



A Fair Alternative to Unfair Arbitration: Proposing an Ombudsman Scheme for Consumer Dispute Resolution in the USA

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ABSTRACT

Mandatory arbitration is facing a backlash in the United States of America. Recently proposed legislations are geared to severely restrict the scope of mandatory arbitration in consumer disputes. This Article proposes the creation of a new hybrid ombudsman scheme on the lines of the Financial Ombudsman Service found in the UK for resolving consumer disputes in the US. The multi-tier alternative dispute resolution system integrating mediation, recommended settlements and adjudications adopted by the FOS internally and the unique position it enjoys in relation to various actors such as the regulators, courts, industry and consumers within the dispute resolution framework enables it to not only act as a grievance addressal point but also as an agent of change. It is about time unfair mandatory arbitration is replaced with fair alternatives such as a hybrid ombudsman scheme.

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KEYWORDS

Ombudsman, Hybrid Ombudsman, Mandatory Arbitration, Financial Ombudsman Service, Consumer Disputes



INTRODUCTION

Mandatory arbitration is facing a backlash in the United States of America (US). Several proposed legislations loom large on the fate of pre-dispute mandatory arbitration in the US that can void all pre-dispute mandatory arbitration agreement in consumer, employment, antitrust and civil rights disputes. This is not the first time that mandatory arbitration has come under attack. Often perceived as being preferred by businesses and law firms, mandatory arbitration has been under serious scrutiny for over a decade. In this backdrop, this article proposes the idea of introducing a Financial Ombudsman Service (FOS)-like scheme to resolve consumer disputes in the US as an alternative to pre-dispute mandatory arbitration. The FOS is an innovative multi-tier dispute resolution system that employs mediation, recommended settlement and adjudication to resolve disputes. Its unique position in relation to consumers, industry and the legislature enables it to transcend the (old-generation) traditional idea of ombudsman as a grievance addressal point to a (new-generation) participative agent in reforming laws, in this case, laws affecting consumers.

This article first provides a brief background and contextualises the proposal by exploring whether mandatory arbitration is a suitable means of resolving consumer disputes. The second part explores the concept of 'hybrid' ombudsman and differentiates it from the traditional and organisational ombudsman schemes. The third part explores the internal mechanics and external synergies of the FOS. The fourth part compares mandatory arbitration with the FOS and discusses why an FOS-like system works better than mandatory arbitration, particularly in resolving consumer disputes. The fifth part discusses the feasibility of such a scheme in the US followed by the conclusion.

MANDATORY ARBITRATION AND CONSUMER DISPUTES

After the Great Depression in 1929 and the Second World War, the US emerged as a market leader leaving behind many countries to follow its foot trail. As an unmatched leader, openly and proudly supporting free trade and capitalism it gave to the people of the world the 'American Dream'. Trade and commerce progress in tandem with a legal system that facilitates trade and effective resolution of commercial disputes. In addition to business-friendly laws, U.S. encouraged the growth of commerce by creating a congenial atmosphere for resolution of commercial disputes by enacting the New York Arbitration Act, 1920 and the United States Arbitration Act, 1925 (renamed as the Federal Arbitration Act (FAA) in 1947). The FAA was supported by business community which viewed litigation as expensive, slow and ill-suited to the growing needs of commerce. Arbitration given its flexibility, cost effectiveness, neutrality and finality of awards became the preferred means of dispute resolution for businesses (Sussman, 2007). The fundamental principle underlying the FAA is the enforceability of arbitration agreements (Watler, 2010). The Senate Report (No. 536 68th Cong. 1st Session 2-3 of 1924) highlights that disinclination of courts to enforce arbitration agreements was one of the primary reasons for the enactment of the FAA (LeRoy, 2007). The founding of the American Arbitration Association (AAA) in 1926 signalled changes to the attitude towards arbitration. The New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards, 1958 (NYC) though adopted by the US only in 1970, fostered the growth of arbitration nationally and internationally. Eventually, courts began to give liberal interpretations to arbitration clauses (Sussman, 2007) and pre-dispute mandatory arbitration clauses also made their way expansively into consumer contracts.

