Introduction

The present financial crisis has had significant repercussions throughout the global economy. It has provided an impetus for examining effective avenues for the resolution of financial disputes. As yet, however, there is little consensus worldwide as to how the effects of such crises can best be addressed through effective systems of financial dispute resolution.

This book presents an examination of how governments and self-regulatory organisations in major global financial centres have increasingly employed alternative dispute resolution mechanisms including ombuds models, arbitration, direct settlement negotiation and mediation to address consumer complaints against retail banks and financial institutions as a form of 'responsive banking'. The results of a comparative cross-jurisdictional analysis of consumer financial dispute resolution centres in seven jurisdictions shed light on the underlying structural design, policy orientation, complaint procedures, financing and oversight of financial dispute resolution centres as established in diverse regions. The findings indicate that such centres in general offer a flexible and relatively fast way to resolve financial disputes, but are not without their challenges. Such challenges include the potential for mismatch between regulatory consistency and individualised case handling.[1] Determining how best to overcome such challenges while addressing a growing number of finance-related disputes are pressing questions facing governments, legislatures and aggrieved citizens.

A financial crisis with global proportions

Beginning in early 2007, the indicators of what would soon become the most severe financial crisis since the Great Depression in the 1930s became increasingly evident. In the summer of 2007, investment banks such as Bear Stearns and BNP Paribus warned investors that they would

[1] See Arner, Hsu and Da Roza (2010) 'Financial regulation in Hong Kong: Time for a Change', *As. J.C.L.*, 5, pp. 71–114.

be unable to retrieve money invested in sub-prime mortgages hedge funds. Later in September, there was a bank run on Northern Rock – the biggest run on a British bank for more than a century. By 2008, Northern Rock was nationalised. Banks such as the Union Bank of Switzerland ('UBS'), Merrill Lynch and Citigroup also started announcing losses due to heavy investments in sub-prime mortgages. In response to the growing crisis, central banks in Europe, Canada, the United Kingdom, the United States and Japan intervened to boost liquidity in the financial markets by reducing interest rates and increasing monetary supply.[2]

To prevent a collapse of the US housing market, financial authorities in the United States stepped in with one of the largest bailouts in history of Fannie Mae and Freddie Mac. On 15 September 2008, Lehman Brothers filed for bankruptcy. Ripple effects were immediately felt throughout the world. Countries successively announced details of rescue packages for individual banks as well as the banking system as a whole and emergency interest rates were further cut. The United States initiated a $700 billion Troubled Asset Relief Program to rescue the financial sector and the Federal Reserve also injected a further $800 billion into the economy to stabilise the system and encourage lending. It also extended insurance to money market accounts via a temporary guarantee.[3] By early 2009, the United Kingdom, the European Union and the United States had officially slipped into recession.

Governments across the world implemented economic stimulus packages and promised to guarantee loans. The International Monetary Fund ('IMF') estimated that banks in total lost $2.8 trillion from toxic assets and bad loans between 2007 and 2010.[4] There was also a severe decline in assets as stock indices worldwide fell along with housing prices in the United States and the United Kingdom.[5]

The global reach of the financial crisis calls for renewed investigation of how governments and self-regulatory organisations in major financial centres can effectively employ dispute resolution mechanisms to address citizen complaints arising from financial dislocation. Such an examination is

[2] BBC News (7 August 2009) 'Credit crunch to downturn', available at: http://news.bbc.co.uk/2/hi/business/7521250.stm [accessed 29 December 2010].

[3] D. Gullapalli, and S. Anand (20 September 2008) 'Bailout of money funds seems to stanch outflow', *The Wall Street Journal*, available at: http://online.wsj.com/article/SB122186683086958875.html?mod=article-outset-box [accessed 29 December 2010].

[4] D. Cutler, S. Slater and E. Comlay (5 November 2009) 'US, European Bank writedowns, credit losses', *Reuters*, available at: www.reuters.com/article/idCNL554155620091105?rpc=44 [accessed 29 December 2010].

[5] BBC News, 'Credit crunch to downturn'.

important not only to help us understand the dynamics of resolving complex consumer disputes in times of financial crisis, but also to prepare us to apply lessons learned to the design of more robust, fair and efficient centres for the prevention and resolution of future financial disputes.

Viewing consumer financial dispute resolution in a theoretical context

The question of how systems of consumer financial dispute resolution can be designed in diverse contexts to effectively and fairly administer the resolution of financial disputes, how such centres can draw on emerging global principles of accessibility, efficiency, impartiality and fairness and how such centres might consequently contribute to the health of the broader economic environment touch on three primary bodies of scholarship: work in the law and development field; studies in dispute system design; and work examining the impact of globalisation on international legal practice.

