2008

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Proposal

A Model for a Financial ADR Organization and Measures for Its Realization

Toward the Development of an Effective and Reliable Financial ADR System for Reasonable and Flexible Dispute Resolution

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Japan Financial ADR/Ombudsman Research Group

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English Version
Produced by
Waseda University Global Center of Excellence – Waseda Institute for Corporaion Law and Society

Preface from Waseda University GCOE Institute

In December 2008, the Financial Services Agency (FSA), Japanese Government, officially announced the policy that it would legislate for financial ADR in Japan.

Based on this policy, in April 24, 2009, so called the Financial ADR Act was passed by the Lower House of the Japanese Congress.

This is an important step for Waseda University GCOE to realize our 2005 proposal in the "NIRA Market Governance Report 2005" made by National Institute for Research Advancement (NIRA) and our Institute in 2005.

And also this 2008 proposal was an extremely important outcome of the Japan Financial ADR/Ombudsman Research Group which established in April 18, 2007.

The Japan Financial ADR/Ombudsman Research Group has its origin in 2005 proposal and has conducted research on financial ADR/Ombudsman over the past two years.

(Waseda Related Personnel in the Group - Official of the group: Professor Shigehito Inukai, Waseda University. Advisor of the group: Professor Tatsuo Uemura, Waseda University)

It is great pleasure and honor to hear that Japanese FSA persons in charge frequently referred this 2008 proposal for making the Financial ADR Act.

As an epoch-making milestone for the development of financial ADR/Ombudsman functions and systems in Japan, we understand that this 2008 proposal has a great value for global references in the future.

In 2008, the Japan Financial ADR/Ombudsman Research Group was so kind to provide Waseda University GCOE an opportunity to produce an ENGLISH Version of this 2008 proposal for global references.

We would like to express sincere appreciation to the Chairperson Shuji Yanase and other officials and members of the Japan Financial ADR/Ombudsman Research Group for giving consent to us of making English version of the 2008 proposal.

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June 08, 2009

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Introduction

The Japan Financial ADR/Ombudsman Research Group is a voluntary association of 26 members and functions as an independent research group free of any interest or influence from public or private institutions. Members consist of lawyers, judicial scriveners, specialists in mediation procedures and academics in the areas of financial business law and dispute resolution procedures who support the purpose of the establishment of the Research Group and are participating in its research activities and discussions. The purpose of the Research Group is to conduct research on a model for a Japanese financial services ADR organization and to propose a range of realistic options for the establishment of such an organization.

As announced at the time of its launching on April 18, 2007, the ultimate purpose of the Research Group is to increase the reliability and convenience of Japan's financial and capital markets as a whole by realizing an ideal dispute settlement organization that is trusted by both enterprises providing financial services and their customers. In this way, the Research Group aims to contribute to development of key infrastructures needed for the establishment of markets that are attractive to all users. Therefore, the proposals of the Research Group are addressed to the users of Japan's financial and capital markets, and in particular to financial services enterprises playing a leadership role in the development of the financial and capital markets and to government agencies charged with the responsibility to develop financial and capital markets that are attractive to all users. The proposals are also addressed to consumer protection organizations, citizens and legislators engaged in activities for the protection of users of financial services.

In light of these objectives, the proposals contained in this document will be released to the media, and will at the same time be delivered to the Financial Services Agency, associations of financial services enterprises and consumer protection organizations together with a call for cooperation for the realization of the aims outlined above.

While the members of the Research Group are each associated with their own organizations, the proposals contained in this document summarize the positions and opinions held by them in their individual capacities and do not constitute the views of their respective organizations.

"I. Overview of the Proposal" provides an outline of the Research Group's discussions contained in "II. Details of the Proposal," which sets out the specifics of the issues on hand. By contrast, "I. Overview of the Proposal" excludes such details and focuses on conveying the general line of thought. Therefore, to understand the details of the proposals, readers are advised to review "II. Details of Proposals." The reference section appended to this document will be useful in gaining an even deeper understanding of the background of the proposals.

