Fordham International Law Journal

Volume 41, *Issue* 4 2018 *Article* 8

2017 FORDHAM INTERNATIONAL ARBITRATION & MEDIATION CONFERENCE ISSUE

Mend it, Don't End it: How to Improve Securities Arbitration In the United States by Adopting Best Practices from the United Kingdom and Australia

Alina Gatskova*

*

NOTE

MEND IT, DON'T END IT:

HOW TO IMPROVE SECURITIES ARBITRATION IN THE UNITED STATES BY ADOPTING BEST PRACTICES FROM THE UNITED KINGDOM AND AUSTRALIA

*Alina Gatskova**

* J.D. candidate, 2019, Fordham University School of Law; Senior Director of Credit Risk, Fidelity Investments. The views and opinions expressed in this Note are solely those of the author and do not necessarily reflect the position of the author's employer. The author would like to thank Prof. George Conk and Prof. Constantine Katsoris, both of Fordham University School of Law, as well as Theodore Kresbach of Murphy & McGonigle, for their suggestions and comments. The author would also like to express gratitude to Roger Curylo, David Fenigstein and Scott Bieler of Fidelity Investments, for their mentorship and support. Lastly, the author is grateful to the editors and staff of the ILJ for their thoughtful comments and editing support.

I. INTRODUCTION

Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion.
Samuel Gompers

Resembling a misunderstood villain,[1] securities disputes arbitration is often cast in a negative light.[2] The investing public widely perceives securities arbitration as unfair, with a pro-industry

1. Consider Maleficent, an iconic villain that casts an evil spell on the Sleeping Beauty but later comes to care for her and desperately tries to rescind the spell. *See generally* MALEFICENT (Walt Disney Pictures 2014). Consider also Severus Snape, who tried to atone for the mistakes he made early in his life when he supported an evil wizard Lord Voldemort, by sacrificing his life for Harry Potter. *See generally* J.K. ROWLING, HARRY POTTER AND THE DEATHLY HOLLOWS (2007).

2. *See, e.g.*, Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice,* N.Y. TIMES, (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html; Michael Hiltzik, *No Surprise: Wells Fargo is Leveraging its Arbitration Clause to Win an Advantageous Scandal Settlement*, L.A. TIMES, (Mar. 31, 2017), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-wells-settlement-20170331-story.html [https://perma.cc/BJU6-DBUB].

bias.[3] While some of this negative perception is deserved,[4] it is not an objective reflection on the soundness of the securities arbitration process as a whole.[5] Yet, negative media portrayal and public opinion should serve as an indicator of the need for continuous improvement.[6] Understanding how securities arbitration in the United States

---

3. An independent survey of 3,087 participants, comprised primarily of investors, revealed significant negative perception of the securities arbitration process. However, the study also found that investors that doubted the integrity of the securities arbitration process did not have a good understanding of it. *See generally* JILL I. GROSS & BARBARA BLACK, PERCEPTION OF FAIRNESS OF SECURITIES ARBITRATION: EMPIRICAL STUDY (2008)*; The Securities Arbitration System: Hearing Before the Subcomm. On the Cap. Mkts., Ins. And Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 109th Cong. 41-46 (2005) (statement of William Galvin, Sec'y of the Commonwealth of Massachusetts)(Mass.) (noting that the securities arbitration system is "rigged" in favor of the financial industry and the arbitration system should be reformed).

4. *See, e.g.,* Mun. Workers Comp. Fund, Inc. v. Morgan Keegan & Co., 190 So. 3d 895, 915 (Ala. 2015)) (finding failure to disclose conflicts of interest by an arbitrator in a Financial Industry Regulatory Authority ("FINRA") arbitration constituted evident partiality towards a member of the securities industry); *see also* Kirill Kan, *The Importance of FINRA's Arbitrator Selection Process and Clarity in the "Evident Partiality" Standard in the Wake of Morgan Keegan*, 18 FORDHAM J. CORP. & FIN. L. 167, 188-89 (2012) (noting that FINRA's arbitrators selection process faces recurring issues with arbitrators' conflicts of interest stemming from the small size of arbitrators' rosters in certain locations, which undermines FINRA's random computer-generated arbitrator selection); Constantine N. Katsoris, *Securities Arbitrators Do Not Grow on Trees*, 14 FORDHAM J. CORP. & FIN. L. 49, 76-77 (2008)) (arguing that FINRA's system for selecting arbitrators uses inflexible criteria that pre-judges the potential arbitrator's impartiality merely because of their prior work experience or their relatives' jobs, thereby discouraging capable candidates and perpetuating the problem of having a small pool of arbitrators to choose from). *But see* James Thorne, *FINRA Diversifies Arbitrator Pool with a Long Road Ahead*, FINANCIAL PLANNING MAGAZINE, (Sept. 21, 2017), https://www.financial-planning.com/news/finra-diversifies-arbitrator-pool-with-a-long-road-ahead [https://perma.cc/BFA3-SCJD] ("FINRA is making progress toward its goal of having a less homogeneous pool of arbitrators, an effort that is likely to take many more years.").

5. *See* Gross, *supra* note 3, at 59 (noting that "subjective perceptions by arbitration participants . . . do not address objective standards of substantive or procedural fairness" of the process); *The Securities Arbitration System: Hearing Before the Subcomm. On the Cap. Mkts., Ins. And Gov't Sponsored Enters.*, 109th Cong. 41-46 (2005) (statement of Constantine N. Katsoris, Wilkinson Professor of Law, Fordham University School of Law) (noting that significant improvements have been made to the securities arbitration process over time and, although imperfect, "the system has on balance worked well.").

6. *See* Constantine N. Katsoris, *Roadmap to Securities ADR*, 11 FORDHAM J. CORP. & FIN. L. 413, 480-81 (2006) (noting that securities industry must retain public confidence and "can never become complacent and feel as though [it] achieved the perfect dispute resolution system."); David B. Lipsky, *The New York Times Attack on Arbitration: Series Highlighted Abuses — but also Ignored Arbitration's Many Advantages,* DISP. RESOL. MAG. 6, 6 (2016) (noting that media's portrayal of the arbitration process is "seriously biased and one-sided" but "attention to the deficiencies of the contemporary practice of arbitration serves as a warning . . . to be diligent in rooting out . . . injustices").

compares to other financially developed common law countries may help identify best practices that, if properly implemented, may improve public opinion of the securities dispute arbitration process.

To achieve that goal, this Note will examine the arbitration of securities disputes between the investing customers[7] and brokerage firms,[8] with a predominant focus on the securities arbitration process in the United States, and compare it to the securities disputes resolution programs in the United Kingdom, and in Australia.[9] Securities disputes discussed within this analysis are limited to those that occur in the context of financial advice and financial services provided in brokerage accounts, including retirement accounts, by brokerage firms.[10] In the United States, such firms are required to be

---

7. Note that for the purposes of securities disputes arbitration in the United States, "customers," herein referred to as "investors," may include not just individual retail investors, but also small and large businesses, trusts, charitable organizations, or other types of entities. While the federal regulations governing securities disputes arbitration are ambiguous and do not define the meaning of the term "customer" beyond stating that a "customer" is not a broker-dealer, the Second Circuit held that "a 'customer' under FINRA Rule 12200 is one who, while not a broker or dealer, either (1) purchases a good or service from a FINRA member, or (2) has an account with a FINRA member." Citigroup Glob. Mkts., Inc. v. Abbar, 761 F.3d 268, 275 (2d Cir. 2014); *see also* Triad Advisors, Inc. v. Siev, 60 F. Supp. 3d 395, 397 (E.D.N.Y. 2014) (noting that "the definition of 'customer' under [FINRA] Rule 12200 and its predecessor rules has never been comprehensively defined by the Second Circuit").

8. Throughout this analysis, brokerage firms may also be referenced as financial advice providers, financial service providers, and simply as brokers.

9. United Kingdom and Australia were selected for this comparison to the United States due to their high degree of economic and financial systems development, as well as their analogous legal systems. *See* THE HERITAGE FOUNDATION, 2018 INDEX OF ECONOMIC FREEDOM, https://www.heritage.org/index/ranking [https://perma.cc/CJS2-FLJY] (last visited Mar. 6, 2018); *see also* CENTRAL INTELLIGENCE AGENCY, LEGAL SYSTEMS, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html [https://perma.cc/7R54-PJU8] (last visited Mar. 6, 2018).

10. Notably, for the United States, securities disputes arising solely out of the financial advice and services rendered to investors by the investment advisers registered under the Investment Advisers Act of 1940, are not within the scope of this paper. This is primarily due to the fact that investment advisers are subject to different standards of care than brokerage firms, and disputes between investment advisors and investing public are currently resolved primarily through the court system. That is, investment advisory disputes fall outside of the traditional securities disputes resolution forums, with only a small portion of disputes arbitrated on a voluntary basis. *See* FINRA, *Guidance on Disputes Between Investors and Investment Advisers that are Not FINRA Members*, https://www.finra.org/arbitration-and-mediation/investment_advisers [https://perma.cc/53QU-FXRD] (last visited Mar. 18, 2018); Norb Vonnegut, *Should Fiduciary Advisers Swear Off Mandatory Arbitration?* WALL ST. J., (Mar. 8, 2016), https://www.wsj.com/articles/should-fiduciary-advisers-swear-off-mandatory-arbitration-1457448422 [https://perma.cc/6N7L-TRTL].

registered as brokers and, where they also trade for their own account, as dealers ("broker-dealers") under the Securities Exchange Act of 1934, which includes registration with the Securities and Exchange Commission ("SEC"),[11] and with a self-regulatory organization ("SRO") such as the Financial Industry Regulatory Authority[12] ("FINRA") or a national securities exchange.[13]

Part II of this Note offers a comparative analysis of how securities arbitration works in the United States, the United Kingdom, and Australia today. This comparative analysis includes a review of the key aspects and structural safeguards within each forum. Further, Part II offers a survey of the varying standards of care required to be followed by the securities industry in each country, as the breach of these standards is what gives rise to securities disputes.

Part III of this Note will discuss how changes in the regulatory landscape, driven and reinforced by negative public opinion of the United States securities dispute resolution process, threaten to fragment the system and harm individual retail investors.

Part IV of this comparison of the intercontinental forums for securities dispute resolution will recommend the adaption of certain positive enhancements to make securities dispute resolution more accessible and transparent. This Note will argue that better accessibility and transparency can be achieved through removal of

11. The Securities and Exchange Commission (the "SEC") is a federal agency principally charged with regulation and enforcement of the securities markets. It has oversight over securities broker-dealers, investment advisors, mutual funds and other market participants. *See* Investor.gov, *The Role of the SEC*, https://www.investor.gov/introduction-investing/basics/role-sec [https://perma.cc/R24M-K7LV] (last visited Mar. 17, 2018); *see also* SEC, *What We Do*, https://www.sec.gov/Article/whatwedo.html [https://perma.cc/K8GH-VV2A] (last visited May. 27, 2018).

12. Of note, FINRA is a self-regulatory organization under 15 U.S.C. § 78c(a)(26),) (2015). It is a successor to and the result of a merger between the National Association of Securities Dealers and the enforcement division of the New York Stock Exchange. It was established under the Securities Exchange Act of 1934 and is overseen by the SEC. It is the primary regulator of the broker-dealer industry in the US. *See* 15 U.S.C. § 78c(a)(26) (2015); Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1210 (9th Cir. 1998), *abrogated on other grounds* by Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning, 136 S. Ct. 1562 (2016); *see also* Investor.gov, *Market Participants,* U.S. Securities and Exchange Commission, https://investor.gov/introduction-markets/how-markets-work/market-participants [https://perma.cc/3CFL-LRXV] (last visited Jan. 20, 2018).

13. *See* Investor.gov, *Market Participants, supra* note 12*; see also* SEC, *Guide to Broker-Dealer Registration*, ¶ 3.2, https://www.sec.gov/reportspubs/investor-publications/divisionsmarketregbdguidehtm.html [https://perma.cc/NLV3-PBGE] (last visited Mar. 18, 2018).

cost barriers for retail investors below certain net worth threshold, implementation of eligibility criteria requiring pre-dispute communication with the financial advice providers, release of reasoned written opinions, and streamlining of discovery, evidentiary and hearing proceedings. In turn, better accessibility and transparency could help mend the public's pervasively low opinion of the securities dispute resolution in the United States, and help restore public trust in the fairness of the process.

Lastly, Part V offers a brief synopsis on the recommendations made in Part IV.

II. HOW SECURITIES DISPUTES ARBITRATION WORKS IN THE MOST FINANCIALLY DEVELOPED COMMON LAW COUNTRIES IN THE WORLD

The United States, the United Kingdom and Australia all have remarkably well-developed securities markets.[14] The United States has an estimated ninety to ninety-six million of individual retail investors, which translates into about 27.63% to 29.47% of US total population participating in the securities markets.[15] In contrast, the United Kingdom has an estimated twelve million investors, which translates to about twenty percent of United Kingdom adult population and eighteen percent of United Kingdom total population

---

14. According to World Economic Forum, in 2012, the US, the UK and Australia ranked as number 2, 3 and 5, respectively, out of 62 of the world's most financially developed countries. The measurement was done as part of the Financial Development Report which ranks countries based on the robustness of their financial markets, the ease of access to capital, the availability of financial advice and ancillary services, and the strength of the financial laws and regulations. *See* World Economic Forum, *Financial Development Report*, xiii, 2012, http://reports.weforum.org/financial-development-report-2012/ [https://perma.cc/V82V-Z5FX] (last visited Mar. 18, 2018); *see also* THE HERITAGE FOUNDATION, *supra* note 9.

15. Note that percentages of population participating in securities markets were calculated by using the number of investors provided by the following sources and dividing that number into the United States' total population, from the most recent census (i.e. 90/325.7 = 27.63% and 96/325.7=29.47%). *See* Kumesh Aroomoogan, *More Investors Striking Out on Their Own,* FORBES, (Jun. 2, 2016), https://www.forbes.com/sites/kumesharoomoogan/2016/06/02/more-investors-striking-out-on-their-own-what-does-all-this-self-directed-trading-mean/#2172af874db6 [https://perma.cc/3GVU-D2G8]; *see also* INVESTMENT COMPANY INSTITUTE, 2017 INVESTMENT COMPANY FACT BOOK 2 (Apr. 2017) https://www.ici.org/pdf/2017_factbook.pdf [https://perma.cc/JY2A-AGKQ] (last visited Mar. 18, 2018); U.S. CENSUS BUREAU, UNITED STATES QUICK FACTS, https://www.census.gov/quickfacts/fact/table/US/PST045217 [https://perma.cc/T398-VRES]. (last visited Mar. 18, 2018).

participating in the securities markets.[16] Australia has about 11.2 million of individual investors which translates to approximately sixty percent of Australia's total adult population participating in the securities markets.[17] Given these strong securities market participation rates, it is unsurprising that disputes between investors and financial service providers arise.[18] In response, the United States, the United Kingdom and Australia all developed robust securities dispute resolution forums. This section will discuss each forum in turn.

A. United States of America

The United States shares familial roots with the United Kingdom and Australia, and as noted above, all three countries have analogously well-developed securities markets. Yet the US approach to securities dispute resolution diverges from that of England and Australia. Although it did not start this way, modern US securities arbitration is an extensive, rigorous and formal process administered in a way that makes it more complex than its overseas counterparts. In this Section, I will discuss how securities arbitration developed and works in the United States today.

---

16. *See* DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS, BIS RESEARCH PAPER NUMBER 261: EXPLORING THE INTERMEDIATED SHAREHOLDING MODEL 27-28 (Jan. 2016); *see also* ShareSoc, UK Stock Market Statistics, https://www.sharesoc.org/investor-academy/advanced-topics/uk-stock-market-statistics/ [https://perma.cc/38ZT-X3JP] (last visited Feb. 18, 2018).

