into the litigation and therefore they can easily get a judgement in favor of them through the litigation.

Issues on confidentiality and transparency

72. Other issues may be covered by the program-design are confidentiality and transparency. The operator of the scheme may be given an obligation to make the process of operation of the scheme, the working process of the scheme and the other relevant information transparent as much as possible. The operator may have the obligation to make an annual report to provide public with information of its situation of operation, information of complaints dealt by the scheme, and it is good to publish all awards made by the scheme to the public so that the public can understand how the scheme work and to expect what possible awards may be made to their own disputes. This information would help both consumers and financial firms to understand more about scheme, which will increase their confidence on the scheme or decrease their concern on the scheme.

73. Confidentiality may also be respected as far as possible. It may be helpful to make a balance between the scheme's obligation to feedback data to financial authority and public and confidentiality. This issue may be regulated by clarify what information is necessary to publish, such as the number and categories of complaints received by the scheme, the details of complaints which go to the final step and produced a final award, and the systematic risks or bad practice the scheme find out during its operation. On the other hand, the rules may also make it clear

that some information may not be published except special situations happened. For example, information such as the name of both parties, the proposals made by the financial firms during the process of dispute resolution and the statements and arguments parties exchanged during the process, documents submitted to the scheme by both parties as evidence, and all other information submitted to the scheme as required. To publish this information may bring both parties with negative consequence, especially for the financial firms, as this may damage their reputation and put a negative influence on their future business. However, there may also be some exceptions, for example, if such information were required by the court or financial authority for the need of another litigation or investigation, then this information may be provided according to the requirement.

Issues of the relationship with the financial authority

74. An financial consumer ADR scheme may have a close relationship with corresponding financial authority. This close and cooperative relationship would benefit both the financial regulators and the scheme. On one hand, the data collected by the scheme on financial service market during its operation can help financial authorities understand the popular issues and problems or systematic risks in the financial service market. With the data provided by the scheme, the financial regulators can realize and locate the problems and risks in financial service market in time and the try to resolve them before the explosion of these problems. On the

other hand, the financial authorities can become a backup of the scheme. The close relationship with financial authorities will make financial firms pay more respect to the scheme and less possible to breach the rules or their obligations under the rules of scheme.

75. However, the close relationship between the financial authorities and the financial consumer ADR scheme may also damage the independence of the scheme if there is no clear rules to draw the line of this relationship. Therefore, it is helpful to clarify their relationship in the program-design, to secure and regulate their cooperation and information sharing. For example, a separate memo of understanding could be signed between financial authorities and financial consumer ADR scheme to make sure that they can cooperate, share information but should not put unappreciated influence of each other.

Issues of budget and fee

76. A financial consumer ADR scheme could work effectively and smoothly without a health financial situation and continuous income to provide the scheme with enough budget. The scheme may expect to receive public funding as initials or supporting in its firs several years. However, the scheme finally needs to collect enough money from other place to cover its expenditures. There are currently two possible fee policies. The first is to collect funds from financial industry through levy and case while charge no fee towards the consumer, as the UK's FOS and the

Australian AFCA. The second is to charge case fee towards both consumers and traders but traders pay more than consumer, as the Hong Kong's FDRC. The comparison study in Chapter VI shows that the first approach leads to a good performance while the second leads to financial difficult. Besides, the second approach may also prevent the consumer from using the scheme. This may also true, in the context of China, as Chinese consumers are sensitive with the cost to dispute resolution. And therefore, almost all current existing financial consumer ADR services in China are free for consumers. Thus, it may be good to the new scheme to not charge to consumers, but charging from the industry.

77. The rules of budget and fee of the scheme should then, clearly set out that the scheme does not charge to consumers, it's funding and budget can come from a levy paid by all financial firms which are under the compulsory jurisdiction of the scheme and case fee paid by the financial firm on a "pay as you go" basis. The levy rate and the case fee for per case can be decided by the government or delegated financial authorities after considering all relevant circumstances and arguments from the financial firms or financial industrial association.

78. In summary, the new financial consumer ADR scheme in China may look like that, it may be imposed by the government or regulators through or not through legislation, with merging existing ADR practice into it. It may be operated by an independent public institute. A multilayer working process where, negotiation

procedure, mediation procedure, and Ombudsman, are used in sequence may be the working procedure of the scheme. It may have characteristics as follow: compulsory jurisdiction on most financial firms and financial service, ability to produce binding and enforceable results while consumers have unilateral opt-in right, easy to use, transparent, fast, having a close relationship with financial authority, and provide free or almost free service to consumers.