Following the liberalization of the financial system, there has been an ongoing

discussion of the reform of financial services dispute resolution organizations. Today, these discussions have reached a higher level of activity. The Research Group is well aware that the proposals contained in this document may not be supported by all people. Furthermore, some may argue that the measures recommended here are unnecessary or that other measures are preferable. Nevertheless, the Research Group has decided to publish its proposals at this time in the hope that this will lend additional impetus to discussions and actions for reform. It is the earnest hope of the Research Group that the publication of its proposals will contribute to speeding the realization of reform.

The Research Group looks forward to the development of financial and capital markets in Japan that users of financial services will find even more reliable than now, and it is our hope that the financial system that buttresses the entire structure of today's Japanese economy will be rendered more resilient by gaining the firm support of the users of financial services. The members of the Research Group have worked tirelessly on this project for nearly two years. We will find our concentrated efforts requited should they succeed in contributing in any way to the realization of these goals.

Shuji Yanase
Chairperson
Japan Financial ADR/Ombudsman Research Group

November 28, 2008

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I. Overview of the Proposal

1. Model for Ideal Financial Dispute Resolution Measures

(1) The Research Group's Ideal Framework for Financial Dispute Resolution

Complaints and disputes related to financial products are less likely to be caused by defects in the products themselves, and are more likely to reflect marketing and solicitation methods that do not properly correspond to the attributes of financial products and their purchasers. For example, in cases involving relatively small disputed amounts where the investor may be partly to blame for failing to exercise due caution when purchasing the financial product in question, it is common to find that the financial institution selling the product has also failed to exercise due consideration at the time of sale. In such instances, suppose an impartial third party will listen to both sides and concludes that "The investor did not exercise due caution when purchasing the financial product and the financial institution also failed to exercise due consideration at the time of sale (or that there was a mismatch in investment,)" or that "The financial service provided left much to be desired" If the financial institution opts for a speedy resolution by offering to compensate the investor for 70 percent of his or her loss, clearly this can result in significantly greater investor satisfaction instead of taking the alternative route of going through a lengthy and costly litigation process conducted under rigorous rules that culminates in compensation of 50 percent of the investor's losses.

In total, the former path to resolution can be expected to create greater value and merit. On one hand, it is less costly for the financial institution. Secondly, it contributes to a greater sense of investor confidence in financial products and the financial services industry.

The above points to the need for non-judicial dispute resolution processes undertaken by financial ADR organizations prioritizing the speedy and simple realization of reasonable and flexible resolutions that appropriately reflect the specific features of individual cases and the attributes of the parties involved. The utility of such processes would be particularly great in complaints lodged by individuals involving relatively small amounts, and in instances where rigorous procedures do not have to be followed in the determination of the facts of the case and consistency in the application of the laws and regulations to individual cases is not of primary concern.

In Japan today, there are 18 private complaint receiving and advisory organizations for specific types of financial services businesses.[1] In effect, these are organizations that correspond to existing business categories in the financial services sector. The problem is that emerging financial products, financial services and marketing channels frequently overlap

[1] Financial Futures Association of Japan, JF Marine Bank Consultation Office Advisory, Trust Companies Association of Japan, Life Insurance Association of Japan, Japanese Bankers Association, National JA Bank Consultation Office Advisory, National Association of Shinkin Banks, Community Bank Shinyo Kumiai, National Association of Labour Banks, Investment Trusts Association of Japan, Japan Financial Services Association, Japan Securities Dealers Association, Japan Securities Investment Advisers Association, Commodity Futures Association of Japan, Japan Commodities Fund Association, General Insurance Association of Japan, Association for Real Estate Securitization, Prepaid Certificates Issuers Association.

existing business categories. As a result, in the case of a dispute, users seeking to lodge a complaint do not know where to seek advice and where best to take the case. This phenomenon can be expected to become more common in the future. To improve user convenience and satisfaction, and to facilitate the discovery of problems and to shorten the response time, it will be necessary to develop comprehensive dispute resolution organizations through the integration of or cooperation among existing organizations.