Law and development literature has long puzzled over the relationship between systems of dispute resolution and economic growth. Much of this literature has focused on formal systems of dispute resolution including litigation and arbitration and economic development.[6] Informal structures have traditionally been framed as outside the shadows of formal law,[7] and somewhat antithetical to growth.[8] Work focusing on East Asia has traditionally framed the debate in terms of whether economic growth has occurred in spite of, or because of, the later development of formal legal structures in the region.[9] However, thus far, none of these studies

[6] See for example: M. Weber (1968) *On Charisma And Institution Building*, S. N. Eisenstadt (ed.), (University of Chicago Press); D. M. Trubek (1972) 'Toward a social theory of law: an essay on the study of law & development', *Yale L. J.*, 82, p. 1; D. M. Trubek (1973) 'Max Weber on law and the rise of capitalism', *Wisconsin Law Review*, 3, p. 720; D. North (1990) *Institutions, Institutional Change And Economic Growth* (New York: Cambridge University Press).

[7] See for example: L. Bernstein (2001) 'Private commercial law in the cotton industry: creating cooperation through rules, norms and institutions', *Michigan L. Rev.*, 99, p. 1724; R. Ellickson (1991) *Order Without Law: How Neighbors Settle Disputes* (Harvard University Press).

[8] See for example: M. Weber, *On Charisma and Institution Building*; D. North, *Institutions, Institutional Change and Economic Growth*.

[9] See for example: A. Rosette and L. Cheng (1991) 'Contract with a Chinese face: socially embedded factors in the transformation from hierarchy to market, 1978–1989', *J. Chin. L.*, 5, pp. 219–233; D. C. Clarke (2003) 'Economic development and the rights hypothesis: the China problem', *Am. J. Comp. L.*, 51, p. 89; F. Upham (2002) 'Mythmaking in the rule of law orthodoxy, Carnegie Endowment for international peace', Rule of Law Series, Democracy and Rule of Law Project, Number 30; T. Ginsburg (2000) 'Does law matter for economic development? Evidence from East Asia', *Law and Society Review*, 34(3).

have directly traced the impact of institutional forms of alternative dispute resolution on the health of the broader economy and consumer confidence. This book will contribute to this discussion by examining the contribution of institutional alternative dispute resolution, including mediation and ombuds fact-finding processes to financial stability and development.

This book also speaks to recent work regarding the design of effective and efficient systems of dispute resolution in resolving polycentric disputes. Recent work has offered insights into the design of institutional dispute resolution mechanisms for a variety of public and private settings,[10] as well as complex multi-party disputes.[11] Thus far there has been limited

[10] See for example: William L. Ury, Jeanne M. Brett and Stephen B. Goldberg (1988) *Getting Disputes Resolved: Designing Systems to Cut the Cost of Conflict* (Jossey-Bass) pp. 41–64; Janet Martinez and Stephanie Smith (2009) 'An analytic framework for dispute system design', *Harvard Negotiation Law Review*, 14, p. 123; Cathy A. Costantino and Christina Sickles Merchant (1996), *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (Jossey-Bass); Lisa Blomgren Bingham, Cynthia J. Hallberlin, Denise A. Walker and Won-Tae Chung (2009) 'Dispute system design and justice in employment dispute resolution: mediation at the workplace', *Harvard Negotiation Law Review*, 14, pp. 1–50; Lawrence Susskind, Sarah McKearnan and Jennifer Thomas-Larmer (1999) *The Consensus Building Handbook: A Comprehensive Guide To Reaching Agreement* (SAGE), pp. 61–168; Richard C. Reuben (2005) 'Democracy and dispute resolution: systems design and the new workplace', *Harvard Negotiation Law Review*, 10, p. 11; Jill Gross (2006) 'Securities mediation: dispute resolution for the individual investor', *Ohio State Journal on Dispute Resolution*, 21(2), pp. 329–381; John Lande (2002) 'Using dispute system design methods to promote good-faith participation in court-connected mediation programs', *UCLA Law Review*, 50, pp. 69–141; Sharon Press (1992–1993) 'Building and maintaining a statewide mediation program: a view from the field', *Kentucky Law Journal*, 81, pp. 1029–1065; Ellen E. Deason (2004) 'Procedural rules for complementary systems of litigation and mediation – worldwide', *Notre Dame Law Review*, 80, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=583141 [accessed 25 May 2012]; Andrea Kupfer Schneider (2008) 'The Intersection of Dispute Systems Design and Transitional Justice', *Harvard Negotiation Law Review*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296183 [accessed 25 May 2012]; Carrie J. Menkel-Meadow (2009) 'Are there systemic ethics issues in dispute system design? And what we should [not] do about it: Lessons from international and domestic fronts', *Harvard Negotiation Law Review*, 14, pp. 195–231; Kagan, Robert A. (2003) *Adversarial Legalism and American Government: The American Way of Life* (Harvard University Press); Malcom M. Feeley (1989) *Court Reform on Trial: Why Simple Solutions Fail* (Basic Books); D. Caron and L. Caplan (2010) *The 2010 UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press); Katherine Lynch (2003) *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* The Hague, Netherlands: Kluwer Law International).