Conclusion

1. In summary, in many jurisdictions, there is a trend to introduce financial consumer ADR schemes in financial service markets to provide the consumer with a cheap, fast, and efficient way to resolve financial consumer disputes, for example, the FOS in UK, the FIDReC in Singapore, the FSPO in Ireland, the "dispute resolution organizations" in Japan, the AFS in Malta, the OBSI and ADRBO in Canada, the Kifid in Netherlands, the AFCA in Australia, the FDRC in Hong Kong, and the ABF in Italy, etc. The reason behind is that there is a significant imbalance of power between the consumer and the financial firm and the consumer needs protection. This protection includes providing the consumer with both substantive right and an accessible way to access to justice. As the research and data show that many consumers are reluctant to go to the court due to the cost, time, and efficient for a litigation, financial consumer ADR schemes were introduced in many jurisdictions to provide the consumer with an accessible alternative, and in some jurisdiction, there is even a trend that the consumer ADR scheme may replace the mechanism in the court that plays the same role such as small claim procedure.
2. In China, the financial service market is new, big, and concentrated, the imbalance of power between the consumer and the financial firm is significant and examples show that the consumer may suffer significant loss in this situation. The Chinese financial consumer needs protection, and this protection may come from by providing both substantive right and an accessible way to resolve disputes. However, in China, consumers may not want to bring disputes to the court for the

cost, time and effort, financial regulators may provide collective redress but only in those significant cases, and there is no an effective financial consumer ADR scheme to provide alternative. Therefore, it seems that there is a gap in access to justice in the Chinese financial service market. Introducing a comprehensive financial consumer ADR scheme with an advanced model of financial Ombudsman may be helpful as such scheme could provide the consumer with a cheap, fast, and efficient way of dispute resolution. Further, a such ADR scheme may have other functions besides dispute resolution, such as providing consumer advice, collecting data and feedback the data to the financial firm, the consumer, the public and the regulator, and improve the market behaviour. Therefore, introducing a financial consumer ADR scheme with an advanced model of financial Ombudsman may provide the consumer with an accessible alternative to justice, increase the consumer confidence on the market and improve the international competitiveness of the Chinese financial service market.

3. As the Chinese financial industry seems no motivation to spontaneously create a such new financial consumer ADR scheme, the new ADR scheme may be imposed by the government or regulators. The new ADR scheme may be created by legislation, and when a legislation is hard to make, directly by the government and regulators. In the later case, a legislation may be pursued in future. The new ADR scheme may be established based on the advanced financial Ombudsman model used by the UK's FOS and the Australian AFCA for their good performance in dispute resolution, ability to fulfil constitutional criteria, and possibilities to

provide additional functions such as consumer advice, collect and feedback data, and improve market behaviour.

4. An independent ADR body may be established to operate the scheme, to secure the independence and impartiality of the new ADR scheme. It may need to have compulsory jurisdiction on most financial firms and financial service, so that if the consumer hopes to use the new ADR scheme, it would be prevented by the un-cooperation of financial firms. A multilayer working process where all three kinds of ADR techniques, negotiation procedure, mediation procedure, and Ombudsman procedure, are used in sequence could be the working procedure of the scheme. As such working procedure can take full advantages of different kinds of ADR techniques, help to resolve disputes in early stage, and secure a binding outcome. The outcome produced by the new ADR scheme could be binding while providing the consumer with a full or limited unilateral opt-in right to protect the consumer's right to bring the case to the court. The new ADR scheme may include constitutional criteria such as independence, impartiality, transparency, and confidentiality, etc. in its rules to show the new ADR scheme highly value these principles. The new ADR scheme may provide the consumer with a free service and collect its funds mainly form the financial industry by charging a levy and case fee.

Bibliography

Ali, Shahla F. & Da Roza, A. M. (2011). Alternative Dispute Resolution in Financial Markets – Some More Equal than Others: Hong Kong's Proposed Financial Dispute Resolution Centre in the Context of Experience in the UK, US, Australia and Singapore, *Pacific Rim Law & Policy Journal* , Vol.21, No.3.