17. *See* DELOITTE ACCESS AND AUSTRALIAN SECURITIES EXCHANGE, AUSTRALIAN INVESTORS STUDY, 1 (2017), https://www.asx.com.au/documents/resources/2017-asx-investor-study.pdf [https://perma.cc/Z4JN-JN7F]. Note that the incidence of share ownership in Australia is high by international standards. *See* AUSTRALIAN SECURITIES EXCHANGE, THE AUSTRALIAN SHARE OWNERSHIP STUDY 49 (June 2015), https://www.asx.com.au/documents/resources/australian-share-ownership-study-2014.pdf [https://perma.cc/V4MK-F5QT].

18. *See* Katsoris, *supra* note 6, at 416 (noting that "[a]s the public increasingly invests in the securities markets - either directly or indirectly . . . - litigation between the securities industry and its customers has mushroomed").

1. Brief History of Securities Arbitration in the United States and How it Became the Dominant Forum for Securities Disputes Resolution

The history of US securities arbitration began in 1817, when the New York Stock Exchange ("NYSE") established an arbitration forum for resolution of disputes between its member broker-dealers.[19] In 1869, the NYSE allowed for the complaints filed by aggrieved investors against the member firms to be resolved through the same forum.[20] Then in 1968, one of FINRA's predecessors, the National Association of Securities Dealers ("NASD"), established its own forum for arbitration.[21] The NYSE and NASD arbitration forums ran separately until June 2007, when they were merged into FINRA.[22] This evolution of a combined expert forum for the securities disputes occurred in the context of a broader trend towards arbitration, where after the passing of the Federal Arbitration Act of 1925, the US Supreme Court decisions in *Shearson/American Express, Inc. v. McMahon* and in *Rodriguez de Quijas v. Shearson/American Express,*

19. *See* Jill Gross, *The Historical Basis of Securities Arbitration As an Investor Protection Mechanism*, 2016 J. DISP. RESOL. 171, 176 (2016); *see also* Robert S. Clemente, *Trends in Securities Industry Arbitration: A View of the Past, Present, and the Future: "The Dream, the Nightmare, and the Reality,"* N.Y. ST. B.J., 18 (1996) (noting that "[a]s far back as the late 1800's the New York Stock Exchange received commendation for its efforts to provide an alternative forum to the courts").

20. *See* Gross, *supra* note 19, at 175-79 ("In 1869, after the consolidation of the Open Board of Brokers with the NYSE Board to form the NYSE, the NYSE amended its constitution to officially require members of the Exchange to submit to arbitration whenever requested by a nonmember," with this action primarily driven by "protection of the good name and reputation of the NYSE."); *see also* Jill I. Gross, *Securities Mediation: Dispute Resolution for the Individual Investor*, 21 OHIO ST. J. ON DISP. RESOL. 329, 336 (2006).

21. *See* Gross, *supra* note 20, at 181 ("The NASD, an SRO that was growing in size and importance to the industry, adopted its first Code of Arbitration Procedure in 1968, providing an alternative to the NYSE for the arbitration of customer disputes."); *see also Hearing Before the Subcomm. on Capital Mkts., Ins. and Gov't supra*, note 3 (testimony of Linda D. Fienberg, President, NASD Dispute Resolution), https://www.finra.org/newsroom/speeches/031705-testimony-subcommittee-capital-markets-insurance-and-government-sponsored [https://perma.cc/WL9P-JB72].

22. *See* Gross, *supra* note 19, at 175; *see also* FINRA Press Release, *NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority* (July 30, 2007), http://www.finra.org/newsroom/2007/nasd-and-nyse-member-regulation-combine-form-financial-industry-regulatory-authority [https://perma.cc/PB6E-9M2F] (noting that FINRA was a result of the consolidation of NASD and the regulatory enforcement and arbitration divisions of the NYSE and became "the largest non-governmental regulatory organization for securities brokers and dealers doing business in the United States").

Inc. began to support and emphasize the federal policy of preference for arbitration, both in general and specifically in the context of securities disputes.[23] With the *McMahon* and *Rodriguez* decisions that pre-dispute agreements to arbitrate ("PDAA") had statutory recognition[24] and were enforceable in securities disputes, compulsory PDAAs became standard in the securities industry and resulted in a virtually uniform compulsory arbitration of investor disputes.[25] Furthermore, in rare cases where no PDAA exists, investors have a unilateral right to demand arbitration under FINRA Rule 12200.[26]

2. How Securities Arbitration Works in the US: FINRA Arbitration Process

As of November 2017, FINRA "operates the largest securities dispute resolution forum in the United States," through its wholly owned subsidiary, FINRA Dispute Resolution.[27] At this time, ninety-nine percent of the securities-related disputes in the United States are managed through FINRA's arbitration process. The process is administered through one or three-person arbitration panel hearings, with seventy-one locations in all fifty states, Sun Juan, Puerto Rico,

---

23. *See* Rodriguez de Quijas v. Shearson/Am. Express Inc., 490 U.S. 477, 486 (1989) (holding that pre-dispute arbitration agreements in securities industry are enforceable and "resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act [of 1934]").]"); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987) (noting that the "[Federal] Arbitration Act establishes a federal policy favoring arbitration" and requires courts to "rigorously enforce agreements to arbitrate") (internal quotations omitted).

24. *See* Rodriguez, 490 U.S. at 486; McMahon, 482 U.S. at 226; *see also* Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-14 (2012).

25. *See* Seth E. Lipner, *Should Securities Arbitration be Mandatory?*, FORBES, (June 29, 2009), https://www.forbes.com/2009/06/29/lipner-mandatory-arbitration-intelligent-investing-consumer-choice.html#72550d1d240b [https://perma.cc/8A88-7TBH] (noting that since late 1980s, "the securities firms uniformly requir[e] that customers sign arbitration agreements" and that "since then, virtually all consumer securities cases have gone to arbitration, and the system that has been created, now run by FINRA, has been termed mandatory arbitration."); *see also* FINRA, *Final Rep. of the FINRA Disp. Res. Task Force* 46 (2015), https://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf [https://perma.cc/CZK4-EHAQ] (last visited Mar. 18, 2018).

26. *See* FINRA Rules r.12200 (Fin. Indus. Regulatory Auth. 2008); *see also* FINRA, REGULATORY NOTICE 16-25 (2016).

27. *See* FINRA, *Arbitration and Mediation*, https://www.finra.org/arbitration-and-mediation [https://perma.cc/TL67-4AKS] (last visited Mar. 6, 2018); *see also* Gross, *supra* note 19, at 184 (noting that FINRA "administers more than 99% of securities arbitrations in the country").

and London, United Kingdom.[28] The one to three-person arbitration panels are comprised of individuals who have gone through FINRA's demanding arbitrator application process. This process includes a review for conflicts of interest,[29] a background investigation, and a general obligation of a continuing duty to disclose special interests of the arbitrator as they arise.[30] Further, for each dispute, the arbitrators are selected randomly, through the Neutral List Selection System, which creates a random computer-generated roster of arbitrator candidates that parties may select for a given dispute.[31] The number of arbitrators for each dispute, which ranges from one to three, is determined by the amounts at issue in the dispute, with claims up to US$100,000 heard by a single arbitrator, and claims involving amounts greater than US$100,000 heard by three arbitrators.[32] The arbitration panel may be comprised public and non-public arbitrators.[33] In cases involving one arbitrator, the arbitrator is always

---

28. *Id. See* FINRA, *Arbitration and Mediation*, *supra* note 27; Gross, *supra* note 19, at 184; *see also* FINRA, *Dispute Resolution Regional Offices and Hearing Locations*, https://www.finra.org/arbitration-and-mediation/dispute-resolution-regional-offices-and-hearing-locations [https://perma.cc/Y724-RANC] (last visited Mar. 7, 2018).

29. For example, FINRA Rule 12405(b) establishes, among other things, an obligation on the part of the arbitrators "to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination [in the arbitration proceeding] . . . [as] a continuing duty that requires an arbitrator who accepts appointment to an arbitration proceeding to disclose, at any stage of the proceeding, any such interests, relationships, or circumstances that arise, or are recalled or discovered." *See* FINRA Rules r.12405(b) (Fin. Indus. Regulatory Auth. 2011); *see also* FINRA, *Your Duty to Disclose*, (Sept. 2015), http://www.finra.org/sites/default/files/FINRA-duty-disclose-training-sept-2015.pdf [https://perma.cc/JHC2-YCJE].

30. *See* FINRA Rules r. 12405 (Fin. Indus. Regulatory Auth. 2011); *see also* Katsoris, *supra* note 6, at 440 (noting the securities dispute resolution forum rules in the US place on the arbitrator an ongoing affirmative duty to disclose any conflicts of interest).

31. *See* FINRA Rules r. 12400(a) (Fin. Indus. Regulatory Auth. 2011)*; see also* Sandra D. Grannum, *FINRA Arbitrator Selection: Understanding the Process and Vetting Potential Arbitrators*, https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2017-women-in-litigation/materials/arbitrating-in-the-finra-forum.authcheckdam.pdf [https://perma.cc/B67T-TRNK] (last visited Mar. 17, 2018).

32. *See* FINRA, *Arbitrator Selection*, https://www.finra.org/arbitration-and-mediation/arbitrator-selection [https://perma.cc/9PQP-5Q9L] (last visited Mar. 6, 2018); *see also* FINRA Rules r. 12403 (Fin. Indus. Regulatory Auth. 2017).

33. *See* FINRA, *Arbitrator Selection, supra* note 32; FINRA Rules r. 12403 (Fin. Indus. Regulatory Auth. 2017); *see also* FINRA Rule 12400 (Fin. Indus. Regulatory Auth. 2017); FINRA Rule 12100(y) (Fin. Indus. Regulatory Auth. 2017) (defining public arbitrator stringently as an independent party that has not been affiliated with a broker-dealer, investment adviser or other type of an industry insider in direct or indirect way); FINRA Rule 12100(r) (Fin. Indus. Regulatory Auth. 2017) (defining non-public arbitrator as anyone who is not a

public, unless there is a consensual agreement to the contrary between the arbitration participants.[34] In cases involving three arbitrators, each party has the right to select a panel with no ties to the securities industry.[35]

Notably, FINRA has no statutory cap on the value of the claims it is permitted to arbitrate, or on the amount it may award in resolution of the claims with respect to compensatory or punitive damages.[36] Recovery of punitive damages in securities disputes is a pro-investor characteristic of FINRA securities arbitration, as ability to obtain punitive damages in securities disputes in federal courts is limited.[37] This makes arbitration attractive for investors that believe they have a strong case for punitive damages.[38]

---

public arbitrator, i.e. persons working within the securities industry or otherwise directly or indirectly connected to it).

34. *See* FINRA, *Arbitrator Selection, supra* note 32; FINRA Rule 12100(r) & (y) (Fin. Indus. Regulatory Auth. 2017); FINRA Rules r. 12400 (Fin. Indus. Regulatory Auth. 2017); FINRA Rules r. 12403 (Fin. Indus. Regulatory Auth. 2017); *see also* FINRA Rules r. 12402(a) (Fin. Indus. Regulatory Auth. 2017).

35. *See* FINRA Rule 12403(c)(1)(A) (Fin. Indus. Regulatory Auth. 2017) ("Each separately represented party may strike any or all of the arbitrators from the non-public arbitrator list by crossing through the names of the arbitrators."); *see also* FINRA, *New Optional All Public Panel Rules*, https://www.finra.org/arbitration-and-mediation/new-optional-all-public-panel-rules [https://perma.cc/6H5U-E9AP] (last visited Mar. 17, 2018) (noting that in 2011 SEC approved a new FINRA rule that allows the parties to an arbitration to select all public arbitrators to hear their case).

36. *See* SHAHLA F. ALI, CONSUMER FINANCIAL DISPUTE RESOLUTION IN A COMPARATIVE CONTEXT: PRINCIPLES, SYSTEMS AND PRACTICE 125 (2013); *see also* Cory Alpert, *Financial Services in the United States and United Kingdom: Comparative Approaches to Securities Regulation and Dispute Resolution*, 5 B.Y.U. INT'L L. & MGMT. REV. 75, 92 (2008) (noting that "FINRA Arbitration has no statutory cap on the value of awards"). The case that established that securities arbitrators may award punitive damages, even if such damages are not available under the laws of the state which govern the dispute, was *Mastrobuono v. Shearson Lehman Hutton, Inc*. The decision broadened the remedies available to customers in arbitration compared to traditional court proceedings. *See generally* Mastrobuono v. Shearson Lehman Hutton, Inc. 514 U.S. 52 (1995).

37. Under existing federal statutory and common law framework governing securities disputes, punitive damages are not available in actions alleging violations of the Securities Exchange Act of 1934. *See* Securities Exchange Act of 1934, § 28(a), 15 U.S.C.A. § 78bb(a) (1934) ("No person permitted to maintain a suit for damages under the provisions of [the 1934 Act] shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of the actual damages to that person . . ."); *see also* Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968) (holding that punitive damages are not available for violations of § 10(b) of the 1934 Act). Further, although the text of the Securities Act of 1933 does not explicitly preclude punitive damages, courts "have endeavored to treat the '33 and '34 Acts in *pari materia* and to construe them as a single comprehensive scheme of regulation." Globus v. Law Research Service, Inc., 418 F.2d 1276, 1286 (2d. Cir. 1969). Thus, punitive damages are generally also

FINRA conducts its arbitration proceedings in adherence with the Uniform Code of Arbitration,[39] to ensure that the arbitration process is fair and efficient.[40] In order to initiate an arbitration claim, investors must be eligible for arbitration from a timeliness perspective, and bring their claim within six years of occurrence of the event that gave rise to the claim.[41] Assuming eligibility requirement is met, investors are encouraged to retain legal counsel[42] and submit a Statement of Claim, which can be done online.[43] The pleading standards employed by FINRA are fairly liberal, only

---

not available in the Securities Act of 1933 actions. *See* Globus, 418 F.2d at 1292*; see also* Robert B. Hirsch & Jack L. Lewis, *Punitive Damage Awards Under Federal Securities Acts*, 47 NOTRE DAME L. REV. 72, 72 (1971).

38. *See* Stephen J. Choi & Theodore Eisenberg, *Punitive Damages in Securities Arbitration: An Empirical Study*, 39 J. LEGAL STUD. 497, 498 (2010) (drawing conclusion after analysis of "a data set of over 6,800 securities arbitration awards . . . that claimants prevailed in 48.9 percent of arbitrations and that 9.1 percent of those claimant victories included a punitive damages award" in claims with "egregious broker misbehavior"); *see also* Peter M. Mundheim, *The Desirability of Punitive Damages in Securities Arbitration: Challenges Facing the Industry Regulators in the Wake of Mastrobuono*, 144 U. PA. L. REV. 197, 223 (1995) (noting that possibility of a punitive damages award in securities arbitration provides an incentive for investors to use the forum, particularly for investors with small compensatory claims).

39. The Code of Arbitration was developed by the Securities Industry Conference on Arbitration ("SICA"), which is comprised of the representatives of the investors, academia and the industry. *See* SEC. INDUS. & FIN. MKT. ASS'N, WHITE PAPER ON ARB. IN THE SEC. INDUS. 11 (2007), https://www.sifma.org/wp-content/uploads/2017/03/White-Paper-on-Arbitration-in-the-Securities-Industry-October-2007.pdf [https://perma.cc/HM7Q-QUQJ] (noting that the Code of Arbitration was developed by SICA and although it has not been updated since the 1970s, SICA and the industry's participants, including investors and plaintiffs' attorney interest groups, meet regularly regarding enhancements to the securities arbitration process); *see also* Katsoris, *supra* note 6, at 420-22.

40. *See* Katsoris, *supra* note 6, at 420.

41. *See* FINRA Rules r. 12206 (Fin. Indus. Regulatory Auth. 2011); *see also* FINRA, REGULATORY NOTICE 09-36, http://finra.complinet.com/net_file_store/new_rulebooks/f/i/finra_09-36.pdf [https://perma.cc/A529-FY4Y].