The unintended effects of pre-dispute mandatory arbitrations, however, began to be felt and arbitration came to be viewed as a means of circumventing mandatory rules and as an instrument of oppression. More particularly, mandatory arbitration came under serious scrutiny when the



Attorney General of Minnesota filed a lawsuit against the National Arbitration Forum (NAF) alleging bias, fraud, unfair consumer practices in arbitrations administered by NAF. Professor Elizabeth Bartholet, former NAF arbitrator was removed from being the arbitrator in various pending cases, after she delivered an award against a company. In her deposition against NAF, she complained of “systematic bias” of NAF in favour of big companies. NAF quickly reached a settlement with the Attorney General’s office to immediately stop administering consumer arbitrations (Budnitz, 2010). Following the NAF imbroglio, pre-dispute mandatory arbitration came to be regularly attacked by consumer rights groups.

Consumer disputes in the US are currently resolved in various ways- mediation and arbitration being the most commonly used mechanisms. Consumers can seek help from local consumer agencies, better business bureaus for guidance in choosing the right forum for their grievance redressal. Furthermore, State Attorney General’s Office(s) has a Consumer Protection Division which deals with consumer grievances. They file cases against firms for fraud and unfair market practices. However, these divisions cannot force businesses to come forward for negotiations, mediations or arbitrations or act as private attorneys for an aggrieved consumer. Instead they act as watchdogs for consumer rights abuse.

Pre-dispute mandatory arbitration has been controversial. It gives rise to serious issues of consent (Budnitz, 2010) and unfairness (Dillon-Coffman, 2010) since consumers sometimes, unknowingly sign contracts containing such clauses without having any meaningful say in selecting the forum (Schmitz, 2007) thereby giving up their right to access courts and jury trial (Budnitz, 2010). Mandatory arbitration therefore suffers from gaping holes in terms of procedural fairness such as in the mode of selecting arbitrators, institutions and rules (Schwartz, 2009). Critics of mandatory arbitration point out that the system is biased in favor of businesses as they can repeatedly appoint pro-business arbitrators who tend to favor businesses over consumers. Critics further point out that the system lacks transparency, accountability and undermines the development of public law. In 2007, an attempt was made to introduce an Arbitration Fairness Act and ever since then (with legislations introduced in the years 2009, 2011, 2013, 2015, 2017, 2019) there’s been an ongoing attempt to introduce measures to restrict mandatory arbitration and promote fairness in dispute resolution between consumers and businesses. Several legislations have been introduced to do away with pre-dispute arbitration provisions in consumer contracts but without much success. Some of these proposed legislations namely Restoring Statutory Rights and Interests of the States Act of 2016, Mandatory Arbitration Transparency Act of 2017, Arbitration Fairness Act of 2018, Forced Arbitration Injustice Repeal Act 2019, Arbitration Fairness for Consumers Act 2019, Mandatory Arbitration Transparency Act of 2017, Investor Choice Act of 2017 can significantly affect the future of mandatory arbitration in the US.

This period of scepticism towards mandatory arbitration presents an opportunity to experiment with other mechanisms of dispute resolution, such as a hybrid ombudsman scheme. Considering the uncertainties associated with the future of mandatory arbitration, there is merit in exploring other mechanisms of dispute resolution that can counterbalance the problems posed by mandatory arbitration without necessarily burdening the courts with more disputes. Consumers are also likely to support an ombudsman scheme which is generally regarded as much more consumer-friendly than mandatory arbitration. This article proposes the idea of an FOS-like scheme for resolving consumer disputes.

OMBUDSMAN- CLASSICAL, ORGANISATIONAL, HYBRID

Historically, the institution of ombudsman emerged in Sweden- the Justitieombudsman, and gradually spread across to other Scandinavian countries during early nineteenth and twentieth centuries (Doyle & Fenn, 2003). In 1919, Finland became the second country to adopt the practice followed by Denmark (in 1955), Norway (Gellhorn, 1966) and New Zealand (in 1962).