[11] See for example: S. Sturn and H. Gadlin (2007) 'Conflict resolution and systemic change', *J. Disp. Resol.*, 1, p. 1; S. A. Wiegand (1996) 'A just and lasting peace: supplanting mediation with the ombuds model', *Ohio St. J. on Disp. Resol.*, 12, p. 95.

work focused on the design of institutional alternative dispute resolution mechanisms in addressing consumer financial disputes. Systems design literature has also examined, from a socio-legal perspective, the larger socio-legal dispute processing debate investigating how mechanisms may be developed to limit the effect of the power/knowledge gap of 'repeat players' in institutional dispute resolution settings through appropriate regulations and policies. Previous studies in respect of litigation tend to suggest that 'haves' (i.e. large businesses, high socio-economic status groups) tend to fare better in courts than 'have nots'.[12] Therefore attention to procedural safeguards aimed at addressing structural inequities in the design and development of such systems is necessary if such disputes are to be effectively addressed.

At the global level, literature examining the impact of globalisation on domestic legal practices has relevance to the question of how domestic legislation effectively integrates relevant global standards and principles. This literature provides a helpful grounding in emerging questions of how global norms interact with national law-making processes,[13] the interaction between processes of 'convergence' and 'informed divergence' in the development of public law,[14] and the interplay between principles and systems in commercial dispute resolution design.[15] Such insights are useful in understanding the extent to which emergent global principles may inform the design and structure of newly emerging consumer financial dispute resolution systems.

This book, drawing on comparative cross-jurisdictional analysis, will make practical proposals for reform which will aim to contribute to the development of systems of transparent and equitable dispute resolution capable of responding to financial dislocation.

Overview of methodology

This book will identify and analyse factors and processes that give rise to the development of accessible, efficient and equitable financial dispute

[12] See M. Galanter (1974) 'Why the "haves" come out ahead: speculations on the limits of legal change', *Law & Society Review*, 9(1), pp. 95–160.

[13] T. Halliday and B. Carruthers (2007) 'The recursivity of law: global norm-making and national law-making in the globalization of corporate insolvency regimes', *American Journal of Sociology*, 112 p. 1135.

[14] See A. M. Slaughter (2004) *A New World Order* (Princeton University Press).

[15] See for example: J. Braithwaite and P. Drahos (2000) *Global Business Regulation* (Cambridge University Press).

resolution mechanisms. It will examine comparative institutional dispute resolution structures and results in selected financial centres in East Asia, North America and Europe in order to glean best practices. Given the near global impact of the current financial crisis, a unique opportunity exists to examine and test the efficacy of diverse dispute resolution approaches to addressing a common global challenge.

Two methodological principles characterise the research process used to examine the primary questions under analysis: a comparative framework and a triangulating approach.

A principal orientation of the research process focuses on comparative methodology. Through comparison among corresponding financial dispute resolution centres in seven jurisdictions, the aim of the research is to understand how these jurisdictions address investor complaints through unique structures of financial dispute resolution including ombuds, arbitration and multi-tier processes.

The second methodological principle parallels the process of 'triangulation' used by geological surveyors in cases where direct measurement of physical heights or spaces is impossible. Based on the assumption that any one research method alone can be subject to bias, contemporary researchers have found that multiple research techniques can, to a large extent, compensate for each other's deficiencies and provide a broader foundation for critical analysis (Cook and Fonow, 1990; Eckstein, 1992). Therefore the methodological approach employed here similarly draws on three complementary qualitative and quantitative data collection methods. These include the following:

> *Secondary academic research*: Empirical research by other scholars concerning institutional alternative dispute resolution of financial disputes, including mediation and negotiation is accumulated, reviewed and examined in the conventional fashion.
>
> *On-site data collection*: A variety of data from financial alternative dispute resolution centres in East Asia, North America and Europe is collected in order to conduct comparative content analysis of alternative dispute resolution processes, methods, ground rules and preparation in order to glean best practices.
>
> *Survey*: In order to assess how arbitrators and ombuds view the benefits of their particular method of consumer financial dispute resolution, its benefits, challenges and suggestions for improvement, a survey was conducted between the autumn of 2011 and the summer of 2012. Nearly 100 survey questionnaires were distributed to practitioners throughout the world. A total of 48 arbitrators and ombuds people from East Asia, North America, Europe, the Middle East and Africa responded. The

participants represented highly experienced practitioners, members of government regulatory ombuds services and private arbitration commissions. The majority of those surveyed (44 per cent) had worked for institutions involved in consumer financial dispute resolution for more than four years.