42. Although representation *pro se* is permitted, securities disputes can be extremely complex and parties are better advised to have an experienced attorney. *See, e.g.*, FINRA Rules r. 12300(b) (Fin. Indus. Regulatory Auth. 2017) (setting forth the rules for submission of claim and supplementary information for pro se claimants); *see also* Lipner, *supra* note 25 (noting that "[t]here will be monthly statements for the lawyers to scrutinize, profit and loss analyses to create, prospectuses and SEC filings to read and pick apart and industry rules to study" and "there are numbers, lots of numbers . . . [t]his is specialized, detail-oriented stuff.").

43. *See* FINRA, *Arbitration Online Claim Filing*, https://www.finra.org/arbitration-and-mediation/online-claim-filing [https://perma.cc/4C9Q-Z682] (last visited Mar. 7, 2018); *see also* FINRA, ARBITRATION CLAIM FILING GUIDE 4 (Jan. 2017), https://www.finra.org/sites/default/files/arbitration-claim-filing-guide.pdf [https://perma.cc/M2P3-6YPQ].

requiring that investors file a Statement of Claim "specifying the relevant facts and remedies requested."[44] The respondent broker-dealer would then have forty-five days to serve the claimant with a Statement of Answer.[45] Failure to respond within the specified period may lead to a default judgment against the offending firm.[46]

After the Statement of Claim and the Statement of Answer have been exchanged, parties have a pre-hearing teleconference to agree on a hearing schedule and discuss motion schedules.[47] Notably, with respect to the motion practices in FINRA arbitration, pre-hearing dispositive motions such as a motion to dismiss are considered on fairly limited grounds and are actively discouraged by the language of FINRA's relevant regulations, such as FINRA Rules 12504 and 12206.[48] Moreover, hostility to pre-hearing dispositive motions is evident from the fact that the arbitrators' panel must assess forum fees against the party filing the motion, and if the panel finds the motion to be in "bad faith" or "frivolous," additional sanctions against the motion proponent may be imposed.[49] Similarly, discovery is significantly less extensive than federal court discovery proceedings, and parties may object to discovery requests found overly

---

44. *See* FINRA Rules r. 12302(a) (Fin. Indus. Regulatory Auth. 2017); *see also* FINRA, DISPUTE RESOLUTION PARTY REFERENCE GUIDE 20 (Sept. 2014), https://www.finra.org/sites/default/files/Partys-Reference-Guide%20(Sept%2012%202014).pdf [https://perma.cc/78VP-N9SW] (noting that a claim does not need to be in special form and only needs to be a written narrative setting forth the facts of the dispute including dates, names and amounts requested for relief).

45. *See* FINRA Rules r. 12303 (Fin. Indus. Regulatory Auth. 2017); *see also* FINRA, DISPUTE RESOLUTION PARTY REFERENCE GUIDE, *supra* note 44, at 30.

46. *See* FINRA Rules r. 12801 (Fin. Indus. Regulatory Auth. 2017); *see also* FINRA Rules r. 13801 (Fin. Indus. Regulatory Auth. 2017).

47. *See* FINRA Rules r. 12500 (Fin. Indus. Regulatory Auth. 2017); *see also* FINRA Rules r. 13501 (Fin. Indus. Regulatory Auth. 2008).

48. *See* FINRA Rules r. 12504 (Fin. Indus. Regulatory Auth. 2017) (noting that "[m]otions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration"); *see also* FINRA Rules r. 12206(b) (Fin. Indus. Regulatory Auth. 2011) (noting that even for motions to dismiss filed on the grounds of time limit where claimants are not meeting the six year eligibility requirement, an arbitration panel may not grant such a motion without an in-person or telephonic conference, and that a decision to grant such a motion must be made by a unanimous panel and must be accompanied by a written explanation, which is remarkable considering that generally securities arbitration decisions do not require an explanation).

49. *See* FINRA Rules r. 12504(a) (Fin. Indus. Regulatory Auth. 2017); *see also* FINRA, *Motion to Dismiss and Eligibility FAQ*, http://www.finra.org/industry/faq-motion-dismiss-and-eligibility-rules-faq [https://perma.cc/6T2B-J76P] (last visited Mar. 7, 2018).

burdensome.[50] FINRA's rules require cooperation between the parties to the full extent needed to expedite the arbitration process.[51] Procedures for admissibility of information found as part of discovery are likewise substantially more liberal than the Federal Rules of Evidence, which the arbitrators are not required to follow, although production of documents does not guarantee their admissibility.[52]

Lastly, after the pre-hearing motions and discovery, the case proceeds to a hearing,[53] following which the panel would render a decision on the dispute, typically within a thirty day period, without being required to provide a rationale for the award.[54] FINRA *permits*, but does not *require*, award reasoning.[55] In 2017, FINRA reported average turnaround time for an arbitration claim, from the beginning

50. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (noting that more limited discovery is permitted in arbitration as compared to traditional court proceedings); *see also* FINRA, *Discovery*, http://www.finra.org/arbitration-and-mediation/discovery [https://perma.cc/LA4L-JQ5P] (last visited Mar. 7, 2018).

51. *See* FINRA Rules r. 12505 (Fin. Indus. Regulatory Auth. 2008); *see also* FINRA Rules r. 13505 (Fin. Indus. Regulatory Auth. 2008).

52. *See* FINRA Rules r. 12508 (Fin. Indus. Regulatory Auth. 2017); FINRA Rules r. 12604 (Fin. Indus. Regulatory Auth. 2008); *see also* FINRA, ARBITRATION AND MEDIATION DISCOVERY GUIDE (2013). Notably, although FINRA's evidentiary procedures are less formal than those of a federal court, they are based on Federal Rules of Evidence. *See* FINRA EVIDENTIARY HEARING, 4D N.Y. PRAC. COM. LITIG. IN N.Y. STATE COURTS § 97:45 (4th ed., 2017).

53. *See* FINRA Rules r. 12600 (Fin. Indus. Regulatory Auth. 2008); FINRA Rules r. 13600 (Fin. Indus. Regulatory Auth. 2009).

54. *See* FINRA Rules r. 12904(f) (Fin. Indus. Regulatory Auth. 2008) (noting that "[t]he award *may* contain a rationale underlying the award")(emphasis added); *see also* Tara Siegel Bernard, *Taking a Broker to Arbitration*, N.Y. TIMES, (July 18, 2014), https://www.nytimes.com/2014/07/19/your-money/a-closer-look-at-the-arbitration-process-for-investors.html (noting that "[w]hether investors win or lose, they rarely know arbitrators' reasoning because they don't have to provide any explanation" because although investors can request an explanation for a fee, they will receive it "only if the opposing party also agrees; legal experts say that typically doesn't happen ."); *see also* FINRA Rules r. 12514 (Fin. Indus. Regulatory Auth. 2017) (holding that all parties in a securities dispute, except for disputes involving amounts less than $50,000, must file for an explained decision at least 20 days before the first hearing date, subject to a $400 fee); FINRA Rule 12904(g) (noting that explained decisions must be requested early in the arbitration process, and may be provided "only when *all parties* jointly request an explained decision") (emphasis added). *But see* SR-FINRA 2018-012, PROPOSED RULE CHANGE TO ELIMINATE THE FEE FOR EXPLAINED DECISION, http://www.finra.org/sites/default/files/rule_filing_file/SR-FINRA-2018-012.pdf [https://perma.cc/AS36-KHGJ] (noting that FINRA recently submitted a proposed rule change to the SEC seeking to eliminate the $400 fee FINRA arbitration system currently imposes for all explained decisions).

55. *See* Siegel Bernard *supra* note 54; *see also* FINRA Rule 12904(g) *supra* note 54.

of the dispute through its resolution, was 14.5 months.[56] In cases involving simplified decisions, or in cases expedited due to the advanced age of the customer bringing the claim, the turnaround time can be cut by nearly half, to an average of 7.3 months.[57] In contrast, a federal lawsuit involving a securities transaction on average takes 689 days or nearly 23 months to resolve.[58]

Securities arbitration awards in the United States are binding on all parties involved.[59] Further, they are made publicly available and must be paid within thirty days unless a motion to vacate the award is filed.[60] However, while the motion to vacate the award is available, judicial review of arbitration awards is very deferential.[61] There are limited grounds for vacating an arbitration award, which typically include corruption, fraud, evident partiality, or undue means in how the award was produced, with similarly limited grounds for modification of awards, typically only where there is a material mistake or miscalculation.[62] FINRA also regularly publishes dispute

---

56. *See* FINRA, Dispute Resolution Statistics 2017, http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics (last visited Mar. 6, 2018); *see also FINRA Stats 12/17*: *With the Year-End Statistics Available from FINRA-ODR, We Take a Detailed Look at "The State of the Forum"*, SECURITIES ARBITRATION COMMENTATOR BLOG, http://www.sacarbitration.com/blog/finra-stats-1217-year-end-statistics-available-finra-odr/ (Feb. 2, 2018).

57. *See* Dispute Resolution Statistics 2017, *supra* note 56.

58. *See generally* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS (2009). For historical perspective and detailed empirical analysis of time to disposition of private civil litigation, *see* Terrence Dungworth & Nicholas M. Pace, *Statistical Overview of Civil Litigation in Federal Courts*, THE RAND INSTITUTE FOR CIV. JUST. 19-21 (1990).

59. *See* FINRA, *Arbitration and Mediation Overview*, http://www.finra.org/arbitration-and-mediation/overview [https://perma.cc/S8V2-Z3FE] (last visited Mar. 7, 2018); *see also* FINRA, *Awards FAQ*, ¶1, https://www.finra.org/arbitration-and-mediation/faq-awards-faq [https://perma.cc/YGT8-UKGF] (last visited Mar. 7, 2018).

60. *See* FINRA Rules r. 12904(h)-(j) (Fin. Indus. Regulatory Auth. 2018); *see also* FINRA Rules r. 13904 (Fin. Indus. Regulatory Auth. 2018).

61. *See, e.g.,* Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 123 (1st Cir. 2008) ("A federal court's review of an arbitrator's decision . . . is extremely narrow and exceedingly deferential.") (internal quotations omitted); 187 Concourse Assocs. v. Fishman, 399 F.3d 524, 526 (2d Cir. 2005) ("We accord a high degree of deference to an arbitrator's decision. An arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the outcome reached.") (internal quotations omitted).

62. *See* 9 U.S.C. §§ 10-11 (2012); UBS Fin. Servs., Inc. v. Mann, No. 14-10621, 2014 WL 1746249, at *2 (E.D. Mich. Apr. 30, 2014) (noting the limited grounds for modification of a securities arbitration award).

resolution statistics, providing transparency into various data points on the arbitrations that it handles.[63]

A notable feature of the securities arbitration process in the United States is that class-action proceedings in arbitration are not permitted by FINRA's rules.[64] However, under FINRA Rule 2268(d)(3) PDAAs may not "include any condition that . . . limits the ability of a party to file any claim in court permitted to be filed in court under the rules of the forums in which a claim may be filed."[65] This reflects FINRA's position that to the extent that class-action remedy is available through other forums, such as federal courts, it may not be waived through prior agreement.[66] FINRA Rule 12204(b) further accounts for the possibility where a claim grounded in the same facts and involving the same defendants is certified as a putative class action while simultaneously pending as arbitration, and holds that such claim would not be arbitrated unless parties to the arbitration opt-out of the class action participation.[67] As a reflection of FINRA's rules and to the extent permitted by the law, most PDAAs between investors and broker-dealers include provisions for class-action waivers. However, under FINRA's Rule 12204(d), PDAAs

---

63. *See* FINRA Dispute Resolution Statistics, *supra* note 56; FINRA, *Statistics*, https://www.finra.org/newsroom/statistics [https://perma.cc/YKH7-MP5T] (last visited Mar. 7, 2018).

64. *See* FINRA Rules r. 12204(a). *But see* FINRA Rules r. 12312 (providing for a more limited joinder of claims by multiple claimants "if the claims contain common questions of law or fact" and either "assert any right for relief jointly and severally" or "arise out of the same transaction or occurrence"). Notably, while FINRA's stance on not permitting class action arbitrations is controversial and open to challenge, it is not without reason. United States class actions have long been criticized as "entrepreneurial," where the class counsel, typically a law firm managing the action on a contingent fee basis, exerts overt control over the case and class representatives, and stands to get paid amounts that may be grotesquely out of proportion to the economic benefits that the class as a whole may receive. Moreover, FINRA member firms, the broker-dealers that would become the defendants in such class actions if FINRA changes its stance, are understandably apprehensive of class actions as consolidation of cases may increase the risk of a significant award. *See, e.g.*, Debra Lyn Bassett, *The Future of International Class Actions*, 18 SW. J. INT'L L. 21, 23-24 (2011); Alissa Piccione, *Class Warfare: Preventing Investor Casualties by Importing England's GLO into America's Class Action Arbitrations*, 12 J. INT'L BUS. & L. 417, 437 (2013); Elliott J. Weiss, *Pleading Securities Fraud*, 64 LAWL. & CONTEMP. PROBS. 5, 6 (2001).

65. *See* FINRA Rules, r. 2268 (Fin. Indus. Regulatory Auth. 2011), *see also* Anna Prior, *Arbitration vs. Class Actions in Investing Disputes,* WALL ST. J., Nov. 11, 2015, https://www.wsj.com/articles/arbitration-vs-class-actions-in-investing-disputes-1447246800.

66. *See* FINRA Rules r. 2268 *supra* note 65;, *see also* Prior, *supra* note 65.

67. *See* FINRA Rules r. 12204(b) (Fin. Indus. Regulatory Auth. 2008); *see also* FINRA Rules r. 13204(b) (Fin. Indus. Regulatory Auth. 2012).

may not be enforced until a member of a class-action proceeding in federal court is (1) denied class certification, (2) loses the certification, is (3) excluded from the class action, or (4) actively opts out of it.[68]

FINRA's stance on class actions is in line with the broader federal jurisprudence on class-action waivers in commercial disputes. In 2010, the Supreme Court held that class action arbitration was permissible but only by explicit agreement between the parties involved, with an inference that class action arbitrations would also need to be permitted by the forum in which the parties agree to arbitrate.[69] In both 2011 and 2013, the Supreme Court ruled that class arbitration waivers were permissible and enforceable.[70] Furthermore, in 2015 the Supreme Court held that state level statutes that prohibited class action arbitration waivers were invalid on federal preemption grounds, holding that "[state law] that does not place arbitration contracts on equal footing with all other contracts" and "does not give due regard to the federal policy favoring arbitration," is unenforceable.[71] Nonetheless, in July 2017, the Consumer Financial Protection Bureau ("CFPB")[72] issued a rule that prohibited class-action waivers in PDAA for certain financial institutions,[73] although the rule was promptly struck down by Congress in October of 2017.[74]

68. *See* FINRA Rules r. 12204(d) (Fin. Indus. Regulatory Auth. 2008); *see also* French v. First Union Sec., Inc., 209 F. Supp. 2d 818 (M.D. Tenn. 2002) (holding that agreement to arbitrate was unenforceable while a class action was pending).

69. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 664 (2010) (noting that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so") (emphasis in the original). *But see* Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 573 (2013) (holding that where arbitrator interpreted agreement between parties concerning authorization of lack thereof for class proceedings, such arbitrator's interpretation holds "however good, bad or ugly.").

70. *See* AT&T Mobility LLC v. Concepcion, 536 U.S. 333, 344 (2011); *see also* Am. Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013).

71. *See* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015).); *see also,* E Jin Lee, *Whose Law Is It Anyway? The Contract Interpretation Problem in U.S. Arbitration Jurisprudence*, 27 AM. REV. INT'L ARB. 495, 496 (2016) (discussing DIRECTV holding).

72. CFPB has the power to regulate consumer financial products and services and has been tasked under § 1028 of the Dodd-Frank Act with the study of PDAA. 12 U.S.C. § 5491 (2012); 12 U.S.C. § 5518 (2012).