The earliest use of the term and its establishment is attributed to the Swedish Parliament in 1809 that intended to provide a means by which citizens could pursue grievances against the administrative and executive branches of the government (Rowe & Gadlin, 2014). In due course, many other countries adopted the practice to effectively remove friction between the Government and its citizenry.

Over a period of time, the traditional idea of ombudsman has evolved into different forms. The classical ombudsman (as one removing friction between the government and its citizenry) paved the way for organisational ombudsman (as one resolving disputes between an individual and a private/public organisation) (Stieber, 2000). In the traditional sense the ombudsman was the representative of the people who bridged the gap between the ruler and the ruled. He was responsible for removing friction between state officials and the common citizenry since the state exercised substantial power over the lives of its citizens (Rawlings & Willett, 1994) and generally enjoyed a security of tenure. Organisational ombudsmen on the other hand are engaged by organisations and corporations to resolve day to day differences. Organisational ombudsman is a professional manager within an organisation who is committed to the organisation he or she serves, yet his/her loyalty is subservient to the principles of fairness and impartiality (Rowe & Gadlin, 2014). Compared to the role of classical ombudsman, the organisational ombudsman model is quite restrictive in its scope (Brandon et al. 1984; Foegen, 1972; Meltzer, 1998; Kahana, 1994). They serve as a platform to express concerns and resolve disputes that arise within a particular organisation and thus act as an alternate and informal channel of communication (generally) without much capacity to hold formal investigations, adjudicate or arbitrate disputes. Organisational ombudsmen have much less protection and can be vulnerable to budget considerations and associated trappings of corporate culture. But despite these structural differences, ombudsman in both forms aim to humanise administration, support fairness, accountability, and equity and provide a chance for ordinary people, those without power or privilege, to be heard and to get fair treatment (Stieber, 2000).

In the course of its evolutionary journey, in addition to the above mentioned classical and organisational ombudsman, the institution of ombudsman has also developed into hybrid forms. Unlike classical or organisational ombudsmen schemes, a hybrid ombudsman may be set up by the Parliament but can be funded by private parties. Some hybrid (private-sector) ombudsman schemes can resolve disputes between two private parties. The FOS is a remarkable hybrid ombudsman scheme, which is an independent expert in settling complaints between consumer and businesses providing financial services. Though set up by the Parliament as an independent public body, the FOS is a company limited by guarantee (not having share capital) called the Financial Ombudsman Service Limited and it is funded by levies and fees paid by businesses. Whereas classical and organisation ombudsman act as a grievance redressal point, their potential to bring about changes within the system is limited. The FOS, on the other hand can significantly affect the larger system in which it operates.

THE FINANCIAL OMBUDSMAN SCHEME IN UK

The FOS is essentially a dispute resolution system between consumers and businesses in the financial market. It has been set up as an independent public body by the Parliament to deal with complaints and resolve them in a fair and impartial way. Despite being set up as a public body, the origin of FOS dates back to 1981 when four insurers formed the Insurance Ombudsman Bureau (IOB) to handle consumer grievances against themselves (Samuel, 2010). With other insurers joining the IOB, its holding expanded and in 2000, the Government fused the IOB with other consumer financial ombudsman organisations to form the FOS.