The ultimate objective of this Proposal is to contribute to the solution of the above problem through the establishment and operation of an effective and reliable financial ADR organization (financial ombudsman organization), and to do this through the cooperation of a wide-as-possible cross section of financial services businesses.

(2) Basic Requirements for Financial ADR Organization (Design Concepts for Organization Establishment)

To successfully engage in dispute resolution in financial services, a financial ADR organization must satisfy eight basic requirements (design concepts): flexibility, speed, simplicity, expertise and quality assurance, ease of access, comprehensiveness and fairness (including independence and transparency), and confidentiality. Therefore, the organization must be designed and operated to satisfy these requirements. These basic requirements (design concepts) are mutually interrelated, and must be able to serve as an appropriate code of conduct for enterprises acting on their own to resolve complaints and disputes. For ease of understanding, these basic requirements can be categorized into four groups.

A. Flexibility, Speed, Simplicity, and Expertise and Quality Assurance

Dispute resolution must be able to deliver simple, speedy, reasonable and flexible relief to complainants. This requires due flexibility in procedures and determination of the facts. In effect, flexibility implies a farewell to Japan's litigation procedures and to its mediation procedures that in recent years have moved closer to litigation. How can this shift to flexibility be justified? Given the increased liberalization of financial and capital markets, the answer lies in the absolute need to ensure fairness to users and to maintain sound and orderly market functions through the operation of such dispute resolution systems. To meet these needs that exist in the financial and capital markets, dispute resolution organizations must have expert knowledge of financial services businesses, financial products and their marketing methods. Furthermore, the resolutions that they propose must contribute to the development of orderly financial and capital markets, and must be high quality proposals offering reasonable, fair and justified relief.

B. Ease of Access and Comprehensiveness

Dispute resolution systems must be easily accessible to users. In the context of the ongoing liberalization of the financial services sector, one of the implications of ease of access is avoiding the "run-around" of sending complainants from one complaint receiving organization to another. Furthermore, the problems of vertically segregated organizations must be avoided in order to ensure user convenience and

satisfaction, as well as to ensure that problems are identified in a timely fashion and the needs for speedy response are not sacrificed. Taking these requirements into consideration, it is obvious that the ultimate goal should be the establishment of a comprehensive dispute resolution organization that cuts across industry lines.

C. Fairness (Including Independence and Transparency)

How should the operating costs of a financial ADR organization be covered? The burden on the users of financial services should be minimized, and the bulk of the costs should be defrayed through dues and subscriptions paid by related enterprises. Such a structure requires measures to effectively ensure the rigorous independence of the operators. Otherwise, user confidence in the fairness of dispute resolution system may be undermined. Moreover, detailed information concerning the organizational structure, personnel, financial status and operations of the dispute resolution organization must be regularly and readily disclosed to users. To maintain user confidence, such disclosures must not hide anything and must conform to appropriate standards of transparency.

D. Confidentiality

The identities of the parties involved in a dispute and the details of the dispute must remain secret. On the other hand, for the development of orderly financial and capital markets, information pertaining to disputes that have been resolved should be actively provided to financial services enterprises, users and to government agencies responsible for financial administration. However, such information should be released in a general and aggregated form to avoid identification of specific individuals, enterprises and disputes.

These basic requirements (design concepts) were derived from an analysis of the problems of existing dispute resolution systems and the specific cases that they have handled. Moreover, this analysis of existing problems adopted the "protection of the users of financial services" as a priority issue and approached its task from the perspective of the overarching question of "What should characterize a financial services dispute resolution system that functions as part of the infrastructure of the financial and capital markets?"