73. CFPB Arbitration Agreements Rule, 12 CFR § 1040 (2017) (reserved) (revoked by Pub. L. No. 115-74).

74. *See* Greg Iacurci, *Senate's takedown of the CFPB class-action rule may pave way for challenge to FINRA policy*, INVESTMENT NEWS, (Oct. 25, 2017), http://www.investmentnews.com/article/20171025/FREE/171029959/senates-takedown-of-the-cfpbs-class-action-rule-

CFPB's attempt to open a path for class-actions in financial services disputes, while unsuccessful, demonstrates that FINRA's rule prohibiting class actions is controversial and may be challenged.[75]

3. Standards of Care Prevalent in the US Brokerage Industry

The brokerage segment of the financial services industry has long operated under what is known as a "suitability standard of care." Under FINRA Rule 2111(a), broker-dealers "must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer."[76] This reasonable basis is generally formed through analysis of multiple relevant factors, which include customer's age, annual income, experience with financial markets, investment objectives, risk tolerance, liquid net worth and tax status.[77] Furthermore, in the United States broker dealers are required to act with reasonable care in all investor communications and have sound basis for investor recommendations, and base all investor communications "on principles of fair dealing and good faith."[78] While the suitability standard is not a best interest fiduciary standard,[79] over the last few years, there has been a movement towards a more stringent fiduciary standard for the US brokerage industry.[80] This shift is driven by the evolution of the industry, the

may-pave-way-for [https://perma.cc/95JH-93XP]; *see also* Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES, (Oct. 24, 2017), https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html?_r=0.

75. *See generally supra,* notes 64, 74.

76. *See* FINRA Rules r. 2111 (Fin. Indus. Regulatory Auth. 2014).

77. *Id.*

78. *Id.*

79. Notably, unlike securities broker-dealers, investment advisers registered under the Investment Advisers Act of 1940, are subject to the fiduciary standard. *See* SEC, General Information on the Regulation of Investment Advisers, (Mar., 31, 2017), https://www.sec.gov/divisions/investment/iaregulation/memoia.ht [https://perma.cc/8MN9-GAWH]; *see also* S.E.C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963) (holding that under Section 206 of the Investment Advisers Act, investment advisers have fiduciary duties to their clients and must disclose all potential conflicts of interest).

80. *See, e.g.,* Securities Industry and Financial Markets Association, Comment Letter to the DOL on its Fiduciary Rule Proposal (July 20, 2015), http://www.sifma.org/issues/item.aspx?id=8589955445 [https://perma.cc/QB2N-6KSR]; FINRA, Comment Letter on Proposed Conflict of Interest Rule and Related Proposals (July 17, 2015), https://www.finra.org/sites/default/files/FINRACommentLetter_DOL_07-17-15.pdf [https://perma.cc/6M87-5VQK]; Securities Industry and Financial Markets Association, Proposed Best Interest of the

need for investor protection, and the desire for a uniform standard in how investment advisers and broker-dealers are treated.[81]

In April 2016, the US Department of Labor ("DOL")[82] adopted a set of regulations("Conflict of Interest Rule"), which set forth an updated framework for rendering financial advice in employment retirement plan accounts ("plans")[83] and the individual retirement accounts ("IRAs").[84] The stated purpose of the Conflict of Interest Rule is to expand the applicability of the statutory definition of "fiduciary" put forward in ERISA and the Code, to all investment professionals that provide retirement accounts with investment advice, to prevent conflicts of interest and require such providers to adhere to an impartial best interest standard of conduct.[85] ERISA, which is largely mirrored by the Code in this respect, defines fiduciary as "any person [who] . . . renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of [a retirement] plan."[86] While the Conflict of Interest Rule does not establish an all-inclusive interpretation of what constitutes fiduciary investment advice, it does significantly expand the previously existing interpretation, defining investment advice as "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the

---

Customer Standard for Broker-Dealers (Jun. 3, 2015), https://www.sifma.org/wp-content/uploads/2017/05/proposed-best-interests-of-the-customer-standard-for-broker-dealers.pdf [https://perma.cc/HQH3-2L5B]; Richard G. Ketchum, Remarks From the 2015 FINRA Annual Conference (May 27, 2015), https://www.finra.org/newsroom/speeches/052715-remarks-2015-finra-annual-conference [https://perma.cc/3ARV-HN5M].

81. *See supra* note 80.

82. DOL has the power to regulate retirement accounts. *See* 29 U.S.C. § 1135 (2012). Retirement accounts comprise a large segment of accounts serviced by the financial industry and broker-dealers in particular, totaling $27.2 trillion as of September 30, 2017. *See* Investment Company Institute, *Retirement Assets Total $27.2 Trillion in Third Quarter 2017* (2017), https://www.ici.org/research/stats/retirement/ret_17_q3 [https://perma.cc/5CTW-HK62].

83. Employee retirement plans are tax-advantaged accounts established under the Employee Retirement Income Security Act of 1974 ("ERISA"). *See* 29 U.S.C. § 1001. Individual retirement accounts, which are similarly tax-advantaged, are established under the Internal Revenue Code ("Code"). *See* 26 U.S.C. § 408.

84. *See* Definition of the Term "Fiduciary," Conflict of Interest Rule – Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016) (to be codified at 29 CFR pt. 2509, 2510 and 2550).

85. *See* Definition of the Term "Fiduciary," Conflict of Interest Rule – Retirement Investment Advice, 81 Fed. Reg. at 68, 20,947.

86. 29 U.S.C. § 1002(21)(A) (2012).

advice recipient engage in or refrain from taking a particular course of action."[87] This definition of what constitutes fiduciary investment advice covers many types of communications with customers that were previously not covered.[88] The Conflict of Interest Rule had an original applicability timeframe of April 2017, however was delayed by the DOL and instead went into partial effect in June 2017, with all elements of the rule scheduled to become effective in July 2019.[89] After the change in political administration in early 2017, the DOL was asked to re-assess the Conflict of Interest Rule.[90] However, there is political opposition to substantive changes to the rule and no material changes were made to date, although both full applicability and enforcement of the rule have been deferred to 2019.[91]

87. *See* Definition of the Term "Fiduciary," Conflict of Interest Rule – Retirement Investment Advice, 81 Fed. Reg. at 20,997.

88. For example, conversations with clients concerning rollovers or distributions, or any discussions where a call-to-action or customization of the conversation occurred based on the customer's needs may be considered fiduciary investment advice under the Conflict of Interest Rule. *Id.* at 20,966.

89. The DOL rule, formally titled "Definition of the Term 'Fiduciary'; Conflict of Interest Rule -- Retirement Investment Advice," was published in the Federal Register on April 8, 2016, became effective on June 7, 2016, and had an original applicability date of April 10, 2017, with a phased implementation period ending on January 1, 2018. On April 7, 2017, the DOL extended the applicability date of the rule by 60 days from April 10, 2017, to June 9, 2017 and leaving the phased final implementation date of January 1, 2018 intact. 82 Fed. Reg. 16902 (Apr. 7, 2017). Subsequently, on November 29, 2017, the DOL extended the final implementation date for the rule by 18 months from January 1, 2018 to July 1, 2019, due to concern that, without a delay in the applicability dates, parties affected by the rule, including investors, may be unduly adversely affected and may incur undue expense. 82 Fed. Reg. 56545 (Nov. 27, 2017).

90. On February 3, 2017, President Donald J. Trump signed a Presidential Memorandum directing the DOL to evaluate the Conflict of Interest Rule. *See* Memorandum on the Fiduciary Duty Rule, 2017 DAILY COMP. PRES. DOC. 201700095 (FEB. 3, 2017). *But see* Jessica Karmasek, *Trump Administration Sued Over Delay of Fiduciary Rule,* FORBES, Nov. 1, 2017, https://www.forbes.com/sites/legalnewsline/2017/11/01/trump-administration-sued-over-delay-of-fiduciary-rule/#7d717f2e7501 [https://perma.cc/2B5F-LYD9]. As a result of this Presidential Memorandum, the DOL published a request for information from the public, seeking to better examine the Conflict of Interest Rule. *See* 82 Fed. Reg. 31278, 31279 (Jul. 6, 2017).

91. Karmasek, *supra* note 90*; see also* U.S. Dep't of Labor, *Conflict of Interest Final Rule,* https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2 [https://perma.cc/5JL5-P9YA] (last visited Nov. 27, 2017); *see also* U.S. Dep't of Labor, *U.S. Department of Labor Extends Transition Period for Fiduciary Rule Exemptions* (Nov. 27, 2017), https://www.dol.gov/newsroom/releases/ebsa/ebsa20171127-0 [https://perma.cc/PZ5U-A2TS] (noting that "from June 9, 2017, to July 1, 2019, the Department [of Labor] will not pursue claims against fiduciaries working diligently and in good faith to comply with the Fiduciary Rule").

While the fiduciary standard imposed by the DOL's Conflict of Interest Rule is different from the suitability standard prevalent in the US securities industry today, the suitability standard already in many ways requires the broker-dealer to act in the best interest of the client. Conduct that can be justified as suitable but nevertheless appears not to be in the best interest of the client is typically addressed by FINRA through FINRA Rule 2010,[92] which is a substantive conduct rule that broadly holds that the broker-dealers "shall observe high standards of commercial honor and just and equitable principles of trade."[93] While the rule is very brief and does not define "high standards" or the meaning of "just and equitable" conduct, FINRA routinely employs this catch-all rule, referred to in the industry as its "long arm," to sanction broker-dealers whose conduct is found to be questionable or unethical.[94]

Furthermore, where the activity by a financial services institution is especially egregious,[95] it may be held accountable by the SEC and by private parties under § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 which gives private parties an implied right of action in federal court for fraud.[96] Courts have also

---

92. Formerly NASD Rule 2110. *See* FINRA Rules r. 2010 (Fin. Indus. Regulatory Auth. 2008).

93. *See* Ian K. Peck, *Is Self-Regulation the Answer? Assessing the Proposal for FINRA Oversight of Investment Advisers*, 10 BERKELEY BUS. L.J. 384, 385 (2013) ("FINRA Rule 2010 is a common tool used by FINRA Enforcement attorneys and has been called FINRA's 'long arm' rule. When bringing a case against a member firm or a registered representative, FINRA Enforcement attorneys can argue that conduct or inaction violated Rule 2010."); *see also* Jonathan Harris, *Rule 2010: FINRA's Long Arm*, LAW360, (Mar. 3, 2011), http://www.law360.com/articles/228028/rule-2010-finra-s-long-arm [https://perma.cc/NBV3-MACR].

94. Peck, *supra* note 93, at 384-85.

95. *See* Press Release, SEC, Broker Charged With Giving Special Access to IPOs for Cash Kickbacks (Dec. 19, 2017), https://www.sec.gov/news/press-release/2017-234 [https://perma.cc/J3UW-NHR9] (bringing action for alleged egregious violations of Section 10(b) of the Securities Exchange Act of 1934); *see also* Press Release, SEC, Stock Trader Charged in Insider Trading Ring (Dec. 11, 2017), https://www.sec.gov/news/press-release/2017-228 [https://perma.cc/7BHF-28ZH].

96. *See* Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 136 (2011) (noting that "[a]lthough neither Rule 10b–5 nor the statute it interprets, § 10(b) of the Act, expressly creates a private right of action, such an 'action is implied under § 10(b).'") (quoting Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n. 9 (1971)). For a more detailed overview, albeit critical, of the *Janus* decision, *see generally* Edward Pekarek & Genevieve Shingle, *The Land of Litigation Make Believe: Janus Capital Group, Inc., et al. v. First Derivative Traders A Case Comment*, 19 PIABA B.J. 1 (2012).

held that a broker-dealer is a fiduciary where it exercises discretion over customer assets and acts in a position of trust and confidence similar to that of a registered investment adviser.[97]

As it stands today, the standards of care in the US broker-dealer industry are a patchwork of the suitability standard for taxable brokerage accounts, and of the fiduciary standard for retirement and tax-advantageous accounts covered by the Conflict of Interest Rule, as well as for certain accounts over which the broker-dealer exercises discretion or in which it holds the position of trust similar to that of an investment adviser. However, there is support within the industry for a uniform best-interest standard that would require broker-dealers to act in the customers' best interest and would apply uniformly across *all* account types.[98]

B. United Kingdom of Great Britain and Northern Ireland

England may be the great-great-great-great-great-grandmother of the US securities arbitration process, as multiple accounts suggest that early types of securities arbitration disputes originated there sometime in the 14th century.[99] But the UK's securities dispute resolution process moved in the opposite direction from the United States over time, shedding complexity and evolving to become comparatively more nimble and simplified. In this Section I will discuss how securities arbitration works in the United Kingdom today, and how it compares to the US's FINRA dispute resolution process.

97. *See, e.g.*, United States v. Skelly, 442 F.3d 94, 98 (2d Cir. 2006); United States v. Szur, 289 F.3d 200, 211 (2d Cir. 2002); Associated Randall Bank v. Griffin, Kubik, Stephens & Thompson, Inc., 3 F.3d 208, 212 (7th Cir. 1993); MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/Am. Express Inc., 886 F.2d 1249, 1257 (10th Cir. 1989); Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 953-954 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981).

98. *See* Mark Schoeff, *SEC Commissioners Cheer Clayton's Efforts on Fiduciary Rule Collaboration,* INVESTMENT NEWS, Feb. 23, 2018, http://www.investmentnews.com/article/20180223/FREE/180229947/sec-commissioners-cheer-claytons-efforts-on-fiduciary-rule [https://perma.cc/YR9B-ZWY4]; *see also* FINRA, Comment Letter on Proposed Conflict of Interest Rule and Related Proposals (July 17, 2015), https://www.finra.org/sites/default/files/FINRACommentLetter_DOL_07-17-15.pdf [https://perma.cc/Q89L-SAEW].

99. *See* Gross, *supra* note 19*,* at 175 (noting that securities arbitration in the US is likely a "carryover from England where it had been utilized to solve disagreements among members of trade groups since the fourteenth century); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 969-72 (1999).

1. How Securities Arbitration Works in the United Kingdom: Financial Ombudsman Service

In contrast to the United States securities disputes arbitration process, which is fairly formal and not entirely unlike litigation, albeit more streamlined and cost-efficient, the UK securities dispute resolution scheme is significantly less formal in comparison. Established by the UK Parliament under Part XVI of the Financial Services and Markets Act of 2000, which governs the conduct of financial services firms in the United Kingdom under the oversight of several agencies,[100] the UK securities resolution scheme is administered through the Financial Ombudsman Service ("FOS").[101] The statutory objective behind the FOS dispute resolution scheme expressly emphasized the need for its informal nature, noting that it should be a scheme that would address investor grievances "quickly and with minimum formality."[102] FOS securities disputes resolution process is not compulsive, and investors[103] may always elect to pursue court litigation rather than FOS arbitration process.[104] Compulsive arbitration agreements and PDAAs are uncommon in the United Kingdom, and clauses in brokerage agreements compelling arbitration have generally been found void by the United Kingdom courts, under

100. The UK agencies principally responsible for oversight over brokerage firms and financial advice providers are the Financial Conduct Authority ("FCA") and the Prudential Regulation Authority. *See* FCA, *UK Regulators, Government and Other Bodies*, https://www.fca.org.uk/about/uk-regulators-government-other-bodies [https://perma.cc/7SH4-LNXK] (last visited Mar. 7, 2018).

101. *See* GERARD MCMEEL & JOHN VIRGO, FINANCIAL ADVICE AND FINANCIAL PRODUCTS: LAW AND LIABILITY 485-88 (2001); *see also* Fin. Ombudsman Serv, *about the Financial Ombudsman Serv.*, http://www.financial-ombudsman.org.uk/about/index.html [https://perma.cc/SS4T-67JG] (last visited Mar. 7, 2018).

102. Financial Services and Markets Act 2000, c. 8, § 225 (Eng.); *see also* FINANCIAL CONDUCT AUTHORITY, FCA HANDBOOK (Aug. 2017), DISP 3.1.4 G.

103. Of note, like in FINRA arbitration but perhaps less broadly, investors or "customers" in FOS securities dispute arbitration scheme also include not just individual retail investors, but also small businesses and charities. *See* Rhoda James, *The New Dispute Resolution System in the U.K. Financial Services Industry*, J. INT'L FIN MKT. I.F.M. 191, 191 (2002); *see also* MCMEEL, *supra* note 101, at 494.