Internally, the FOS processes complaints in different stages. The complainant can make a complaint by telephone or by filling up an online form or by making a complaint by post. The internal complaint (depending on how it is received) goes through the call centre routing of complaints, the adjudicator conciliation, and the ombudsman review (Schwarcz, 2009). At the first instance, complaints are to be directed to the firm against whom the private consumer has grievances which then responds to the customer. Such responses should sufficiently address the subject matter of the complaint and if complaint is legitimate the firm must take appropriate remedial action (MacNeil, 2007). The firm then informs the customer about any remedial action taken and provides him the information about the ombudsman service available. If the customer is not satisfied with this response, he can contact the call centre of the FOS which routes the complaint to the adjudicator. The adjudicator investigates the case by collecting and examining relevant documents in an inquisitorial way and then attempt to settle the dispute between the customer and the firm by way of guided conciliation/mediation. The adjudicator considers relevant laws, regulations and codes of practice and tries to conciliate in an informal setting, giving each party various concessions to mutually settle the matter. The internal complaint system, call centre and guided conciliation/mediation by the adjudicator helps in checking trivial complaints and a bulk of them are either settled or withdrawn. If the parties are still not satisfied, they can “appeal” to the Ombudsman who reviews and renders a formal decision at this stage.

Externally, the FOS shares a wide network of relationships with other actors i.e., customers, industry, regulators, and courts. In relation to the disputing parties (customers and firms), the FOS service is provided free of cost to the customers. The decision rendered by the Ombudsman is not binding on the customer and he is free to pursue other legal remedies. In relation to the regulator (the Financial Services Authority (FSA)), both FOS and FSA have rule making responsibilities under the Financial Services and Markets Act of 2000, but the FOS is free on consumer grievance redressal aspects. The FSA maintains a strong hold over policy matters i.e., approve its annual budget, set limits of monetary jurisdiction of the FOS, setting rules governing its compulsory jurisdiction etc. (James and Morris, 2003). The FOS, on its part, can give feedback on the general functioning of the industry and share data for formulating policy decisions and guidelines relating to consumer grievance redressal system. This connection with regulatory agency opens up avenues for constructive communications and it can liaise with regulators to construct new rules (Merricks, 2001) and bring about changes in the industry. In relation to courts, FOS is separate from the court system and keeps disputes out of the court system but, unlike courts’ decisions wherein orders are binding on both parties, here ombudsman’s decisions are binding only on the firm. It therefore, stands in a unique nodal position in relation to the consumers, the industry, and the regulators (Merricks, 2001).

The FOS incorporates elements of negotiation, conciliation, mediation, adjudication reaping the benefits of all the ADRs thereby making it a very effective, consistent means for dispute resolution. The network shared by the FOS with external actors differentiates it from other forms of dispute resolution and highlights why it has the potential to do better than the other ADRs functioning independently. The synergies generated by the FOS’s distinctive position also makes it a unique organisation and places it in an arrangement through which it can effectively serve the customers and the industry by resolving their disputes, the regulators/law makers by providing them guidelines for making new policies, the courts by keeping litigations away from their purview. The FOS therefore shows promising potential for resolving general consumer disputes, even beyond the financial market.

