

A 'compliant' alternative to FOS.

This is where the compliance issue sits in terms of being able to use an alternative dispute resolution process.

Schedule 17 of FSMA ¹

14 (1) The scheme operator must make rules, to be known as “scheme rules”, which are to set out the procedure for an ombudsman.

14(2) Scheme rules may, among other things—

((c) *provide for the reference of a complaint, in specified circumstances and with the **consent of the complainant**, to another body with a view to its being determined by that body instead of by an ombudsman;*

THE DISP RULES e.g. the Scheme rules

²Grounds for dismissal

DISP 3.3.4 R

The Ombudsman may dismiss a complaint without considering its merits if he considers that:

(7) *the subject matter of the complaint has been dealt with, or is being dealt with, by a comparable independent complaints scheme or dispute-resolution process;* or

(10) it would be more suitable for the subject matter of the complaint to be dealt with by a court, arbitration or another complaints scheme;

DISP 3.4 R

Referring a complaint to another complaints scheme

DISP 3.4.1

1. 2 The Ombudsman may refer a complaint to another complaints scheme where:

(1) he considers that it would be more suitable for the matter to be determined by that scheme; and

(2) the **complainant consents** to the referral.

DISP 1.4.3

The respondent should aim to resolve complaints at the earliest possible opportunity, *minimising the number of unresolved complaints which need to be referred to the Financial Ombudsman Scheme.*

The provisions above explained in plain English

¹ available at http://www.opsi.gov.uk/acts/acts2000/ukpga_20000008_en_48#sch17-pt3)

² available at <http://fsahandbook.info/FSA/html/handbook/DISP/3/3>)

Basically, the law and the DISP rules above provide for situations where, WITH THE COMPLAINANT'S CONSENT, the complaint can be dismissed, or referred to a '*comparable independent complaints scheme or dispute-resolution process*'.

Yes, but what does this mean?

I have a letter from FOS to one of my clients which specifically stated that they were dismissing his case because it had been dealt with by the courts. I have further letters from clients in which a complainant has threatened court action and FOS have told the complainant that unless they stay proceedings, they will dismiss the complaint. So, in practice, if FOS found out that a comparable independent complaints scheme was also dealing with a complaint they would dismiss the complaint.

Similarly, if you brought a civil or criminal action against a complainant in relation to a complaint that was being considered at FOS, FOS would have to dismiss the complaint. But, we want to get into a position where the complaint never 'goes' to FOS.

How to do this?

Easy - use an ouster clause.

What is this?

This is an ADR clause (a clause which states that you will use an informal process such as mediation to resolve a dispute if one arises, and NOT FOS). You include the clause in your existing terms of business and ask your clients if they will agree. For those of you that are technically minded, and have read the legislative provisions above, you will see that provided the client consents, there is NOTHING to prevent this. BUT, consent is KEY.

There are two issues to be considered for your business in practice:

1. Do you intend to try and get all your clients, with whom you have already done business, to accept the 'alternative?'; or
2. Are you going to use the system for complaints going forward from when you add the clause.

Scenario 1

You will need to write out to *all* your clients with whom you have already done business, sending them a copy of your terms of business including the new clause. Then, IF a complaint arises which refers to business already written, and they have accepted the new variation, in writing, and signed to say so, your complaint should be referred to us, or any other firm that represents a '*comparable independent dispute resolution body*'.

Scenario 2

If you want to use the clause to deal with complaints going forward, leaving complaints about previous business to be dealt with by FOS, you just issue new terms of business to clients when writing the business, as you would do normally, and ask them to sign, as normal.

RISK - handle it properly!

So, in practice, you add the ADR clause (which can be provided by JSCS, based on a clause that has been accepted by the Court of Appeal) to your terms of business, and send out a copy to each of your clients, asking them to read, digest and sign their agreement.

BE WARNED -

The courts are not silly, and neither are the FSA and FOS. You will not get away with tricking your clients into accepting the terms. Just as you would with the risk that a client will take with an investment, you **MUST** explain what they would be giving up by using an alternative e.g. they will not be able to refer the matter to FOS - who would presumably dismiss the complaint, but **WILL** be able to go to court. They will, however, receive expert dispute resolution services, which we can provide through JSCS that are equal, if not superior, to FOS.