104. *See* FINANCIAL CONDUCT AUTHORITY, FCA HANDBOOK (Mar. 2018), DISP. 2.5.1 R. Notably, FOS has compulsory jurisdiction over many activities of the financial sector in the UK, such as lending money, payment services, and ancillary banking services. However, financial advice and securities services are only subject to voluntary FOS jurisdiction. *See* FINANCIAL CONDUCT AUTHORITY, FCA HANDBOOK (Mar. 2018), DISP 2.3.1 R.

the Unfair Contract Terms in Consumer Contracts Regulations.[105] Thus, the arbitration system administered by the FOS is entirely voluntary.

Similar to FINRA, FOS has certain eligibility requirements, precluding claims that pertain to events older than six years and claims "three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint."[106] Unlike FINRA, FOS may not handle disputes that involve amounts greater than UK£150,000, such disputes must be handled through the court system.[107] Also unlike FINRA, the FOS has a formal requirement that prior to the submission of a complaint to FOS, the investor communicate with the business they are complaining about, for up to eight weeks, to resolve the complaint through the internal review mechanisms that the business is required to maintain for resolution of aggrieved investors' complaints.[108] If the investor is not satisfied with how the business addressed his or her complaint, the investor may submit a complaint to FOS by phone, online[109] or in writing.[110] FOS securities dispute resolution forum is absolutely free of charge to investors.[111] This is because the UK legislature believed that "access to a free, independent dispute-

105. *See* The Unfair Terms in Consumer Contracts Regulations 1999, S.I. 1999/2083, at 5-6, 1(q). For a more general overview of unfair terms in consumer contracts, including in the context of financial advice, see RICHARD LAWSON, EXCLUSION CLAUSES AND UNFAIR CONTRACT TERMS (2011).

106. *See* FINANCIAL CONDUCT AUTHORITY, FCA HANDBOOK (Jan. 2018), DISP. 2.8 R; *see also* McMeel, *supra* note 101, at 494.

107. *See* FINANCIAL CONDUCT AUTHORITY, FCA HANDBOOK (Jan. 2012), DISP. 3.7.4 R; *see also* Fin. Ombudsman Serv., *Compensation*, http://www.financial-ombudsman.org.uk/publications/technical_notes/compensation.html [https://perma.cc/H85Q-GJK6] (last visited Mar. 7, 2018).

108. *See* Fin. Ombudsman Serv., *Before we get involved*, http://www.financial-ombudsman.org.uk/faq/businesses/before_we_get_involved.html [https://perma.cc/PD5B-3VV7] (last visited Nov. 5, 2017); *see also* FINANCIAL CONDUCT AUTHORITY, FCA HANDBOOK (Jan. 2019), DISP. 1.6.2 R.

109. Fin. Ombudsman Serv., *Before we get involved, supra* note 108; *see also* Fin. Ombudsman Serv., *How to Complain*, https://help.financial-ombudsman.org.uk/help [https://perma.cc/98LW-3A77] (last visited Mar. 7, 2018).

110. *See* Fin. Ombudsman Serv., *How to Complain*, *supra* note 109.

111. Fin. Ombudsman Serv., *Why Consumers Don't Pay*, http://www.financial-ombudsman.org.uk/faq/businesses/answers/funding_a9.html [https://perma.cc/4RRS-7S2W] (last visited Mar. 7, 2018); *see also* FIN. OMBUDSMAN SERV., ANNUAL REVIEW 2015/2016 1 (2016), http://www.financial-ombudsman.org.uk/publications/annual-review-2016/ar16.pdf [https://perma.cc/UC3Z-H3JM] (last visited Mar. 17, 2018).

resolution service was essential to underpinning public confidence in financial services."[112] Further, the forum is also partially free to the businesses, where the brokerage firm does not have to pay case fees on the first twenty-five complaints per year, after which point a case fee of £550 will apply.[113] Similar to FINRA, the FOS has a low pleading standard and merely requires investors to submit a written statement explaining events that led to the complaint, and include relevant documents.[114]

With respect to the more procedural aspects of the FOS securities dispute resolution process, it differs from FINRA's in that unlike FINRA's, FOS arbitration does not require a hearing.[115] FOS reviews the case and works with the business and the investor to gather relevant documentation as needed, but no formal hearings are required to be held, although the FOS may order that a hearing or a telephone conference be held if it considers it appropriate for any given complaint.[116] Furthermore, FOS does not have formal evidentiary procedures or discovery, although all financial services firms and their authorized persons are required to cooperate with the FOS and produce documents on request, in the format requested by the FOS, and within the time limits specified by the FOS.[117] The FOS has the ability to "exclude evidence that would otherwise be admissible in a court or include evidence that would not be admissible

112. Fin. Ombudsman Serv., *Our Funding*, http://www.financial-ombudsman.org.uk/faq/businesses/answers/funding_a1.html [https://perma.cc/N85V-9YXX] (last visited Feb. 18, 2018). It should be noted that although FOS is an independent regulatory body not controlled by the UK financial industry, it is primarily funded by annual levies on the businesses it regulates, as well as through arbitration case fees paid by the businesses. *See id.*; *see also* FIN. OMBUDSMAN SERV., ANNUAL REVIEW 2015/2016, *supra* note 111, at 105.

113 Fin. Ombudsman Serv., *When the Case Fee is Payable*, http://www.financial-ombudsman.org.uk/faq/businesses/answers/funding_a5.html [https://perma.cc/8QTA-FAG6] (last visited Feb. 18, 2018); *see also* FIN. OMBUDSMAN SERV., ANNUAL REVIEW 2015/2016, *supra* note 111, at 105.

114. *See How to Complain*, FINANCIAL OMBUDSMAN SERVICE, http://www.financial-ombudsman.org.uk/consumer/complaints.htm [https://perma.cc/DF56-A88Z] (last visited Mar. 19, 2018); *see also FAQs*, FINANCIAL OMBUDSMAN SERVICE, http://www.financial-ombudsman.org.uk/faq/answers/complaints_a1.html [https://perma.cc/CR7Q-R2CC] (last visited Mar. 19, 2018).

115. *See* FINANCIAL CONDUCT AUTHORITY, FCA HANDBOOK, (Release 25, Mar. 2018) DISP. 3.5.5R; *see also* McMeel, *supra* note 101, at 500.

116. *Id.*

117. *See* FCA HANDBOOK, DISP. 3.5.8 R8R. Notably, failure to comply with FOS requirements to provide evidence may be referred to court for disciplinary action. *See* FCA HANDBOOK, DISP. 3.5.11 G11G; *see also* McMeel, *supra* note 101, at 501.

in a court" and may "accept information in confidence" where only a summary or edited version will be made available to the other party in the dispute.[118] These aspects of the FOS securities dispute resolution process are unlike their counterparts in the FINRA process, which as discussed above are rooted in the US Federal Rules of Evidence, albeit abbreviated and somewhat less formal.

Sixty nine percent of the FOS securities disputes cases are resolved within a twelve month timeframe, which is almost three months shorter than FINRA's turnaround time.[119] However, FOS's complaint volumes were significantly higher than FINRA's, with 438,802 complaints resolved for the year ended March 30, 2016.[120] After the FOS considers the evidence and renders a decision in the case, it gives both parties "a signed written statement of the determination, giving the reasons for it."[121] In this aspect the FOS process also differs from FINRA's as FINRA's rules permit, but do not require, an explanation of reasons for the arbitrators' decisions.[122] The maximum amount of award that the FOS arbitration may order is UK£150,000, unlike FINRA which has no statutory cap as to the amounts of the awards.[123] However, interest and costs that may be awarded are excluded from the UK£150,000 cap,[124] and whenever the FOS finds that additional compensation is warranted, it may make a recommendation to the offending firm to pay the extra amount.[125] Notably, because the FOS securities disputes resolution scheme is free for investors and the FOS's position is that investors do not need professionals such as attorneys and expert witnesses to bring and resolve FOS complaints, awards of costs (including, by inference, for expert witnesses) are not common.[126] Furthermore, the FOS has a one-sided power to award the costs incurred by the investors in the arbitration process, although such costs may not be awarded to a

118. *See* FCA HANDBOOK, DISP. 3.5.9 R9R; *see also* McMeel, *supra* note 101, at 501.

119. *See* FOS, ANNUAL REVIEW 2015/2016, *supra* note 111, at 38.

120. *Id.* at 3. *See also Annual Review 2016/2017: Data in More Depth* 56, FIN. OMBUDSMAN SER., http://www.financial-ombudsman.org.uk/publications/annual-review-2017/pdf/Datamoredepth-AR2016-17.pdf [https://perma.cc/7ZG8-9QXE].

121. *See* FCA HANDBOOK, DISP. 3.6.6R; *see also* McMeel, *supra* note 101, at 502.

122. *See supra* note 54.

123. *See supra* note 36.

124. *See* FCA HANDBOOK, DISP. 3.7.5G; *see also* McMeel, *supra* note 101, at 503.

125. *See* FCA HANDBOOK, CONRED. 1.6.19G; *see also* McMeel, *supra* note 101, at 502.

126. *See* FCA HANDBOOK, DISP. 3.7.10; *see also* McMeel, *supra* note 101, at 503.

brokerage firm and their recovery is only available to investors.[127] With respect to punitive damages, which are not available in securities disputes in United States federal courts but are available in FINRA arbitration of securities disputes,[128] the FOS arbitrators do not have the authority to award punitive damages.[129] This difference between the FOS securities disputes resolution scheme and the FINRA securities arbitration process illustrates that the US arbitration system gives very broad latitude to the arbitrators in devising remedies to the aggrieved parties.[130]

FOS arbitration awards are binding on the financial advice providers but not on the investors.[131] Investors may choose to accept the FOS determination within the time period specified by the FOS, in which case the award becomes binding on both parties and may be enforced in court if not paid, or the investor may choose not to accept the arbitration award and proceed to court litigation.[132] Once the determination by the investor is made whether to accept the award,

---

127. *Id.*

128. *See supra* text accompanying notes 36-37.

129. Notably, this inability to award punitive damages is not specific to the FOS securities arbitration forum. Under the United Kingdom law, arbitrators generally do not have the power to award punitive damages, this power is reserved to the courts. Moreover, punitive damages are generally not recognized under UK law, except in very limited "cases (i) of oppressive, arbitrary or unconstitutional acts by government servants; (ii) where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; (iii) where expressly authorized by statute." This is in marked contrast to the United States approach. Despite the fact that the FAA does not even mention punitive damages and nothing within the United States statutory framework governing arbitration explicitly empowers arbitrators to award punitive damages, the United States courts nonetheless have recognized the arbitrators' right to award punitive damages and generally uphold arbitral punitive damage awards under the broader premise of the federal policy favoring arbitration and affording extreme deference to arbitration decisions. *See* International Dispute Resolution Committee of New York State Bar Association, *Report on Punitive Damages in International Commercial Arbitration*, 5 N.Y. INT'L L. REV. 103, 108 (1992). *See supra* text accompanying notes 36-37.

130. Of note, the broad latitude available to the US arbitrators in devising remedies for the victims is not specific to the securities disputes, and holds true with respect to United States arbitration process in other industries. The federal policy favoring arbitration does not limit the arbitration remedies to those traditionally available in law. For example, Section 12 (a)(5) of the Uniform Arbitration Act, provides that "[t]he fact that the relief was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm an award." *See* Uniform Arbitration Act § 12 (a)(5) (1955); *see also* Payer & Wildfoerster v. Catholic High Sch. Ass'n, 38 N.Y.2d 669, 672 (N.Y. 1976) (noting that remedies available in arbitration need not be confined to the traditional remedies at law).

131. *See* FCA HANDBOOK, DISP 3.7.12 R; *see also* McMeel, *supra* note 101, at 496-97.

132. *See* FCA HANDBOOK, DISP 3.7.13, DISP. 4.2.5 R.

the FOS may specify the date by which the amount awarded must be paid by the respondent business.[133] The details of the awards are not made public, although the FOS is required to maintain a register of each money award and every six months it publishes a public statistics report on the complaints data and awards.[134]

As for the comparison of the treatment of class actions in the United Kingdom, like FINRA, the FOS securities disputes resolution system does not permit collective actions.[135] More generally, although US class actions trace their roots back to the United Kingdom,[136] they have come very far from the United Kingdom model in that regard, with the United Kingdom embracing a more cautious approach with respect to collective actions and limiting them to very few mechanisms, under which actions for damages are only available in limited circumstances, with greater focus on injunctive and other equitable relief.[137]

2. Standards of Care Prevalent in the UK Financial Advice Industry

In the aftermath of the global financial crisis of 2007-08, the United Kingdom implemented some key changes to the way the financial advice providers get compensated for their services by banning commissions, one of the defining features of brokerage

---

133. *See id.*, DISP 3.7.2(B) G; *see also* McMeel, *supra* note 101, at 503.

134. *See, e.g.*, *Complaints Data*, FINANCIAL OMBUDSMAN SERVICE, http://www.financial-ombudsman.org.uk/publications/complaints-data.html (last visited Mar. 7, 2018); *Annual Reviews and Directors' Reports*, FINANCIAL OMBUDSMAN SERVICE, http://www.financial-ombudsman.org.uk/publications/annual-reviews.htm (last visited Mar. 7, 2018); *see also* FCA HANDBOOK, DISP. 3.7.7 R.

135. *See* FCA HANDBOOK, DISP 2.11 G – 2.1.6 R, (setting forth the introduction to the FOS dispute resolution scheme and making it clear, by inference, that collective actions are not supported); *see also* FCA, ENFORCEMENT GUIDE, 102-04, https://www.handbook.fca.org.uk/handbook/document/eg/EG_Full_20160321.pdf [https://perma.cc/UUT2-ASXL] (noting that FCA is empowered to engage in public representative enforcement procedures, a form of collective action in the United Kingdom, where it may bring claims on behalf of consumers to obtain collective redress).

136. The earliest form of class action can be traced back to a group action brought by the parishioners against the parish rector for failing in financial management of the church, in *Master Martin Rector of Barkway v. Parishioners of Nuthampstead*. S*ee* STEPHEN YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 54 (YALE UNIVERSITY PRESS, 1987).

137. *See* JOANNE BLENNERHASSETT, A COMPARATIVE EXAMINATION OF MULTI-PARTY ACTIONS, 45-49 (2016); *see also* FCA HANDBOOK, EG, supra note 135.

industry in the United States.[138] This change in turn led to change in designations applicable to the retail investor financial advice providers in the United Kingdom, which are now known solely as investment advisers and are more akin to the US investment advisers than to the US broker-dealers.[139] This change is largely what underpins the differences in the standards of care for financial advice providers in the United States and United Kingdom, as discussed in more detai l below.

Under Part X of the Financial Services and Markets Act of 2000, the UK legislature conferred rule-making powers on the FCA, including the power to set the standards of care for the financial advisers and brokerage firms.[140] The FCA has in turn developed and promulgated rules that set forth most of the standards that the industry adheres to.[141] In 2012, the FCA implemented an overarching initiative known as the Retail Distribution Review ("RDR"), which was aimed at eliminating bias and conflicted advice in the UK financial markets.[142] Under the RDR, all retail financial advice providers dealing with individual investors were grouped into two categories: independent and restricted.[143]

---

138. *See* Evan Cooper, *Regulatory Changes Abroad Hint at the DOL Fiduciary Rule's Potential Impact,* INVESTMENT NEWS (Apr. 17, 2016), http://www.investmentnews.com/article/20160417/FREE/160419944/regulatory-changes-abroad-hint-at-the-dol-fiduciary-rules-potential [https://perma.cc/7EPE-7UDE] (noting that commissions were prohibited and instead advisers must now charge customers a fixed fee or an hourly rate or a combination thereof); *see also* Financial Advice Market Review 17, FINANCIAL CONDUCT AUTHORITY (Mar. 2016), https://www.fca.org.uk/publication/corporate/famr-final-report.pdf [https://perma.cc/JYF7-88CQ] (noting the high standard for rendering financial advice in the United Kingdom and stating the commissions were banned to eliminate "unacceptable conflicts of interest").

139. *Id. See also supra* text accompanying notes 10, 79.