Ali, Shahla F. & Kwok , J. K. W. (2011). After Lehman: International Response to Financial Disputes – a Focus on Hong Kong. *Richmond Journal of Global Law and Business,* Vol.10(2).

Ali, Shahla F. (2009). Approaching the Global Arbitration Table: Comparing Advantages
ofArbitrationas Seen by Practitioners in East Asia and the West, *28 REv. LITIG. 791, 793*.

Ali, Shahla F. (2013). Lessons for the US System of Financial Arbitration: A Responsive Empirical Exploration of Arbitration and Ombudsman Service *Frontiers of Law in China* Vol.8 (4).

Ali, Shahla F. (2013). Globalization and Financial Dispute Resolution: Examining Areas of Convergence and Informed Divergence in Financial ADR *J. Disp. Resol. 331 2013.*

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

Ali, Shahla F. (2013). *Consumer Financial Dispute Resolution in a Comparative Context, Principles, Systems and Practice,* Cambridge University Press, 2013.

Ali, Shahla F. & Huang , H. R. (2012). Financial Dispute Resolution in China: Arbitration or Court Litigation? *Arbitration International*, Vol.28(1).

Ali, Shahla F. & John Koon Wang(2011), After Lehman: International Response to Financial Disputes A Focuson Hong Kong *10 RICH. J. GLOBAL L. & Bus. 151*.

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

Alan Ewins, Catherine Husted, Juliana Lee, & Joyce Woo.(2010).The Lehman Aftermath: Hong Kong

and SingaporeRegulatory Reforms in the StructuredProduct *5 CAPITAL MARKETS LAW J. 301, 303.*

Andrea Kupfer Schneider.(2008). The Intersection of Dispute Systems Design and Transitional Justice *13 HARV. NEGO. L. REV. 329.*

Attard, M. Resolution of Insurance Disputes. The Law Handbook. Retrieved from www.lawhandbook.org.au/handbook/ch23s01s10.php#.

Australian Securities and Investments Commission.(n.d.). ASIC-approved external dispute resolution schemes. Retrieved from www.asic.gov.au/asic/asic.nsf/byheadline/ASIC+approved+external+complaints+resolution+schemes?opendocument.
(n.d.).Complaints Resolution Schemes. Retrieved from www.asic.gov.au/asic/asic.nsf/byheadline/Complaints+resolution+schemes?openDocument.
(n.d.).Regulatory Guide 139. Retrieved from www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg139-published-20-4-2011.pdf/$file/rg139-published-20-4-2011.pdf.

B.B. Zoltowski.(2008). Restoring Investor Confidence: Providing Uniformity in Securities Arbitration by Offering Guidelines for Arbitrators in Deciding Motions to Dismiss Before a Hearing on the Merits, *58(2) Syracuse L. Rev. 375*.

B. Black.(2010). How to Improve Retail Investor Protection after the Dodd-Frank Wall Street Reform and Consumer Protection Act, *13 U. Pa. J. Bus. L. 59*.

Bank for International Settlements.(n.d.).About the Basel Committee. Retrieved from www.bis.org/bcbs/about.htm.
(n.d.).History of the Basel Committee and its Membership. Retrieved from www.bis.org/bcbs/history.htm.
(n.d.).International regulatory framework for banks (Basel III). Retrieved from www.bis.org/bcbs/basel3.htm.

Banking and Financial Services Ombudsman. (February 2008). *Review of Australia's Consumer Policy Framework, Production Commission Discussion Paper*. Retrieved from www.pc.gov.au/__data/assets/pdf_file/0010/89092/subdr170.pdf.

Banking and Financial Services Ombudsman Limited. (March 2008). BFSO Bulletin 57. Retrieved from www.bfso.org.au/ABIOWeb/ABIOWebSite.nsf/0/A2502C2CFD46FF46CA25741E001713C1/$file/Bulletin+57.pdf.

Baum, H. (2011). *Debating the Japanese Approach to Dispute Resolution. Max Planck Research*. Max Planck Institute for Comparative and International Private Law. Retrieved from www.mpg.de/4379741/W006_Culture-Society_084-091.pdf.

Beaman, L. (2010). FOS Alternative Emerges. *Money Management*. Retrieved from www.moneymanagement.com.au/news/fos-alternative-emerges.

Black, B. (2010). How to Improve Retail Investor Protection at after the Dodd-Frank Wall Street Reform and Consumer Protection Act. *U. Pa. J. Bus. L.*, Vol.13, 59 – 106.