Due attention must be paid to the fact that it is not enough to design a system in which the basic requirements (design concepts) are satisfied only in the processes that follow a request for dispute resolution submitted to the financial ADR organization. Rather, the above basic requirements (design concepts) must be satisfied throughout the entire response process. While initial response is very important in the resolution of complaints and disputes, it should be noted that, once a complaint is referred to a financial ADR organization, the records of the details of complaints against individual financial services enterprises are opened during its procedures.

2. Model for Ideal Financial ADR Organization

Section 2 of "II. Details of the Proposal" presents the specific details of ideal financial services dispute resolution measures outlined in Section 1. The following features of the Research Group's proposed model for an ideal financial ADR organization are discussed below: dispute resolution procedures; mechanisms for arriving at a consensus; organizational structure, operations and finances; and, the range of disputes to be handled. Note that the Research Group's proposals are predicated on the assumption that its model for an ideal financial ADR organization will be certified under the Act on Promotion of Use of Alternative Dispute Resolution (hereinafter ADR Promotion Act).[2]

(1) Flow of Dispute Resolution Procedures

An ideal financial ADR organization should provide a series of processes and procedures comprising three successive stages.

A. In **the first process**, dispute resolution is attempted by an expert mediator. Specifically, the mediator holds hearings (debriefing of complainant; receiving and examination of materials provided by complainant; inquiries with related financial institution; receiving and examination of materials provided by related financial institution; debriefing of related financial institution; investigation of precedents and other literature) and presents a **resolution proposal (stage-one resolution proposal)**.

The parties to the dispute are not obligated to accept the resolution proposal (stage-one resolution proposal). However, as discussed in Sub-section (2) below, incentives can be given to the parties to accept the proposal through such means as the fee structure, training and education of the expert mediators and the public relations activities of the ADR organization.

B. In **the second process (deliberative mediation)**, a mediation commission consisting of three expert mediators deliberates on the case on hand and presents its **resolution proposal (stage-two resolution proposal)**. The expert mediator involved in the first process is appointed to the mediation commission and carries on in designing a proposal. The stage-two resolution proposal is binding on the related financial institution only.

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[2] The purpose of this Proposal is to present a model outlining the features of an ideal financial ADR organization. As such, this Proposal does not consider how a financial ADR organization (financial ombudsman organization) should be established and operated in order to be in compliance with the provisions of existing laws and ordinances (including the Practicing Attorney Law). Nor does it delve into a detailed examination of the conditions that must be met in order for a financial ADR organization (financial ombudsman organization) to be certified under the Act on Promotion of Use of Alternative Dispute Resolution (ADR Promotion Act) and to be recognized as a certified investor protection organization under the provisions of the Financial Instruments and Exchange Act. These matters must be separately considered when a financial ADR organization is to be actually established, and must be undertaken in reference to the specific features and design of such an organization.

C. **The third process (arbitration)** is launched when both parties agree to refer their dispute to **arbitration**. Whereas a financial institution is obligated in the first and second processes to act toward resolving the complaint or dispute, arbitration can be undertaken only when both parties agree to it.

(2) Mechanisms for Arriving at Consensus in Dispute Resolution

The ideal financial ADR organization must function to achieve speedy dispute resolution based on the consent of the financial services user. This requires an integrated approach that carries through the two mediation processes and the final arbitration process. In other words, it is not enough to design features for each individual process, and it is important to regard the procedures of the three processes as a single integrated process.

A. Fee Structure

The financial services user shall not be charged in the first process. For deliberative mediation in the second process, there shall be no filing fee for a user lodging a complaint. Alternatively, if a filing fee is to be charged to the user, the amount shall be small. On the other hand, a relatively large filing fee shall be charged to financial services enterprises lodging a complaint.

B. Training and Education of Expert Mediators

Measures must be taken to instill a sense of confidence in stage-one resolution proposals. For this purpose, expert mediators must be properly trained and appropriate measures must be adopted to ensure the close exchange of information within the ADR organization. To realize speedy dispute resolution, the goal should be to achieve an acceptance rate of about 80 percent for stage-one resolution proposals based on this sense of confidence.