Explaining to your clients

We can provide an explanatory document, written in plain and simple English, which can be sent along with the proposed new clause. For a set cost, you can refer any questions to us.

WARNING: Remember, consent is key. That does not mean that every client who is invited to accept **WILL**.

What does this mean then?

Well, every client who **DOES** accept, will then be bound to use an alternative process to resolve the dispute if one arises. For those that do not, nothing changes. They will go to FOS, as usual.

For those clients who do accept, whichever of the scenarios you use, **IF** a complaint arises, you simply refer the matter to JSCS for a negotiation or mediation, or evaluation, depending on what the parties decide, and we will assist you in attempting to resolve the matter. Our involvement, when combined with the ADR clause, which has been explained and accepted, in writing, by your client, should lead to the complaint being dismissed at FOS if your client tries to take it there, and is robust enough to withstand scrutiny from the FSA (as explained below).

Why do I think this will work?

Well, whilst FOS have powers over firms, they cannot order complainants about. The system is set up specifically for complainants. By analogy, if the complainant says he does not want to use FOS, he does not have to. Thereby, if you have a contractual arrangement with your client, and they agree - with no duress and having had the full facts explained to them - to use a comparable service, FOS and the FSA can do nothing about it. It is all perfectly legal - and you are compliant.

Furthermore, whilst all firms know that at present FOS sits outside the Civil Justice System, the ADR clauses that we use are recognised and accepted by the courts. So, even if FOS tried to take jurisdiction when the ADR clause had ousted their jurisdiction, you could seek the court's direction on the matter. The effect of this? Well, it then becomes a test case and if you read the DISP rules, where the court becomes involved in a case, FOS declines jurisdiction, in favour of the courts.

Do I have any proof that this will work?

Since this document was drafted, I am pleased to state that a set of terms of business which we drafted to include an ADR clause has passed through the FSA without comment. This is highly promising.

Consent

As stated, the key issue here is your clients' consent. But with their consent you, the parties, can choose to use what you want to resolve any disputes. When better to get their consent, than when you are on good terms - BEFORE a dispute arises, when the business is being written.

What about TCF?

Okay, we all know TCF can be a catchall for any number of issues. At present, the only issue that I can see as problematic is the fact that FOS is free to complainants. Market research with a small number of my clients has shown that they would be happy to continue to pay the whole cost of an endowment negotiation/mediation, if it were comparable, given that they would *have* to pay this if they were dragged to FOS irrespective of whether they win or lose.

Whilst I am obligated to tell you that ordinarily, the costs of a mediation etc... are borne equally by the parties, I would not suggest this in these settings, because the FSA could well find this contrary to TCF.

Your other considerations

1. In terms of pre-empting the FSA, they arguably cannot complain that complainants are being disadvantaged when the proposed method still carries no cost for complainants.
2. JSCS's director was trained by CEDR - who in turn train the English judiciary. Comparable? I think so. Independent? Absolutely.
3. In practice, in every other field, parties share the cost of mediating/arbitration etc... which is infinitely fairer. You could include this provision if you wish, although

you could expect some fallout from the FSA because FOS is free, *but only* if a complainant decided he or she was unhappy when a dispute arose.

4. The FSA cannot have any objection to your clients being treated unfairly if they have consented to use an alternative process, having been given all the facts at the outset, given the opportunity to ask questions - and have them explained - and signed their agreement.
5. Where a client does not wish to use the alternative procedure, and has not signed to accept the clause, and a dispute arises you simply use FOS, accordingly.
6. If you are using a 'comparable' alternative to FOS you might be interested to know that it is most likely that they will follow the laws of the land. Thereby, if I was asked to adjudicate on a dispute, and a firm raised a timebar, based on the proper application of the Limitation Act to the facts, and I was satisfied that it applied, I would consider it a complete defence to the complaint, and would not proceed to consider its merits. This may be said to follow the rules of the PIA ombudsman. Of course, this argument is not 'as' compelling as it used to be for persuading you to use an alternative to FOS because even FOS's manipulation of the Limitation Act 1980 can only go so far, and many endowment complaints can now be timebarred even by their standards.
7. It would be worthy of note that pension review cases, which cannot ordinarily be timebarred, would likely operate on the same basis as FOS for policy reasons. That said, the pension review is ended, and many of the complaints have been resolved. If in doubt, I would simply seek the FSA's guidance.