Bondi, B. J. (2010). Facilitating Economic Recovery and Sustainable Growth through Reform of the Securities Class-Action System: exploring arbitration as an alternative to litigation. *Harvard Journal of Law & Public Policy*, Vol.33 (2), 607 – 638.

Brown, R. (2011). The UN Guidelines for Consumer Protection: making them work in developing countries. *Paper for Consumers' International Congress*. Retrieved from http://a2knetwork.org/sites/default/files/un_guidelines_r_brown_paper.doc.

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

Carter Newell Insurance Ombudsman Service Fact Sheet 2.(n.d.). Retrieved from www.carternewell.com/media/799149/fact%20sheet%202%20-%20new.pdf.

Carrie J. Meadow.(2009). Are There Systemic Ethics Issues in Dispute System Design?And What We Should [Not] Do About It: Lessons From International and Domestic Fronts *14 HARV. NEGO. L. REV. 195, 195-231*.

Celnik, C. and Yakura, C. (2011–2012). Dispute Resolution Handbook 2011/12 – Japan. *Practical Law Company*. Retrieved from www.practicallaw.com/9-502-0319.

Clarke, D. C.(2003). Economic Development and the Rights Hypothesis: the China problem. *Am. J. Comp. L.*, Vol.51, 89.

Clift, R.(2009). The Phenomenon of Mediation: judicial perspectives and an eye on the future. *The Journal of International Maritime Law*, Vol.15, 508 – 517.

Chan Bing Woon & Oscar Tan.(2007). Building a Mediation Culture in Hong Kong *Asian DISP. REV.126***.**

Civil Justice Reform-Interim Report.(2001). Interim Reportofthe ChiefJustices Working Partyon Civil
Justice Reform, *available at:*
http://www.civiljustice.gov.hk/ir/paperHTML/WorkingParty.html.

Code of Arbitration Procedures for Customer Disputes, Financial Industry Regulatory Authority, available at:
http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbrut/documents/arbmed/p117546.pdf.

Cole, C. W. (2007–2008). Financial Industry Regulatory Authority (FINRA): is the consolidation of NASD and the regulatory arm of NYSE a bull or a bear for US capital markets? *UMKC L. Rev.*, Vol.76, 251 – 272.

Consumers International. (n.d.). Consumer Rights. Retrieved from www.consumersinternational.org/who-we-are/consumer-rights.

Cooper, J. (2006). The Integration of Financial Regulatory Authorities – the Australian experience. Retrieved from
www.asic.gov.au/asic/pdflib.nsf/lookupbyfilename/integration-financial-regulatory-authorities.pdf/$file/integration-financial-regulatory-authorities.pdf.

COSL Member Alert. (18 June 2009). Retrieved from www.cosl.com.au/Resources/COSL/Sites/COSL/PDF/News/MemberNews-Issue22.pdf.

COSL Member News Issue 27. (1 April 2010). Retrieved from www.cosl.com.au/Resources/COSL/Sites/COSL/PDF/News/MemberNews-Issue27.pdf.

Credit Ombudsman Service. (n.d.). Annual Report on Operations 2009–2010. (n.d.). Complaint FAQs. Retrieved from
www.cosl.com.au/Complaint-FAQs.
(n.d.). Complaints Process. Retrieved from
www.cosl.com.au/Complaints-Process.

Credit Union Dispute Resolution Centre. (2005–2006). *2005–2006 Annual Report*. Retrieved from
www.fos.org.au/public/download.jsp?id=36].

D.E. Robbins ed. (2009). *Securities Arbitration in the Market Meltdown Era*, Practicing Law Institute,
New York.

Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters *OJ L136/324.5.2008*.

Ellen E. Deason.(2004). ProceduralRules for Complementary Systems of Litigation and MediationWorldwide, *80 NOTRE DAME L. REV. 553*.

FINRA. (Sept. 2013). DisputeResolutionStatistics, Retrived from http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/ (last visited Oct. 12, 2016).

Egan, L. (2009). Criticism of Expanding FOS Jurisdiction. Money Management. Retrieved from www.moneymanagement.com.au/news/criticism-ofexpanding-fos-jurisdiction.

Fan Yu.(2007).*The Theory and Practice of Dispute Resolution*, Qinghua Press.

F. Weber.(2015). Is ADR the Superior Mechanism for Consumer Contractual Disputes? – an Assessment of the Incentivizing Effects of the ADR Directive, *38 JCP 2015*.