In the ideal financial ADR organization, it is important to lead both parties in the dispute to believe that neither the stage-two resolution proposal nor the final arbitration results will be substantially different from the original stage-one proposal. This implies that the stage-one resolution proposal must be convincing and solid.

For this purpose, it is necessary for a financial ADR organization to establish guidelines for reasonable, fair and justified resolutions of financial services related disputes.

C. Public Relations Activities of Financial ADR Organization

Due efforts must be made to inform financial services users of the guidelines for the resolution of financial services disputes and to deepen their understanding of what is deemed to constitute a reasonable, fair and justified resolution. Periodically published public relations materials concerning the activities of a financial ADR organization must be designed to promote good communications with financial services users expressly for the achievement of the above purposes. For example, easy-to-understand information should be provided on how typical and specific disputes have been resolved in the past.

When multiple (or, at times, large numbers of) disputes arise that comprise typical and systemic groupings, a financial ADR organization must be prepared to inform the public of past cases and the rationale of resolutions pertaining to relevant groupings. This must be done speedily as occasion demands.

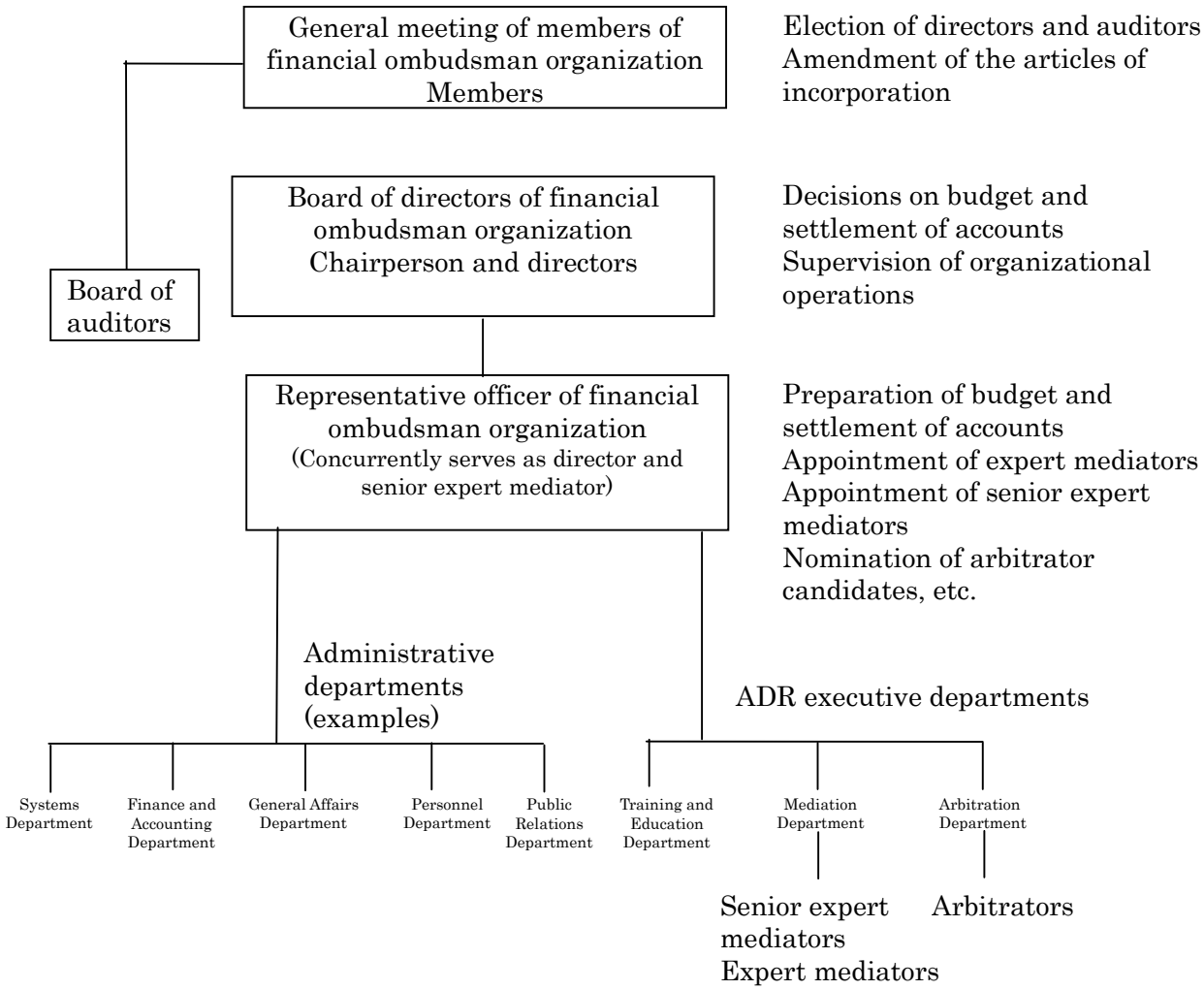
(3) Organization Structure and Operations