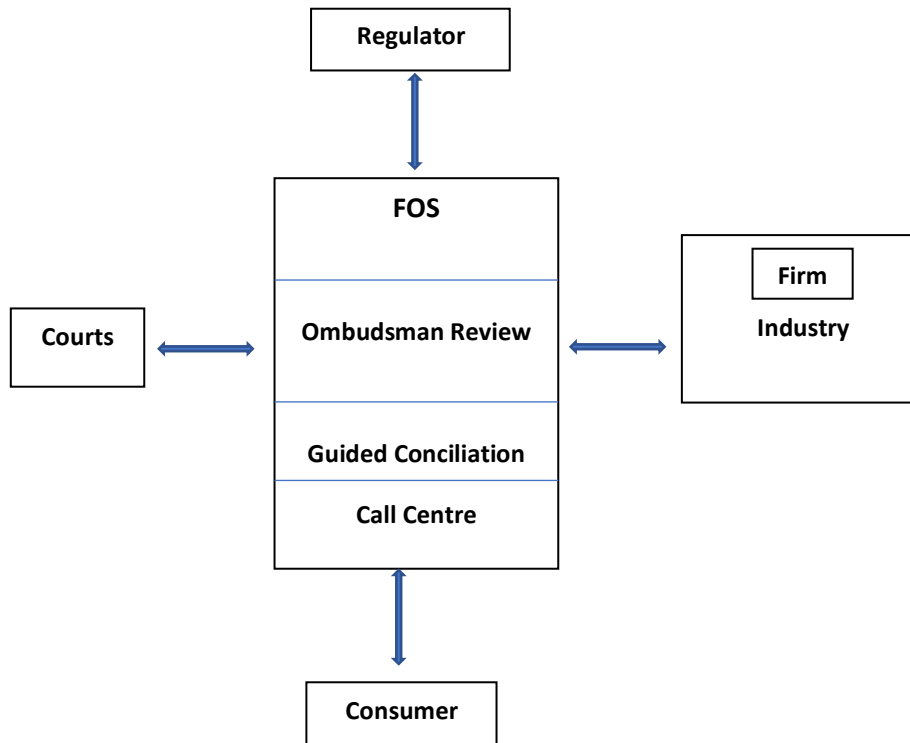


Figure 1: FOS internal process and external synergy

MANDATORY ARBITRATION VIS-À-VIS THE FOS FOR CONSUMER DISPUTE RESOLUTION

FOS integrates a multi-tier dispute resolution structure internally and enjoys a unique nodal position relative to other actors that makes it a very effective system. Particularly when compared to mandatory arbitration, an FOS-like system is likely to be far more advantageous and especially apropos for general consumer disputes resolution for the following reasons. First, unlike mandatory arbitrations wherein one-off disputes are arbitrated, award rendered and forgotten; an FOS-like system provides an opportunity to oversee and examine unrelated disputes for the purpose of arriving at meaningful policy formulations. This helps in determining changes and trends in consumer attitudes (Rawlings & Willett, 1994). These trends can then be communicated to the regulator who can take them into account for formulating future rules for the industry (Merricks, 2001). Unlike arbitration, an FOS-like system will provide guidance for future regulation based on the experiences of previous cases. In the words of Walter Gellhorn under an FOS-like system, a “particular instance would have a generative force beyond the episode itself” (Gellhorn, 1970). This generative force can also help in avoiding similar problems from recurring.

Second, an FOS-like system counters the problem of opacity, of keeping mistakes/shortcomings of the companies out of public view. For example, nursing home admission contracts which provide for arbitration keep the helplessness of suffering patients of those institutions within the confines of the arbitration table. Any maladministration in such institutions is susceptible to going unnoticed. An FOS-like system can help to bring such issues to fore thereby fostering transparency and accountability (Tripp, 2009).

Third, an FOS-like system serves as a watchdog for the industry. The arbitration industry as such does not have any inbuilt mechanism to receive feedback on its own functioning. An FOS-like

system overcomes this limitation. For example, in the field of consumer arbitration, when the NAF was accused of defrauding customers (Salzwedel & Wells, 2009), there was no system in place to take into account such incidences. Though other arbitration institutes such as the AAA at that time voluntarily suspended its consumer debt arbitration, arbitrators and arbitration institutions remained immune from civil claims. Though some commentators have recommended diluting arbitral immunity, there was hardly any response from the arbitration industry except for adopting code of ethics which are completely dependent on voluntary compliance by arbitration providers. The prospect of connivance among arbitrator, arbitration provider and company (respondent) is not present in an-FOS like system. The effect of repeat player advantage and repeat payer bias do not arise in the FOS-like scheme. Though funded by the industry, and recognised by regulators, the FOS as such is independent from the industry, regulators, consumers and consumer bodies.