Financial Industry Disputes Resolution Centre Ltd.(n.d.). Adjudicators. Retrieved from www.fidrec.com.sg/website/adjudicators.html.
(n.d.). The Jurisdiction of FIDReC. Retrieved from www.fidrec.com.sg/website/jurisdiction.html.
(n.d.). Terms of Reference. Retrieved from www.fidrec.com.sg/resources/tor/FIDReC_TOR.pdf.
(2005– 2006). *Annual Report 2005/6*.
(2009– 2010). *Annual Report 2009/10*.

Financial Services and Markets Act, 2000, (U.K.), available at: http://www.legislation.gov.uk/ukpga/2000/8/section/22.

Financial Ombudsman Service, Australia. (n.d.). Dispute Handling Process in Detail. Retrieved from www.fos.org.au/centric/home_page/resolving_disputes/dispute_handling_process_in_detail.jsp.
(n.d.). Financial Difficulty. Retrieved from www.fos.org.au/centric/home_page/resolving_disputes/financial_difficulty.jsp.
(n.d.). Online Form. Retrieved from https://forms.fos.org.au/OnlineDispute.
(n.d.). The Financial Ombudsman Service establishes Mutuals and Insurance Broking divisions. Retrieved from

www.fos.org.au/centric/home_page/news/the_financial_ombudsman_service_establishes_mutuals_and_insurance_broking_divisions.jsp.
(n.d.). Submission: inquiry into collapses in the financial services industry. Retrieved from www.aph.gov.au/senate/committee/corporations_ctte/fps/submissions/sub353.pdf.
(2008– 2009). 2008-2009 *Annual Review*. Retrieved from www.fos.org.au/centric/home_page/publications/annual_reports_archive.jsp.
(2010). ASIC-approved Terms of Reference. Retrieved from www.fos.org.au/centric/home_page/about_us/terms_of_reference_b.jsp.
(2010). Terms of Reference. Retrieved from www.fos.org.au/public/download.jsp?id=4040.
(2010–2011). 2010–2011 *Annual Review*. Retrieved from www.2.fos.org.au/annualreview/2010-2011/our-members.html.
'ASIC-approved Terms of Reference effective from 1 January 2010', amended 1 July 2010, available at: www.fos.org.au/centric/home_page/about_us/terms_of_reference_b.jsp [accessed 1 September 2016]

Financial Ombudsman Service, UK. (n.d.). A quick guide to how we handle disputes between businesses and consumers. Retrieved from www.financialombudsman.org.uk/publications/technical_notes/QG7.pdf.
(n.d.). About Us. Retrieved from www.financial-ombudsman.org.uk/about/index.html.
(n.d.). Frequently-asked Questions. Retrieved from www.financialombudsman.org.uk/faq/answers/research_a5.html.
(n.d.). Online technical resource. Retrieved from www.financialombudsman.org.uk/publications/technical_notes/pensions.html
(n.d.). Our Organisation Chart. Retrieved from www.financialombudsman.org.uk/about/organisation-chart.htm.
(n.d.).Our Consumer Leaflet: Your Complaint and the Ombudsman Retrieved from http://www.financial-ombudsman.org.uk/publications/consumer-leftlet.htm.
(n.d .). The Case Fee. Retrieved from www.financialombudsman.org.uk/faq/answers/research_a5.html.
(1999–2000). *Annual Report 1999/2000: Laying the foundations*. Retrieved from www.financial-ombudsman.org.uk/publications/first-annual-report/ar-1999-2000.pdf.
(2009–2010). *Annual Review 2009/2010*. Retrieved from www.financialombudsman.org.uk/publications/ar10/ar10.pdf.
(2010–2011). *Annual Review 2010/2011*. Retrieved from www.financialombudsman.org.uk/publications/ar11/ar11.pdf.
(2011–2012). *Annual Review 2011/2012*. Retrieved from www.financialombudsman.org.uk/publications/ar12/ar12.pdf.
(2012–2013). *Annual Review 2012/2013*. Retrieved from www.financialombudsman.org.uk/publications/ar13/ar13.pdf.

(2013–2014). *Annual Review 2013/2014*. Retrieved from www.financialombudsman.org.uk/publications/ar14/ar14.pdf.
(2014–2015). *Annual Review 2014/2015*. Retrieved from www.financialombudsman.org.uk/publications/ar15/ar15.pdf.