In this context, let us refer to the ideal financial ADR organization as a "financial ombudsman organization." The term "ombudsman" is commonly used in the names of financial ADR organizations in various countries of the world.

In financial ombudsman organizations, wide ranging discretion is granted to the executors of ADR procedures in order to ensure due flexibility.

Under Japan's existing laws, one of the available options is to establish financial ombudsman organizations as general non-profit organizations. The structure of such an organization would be as follows.

Financial Ombudsman Organization (Principal Functions)



As discussed under "(4) Finances" below, the bulk of the operating expenses of the financial ombudsman organization shall be defrayed through the dues and subscriptions of member financial services enterprises. Therefore, one of the most important organizational issues is to structure the financial ombudsman organization in such a way as to ensure its independence and fairness as a third party in dispute resolution. This will require effective measures to ensure the independence and high morale of the expert mediators, senior expert mediators and nominated arbitrators who will be directly responsible for the dispute resolution procedures in individual cases. This also constitutes an essential requirement in being able to recruit personnel capable of carrying out the critically important functions of supporting a key element of the infrastructure of the financial and capital markets.

A. Members and General Meeting of Members

Members shall consist of financial services enterprises. The basic structure of the organization shall be stipulated in the articles of incorporation. However, the powers of the general meeting of members must be restricted so as not to exceed the election of directors and the

ratification of changes in the articles of incorporation and other important organizational matters.

B. Election of Directors

Directors shall be elected by the general meeting of members. However, it is desirable for directors to be elected from among the following: (a) representative officers of member financial services industry associations, (b) experts with practical knowledge and experience in dispute resolution (law practitioners, ADR experts, specialists in financial services operations, etc.), and (c) to enable the board of directors to properly reflect the views of the public in the pursuit of its responsibilities and the exercise of its authority, directors should be elected from among persons representing appropriate consumer organizations, journalists and academics. The membership of the board of directors must be such as to ensure the firm confidence of financial services users. The board of directors shall elect a chairperson by mutual vote.

C. Directors and the Board of Directors

The board of directors shall make decisions on the budget and the settlement of accounts, and shall supervise the operations of the entire organization.

D. Appointment of Representative Officer of Financial Ombudsman Organization

The representative officer of the financial ombudsman organization shall be appointed by the board of directors. The appointment process shall be transparently disclosed. One possible method is to accept nominations from the public and to appoint a representative officer from this pool of candidates.

E. Powers and Responsibilities of Representative Officer

The representative officer shall represent the financial ombudsman organization, and shall be empowered to execute the operations of the financial ombudsman organization and shall be responsible for the same. The functions of the representative officer shall include the following: preparation of budgets and settlement of accounts; appointment of expert mediators and senior expert mediators and nomination of arbitrators; personnel matters related to secretariat staff; training and education of expert mediators; and, public relations. The representative officer shall concurrently serve as a director and shall be present in meetings of the board of directors. The representative officer shall submit to the supervision of the board of directors and shall be responsible for reporting to the board of directors. The representative officer shall participate in individual cases of dispute resolution as an arbitrator or senior expert mediator.