140. *See* Financial Services and Markets Act 2000, Part X, §§ 138–150; *see also Authorization*, FINANCIAL CONDUCT AUTHORITY, https://www.fca.org.uk/firms/authorisation [https://perma.cc/5CPT-VDY7] (last visited Mar. 7, 2018).

141. *Id. See also Handbook and Guidance*, FINANCIAL CONDUCT AUTHORITY https://www.fca.org.uk/about/handbook [https://perma.cc/4LNT-LVLR] (last visited Mar. 19, 2018) (noting that "[a]ll regulated firms must comply with the [FCA] rules," with financial advisers and investment managers, UK equivalents of US broker-dealers, being among the regulated firms).

142. *See* FINANCIAL CONDUCT AUTHORITY, RETAIL DISTRIBUTION REVIEW 2-3 (2012), https://www.fca.org.uk/publication/finalised-guidance/fg12-15.pdf [https://perma.cc/2RSL-G48Y]; *see also Post-Implementation Review of Retail Distribution Review*, FINANCIAL CONDUCT AUTHORITY https://www.fca.org.uk/news/news-stories/post-implementation-review-retail-distribution-review [https://perma.cc/8FQV-SMTR].

143. FCA, RETAIL DISTRIBUTION REVIEW, *supra* note 142, at 2.

Independent advisers that do not hold themselves out as specialists in a particular product and operate as full-service advisers, have to provide all financial advice to investors in compliance with a "twin test" of being (1) "based on a comprehensive and fair analysis of the relevant market;" and (2) "unbiased and unrestricted."[144] This requires analysis of all available products that exist in the marketplace and precludes advisors from being "bound by any form of agreement with a retail investment product provider[s] that restricts . . . the firm's ability to provide a personal recommendation which is unbiased and unrestricted."[145]

Restricted advice is all advice that is not independent, which may occur when financial services provider specializes in a specific type of products.[146] The same standard of care applies to the restricted advice provider as to the independent one, but restricted advice providers are not required to analyze all available products in the marketplace for a best fit for the client, and are instead obligated to make a detailed disclosure about the restricted nature of their service.[147]

Overall, both independent and restricted financial advice standards require the financial advisory firms to "take reasonable care to ensure suitability of . . . advice and discretionary decisions for any customer," conduct business "with due skill, care and diligence," manage "conflicts of interest fairly," and communicate pertinent information to investors "in a way that is clear, fair and not misleading."[148] This standard of care, with focus on suitability of advice and disclosure of all pertinent information, resembles the US suitability standard for the brokerage industry, although the restrictions on entering into agreements with investment product providers makes it more stringent and closer in spirit to the US fiduciary standard.[149] Similar to the United States, the UK law also recognizes the existence of fiduciary duties by the financial advice providers to the investors where financial advisers have custodianship

144. *Id.* at 6-7.

145. *Id.* at 7.

146. *Id.* at 7-8.

147. *Id.* at 8.

148. *See* FCA HANDBOOK, PRIN. 2.1.1 R; *see also* FCA, Principles of Good Regulation, https://www.fca.org.uk/about/principles-good-regulation [https://perma.cc/7ZCF-SPR9] (last visited Mar. 7, 2018).

149. *See supra* text accompanying note 79; *see also* Cooper, *supra* note 138.

and control over investor's assets and have assumed discretionary authority to manage such assets.[150]

C. Australia

While England may be the great-great-great-great-great-grandmother of the US securities arbitration, Australia is more like its overachieving cousin that always does more. This is evident in Australia's not one, but two securities dispute resolution forums, both of which are faster and more efficient in their administration of securities disputes than FINRA. In this Section I will discuss how securities arbitration works in Australia today, and how it compares to the UK's FOS and the US's FINRA dispute resolution processes.

1. How Securities Arbitration Works in Australia: Financial Ombudsman Service Australia and the Credit and Investment Ombudsman

In contrast to the US and UK securities disputes arbitration processes, which are both centralized in one regulatory body, Australian securities dispute resolution program is more varied and decentralized in comparison. Australian financial markets are regulated by the Australian Securities and Investments Commission ("ASIC") and the Australian Prudential Regulatory Authority ("APRA").[151] Of the two agencies, ASIC has the primary responsibility for approving and overseeing external dispute resolution forums.[152] Two main forums are currently approved and

150. *See* McMeel, *supra* note 101, at 279-82; *see also* LAW COMMISSION, FIDUCIARY DUTIES OF INVESTMENT INTERMEDIARIES, 34-46 (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325509/41342_HC_368_LC350_Print_Ready.pdf [https://perma.cc/8HHM-SKHD].

151. *See Our Role*, AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION, http://asic.gov.au/about-asic/what-we-do/our-role/ [https://perma.cc/RW2G-6MWY] (last visited Mar. 19, 2018); *About APRA*, AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY, http://www.apra.gov.au/AboutAPRA/Pages/Default.aspx [https://perma.cc/2T6Z-EMRS] (last visited Mar. 19, 2018).

152. *See* ASIC, CORPORATE PLAN 2017-18 TO 2020-21, 21 (2017), http://download.asic.gov.au/media/4439405/corporate-plan-2017-published-31-august-2017-1.pdf [https://perma.cc/A6SD-SUUG]; *see also External Dispute Resolution*, AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION, http://asic.gov.au/about-asic/contact-us/how-to-complain/external-dispute-resolution-what-to-do-if-you-are-dissatisfied-with-a-decision/ [https://perma.cc/MP2H-ALYR] (last visited Mar. 19, 2018)("ASIC's role is to provide

operating for resolution of securities disputes in Australia: (i) the Financial Ombudsman Service Australia Limited (FOSA) dispute resolution forum which is the bigger of the two, closing a total of 39,481 disputes in the fiscal year ended June 30, 2017, of which 1,791 were specific to the financial advice and securities brokerage activity comparable to those of US broker-dealers;(ii) the Credit and Investment Ombudsman ("CIO") dispute resolution forum, which resolved a total of 4,145 disputes in the fiscal year ended June 30, 2016.[153] The primary difference between the two forums is that FOSA is geared towards handling complaints for larger institutions, including not only brokerage firms but also large banks and insurers, whereas the CIO primarily handles disputes for the firms it regulates which are ninety-seven percent non-banks, sole traders and smaller financial service providers.[154]

Both FOSA and CIO dispute resolution processes are more similar to the UK's FOS approach to securities dispute resolution than

---

oversight to EDR schemes to ensure they are working . . . effectively in dealing with consumer complaints.").

153. *See* Approved Dispute Resolution Schemes, AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION, http://asic.gov.au/regulatory-resources/financial-services/dispute-resolution/asic-approved-dispute-resolution-schemes/ [https://perma.cc/7ST2-8DGL] (last visited Mar. 19, 2018). Notably, Australian legislature also set up a separate dispute resolution forum reserved solely for complaints dealing with superannuation funds. This alternative dispute resolution scheme is the smallest of the three schemes, with 2,051 complaints resolved in the fiscal year ended June 30, 2017. Because superannuation funds and products are generally more similar in nature to pension plans and insurance than to the traditional securities, this specialized alternative dispute resolution forum is not necessarily comparable to the FINRA dispute resolution processes and is thus outside of scope of this paper. *See What We Do*, SUPERANNUATION COMPLAINTS TRIBUNAL, http://www.sct.gov.au/pages/about-us/about-the-tribunal [https://perma.cc/3EHN-SLGH] (last visited Mar. 19, 2018); *see also* SUPERANNUATION COMPLAINTS TRIBUNAL ANNUAL REPORT 2016-17 2 (2017), http://www.sct.gov.au/dreamcms/app/webroot/uploads/documents/Superannuation%20Complaints%20Tribunal%20Annual%20Report%202016-17%20-%20web.pdf [https://perma.cc/8QYW-45UT] (last visited Mar. 7, 2018); FINANCIAL OMBUDSMAN SERVICE AUSTRALIA, ANNUAL REPORT 2016-17 62 (2017), https://www.fos.org.au/custom/files/docs/fos-annual-review-20162017.pdf [https://perma.cc/C7NQ-W557] [hereinafter FOSA, ANNUAL REPORT 2016-17]; CREDIT AND INVESTMENTS OMBUDSMAN LIMITED, ANNUAL REPORT 2016 7 (2016), https://www.cio.org.au/assets/1212450/CIO%20Annual%20Report%20-%202016.pdf [https://perma.cc/W4JZ-QGZD] [hereinafter CIO, ANNUAL REPORT 2016].

154. *See* CIO, ANNUAL REPORT 2016, *supra* note 153, at 5; *see also Media Release – Ramsay Review Findings – A Solution Looking For a Problem*, CREDIT AND INVESTMENTS OMBUDSMAN, https://www.cio.org.au/news-and-events/media-releases/media-release-ramsay-review-findings-a-solution-looking-for-a-problem.html [https://perma.cc/V6NG-F8XY] (last visited Mar. 19, 2018).

to FINRA's process. This is because both forums are free of charge to the consumers and fairly informal in nature, with FOSA in particular emphasizing that its resolution of the investor complaints is done with "minimum formality and technicality."[155] Further similarity to the UK process is that FOSA and CIO securities disputes resolution processes are not compulsive, and investors[156] may always elect to pursue court litigation rather than the dispute resolution arbitration process.[157]For both FOSA and CIO forums, the dispute resolution determination will be binding on the respondent financial services provider only if the consumer chooses to accept the FOSA or CIO determination.[158] Furthermore, both FOSA and CIO forums have a cap on the monetary compensation limits for the disputes they consider, with both FOSA and CIO noting that they can accept claims up to AU$500,000, however the maximum compensation each agency is allowed to recommend is AU$309,000.[159] Both forums may also award interest costs on an award payment to investors, which are not counted as part

155. *See What We Do*, FINANCIAL OMBUDSMAN SERVICE AUSTRALIA, http://www.fos.org.au/about-us/what-we-do/#id=compensation-caps [https://perma.cc/BXG5-NC2C] (last visited Mar. 19, 2018); FOSA, ANNUAL REPORT 2016-17, *supra* note 153, at 3; *see also About Us*, CREDIT AND INVESTMENTS OMBUDSMAN, https://www.cio.org.au/about-us.html [https://perma.cc/W7L2-F89A] (last visited Mar. 19, 2018).

156. Notably, unlike in US FINRA arbitration and the UK FOS dispute resolution which have fairly broad definitions of what constitutes a "customer" for which disputes may be resolved, Australian securities dispute resolution schemes are limited to investors that are either individual consumers or small businesses. *See Our Small Business Jurisdiction,* FINANCIAL OMBUDSMAN SERVICE AUSTRALIA, http://www.fos.org.au/small-business/our-small-business-jurisdiction/ [https://perma.cc/L7DT-HWZW] (last visited Mar. 19, 2018); *Complaints We Cover*, CREDIT AND INVESTMENTS OMBUDSMAN, https://www.cio.org.au/complaint-resolution/complaints-cio-covers.html [https://perma.cc/P7E4-PVA8] (last visited Mar. 19, 2018).

157. *See Dispute Resolution Process in Detail*, FINANCIAL OMBUDSMAN SERVICE AUSTRALIA, http://www.fos.org.au/resolving-disputes/dispute-resolution-process-in-detail.jsp#id=decision [https://perma.cc/R3Z3-DNZU] (last visited Mar. 19, 2018); *About Ombudsman Determinations*, CREDIT AND INVESTMENTS OMBUDSMAN, https://www.cio.org.au/cases/about-ombudsman-determinations.html [https://perma.cc/U4EG-HRRN] (last visited Mar. 19, 2018).

158. *Id.*

159. *See Before You Lodge a Dispute*, *Limits on Claims and Compensation*, FINANCIAL OMBUDSMAN SERVICE AUSTRALIA, http://www.fos.org.au/resolving-disputes/before-you-lodge-a-dispute/#id=limits [https://perma.cc/DT3H-E7BW] (last visited Apr. 14, 2018); *Complaints CIO Covers*, CREDIT AND INVESTMENTS OMBUDSMAN, https://www.cio.org.au/complaint-resolution/complaints-cio-covers.html [https://perma.cc/8R56-38MS] (last visited Mar. 19, 2018).

of the AU$309,000 monetary compensation limit.[160] With respect to punitive damages, neither FOSA nor CIO forums allow for punitive damage awards, in line with the UK's FOS securities dispute resolution forum but different from the US's FINRA arbitration of securities disputes, where punitive damages are available.[161]

With respect to eligibility requirements, similar to the UK's FOS process, both FOSA and CIO require investors to first work with the financial services provider about which they are looking to lodge a complaint, before investigating and resolving the dispute through their forums.[162] Financial service providers are allowed up to forty-five days to review and address the consumer complaints through their internal complaint handling procedures, with a shorter timeframe of twenty-one days available in cases of financial hardship, after which point FOSA or CIO will start their process if the complaint is not resolved to the investor's satisfaction.[163] FOSA and CIO also have a time limit similar to that of FINRA and FOS, where claims that may be brought for resolution must fall within six years from the date the investor became aware of the loss (or should have reasonably become aware).[164] Pleading standards are low, where investors are simply required to summarize their complaint without the use of "any formal, legal or technical language," and provide copies of the documents that may be relevant to the resolution of their dispute.[165]

160. *See* FOSA, TERMS OF REFERENCE § 9.5; CIO, CREDIT AND INVESTMENTS OMBUDSMAN RULES §§ 9.4-9.5 [hereinafter CIO RULES].

161. *See supra* text accompanying notes 36, 37, 129. Notably, outside of alternative securities dispute resolution schemes, Australian courts permit punitive damages, although "they are considered an extraordinary remedy appropriate only in cases of truly outrageous conduct." This approach is not as limited as that of the United Kingdom under *Rookes v. Barnard,* but not as broad as the availability of punitive damages in the United States. John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 407-08 (2004).

162. *See* CIO RULES, *supra* note 160, at § 9.1; *see also Making a Complaint*, CREDIT AND INVESTMENTS OMBUDSMAN, https://www.cio.org.au/complaint-resolution/making-a-complaint.html [https://perma.cc/LQA8-FTWT] (last visited Mar. 19, 2018); *Dispute Resolution Process in Detail*, FINANCIAL OMBUDSMAN SERVICE AUSTRALIA, http://www.fos.org.au/resolving-disputes/dispute-resolution-process-in-detail.jsp#id=decision [https://perma.cc/2QCZ-YR88] (last visited Mar. 19, 2018).

163. *Id.*

164. FOSA, TERMS OF REFERENCE, *supra* note 160, at § 15.2; CIO RULES, *supra* note 160, at § 6.3.

165. *See* CIO RULES, *supra* note 160, at § 14.5; *see also Lodge a Dispute*, FINANCIAL OMBUDSMAN SERVICE AUSTRALIA, https://odf.fos.org.au/ [https://perma.cc/K9WU-V7TC] (last visited Mar. 19, 2018).

With respect to the procedural aspects of the FOSA and CIO securities dispute resolution processes, again there are strong similarities to the UK's FOS process, and differences from FINRA's process which is more formal. FOSA and CIO both work with the financial services provider named in the dispute, as well as the complaining investor, to gather relevant documentation as needed, and the financial service providers and investors are obligated to comply, however, these forums do not have formal evidentiary procedures or discovery, and are not bound by any rules of evidence.[166] Neither forum requires for a hearing between the parties to be held prior to issuing a determination of the securities dispute, although CIO's dispute resolution rules specifically state that it may convene a hearing "if it is satisfied that doing so would lead to the more efficient and effective resolution of the complaint."[167]

FOSA and CIO appear to have shorter dispute resolution timeframes than FINRA and FOS, with FOSA reporting that eighty-six percent of disputes it closed in the fiscal year ended June 30, 2017 were resolved within three months,[168] and CIO reporting that eighty-three percent of the disputes it closed in the fiscal year ended June 30, 2016[169] were resolved within six months.[170] The rules for both forums require that when a final determination on a dispute is made, a decision supported by reasons be provided to parties involved in the dispute.[171] This is in line with UK's FOS process, but not FINRA's.[172] While FOSA and CIO securities dispute determinations are not required to be made public, unlike FINRA's, both agencies are required to publish statistical reports and analysis of the complaints data on at least an annual basis.[173]

166. *See* FOSA Rules 8.1, 8.4 and 16.5; CIO Rules, *supra* note 160, at §§ 3.4, 16.1. Notably, failure by comply with requests for information within specified time frames allows FOSA and CIO to make adverse evidentiary inferences against the party that failed to respond to the evidence request. *Id.*

167. *See* CIO RULES, *supra* note 160, at §§ 22.2, 22.3.