Financial Industry Regulatory Authority.(May 4, 2010). FINRA to Perform NYSE Regulation's Market Oversight Functions. Retrived from http://www.finra.org/Newsroom/NewsReleases/2010/P121365.
(n.d.). Overview of Arbitration & Mediation Retrived from http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/OverviewofArbitrationMediation.

Financial Services and the Treasury Bureau. (February 2010). Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre: Consultation Paper. Retrieved from www.gov.hk/en/residents/government/publication/consultation/docs/2010/consult_iec_fdrc_e.pdf.
(13 December 2012). Consultation Conclusions on Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre. Retrieved from www.fstb.gov.hk/fsb/ppr/consult/doc/consult_iec_fdrc_conslusion_e.pdf.

Gary Soo, Yun Zhao & Dennis Cai.(2010). Better Ways of Resolving Disputes in Hong Kong-Some
Insights from the Lehman-BrothersRelated Investment Product Dispute Mediation and Arbitration
Scheme, *9* ***J.*** *Int'l Bus. & L. 137, 146-47*.

G. Wanger.(2014). 'Private Law Enforcement through ADR: Wonder Drug or a Snake Oil?' *51 Common Market Law Review 2014*.

G. Ruhl. (2015). Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts. A Critical Evaluation of the European Legislature's Recent Effort to Boost Competitiveness and Growth in the Internal Market *38 JCP 2015*.

Gu Weixia.(2010). Civil Justice Reform in Hong Kong: Challenges and Opportunities for Development of Alternative Dispute Resolution *40 H.K. L.J. 43,52*.

Hensler, D. R. (2003). Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System. *108 Penn State Law Review*, 165 – 197.

Herbert Smith. (2009). ADR for financial sector retail to start soon, but it is still flawed. Retrieved from

www.herbertsmith.com/NR/rdonlyres/EA8A230E-9964-48ED-B3E4-7B5E613BDB15/13439/RegulatoryNewsletterNo16ENovember2009.pdf.

Hodges, C. (2010). Collective Redress in Europe: the new model. *Civil Justice Quarterly*, Vol.29(3),
370 – 395.

Hong Kong Democratic Foundation.(Nov.2008). Proposalfor Resolution of Mini-bond Issue.
Rtrived from
http://www.hkdf.org/pr.asp?func=show&pr=178.

Hong Kong International Arbitration Centre. (Oct. 31, 2008). HKIAC to Provide Mediation and Arbitration Services for Lehman-Brothers-RelatedInvestment Products Dispute. Retrived from
http://www.hkiac.org/images/stories/mediation/081031_Lehman_E.pdf.

Hong Kong Association of Banks.(2008). The Hong Kong Association of Banks Sets Up Task Force
to Follow Up Lehman Brothers Incident Retirved from
http://www.hkab.org.hk/DisplayWhatsNewsAction.do?ss=1&id=37 (last visited Oct.11, 2016).

Hong Kong Consumer Council.(2008). Consumer Council Has Put in Place a Special Workforce to Handle the Lehman Brothers Cases, available at:
http://www.consumer.org.hk/website/ws_en/news/press_releases/2008103001.html.
(n.d.). Year Ender 2008, *available at:*
http://www.consumer.org.hk/website/ws_en/news/press_releases/2009011901.html.
(n.d.). Public Education Proved to be Effective: Consumer Complaints Alleviated in 2010, available at:
http://www.consumer.org.hk/website/ws_en/news/press_releases/2011012701.html.

Informationfor Businesses Covered by the Ombudsman Service: How the Ombudsman Service
Reaches Decisions, *Financial Ombudsman Service*(Jan. 8, 2013), *avaliable at*
http://www.financialombudsman.org.uk/faq/businesses/answers/decide_cases_aI .html.

James T. Koebel.(2010). Trust and the Investment Adviser Industry: Congress 'Failure to Realize FINRA' Potential to Restore Investor Confidence, *35 Seton Hall Legis. J. 61*.

Janet Martinez & Stephanie Smith.(2009). An Analytic Framework for DisputeSystem Design, *14 HARV. NEGO. L. REV. 123*.

