How do ethics and values in such sensitive issues affect the usual distinction between positions and interests in negotiation? How should relationships be managed in negotiations when the parties intend to continue working together afterward?

In addition, can a mediator help facilitate a multi-party dispute like this? Law classes, business school classes, and arts management classes ought to cover the kinds of difficult conflict raised in this role play, but often the faculty do not have first-hand experience with these questions. These new teaching materials make it easy for instructors to update their curricula. By offering a sequence of role plays, faculty can help their students "work up to" the most difficult current situations. The earlier exercises and readings provided a basis for handling the more complex games that come later.

Role-play simulations (or "serious games") can be powerful tools for teaching and learning in a wide range of contexts. I hope that people from all disciplines and fields will take advantage of the teaching materials Harvard Law School PON's Teaching Negotiation Resource Center has to offer.

ADR Systems

The Pandemic’s Nasty Effects on Consumer Complaints Schemes

BY ADAM SAMUEL

The literature on pandemic dispute resolution has tended to focus on the challenges of holding remote hearings in international arbitration. In reality, though, the vast majority of disputes have nothing to do with arbitration, operate at a purely domestic or even local level, and do not require any form of hearing or personal interaction.

Every day, members of the public, either individuals or businesses, deal and fall out with a wide variety of public and private entities and seek redress in various forms from those entities and bodies set up to enable them to obtain some form of justice. The annual number of cases and the fluctuations involved can be staggering.

Revisiting an Old Friend

Readers of this column may now know a great deal about the United Kingdom’s Financial Ombudsman Service (www.financial-ombudsman.org.uk); see Adam Samuel, "Business Interruption Insurance, Pandemics, And A Very U.K. Story of Dispute Resolution," 39 Alternatives 101 (June 2021) (available at https://bit.ly/3rYQS1G). This agency deals with complaints brought by individuals and small and medium-sized businesses, trusts and charities against financial firms varying from multinational banks to one-person financial advisers.

Its model resembles many similar schemes worldwide. Regulators across Europe insist on the financial business operating a complaints process and paying compensation where fairness requires this. For example, see the U.K.'s Financial Conduct Authority DISP 1.4 Complaints Resolution Rules (available at https://bit.ly/32LdQRd) and Article 26 of the EU MiFID Org Regulation (available at https://bit.ly/3gj8cck) (focusing on complaints in an EU directive on organizational requirements and operating conditions for investment firms; this regulation was discussed at Adam Samuel, "Complaint Handling: The Technique that (Almost) Nobody In the Conflict Resolution World Talks About," 38 Alternatives 109 (July/August 2020) (available at https://bit.ly/347bzAr).)

Only after the internal process has finished can the Ombudsman Service take over with a mixture of evaluative mediation and judging (DISP 3.2.2R, available at https://bit.ly/3odPRBY).

Those with sexism concerns should realize that the Swedish origin of the word "Ombudsman" means that the term does not denote the sex of the person performing the function. The Chief Ombudsman at the Financial Ombudsman Service has been a woman since 2009.

New Complaint Volumes

Various scandals drive fluctuating complaint volumes to both firms and Ombudsman arrangements. In its first 20 years, starting in the year ending in April 2001, case numbers looked like Chart 1 on the following page on new FOS complaints.

The mis-selling of savings plans designed to pay off mortgages—mortgage endowments—fueled the original rise to beyond 100,000 cases in 2005. Similar behavior with respect to payment protection insurance (which insured borrowers against accidents, sickness, and unemployment) led the drive beyond 500,000 complaints.

The imposition of time-bars by the Financial Conduct Authority has now largely removed the effect of both scandals on the numbers (DISP 2.8.6-2.8.10 available at https://bit.ly/3Hxkk5D). See the accompanying PPP Chart 2 on page 52.

The sharp downward drop, generated by a requirement on customers to file the most common types of complaints with firms by Aug. 29, 2019, has continued into the two subsequent years. It is not reflected, however, in a significant fall in actual cases. The reason is a 58% increase in new filings in the last completed financial (continued on next page)
year, unrelated to any particular issue. See the Mainstream Chart 3 on page 53.

Basically, annual numbers of non-PPI or ordinary cases have doubled since 2014. Over half of this doubling occurred during the pandemic.

The Ombudsman Plan and Budget consultation document for 2022-2023 (available at https://bit.ly/3reqgKO) predicts a drop to 165,000 mainstream new complaints in 2021-2022, and then a small increase to 175,000 in the following year. The historic trend in Chart 3 suggests a basic figure of 150,000 cases from 2016 onward, itself a year that showed a considerable rise from previous years.