F. Expert Mediators, Senior Expert Mediators and Candidates for Arbitrators

It is important for the financial ombudsman organization to have a sufficient number of full-time experts and, for the following reasons, it

is essential for expert mediators to be full-time personnel: to be able to respond speedily to complaints; to be properly trained and educated within the financial ombudsman organization; to rigorously uphold rules for arriving at reasonable, fair and justified dispute resolutions; and, to maintain consistency in responses to complaints. The candidate list of arbitrators may include part-time personnel, but such persons must be prepared to concentrate on the functions of an arbitrator for the purpose of arriving at speedy resolution of disputes.

(4) Finances

The finances of the organization shall be supported by member financial services enterprises, and the annual dues paid by member financial services enterprises would be expected to constitute the primary source of funds. A fair method for determining the amount of dues payable would be the following. Dues would consist of a "basic contribution amount" and a "beneficiary charge." The former would be calibrated to reflect the business scale of the member enterprise. The latter would reflect the number of first-process complaints or filings made and other factors.

Given that the purpose of the system is to provide users with a means for dispute resolution, a user filing a complaint should not be charged for the case, or should be charged a minimal amount.

The services provided to users by the financial ombudsman organization will raise the level of confidence in the financial and capital markets, and will in this way contribute to the development of financial and capital market infrastructure. This will ultimately benefit financial service enterprises. Therefore, unless the costs of the financial ombudsman organization are covered by taxes, financial services enterprises should accept the burden of funding the organization as part of their responsibility and for the sake of broadly defined corporate self-interest. The above constitutes the reason why financial services enterprises should defray the costs of the financial ombudsman organization.

(5) Range of Disputes to Be Handled

A. Range of Complaints and Disputes to Be Handled

The financial ombudsman organization should be responsible for handling a wide range of complaints and disputes pertaining to Japan's financial services. However, it should not stop at being certified under the Financial Instruments and Exchange Act to handle those complaints and disputes specified under the same act. Rather, the financial ombudsman organization should ultimately aim to cover, as much as possible, those complaints and disputes that pertain to businesses conducted by unregistered and unlicensed enterprises as well as businesses not covered by industry-based laws (transactions abusing blind spots in the legal system).

B. Range of Parties to Complaints and Disputes

As a rule, the financial ombudsman organization should provide relief to individuals only. Therefore, it shall handle disputes between the following parties.

- Between a financial services enterprise and an individual customer.
- Between a financial services enterprise and a corporate customer (provided the corporate customer is small enterprise that in effect can be regarded to be equivalent to an individual customer).

C. Upper Limit on Dispute Amounts

Disputes to be referred to the second process (deliberative mediation) should be restricted to disputes involving amounts not exceeding a certain upper limit. Alternatively, the system should be designed so that when a mediation proposal is rendered in the second process, amounts exceeding a certain upper limit should not be binding on the financial services enterprise. Given that the resolution proposals of the financial ombudsman organization are intended to be "flexible," it would be inappropriate to obligate financial services enterprises to abide by such proposals (binding on one party only). The upper limit on dispute amounts may, for example, be set at around 20 million yen.

D. Geographic Limits

The range of disputes handled should be restricted to those involving businesses of financial services enterprises conducted within Japan. "Businesses conducted within Japan" shall include financial services provided within Japan and financial services provided from Japan.

E. Time Limits

Given that certain complaints and disputes may not emerge for a considerable period of time after the causal event, one option would be to place time limits on filing. However, this matter calls for careful consideration because financial disputes involving the sale of financial products may emerge only after the passage of considerable time from the time of their sale.