Jeremy Cooper(2009). FinancialOmbudsman Service 2009 National Conference FinancialServices -
the ChangingLandscape, *Austranlian Securites & Investments Commision* [at] 2 (Jun. 11-12,
2009), available at:
http://www.asic.gov.au/asic/pdflib.nsf/add907be1c708f42ca256aca0007f465/dde0857fa789274cca2575d2001bdfd4/$FILE/FOS_speech-11 Jun09.pdf.

J. Luzak. (2016). 'The New ADR Directive: designed to fail? A short but hole-ridden stairway to consumer justice' *1 ERPL 2016*.

J.I. Gross. (2010). The End of Mandatory Securities Arbitration? *30 Pace L. Rev. 1174*.

J. Gross.(2006). Securities Mediation:Dispute Resolutionfor the IndividualInvestor, *21 OHIO ST. J. ON DISP. RESOL. 329***.**

J. Lande.(2002). Using Dispute System Design Methods to Promote Good-Faith Participationin Court-Connected Mediation Programs, *50 UCLA L. REV. 69*.

Karmel, R. S. (2008). Should Securities Industry Self-Regulatory Organizations be Considered Government Agencies? *Stan. J.L. Bus. & Fin.*, Vol.14, 151.

Klijn, W. (2008). Govt gives FOS green light. *Investor Daily*. Retrieved from www.investordaily.com.au/cps/rde/xchg/id/style/4653.htm?rdeCOQ=SID-0A3D9633-A6FEA22A.

Koebel, J. T. (2010). Trust and the investment adviser industry: Congress' failure to realize FINRA's potential to restore investor confidence. *Seton Hall Legis. J.*, Vol.35, 61.

Legislative Council Secretariat (2010), *Note: Financial Ombudsman System in the United Kingdom*
available at:
http://www.legco.gov.hk/yr09-10/english/sec/library/0910in15-e.pdf.

Lief Soreide.(2010). Statistics Reveal Chances of Recovering in a FINRA Arbitration, *FREE PRESS*
RELEASE (Feb. 2010) available at:
http://www.free-press-release.com/news-statistics-reveal-chances-of-recoveringin-a-finra-arbitration-1266711057.html(last visited Oct.14, 2016).

Llewellyn, D. T. (2006). Institutional Structure of Financial Regulation

and Supervision: the basic issues. Retrieved from http://siteresources.worldbank.org/INTTOPCONF6/Resources/2057292-1162909660809/F2FlemmingLlewellyn.pdf.

L. Konish. (2011). All-Public Panels Approved for Arbitrations; A Step in the Right Direction or Just a Cost Increase?, *Wall Street, Mar. 1*, available at: http://www.onwallstreet.com/owsissues/2011_3/all-public-panels-approved-for-arbitrations-2671609-1.html (last visited October.2,2016).

Lisa Blomgren Bingham et al.(2009). Dispute System Design andJustice in Employment DisputeResolution: Mediation at the Workplace *14 HARV. NEGO. L. REV. 1*.

Li Huijun.(2012). On the Multiple Solutions for Financial Consumer Disputes under the Alternative Dispute Resolution Mechansim *Shanghai Finance* Vol.10 2012

Li Jingwei & Zhou Zhongfei. (2002). English Financial Service Authority and Its Experience for China *Foreign Economies and Management* Vol.24(2).

Miyatake, M. and Andriotis, T. (2010). Japan's New Financial ADR System. *Bloomberg Law Reports*. Retrieved from www.hugheshubbard.com/files/Publication/e66266f4-0130-4416-ae75accafffcde78/Presentation/PublicationAttachment/4792b24e-4239-45b5-a62a-b7b03488f6df/Japan's%20New%20Financial%20ADR%20System%20%20Andriotis%20Bloomberg%20Article.pdf.

MonetaryAuthoruty of Singapore, Investigation Report on the Sale and Marketing of Structure Notes Linked to Leman Brothers (July 7, 2009), available at: http://www.lioninvestor.com/code/uploads/structured-products-investigation-report.pdf.

Morris , E. (2008). The Financial Ombudsman Service and the Hunt Review: continuing
evolution in dispute resolution. *J.B.L.*, Vol. 8, 785 – 808.

National Alternative Dispute Resolution Advisory Council. (2003). ADR Statistics – Published Statistics on Alternative Dispute Resolution in Australia. Retrieved from www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(960DF944D2AF105D4B7573C11018CFB4)~ADRstats+2003.pdf/$file/ADRstats+2003.pdf.