168. FOSA ANNUAL REPORT 2016-17, *supra* note 153, at 64.

169. The corresponding 2017 data was not available at the time of this analysis.

170. CIO ANNUAL REPORT 2015-16, *supra* note 153, at 7.

171. FOSA TERMS OF REFERENCE, *supra* note 160, at § 8.7; CIO RULES, *supra* note 160, at § 23.4.

172. *Supra* text accompanying notes 54 and 121.

173. FOSA TERMS OF REFERENCE, *supra* note 160, at § 12.2; CIO RULES, *supra* note 160, at § 41.2.

Lastly, with respect to availability of class action remedy in FOSA and CIO forums, CIO's rules and website are silent as to availability of class action arbitration, whereas FOSA's website specifically identified class actions as an area of concern, stating that class actions are handled by the Supreme Court of Victoria or the Federal Court of Australia, and noted that pursuant to Term of Reference (FOSA's rules of conduct) 5.2, the agency has discretion to "refuse to consider a dispute if there is a more appropriate place to deal with a dispute" implying that class actions are not going to be accepted within the FOSA dispute resolution forum.[174]

2. Standards of Care Prevalent in the Financial Advice Industry of Australia

Following the global financial crisis of 2007-08, Australia's legislature passed a number of legislative changes that had the effect of banning commissions and implementing a best interest fiduciary standard for financial advice providers.[175] However, the fiduciary standard in Australia is subject to certain "reasonable step qualifications" which ultimately mean that Australian financial advice providers are, on balance, fiduciaries only when dealing with small and unsophisticated retail investors.[176] This approach is different from those taken in the United States and United Kingdom, as explained in more detail below.

Under Part 1, subsection 5B of the Corporations Act of 2001, Australian legislature gave ASIC the power to administer the Act and

---

174. *Opt-Out Class Actions*, FINANCIAL OMBUDSMAN SERVICE CIRCULAR, Issue 6 (2011) http://www.fos.org.au/the-circular-6-home/optout-class-actions/ [https://perma.cc/R32K-GX7W]; *see also* Michael Legg, *Redressing Mass Harm: ADR, Class Actions and Regulatory Responses,* UNIVERSITY OF NEW SOUTH WALES REDRESS AND REGULATION SEMINAR 32-38 (2014).

175. These legislative changes are collectively known as Future of Financial Advice Laws ("FOFA"). *Background and Implementation of FOFA*, AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION, http://asic.gov.au/regulatory-resources/financial-services/future-of-financial-advice-reforms/fofa-background-and-implementation/ [https://perma.cc/U3HU-HTQ9]. *See also* Cooper, *supra* note 138 (noting that FOFA enactment was "a reaction to cases of wealth management firm malfeasance during the 2008" and resulted in ban on commissions but otherwise had little effect on the financial advice and securities industry).

176. *Id. See also Regulatory Guide 175, Licensing: Financial Product Advisors – Conduct and Disclosure,* RG 175.10, AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION, (Nov. 2017) http://download.asic.gov.au/media/4543983/rg175-published-14-november-2017.pdf [https://perma.cc/7FUY-ARU6].

thus set the standards of conduct for the financial advisers and brokerage firms.[177] ASIC has in turn developed a set of comprehensive regulations that form the standards of care for the Australian securities industry. [178] These standards require that the financial service providers such as brokerage firms "do all things necessary to ensure that financial services . . . are provided efficiently, honestly and fairly" and "have adequate arrangements in place to manage . . . conflicts of interest."[179] Australian financial service advice providers also have additional, extensive statutory obligations concerning disclosure of pertinent information to investors, which vary depending on whether the advice provided is personalized or generic[180] and whether it is provided to a retail or institutional client.[181] Generally, Australian financial advice and brokerage services providers must provide clients with the so-called written "Financial Service Guides" before any advice is given, and provide additional "Statement of Advice" with an explanation of the basis for advice in each personalized advice instance with a retail client.[182] Where the financial advice is personalized and provided to retail clients,[183] financial advisers have fiduciary duties and must prioritize

177. The Corporations Act is the primary federal statute governing financial services industry in Australia. *See* Corporations Act of 2001, Volume 1, ch 1 pt 1.1.5B (Austl.); *see also Laws We Administer*, AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION, http://asic.gov.au/about-asic/what-we-do/laws-we-administer/ [https://perma.cc/6KPB-GEHF] (last visited Mar. 19, 2018).

178. *See Giving Financial Products Advice*, AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION, http://asic.gov.au/regulatory-resources/financial-services/giving-financial-product-advice/ [https://perma.cc/5DNF-2S85] (last visited Mar. 19, 2018); *see also Codes of Conduct*, AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION, http://asic.gov.au/for-consumers/codes-of-conduct/ [https://perma.cc/R6KE-AFPD] (last visited Mar. 19, 2018).

179. *See Regulatory Guide 36 Licensing: Financial Product Advice and Dealing*, RG 36.94-96, AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION, (June 2016) http://download.asic.gov.au/media/3889417/rg36-published-8-june-2016.pdf [https://perma.cc/4F6S-YUJQ]; *see also supra* note 178.

180. ASIC defines "personal advice" as financial product advice that is given after consideration of the investor 'objectives, finances and needs, whereas "generic advice" is all other advice. *See Regulatory Guide 175*, *supra* note176, at RG 175.10.

181. *See Regulatory Guide 36, supra* note 179, at RG 36.96-36.100.

182. *See Regulatory Guide 175, supra* note 176, at RG 175.3.

183. A "retail client" is not simply an individual client, further considerations as to whether the client is "retail" within the meaning of the Corporations Act and ASIC's regulatory scheme depend on the client's financial status and investment experience. For example, investors who are sophisticated investors or have assets of at least AU$2,500,000 and gross income of AU$250,000, or receive advice on transactions involving amounts in excess of AU$500,000, are not considered "retail clients." *See* Corporations Act of 2001 (Cth) ss

client's interests above their own and "act in the best interest of the client" through advice that includes disclosures as to the basis for such advice, warnings regarding various risks associated with securities, and disclosure of any related party conflicts of interests.[184] This standard of care is different from the US suitability standard and limited fiduciary standard for retirement accounts and certain discretionary and control relationships, and from the UK reasonable care and suitable advice standard which likewise recognizes certain fiduciary relationships, not limited to retirement accounts but determined by exercise of a relationship of trust or control and discretion over investor's assets.[185] Thus, Australia's securities laws impose the best interest fiduciary standard on all personalized advice to individual investors who are not experienced and not wealthy, thus predicating Australian standard of care for financial advice providers on the client's profile rather than on the financial service provider's business designation.

III. THREAT OF FRAGMENTATION AND LOSS OF AN EXPERT FORUM IN HANDLING OF THE SECURITIES DISPUTES IN THE US

Why are these securities dispute resolution forums and the varying standards of care important? They are important because they help preserve confidence in the securities markets, which rely on broker-dealers to function effectively. Further, they help the investing public achieve quicker, less expensive, and more uniform resolution of conflicts that arise in the context of financial advice. However, the way the securities disputes are resolved in the US may change significantly in the near future. This is due to the fact that the enforcement mechanism for the Conflict of Interest Rule[186] comes into effect on July 1, 2019, and both the DOL and enterprising securities plaintiffs' attorneys may start to bring litigation that would traditionally be handled through the FINRA securities dispute resolution forum, to federal courts. Even if the Conflict of Interest

761G(7), 761GA (Austl.); *see also* Corporations Regulations 2001 (Cth) regs 7.1.19-7.1.28 (Austl.).

184. *See* Corporations Act of 2001(Cth) pt, 7.7 div. 2 (Austl.); *see also Regulatory Guide 175*, *supra* note 176, at RG 175.1, RG 175.20.

185. *See supra* text accompanying notes 79, 97, 150.

186. *See supra* Part II (A)(3).

Rule is further delayed or amended, attempts at similar regulatory undertakings with similar effects should be expected. Coupled with the pervasively negative public view of the securities industry,[187] this may pose a serious threat to an expert securities disputes resolution forum that has developed over the last two centuries. This impending conflict is addressed in more detail below.

According to FINRA, in 2017 and in 2016, the top 5 controversy types in customer arbitrations were:[188]

1. Breach of fiduciary duty, with 2,002 cases in 2016 and 1,899 cases served in 2017.
2. Misrepresentation, with 1,670 cases in 2016 and 1,663 cases served in 2017.
3. Negligence, with 1,862 cases in 2016 and 1,662 cases served in 2017.
4. Failure to supervise, with 1,802 cases in 2016 and with 1,621 cases served in 2017.
5. Suitability, with 1,606 cases in 2016 and 1,606 cases served in 2017 (flat, no change year-over-year).

As these statistics indicate, FINRA has *substantial* expertise in handling arbitrations pertaining to the breach of fiduciary duty. This is a decisive differentiator that should not be taken lightly, as the financial industry is highly complex and there is substantial value in FINRA's specialized forum with experienced arbitrators, compared to limited or no experience in this technical field for the likely majority

---

187. According to the 2016 Makovsky Wall Street Reputation Study, which involved a survey of 228 executives across the financial services industry, and of 1,079 persons representative of the U.S. general population, 86% of the financial industry respondents viewed the financials services industry's reputation as still being adversely impacted by the 2007-2008 financial crisis, over a decade after its occurrence, and regardless of remedial efforts and the remarkable market rebound. Furthermore, 27% of the general population respondents reportedly lost trust in the financial sector, and 91% believed that another financial crisis was likely. MAKOVSKY, 2016 WALL STREET REPUTATION STUDY (2016). *See also* Paul R. La Monica, *Banks Know that Customers Hate Them*, CNN MONEY (June 17, 2014), http://money.cnn.com/2014/06/17/investing/banks-crisis-reputation/index.html [https://perma.cc/3FT3-V28M].

188. *See Top 15 Controversy Types in Customer Arbitration*, FINANCIAL INDUSTRY REGULATORY AUTHORITY, http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics#top15controversycustomers (last visited Mar. 19, 2018); *see also* George H. Friedman, *Giving Credit Where Credit is Due: FINRA Improves Dispute Resolution Transparency*, SAC BLOG (Dec. 8, 2015) http://www.sacarbitration.com/blog/giving-credit-credit-due-finra-improves-dispute-resolution-transparency/ [https://perma.cc/PWU8-EL9A].

of federal judges and juries.[189] Moreover, statistical analysis of the arbitration decisions indicates that on average, investors prevail between thirty-eight to forty-nine percent the time, and punitive damages are awarded in as many as 9.1% of those cases where investors prevailed.[190] Notably, punitive damages are rarely awarded in securities disputes in federal courts, although they may be available in non-securities cases involving a financial injury.[191] However, under the Conflict of Interest Rule, broker-dealers are prohibited from compelling clients to sign PDAAs,[192] which have been employed by the securities industry since 1980s as a means of directing all securities disputes through FINRA arbitration, and not the federal courts. Under the Conflict of Interest Rule, the parties would have the option to bring their disputes to federal courts, although they may voluntarily elect FINRA arbitration. Given the low public opinion of the securities industry in general and of the FINRA dispute resolution forum in particular, the Conflict of Interest Rule has the potential to redirect many of the securities disputes away from the specialized FINRA forum.

Further complicating the matter is the fact that courts have held that breach of fiduciary duty suits brought under 29 U.S.C. § 1132(a)(2) for ERISA plans by a participant or beneficiary may be maintained as class actions on behalf of all or many of the retirement

189. *See* Laurence Shore, *The Advantages of Arbitration for Banking Institutions*, 14 J. INT'L BANKING L. 347, 347 (1999) (noting that not only is it likely that courts and juries do not have specific expertise in financial disputes, but they may also not be inclined to understand the details of the financial services field); *see also* Stefano E. Cirielli, *Arbitration, Financial Markets and Banking Disputes*, 14 AM. REV. INT'L ARB. 243, 249 (2003) ()(emphasizing that "[d]ue to the rapid expansion of financial activities, a judge in fact might not always be familiar with the new financial services and financial transactions, many of which can have a very technical content.").

190. *See* Choi & Eisenberg, *supra* note 38, at 497(discussing a 2010 study of 6,803 securities arbitration awards which showed that claimants prevailed in 49 percent of arbitrations and that of those victories, three hundred and four cases, which would represent an incidence rate of 9.1 percent, included a punitive damages award). However, 2017 FINRA statistics indicate customers were awarded damages in 43 percent of cases. *See Results of Customer Claimant Arbitration Award Cases*, FINANCIAL INDUSTRY REGULATORY AUTHORITY, http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics [https://perma.cc/VD74-5MVL].

191. Choi & Eisenberg, *supra* note 38, ,at 503. ("Virtually all empirical studies of punitive damages in court-based litigation find them to be infrequently awarded, with a rate of . . . three to five percent of plaintiff trial wins.").

192. *See supra* Part II(A)(1), at pp. 10-11.

plan participants, allowing for actions seeking relief beyond just the individual's personal share of losses.[193] As the FINRA securities arbitration forum does not handle class action matters, the Conflict of Interest Rule provides an incentive to seek relief in federal court and to bring class actions. This could potentially act as a disruptor to the established securities dispute resolution arbitration scheme in the United States and adversely impact investor's interests and public policy of favoring arbitration. The federal courts process does not have the benefit of the speed, expertise and uniformity of the FINRA forum. Equally important, the costs of bringing securities disputes to court are likely to be substantially higher.[194]

FINRA's arbitration dispute resolution is a more cost-effective way to resolve a securities claim than bringing a federal court claim. The initial fees for the two proceedings are comparable: FINRA's filing fee for investors varies depending on the amount of the claim but starts at US$50 and is capped at US$2,250,[195] as compared to the district court flat initial claim fee of US$400.[196] FINRA's also considers financial hardship arbitration fee deferrals and waivers, on a case by case basis.[197] The securities industry also subsidizes a large portion of the FINRA arbitration process in each case, through the

193. *See* Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 423 (6th Cir. 1998) ("[T]he standing-related provisions of ERISA were not intended to limit a claimant's right to proceed under Rule 23 on behalf of all individuals affected by the challenged conduct [of the fiduciary], regardless of the representative's lack of participation in all the ERISA-governed plans involved."); *see also In re* Principal U.S. Prop. Account ERISA Litig., 274 F.R.D. 649 (S.D. Iowa 2011).

194. *See* Lipner, *supra* note 42 (noting that biggest cost in both traditional litigation and in arbitration is attorney's fees, however "[l]itigation involves so much more lawyer work than does arbitration" thus making arbitration a cheaper and "more streamlined" choice for investors); *see also* White v. Preferred Research, Inc., 315 S.C. 209, 212 (Ct. App. 1993)(noting that "arbitration is not litigation carried on by other means. It is intended to be, and it is, an alternative means for resolving disputes *without the cost and delay of a lawsuit*.")(emphasis added).

195. Of note, $2,250 fee is the high watermark and only applies to disputes seeking $5 million in damages or greater. *See* FINRA Rules, Rule 12900 (2007).

196. *See District Court Fee Schedule and Related Information*, UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, http://www.nysd.uscourts.gov/fees [https://perma.cc/N9W4-ST9T] (last visited Mar. 19, 2018); *see also Court Fees*, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK, https://www.nyed.uscourts.gov/court-fees [https://perma.cc/W2QZ-GCYN] (last visited Mar. 19, 2018).