Fourth, ombudsman in an FOS-like system in certain circumstances is not bound to strictly follow the law and can give rulings as per their sense of justice. The ombudsman can disregard rigid application of prescribed legal rules if such an approach is necessary to reach a fair result by adopting alternative considerations. This safeguards the spirit if not the letter of the law (MacNeil, 2007). It is especially suitable in the field of consumer protection where sometimes “notions of justice do not agree with the rules of law” (Rawlings & Willett, 1994). An ombudsman in an FOS-like system can go beyond parties’ submissions and pleadings in making his determination. As illustrated in the case of *R (on the application of Green Denman & Co) v Financial Ombudsman Service Ltd.* (2003), the court specifically stated that “In some contexts, it is unfair for a decision maker to go beyond the points put forward by the complainant. In litigation before the courts, for example, the issues are normally defined in the parties’ pleadings and the court will not normally decide the case on a point that has not been raised in the pleadings (although they may be amended to raise an issue suggested by the court if no unfairness results). The present context is very different... It cannot therefore be contended that the Ombudsman acts unfairly if he decides against a respondent on the basis of a comparison of the rival pension schemes that the complainant did not make”. Therefore, such a scheme is more consumer friendly and fairer than mandatory arbitration.

Fifth, under an-FOS like system a consumer is not intimidated by his lack of procedural knowledge as is the case with arbitration. Third-party grievance handling institutions are democratic instrumentalities (Adler, 2003) which employ expectation management strategies to win over complainants (Gilad, 2008). It works towards improving the structure of consumer dispute resolution. They try to remove lack of familiarity and procedural obstacles thereby improving consumer access to justice. An FOS-like system is simple and makes hiring legal representation by the complainants unnecessary hereby also saving legal costs (Samuel, 2010).

Sixth, an FOS-like system does not obstruct the development of law and can impact reformation of the law. Arbitration as an alternative to litigation is often criticised for stagnating the development of law by taking disputes outside the purview of courts. An FOS-like system overcomes this problem. An FOS-like system does not completely take cases outside the court system since the complainant has the option of going to the court if he does not accept the decision of the ombudsman. Furthermore, ombudsman train and mentor adjudicators, which gives rise to an “institutional culture that impacts the decision-making heuristics and instincts of individual adjudicators” (Schwarcz, 2009) which results in consistent decisions, brings about predictability and improves the dispute resolution system. Rawling and Willett, quote the example of the attack made by an Ombudsman on the first draft of Code of Banking Practice in UK (Rawlings & Willett, 1994), a perfect example to highlight the reformatory role played by the FOS-like scheme.

Seventh, one of the arguments against arbitration is that it is private adjudication of disputes and that arbitrators and their awards are relatively free from public scrutiny. An FOS-like system easily overcomes such a problem. Ombudsman's awards can be placed for review in courts and are appealable by consumers unlike that of an arbitrator whose awards are final and binding. Moreover, ombudsman's decisions unlike (most) arbitration awards can be published (Schwarcz, 2009).

Eighth, one of the key advantages of such a system is its multi-tier internal procedure, that reduces the burden on courts. These internal stages help filter out avoidable disputes. The decisions of the Ombudsman are binding on the complainants only if they accept it, leaving them with the option of litigation. But in practice, few complainants do so (Samuel, 2010). Consumers do not resort to litigation since adverse rulings by ombudsmen findings can be used against them at the litigation stage (Schwarcz, 2009). Ombudsman practice therefore reduces the burden on courts.

An-FOS like system has several advantages over pre-dispute mandatory arbitration, but the success of such a system also depends on a number of other factors. First, as Rawlings and Willet point out, the success of a model like FOS will depend on publicity by companies. Under the FOS model the complainant first complains to the company/firm which in its response makes available the information about the ombudsman scheme. Those companies against whom the ombudsman repeatedly render awards may not be willing to publicize the scheme (Rawlings & Willett, 1994). This makes it susceptible to the risk of "industry capture" (Samuel, 2010). This problem however can be overcome by facilitating general consumer awareness about the scheme by regulatory authorities. Second, if the FOS model is copied without any adaptations or modifications, it risks adopting the elastic interpretation of the "fair and reasonable" standard used by the FOS ombudsman. It is contended that a wide interpretation of such a standard can lead to distorting the law which will generate legal uncertainty that will deter firms from joining the scheme (MacNeil, 2007). This problem too can be overcome by providing for specific guidelines which ombudsmen must adhere to while deciding cases. Third, some commentators raise the question of supervision of ombudsman schemes and good practice amongst ombudsmen. This criticism can also be dealt with by adhering to the Code of Ethics, Standard of Practice, and Best Practices of the International Ombudsman Association. Furthermore, when compared to court litigation, FOS face some limitations, i.e., it is incapable of resolving disputes with a collective dimension or which involve a conflict between the roles of adjudication (FOS) and regulation (FSA) or cases which involve complex contested factual issues (Kelly-Louw, Rott and Nehf 2016).