N. Reich. (2014). A "Trojan Horse" in the Access to Justice - Party Autonomy and Consumer Arbitration in Conflict in the ADR-Directive 2013/11/EU?, *10 ERCL 2014*.

P. Cortes. (2015). A New Regulatory Framework for Extra-judicial Consumer Redress: Where We Are and How to Move Forward, *35 Legal Studies 2015*.

Pokrajac, M. (20 August 2010). FOS upgrades dispute resolution approach. Retrieved from www.moneymanagement.com.au/news/fos-upgradesdispute-resolution-approach.

Powell. (2008). Business Law: What Montana Lawyers Need to Know about FINRA, *33*
Montana Lawyer 31.

Review of the Financial Industry Complaints Service 2002 – Final Report.

Richard C. Rueben. (2005).Democracy and Dispute Resolution: Systems Design and the New Workplace, *10 HARV. NEGO. L. REV. 11*.

R.S. Karmel. (2008). Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?, *14 Stan. J.L. Bus. & Fin.151*.

Samuel, A. (2010). With Arbitration Facing Restrictions, It's Time to Look at A UK Solution for Consumer Disputes. *Alternatives to the High Cost of Litigation: the Newsletter of the International Institute for Conflict Prevention & Resolution*, Vol.28, 111 – 113.

Schneider, Andrea Kupfer. (2008). The Intersection of Dispute Systems Design and Transitional Justice. Harvard Negotiation Law Review. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296183.

S. Choi, J. E. Fisch & A. C. Pritchard. (2010). Attorneys as Arbitrators *39 J. Legal Stud 109.*

Shuji Yanase.(2013).The Standards of Judgment for Dispute Resolution in Financial ADR of Japan *26 Colum. J. Asian L. 29.*

S. Kratsch (2010). The Financial Crisis: Arbitration as a Viable Option for European Financial Institutions, *76(4) Arbitration 680*.

UN Department of Economic and Social Affairs. (1999). Part II. *UN Guidelines for Consumer Protection*. Retrieved from
www.un.org/esa/sustdev/publications/consumption_en.pdf.

UN Division for Sustainable Development Department of Economic and Social Affairs. (1998). Consumer protection and sustainable consumption: new guidelines for the global consumer. *Background paper for the United Nations inter-regional*

expert group meeting. Retrieved from www.un.org/esa/sustdev/sdissues/consumption/cppgoph4.htm.

United Nations. (n.d.). Background. Retrieved from www.un.org/millenniumgoals/bkgd.shtml.

Wang Jun(2013). Study on Consumer Finance ADR mechanism *Huabei Finance* Vol.9 2013.

Wilson Wong& Raymond Yuen.(2009). The Ombudsman in Hong Kong: Role and Challenges under the Transformation of Governance in the Post-1997 *Era 17 Asia Pac. L. Rev. 115*.

Wong, E. (2008). Singapore: Financial Regulation – Dispute Resolution Schemes. *J.I.B.L.R.*, Vol. 23(1), N10 – 11.

Xing Huiqiang(2009).A New Way to Solve Disputes Arising Out of Financial Consumption. *Modern Law Science* Vol.31(5).

Xing Huiqiang(2011) Analysis about the Establishment of Multi-Dispute Resolution Mechanism in Financial Services Industry and Advice to Beijing. *Law Science Magzaine* Vol.2 2011.

Xu Huijuan(2005). On Financial Ombudsman System in UK and Protection of Consumers' Rights and Interests – Comment on Our Financial Regulations. *Finance Forum* Vol.1 (2005).

Yang Dong(2013). Introduction and Comment on Government-Led Financial Ombudsman Service System *Tribune of Political Science and Law* Vol.31(3).

Yang Dong(2013). Typed Research on Financial Ombudsman Service Scheme *Law Review* Vol.180(4) 2013.

Yin Jianmin, Huang Wei(2013). On Operating Mechanism and Inspiration of the Financial Ombudsman Institution in Tai Wan, China. *Shang Hai Finance*, Vol.7 2013.

Yokoi-Arai, M. (2004). A Comparative Analysis of the Financial Ombudsman Systems in the UK and Japan. *Journal of Banking Regulation*, Vol.5, 333 – 357.

Zhu, S. (2009). Legal Aspects of the Commodity and Financial Futures Market in China. *The Brooklyn Journal of Corporate, Financial & Commercial Law*, Vol.3, 377 – 430.