Assuming that the Ombudsman forecast is correct, the pandemic has added about 95,000 new cases to the FOS' caseload in two years, a figure that represents about 40% of the figures for 2014-2015.

### Why the Increase?

Why have Ombudsman mainstream complaint volumes exceeded expectations during the pandemic? So, what has caused this burst in litigious activity? Customer service has fallen apart in the United Kingdom during periods of home working.

In addition, notwithstanding the government’s introduction of a furlough scheme which paid large proportions of people’s wages from early on in the pandemic, financial distress may be both causing complaints and testing firms’ ability to respond appropriately. Poor service standards at a time of distress increases complaint volumes.

That, though, is not the whole story. Firms have an opportunity to respond to complaints within eight weeks before the customer can file a complaint with the Ombudsman. Poor, defensive, or nonexistent case investigations by firms, typically big ones with large volumes of customers and consequently dissatisfaction, generate Ombudsman referrals.

The rate at which FOS upholds complaints—judged traditionally by whether the customer receives a better outcome after referring the case to the scheme—have remained surprisingly constant in mainstream cases.

In 2021’s first quarter, it was 40%. In recent years, the figure has been consistently around 35%. These numbers, though, omit those consumers who received a defective response to their complaint but chose not to go any further with their grievances.

### FOS Productivity

Firms are definitely struggling with their case handling. Unfortunately, this coincides with similar issues at the Financial Ombudsman Service. It suffered an ugly fall in productivity of 16.5%, to 247,916 cases closed in 2020-2021, from 296,712. See Chart 4 at the bottom of the facing page.

A number of explanations exist for FOS’s issues. First, the huge fall in payment protection insurance cases during the pandemic caused the Ombudsman to lose some of the economies of scale it had developed when handling these broadly similar mass complaints between 2012 and 2019. But that is not the whole story.

Both firms and FOS are finding complaint-handling productivity difficult to achieve in a pandemic, and there is some talk that each’s problem is affecting the other. Delays by firms in responding to requests for information from FOS do not help the dispute resolution body complete its investigations.

### The Human Factor

There is also a human factor.
In 1991, the Insurance Ombudsman Bureau, one of FOS’s ancestor organizations, experimented with home working when it ran out of office space. The results were so disappointing that the bureau never tried it again.

Handling complaints requires both access to materials required for investigations and a degree of human interaction. Dealing with angry people creates high levels of stress which supportive human contact can at least mitigate.

Case-handlers of firms working from home suffered from both these information and human resource failings. At the Ombudsman, this probably increased because neutral investigation and decision-making often involves confronting both sides with the weaknesses of their case.

The very act of neutrality creates isolation and hostility from both parties. Without colleagues by the water cooler or, in Britain, the hot-drinks machine, case-handling and the relevant motivation becomes much more difficult to achieve.

**Possible Solutions**

One solution would be to recruit more staff.

For an Ombudsman, that involves raising money from the financial services industry. FOS makes its money from a strange combination of a regulatory levy which the Financial Conduct Authority largely decides upon and collects from firms in accordance with their size, and a £750 (about $1,000) case fee, payable if the case merits an investigation, regardless of the outcome.

As the English Court of Appeal concluded some years ago, a dispute scheme cannot have its funding depend on the outcome of cases if it wants to maintain any appearance of neutrality. Financial Ombudsman Service v. Heather Moor & Edgecomb Ltd., [2008] EWCA Civ. 643 at para. 32 (available at https://bit.ly/3HiUvGc).

Currently, firms do not pay for the first 25 cases, which helps small firms and redresses the fact that otherwise, they would overpay through the levy for a service in which, as a sector, they have very little involvement. The Ombudsman’s Plan and Budget proposes to reduce this number to 3, thereby creating significant problems for small firms targeted by lawyers.

Other measures include working more closely with the financial services industry to bring down complaint numbers. This could easily compromise FOS’s neutrality. It is reasonably well-known that it takes about 60%-100% more time to find for the complainant than to reject the case. In this way, productivity pressures can affect outcomes in small complaints schemes.

*Covid-19* has not just done vast amounts of damage to life and health. It has also significantly disrupted the dispute resolution world that most of us actually occupy.

Homeworking messed up service and management standards and internal corporate supervision, all of which generated complaints. The investigation and decision making both by the firms to which customers expressed their dissatisfaction and dispute resolution schemes designed to rectify first instance errors have both been compromised.

Delays by firms in responding to complaints and co-operating with Ombudsman investigations has contributed to the dispute resolution body’s problems keeping up with its backlog. Ultimately, attempts to fix the productivity gap created as a result risk compromising the neutrality of the decision-making bodies involved. These are some of the costs that this pandemic has imposed on our daily lives and the dispute resolution bodies designed to improve them.