FEASIBILITY OF AN FOS-LIKE SYSTEM IN THE AMERICAN SETTING

The suitability of an FOS-like system has been illustrated above, but its feasibility in the American setting is a separate question. Historically, ombudsman practice has been associated with fair play and accountability in democratic governance. Given America's love for democracy, it is in keeping with the American spirit of openness that provides a fertile ground for the institution of Ombudsman to grow and flourish. Furthermore, available expertise in the field to start an FOS-like scheme is yet another reason why it is viable in the US. Organizational ombudsman scheme has been functioning in the US for long. Many such schemes are available in universities, institutions and corporations. The United States Ombudsman Association is a national organisation for public sector ombudsman professionals which provides regular training for the development of the profession. Though the above-mentioned ombudsman schemes are based on the organisational or classical model, their operation provides the insights needed for the successful implementation of an FOS-like scheme. Therefore, there is an existing ancillary support architecture which can foster the growth of an FOS-like system in the U.S. Such an initiative can be taken up by the Government at State-level with monetary cooperation with



private firms as in the case of UK. State Consumer Protection Offices can take up the initiative and integrate such a system within the existing machinery of consumer protection.

An FOS-like system holds promises of efficient and effective resolution of consumer disputes, but there are two significant roadblocks that need to be addressed. Firstly, political differences, that may render an FOS-like scheme infeasible in the US (Schwarcz, 2009). The legislations introduced to curtail mandatory arbitration are viewed by some as an attempt to save the US litigation industry. Given that an FOS-like system impacts the number of litigations that reach the courts, the idea of promoting another alternative dispute resolution mechanism (instead of mandatory arbitration) is irreconcilable with these political motives and this may prove to be a significant impediment in implementation of an FOS-like scheme. Secondly, similar schemes in Australia (replaced by the Australian Financial Complaints Authority) and in Canada (Ombudsman for Banking Services and Investments (OBSI)) have received mixed reviews. For example, the Canadian OBSI has been criticised in an independent review by Nikki Pender and Deborah Battell that it tilts the playing field in favour of firms and that the operating model makes it unable to prevent future complaints, or lift consumer confidence (Kerton and Ademuyiya, 2018). Similarly, within the Australian context, a study found a number of shortcomings in the ombudsman system, and recommended solving securities exchange disputes with arbitration (Jaberi, 2014) because decisions made by ombudsman are not as easily/directly enforceable without court intervention. While the UK FOS gives teeth to the determination by the FOS, institutionally setting up such a mechanism in the US mandates that such shortcomings are meaningfully addressed.

CONCLUSION

For a long time in history, questions have been asked if the American system can be improved by assimilation of ideas and concepts from the British system and vice versa. In light of proposed legislations seeking to curtail mandatory arbitration, the time is opportune to experiment with new ideas. The synergies the FOS reaps given its unique nodal position relative to other actors and the integrated multi-tier dispute resolution it adopts to resolve consumer disputes highlight the potential of hybrid ombudsman schemes. Most consumers, businesses have been fairly satisfied with the FOS scheme in the United Kingdom. It is likely that even in the American setting an FOS-like scheme will receive a similar welcome and achieve similar results. There seems to be no extraordinary hurdle in introducing the concept. In the interest of fairness, adversarial legalism of mandatory arbitration should therefore make way for an inquisitorial approach of ombudsman.



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