The survey results are described in Part II (Ombuds systems), on arbitration and ombuds practices respectively, which in summary are as follows: practitioners of consumer financial dispute resolution view ombuds processes as particularly useful in providing an independent and free review service for financial customers. At the same time the service also helps to identify areas for further improvement by banks and regulatory agencies.[16] Perhaps as a result of such benefits, the use of ombuds processes has been increasing in recent years. The majority of respondents (89 per cent) indicated that they had in fact seen an increase in the use of ombuds processes in consumer financial dispute resolution in recent years. At the same time, practitioners acknowledged areas for continued improvement including the need for greater public education[17] and oversight and quality assurance of ombuds processes.[18]

Arbitration practitioners likewise viewed the benefits of arbitration services in consumer financial disputes as providing disputants with technical expertise 'where the parties are not arguing over the law, but application of financial/accounting principles'.[19] Among the challenges include 'proof issues, imbalance of power and information, lack of full discovery options/rights'.[20] Concerns about such disparities were echoed by other participants who noted the prevalence of perceptions that 'large institutions have "repeat-user" advantage'.[21] Practitioners noted suggestions for improvement including the need for '[g]ood program design [including] exit evaluations [and a] grievance process to allow parties to file complaints against neutrals who do not perform well'. In addition, 'a code of ethics for neutrals' was suggested along with 'anything that supports procedural due process'.[22] These findings are elaborated on in greater depth in Part II.

[16] Survey No. 1 (July 2011–March 2012).
[17] Survey No. 1 (July 2011–March 2012).
[18] Survey No. 4 (July 2011–March 2012).
[19] Survey No. 8 (July 2011–March 2012).
[20] Survey No. 10 (July 2011–March 2012).
[21] Survey No. 14 (July 2011–March 2012).
[22] Survey No. 10 (July 2011–March 2012).

Structure of the book

The book is divided into three parts: following an introduction, Part I (Principles) explores the emergence of global principles that influence to varying degrees the design of consumer financial dispute resolution systems in diverse societies. A number of emerging standards, gleaned from the Equator Principles, the Basel Accords, the UN Millennium Development Goals, global deliberative processes and general rule of law principles, including the need for accessible grievance mechanisms, financial dispute prevention through transparent risk disclosure and risk mitigation, impartiality, equity, accountability and fairness, provide helpful guidance in the development of consumer financial dispute resolution systems.

Parts II and III (Ombuds systems and Arbitration systems) then examine the two major systems of consumer financial dispute resolution: the ombuds process and the arbitration system. Part II examines the structure and function of ombuds-based consumer financial dispute resolution centres in the United Kingdom, Australia and Japan. Part III then goes on to examine arbitration-based models in the United States, Singapore and Hong Kong as well as emerging systems in China. These jurisdictions are selected because they represent two very different forms of consumer financial dispute resolution in relatively well established markets and therefore provide a basis for comparison. These sections systematically examine the structural design, policy orientation, complaint procedures, financing and oversight of financial dispute resolution centres as established within each region.

Part IV (Practice), drawing on comparative cross-jurisdictional analysis of regional models and empirical findings of consumer financial dispute resolution practitioners, presents policy recommendations, including investigating the efficacy of developing interventions that aim to minimise the power/knowledge gap of 'repeat players' in institutional dispute resolution settings through appropriate regulations and policies. As will be seen in the chapters that follow, the ombuds and arbitration models of consumer financial dispute resolution implement principles of impartiality, equity, accountability and fairness to varying degrees, based on the unique mandate, regulatory function and objectives of each mechanism.

In examining financial dispute resolution models in the jurisdictions studied, this research finds that at the global level, due to the fact that such non-binding global principles allow diverse consumer financial dispute resolution mechanisms the option of opting into such standards, at

the substantive level, divergence in costs, regulatory role and the binding nature of awards can, to a large extent, co-exist with a relatively high degree of convergence in relation to the multi-tier structure of most consumer financial dispute resolution processes.

In addition, the findings indicate that the appropriateness of a dispute resolution method is arguably informed by the extent to which it takes on a regulatory role. Regulatory dispute resolution modes such as the ombudsman model that take on inquisitorial elements may be preferred when displacing the judicial function as they incorporate safeguards for disputants against third party discretion. But even for non-regulatory schemes, inquisitorial elements aimed at addressing the power/knowledge gap, including suggesting the provision of information regarding relevant standards and rules, at least as touchstones, may still be incorporated into consensual models of dispute resolution, in order to ensure a de minimis level of fairness and confidence in the process.