197. *See* FINRA Rules r. 12900(a) (Fin. Indus. Regulatory Auth. 2014); *see also Arbitration Fee Waivers*, FINANCIAL INDUSTRY REGULATORY AUTHORITY, https://www.finra.org/arbitration-and-mediation/arbitration-fee-waivers [https://perma.cc/5JDJ-6DPV].

higher member filing fees and member surcharges.[198] However, the main component of legal costs associated with both arbitration and a traditional court action is attorney's fees.[199] Securities transactions tend to be complex and require significant subject matter expertise on the part of the attorney, as well as extensive use of expert witnesses.[200] Such expertise does not come cheap. Rates vary between US$300 and US$1,500 an hour for securities attorneys.[201] Notably, in 2013 the ABA Journal reported that "the practice area with the highest billing rate was finance and securities, with an average of US$673 an hour."[202] Furthermore, expert witness fees in a highly technical and complex area such as securities are likewise high, and may reach well over US$1,000 per hour.[203] For two reasons, these hourly attorney's fees and expert witness costs add up a lot more in a traditional court action as compared to an arbitration proceeding.[204] First, in traditional court litigation there are motions to dismiss, interrogatories and depositions, motions for summary judgment, pre-

---

198. *See* FINRA Rules r. 12900(b) (Fin. Indus. Regulatory Auth. 2014); FINRA Rules r. 12901(a) (Fin. Indus. Regulatory Auth. 2017).

199. *See* Lipner, *supra* note 42 (noting the biggest cost in both traditional litigation and in arbitration is attorney's fees, however "[l]itigation involves so much more lawyer work than does arbitration" thus making arbitration a cheaper and "more streamlined" choice for investors); *see also* Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 CT. STAT. PROJECT 7 (2013), http://www.courtstatistics.org/~/media/microsites/files/csp/data%20pdf/csph_online2.ashx [https://perma.cc/7Z8N-CAY2] (noting that traditional court trial is single most expensive component of litigation representing one-third to one-half of total litigation time and thus, its cost).

200. *See* Lipner, *supra* note 42; *see also* Raymond W. Henney, *Expert Witness Testimony in Securities Cases*, 78 MICH. B. J., 696 (1999) (noting that "[e]xpert testimony in the securities area is particularly attractive because it is highly regulated, dominated by specialized terms, and is generally unfamiliar to jurors and many trial judges.").

201. Sara Randazzo, *Legal Fees Cross New Mark: $1,500 an Hour,* WALL ST. J. (Feb. 9, 2016), http://www.wsj.com/articles/legal-fees-reach-new-pinnacle-1-500-an-hour-1454960708

202. Debra Cassens Weiss, *Average Hourly Billing Rate for Partners Last Year $727 in Largest Law Firms*, A.B.A. J., (July 15, 2013), http://www.abajournal.com/news/article/average_hourly_billing_rate_for_partners_last_year_was_727_in_largest_law_f/ [https://perma.cc/9T7U-6QZC].

203. *See* Theresa W. Parrish, *Tips for Dealing with Exorbitant Expert Witness Fees,* A.B.A. TRIAL PRACTICE BLOG (Sept. 10, 2015), https://apps.americanbar.org/litigation/committees/trialpractice/articles/summer2015-0915-tips-dealing-with-exorbitant-expert-witness-fees.html [https://perma.cc/8R5U-5AYQ].

204. Susan Zuckerman, *Comparing Costs in Construction Arbitration and Litigation*, 62 DISP. RESOL. J. 70, n. 4 (2007). *See also* Lipner, *supra* note 42 (noting that extensive discovery is the hallmark of traditional litigation and is "very pricey," with deposition costs that can quickly match and exceed the cost of arbitration).

trial briefs, post-trial briefs, and the potential for multiple appeals, all of which require significant attorney's hours and potential multiple rounds of expert witness work. Second, the cost of discovery in a traditional court proceeding is significant, especially since discovery motions in federal court litigation are common,[205] with some outliers reaching as high as US$1 million.[206] In arbitration, the process is more streamlined, since as discussed above there are limited pre-hearing motions, very few appeals, and more simplified and limited rule-based discovery,[207] which lead to lower procedural costs.[208] Expert testimony is permitted and often used in securities arbitration, however the expense associated with the use of experts is lower due to the more expedited nature of arbitration proceedings.[209] Parties to the arbitration may request that the arbitration panel award the costs of experts, with FINRA arbitration rules and the arbitrators' guide expressly providing for award of such costs.[210] While securities

---

205. *See* Zuckerman at 74, *supra* note 204. *See also* Hannaford-Agor, & Waters, *supra* note 199 (noting that discovery is second most-time intensive, and thus second most expensive, element of civil litigation proceedings).

206. *See, e.g.*, Major Tours, Inc. v. Colorel, No. 05-3091 (JBS/JS), 2009 WL 3446761, at *1 (D.N.J. Oct. 20, 2009) (noting complexities associated with electronic discovery in a case where the defendant estimated that to meet the plaintiff's request for e-mail production it would need to incur in excess of $1 million in e-mail retrieval costs).

207. *See* Aaron Aizenberg, Benjamin Prinsen, *FINRA Arbitration: Leveling the Playing Field for Investors*, 90 WIS. LAW. 30, 33 (2017) ("FINRA discovery focuses almost exclusively on the exchange of documents. Parties do not have the right (although it can be requested in extraordinary circumstances) to take depositions. This can benefit parties with fewer resources because it prevents the more well-funded party from driving up expenses by serving extensive written discovery and conducting numerous depositions.").

208. *See, e.g.,* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 542, 97th Cong., 2d Sess. 13 (1982)) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is more often flexible in regard to scheduling of times and places of future hearings and discovery devices."); Theodore O. Rogers, Jr., *Mandatory Pre-Dispute Arbitration: Self-Interested Critics Only Spinning Truth About a Process That Has Been Approved by Congress*, DISP. RESOL. MAG., 5 (1998) (asserting that arbitration is "a congressionally approved mechanism for resolution of claims that saves all parties time and expense").

209. *See* Lipner, *supra*, note 42 (noting that a "big expense in a securities case is retaining the services of an expert witness to analyze the account and testify on technical matters. The cost of an expert can range from a few thousand dollars to tens of thousands, depending on the kind of case and the kind of expert.").

210. *See* FINRA Rules, r. 13902 (Fin. Indus. Regulatory Auth. 2014); *see also* FINANCIAL INDUSTRY REGULATORY AUTHORITY Office, DISPUTE RESOLUTION,

arbitrators have the discretion to deny the allocation of expert witness costs,[211] they often grant them,[212] with some securities industry experts reporting that in 2016 an estimated thirty-four percent of arbitration decisions resulted in award of expert fees.[213] Thus, recent hostile trends against arbitration of securities disputes in the United States, exemplified by the DOL Fiduciary Rule, the CFPB's regulatory efforts, and most recently by the pending Arbitration Fairness Act of 2017,[214] are troubling because they "brazenly dismiss[] . . . the FINRA arbitration system as a mechanism to resolve disputes between financial professionals and their clients," which has the unfortunate effect of being "good for plaintiffs' lawyers, bad for investors."[215] These efforts could, over time, lead to a decline in usage of a highly specialized, effective, and lower cost forum.

IV. FINRA SHOULD RESTORE PUBLIC'S CONFIDENCE IN ITS DISPUTE RESOLUTION FORUM BY LEARNING FROM THE UK AND AUSTRALIA'S SECURITIES DISPUTE RESOLUTION PROCESSES

In the age of skepticism and hostility towards financial advice providers and the brokerage industry,[216] it makes sense to examine

---

ARBITRATOR'S GUIDE 70 (2017), https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf [https://perma.cc/3DVQ-SGJJ].

211. *See e.g.,* Mutual of Omaha Investor Services v. Kevin P. Pearce, Case No. 14-00988 (2017) (FINRA Arb) (declining to award expert witness fees for unspecified reason); Callas Found., Inc. v. Morgan Keegan & Co., Case No. 10-00606 (2012) (FINRA Arb.) (declining to award expert fees due to claimant's culpable conduct).

212. *See, e.g.,* Farah v Wedbush Sec. Co., Case No. 12-02469 (2013) (FINRA Arb.) (awarding claimant $18,500 in expert witness fees); Jaynes v. Sec. Am., Inc., Case No. 10-03787 (2013) (FINRA Arb.) (awarding claimant $4,000 for expert witness fees); Aberlich v. Intervest Int'l Equities Corp., Case No. 10-00481 (2012) (FINRA Arb.) (awarding claimant $25,000 in expert witness fees).

213. Dana N. Pescosolido, *FINRA Customer Case Awards – Story Behind the Statistics,* GUILIANO LAW FIRM (Jan. 30, 2017), https://securitiesarbitrations.com/finra-customer-case-awards-story-behind-statistics/ [https://perma.cc/YL9A-ZRWP].

214. The Arbitration Fairness Act of 2017 was introduced to the US Senate in March with the express purpose of excluding, among other things, consumer contracts for securities that include PDAA from being enforceable under the FAA. Arbitration Fairness Act of 2017, H.R. 1347, 115th Cong. (2017).

215. Comment Letter from Daniel M. Gallagher, SEC Commissioner, on Proposed Fiduciary Rule (July 21, 2015), https://www.sec.gov/news/speech/2015/gallagher-dol-comment-ttr-7-21-15.pdf [https://perma.cc/YHK3-BYXT].

216. *See supra* text accompanying notes 3, 5.

how international common law jurisdictions with developed securities markets address common problems in securities dispute resolution. We can learn from other statutory systems for securities dispute resolutions and adopt some of their best practices. Although the United States had long been a pioneer in regulation of the securities markets and in investor protection, the United Kingdom and Australia demonstrate there is a way to improve the United States' FINRA securities dispute resolution process.

First, analysis of the UK's and Australia's dispute resolution forums shows that they are absolutely free of charge to consumers. The fact that FINRA imposes arbitration fees on consumers is hardly surprising, considering the extensive nature and relative formality of its process. However, learning from other jurisdictions and finding a way to make the service free, at least for retail investors under a certain net worth threshold, would advance FINRA's statutory obligation of safeguarding investors.[217] It could also make FINRA's forum more accessible to the small individual retail investors who may not be attractive plaintiffs for attorneys working on a contingent fee basis.[218] Currently, FINRA's half measure is to consider financial hardship arbitration fee deferrals and waivers.[219] However, no criteria is set forth as to who would qualify, and no statistics are available as to how many investors were able to obtain deferrals and waivers.[220] The securities industry already subsidizes a large portion of the FINRA arbitration process in each case, through the higher member filing fees and member surcharges.[221] In the interest of making securities dispute arbitration forum more accessible, it would seem that asking the industry to fund all of it would not be too far-fetched.

Some may argue that making FINRA's arbitration process free of charge may encourage more arbitration claims as American investors are part of the society that is already known for being

217. 15 U.S.C. § 78o-3(b)(6) ()(2012). *See also Our Mission*, FINANCIAL INDUSTRY REGULATORY AUTHORITY, https://www.finra.org/about/our-mission [https://perma.cc/R8D7-ERXL].

218. *See* Lipner *supra*, note 42 ("A lawyer's willingness to accept a case on a contingency depends on not just the lawyer's perception of the merit of the case, but also its size.").

219. *See* FINRA Rules r.12900(a) (Fin. Indus. Regulatory Auth. 2014).

220. *Id.*

221. *See* FINRA Rules r.12900(b) (Fin. Indus. Regulatory Auth. 2014); FINRA Rules r.12901(a) (Fin. Indus. Regulatory Auth. 2017).

notoriously litigious.[222] This could be partially mitigated, however, through an implementation of the eligibility requirement akin to that of the UK and Australian securities dispute resolution forums. Prior to being eligible to bring a FINRA securities arbitration claim, all investors should be first required to go through the internal complaint review mechanisms that the financial service providers maintain, and financial services providers should be given a reasonable amount of time to resolve the dispute before FINRA accepts it into arbitration.

Second, both the United Kingdom and Australia require their securities dispute resolution agencies to provide parties in a securities dispute with the reasoning for their decision. Requiring rather than permitting rationale for the arbitration decisions in the United States makes a lot of sense and would aid greatly in making FINRA's process more transparent, as well as help facilitate clearer precedential value of arbitration decisions. Indeed, reasoned decisions make particular sense in the United States, because unlike the securities dispute resolution processes in the United Kingdom and Australia, the US securities dispute resolution process is binding on all parties,[223] and US arbitration awards may only be appealed on very limited grounds.[224] Hence, a written record of rationale used to achieve a particular arbitration decision is critical because its absence undermines the confidence of the parties in the objectivity of the arbitration process, and makes it difficult to challenge FINRA arbitration decisions in case of injustice. A countervailing argument to this recommendation for explained opinions is that written opinions will be used as a conduit for appeals, and will slow down the arbitration process.[225] However, arbitration awards may only be appealed on very limited grounds, and courts accord great deference to arbitration decisions.[226] As to the delay that written arbitration

---

222. While the litigiousness of the American society is most pronounced in tort litigation, this litigiousness is also pervasive in other areas of the law. *See* Procek v. Hudak, No. 2000 WL 546079, at *7 (Del. Ch. Apr. 20, 2000) (noting that the "people so common in today's litigious America [are] willing to march to a lawyer's office at the slightest hint of legal conflict"). For a more in-depth analysis of the American notoriety in litigation, see J. Mark Ramseyer, Eric Rasmusen, *Comparative Litigation Rates*, (Harvard John M. Olin Ctr. For Law, Econ. & Bus. Discussion Paper Series, Discussion Paper No. 681, 2010), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Ramseyer_681.pdf.

223. *See supra* text accompanying note 59.

224. *See supra* text accompanying notes 61, 62.

225. *See* Katsoris *supra* note 6, at 459-60.

226. *See supra* Part II(A)(2) at pp. 20-21; *see also supra* text accompanying notes 61, 62.

opinions may introduce to the FINRA process, a solution proposed below addresses how this can be mitigated.

FINRA's securities disputes resolution process, while more streamlined than US federal court litigation, is significantly more formal, and thus time-consuming, when compared to the United Kingdom and Australia's securities dispute resolution forums. FINRA's average turnaround time of 14.5 months is considerably longer than the UK's FOS reported average of just under twelve months, and Australia's FOSA and CIO reported averages of three and six months, respectively. FINRA could optimize the process by further simplifying its evidentiary, discovery and hearing procedures, and borrowing a page from the UK's FOS or Australia's CIO, which only order hearings if they believe it is the most efficient way to resolve a dispute. Such streamlining may be perceived as undermining the structural protections for the benefit of retail investors. However, FINRA could overcome the objections from the plaintiffs' representatives by making the right to eliminate certain hearings or components of the discovery and evidentiary procedures unilateral to retail investor plaintiffs.

With that said, FINRA's process is effective in many ways, and the United Kingdom and Australia can likewise learn from the United States and FINRA. Allowing securities arbitration awards in both United Kingdom and Australia's forums to be non-binding on investors may invite abuse and forum – shopping, and could waste taxpayers' money. FINRA's policy that all arbitration decisions are binding on both parties is a sound policy that encourages efficient use of resources and promotes judicial economy. Furthermore, FINRA should be applauded for making securities dispute decisions publicly available. United Kingdom and Australia provide parties to a dispute with reasoned decisions, but do not make them publicly available. This does not help foster public transparency into the securities dispute resolution process. FINRA should continue to maintain a public database of all securities arbitration decisions.

V. CONCLUSION

In summary, FINRA should: (a) make its securities disputes resolution forum free of charge for retail investors, at least under a certain net worth threshold; (b) mitigate potential for increase in arbitrations by adopting an eligibility criteria requiring claimants to work with the financial services provider for a reasonable period of time before commencing arbitration; (c) mandate rather than permit that all FINRA arbitrators provide rationale for their decisions and prepare written explanations, which should be made publicly available; (d) optimize its discovery, evidentiary and hearing processes so that the forum is more competitive and prompt; (e)maintain the policy of making all of its arbitration decisions binding, and continue to provide public access to its decisions. Taking these steps will help shore up the confidence of the investing public in the integrity of the FINRA securities dispute resolution process and enable FINRA to finally shake off its villain image and make the United States the golden child of the securities dispute resolution family.