3. Concrete Steps toward Realization

The most desirable path to the establishment of an ideal financial ADR organization would involve the cooperation of the financial services sector in preparations from the earliest stages. This would entail industry participation in drawing up the articles of incorporation and committing to monetary subscriptions needed for establishing and operating the organization. However, given that 18 financial services industries are already operating their own ADR organizations with complaint receiving and dispute resolution functions, it is unlikely that the proposed financial ADR organization will immediately be established to cover the industries comprehensively.

In light of this situation, the available options for satisfying such key requirements as flexibility and comprehensiveness will be examined in Section 3 of "II. Details of the Proposal."

(1) Process for the Realization of Financial Ombudsman Organization

In Japan today, 18 industry associations in the financial sector are operating complaint receiving and dispute resolution organizations. In

light of this fact, the ultimate objective of establishing a comprehensive financial ADR organization will have to be achieved through a gradual approach.

The Research Group examined various scenarios for a gradual approach. One of these scenarios is outlined below for the benefit of those who are earnestly engaged in this problem.

Step One: Internal reform of existing industry-based financial ADR organizations – Achieving flexibility

First of all, it is hoped that the existing industry-based financial ADR organizations will undertake a process of internal reform inspired by this Proposal and improve their systems by adopting, to the greatest extent possible, the principles enunciated in this Proposal. Of the design concepts discussed above, the requirements of ease of access and comprehensiveness cannot be readily achieved through the efforts of any single organization. However, it is hoped that the existing ADR organizations will make necessary changes in their organizational structures, procedures and operations to satisfy the remaining requirements. Such internal reform would in itself constitute a major advance toward the realization of a reasonable, flexible, speedy and simple dispute resolution process. Furthermore, it is hoped that such industries that currently do not have their own industry-based ADR organization will establish ADR organizations that adopt the provisions of this Proposal, or that alternatively they will join existing ADR organizations that have undergone internal reform.

Step Two: Establish/expand complaint receiving channel, and adopt/promote model standards – First step toward realization of comprehensiveness

(Establish/expand unified complaint receiving channel)

It is obvious that Step One will not be enough to achieve one of the main objectives of this Proposal: the establishment of a comprehensive dispute resolution organization. As a step toward the creation of a comprehensive organization, it is hoped that a number of industries and their industry-based financial ADR organizations, which to a significant degree have come to share the design concepts of this Proposal, will voluntarily move in the direction of amalgamation. As the first initiative in this direction, several existing organizations may jointly establish a new organization whose ultimate objective would be the establishment of a financial ombudsman organization. Such an organization could take various forms, ranging from an unincorporated body functioning as a liaison meeting or preparatory committee to a fully incorporated body that itself would ultimately be transformed into a financial ombudsman organization. The new organization would take the first step toward the achievement of the two remaining requirements of ease of access and comprehensiveness by establishing a unified complaint-receiving channel that would serve all the constituent members of the organization. Thus, the process would start at the complaint receiving level. The new organization could conceivably provide a unified complaint-receiving channel for all financial services

enterprises. Another option would be to transfer to this new organization all financial services related complaints and problems received by such organizations as the Japan Legal Support Center (*Houterasu*), the legal advice desks of local bar associations and judicial scriveners associations, the National Consumer Affairs Center of Japan and the advice desks of local Consumer Affairs Centers. A nationally unified complaint-receiving channel for financial services complaints and disputes could be gradually developed and expanded through this process.

(Initial Response Functions of New Organization)

In addition to providing a unified channel for receiving complaints, the new organization could undertake some of the initial response functions of the "first process" (debriefing of complainant and presentation of resolution proposal) indicated above. For example, this could include investigation by expert mediator. In such instances, the expert mediator would confirm the details of the complaint and thereupon hand over the case to an appropriate existing financial ADR organization. Where possible, the new organization may itself be able to carry the case forward to conclusion.

(Formulating Model Standards for Establishment of Unified Organization)

Taking into consideration the provisions of this Proposal and the views of existing financial ADR organizations, and drawing on its own knowledge accumulated through the above experiences, the new organization shall formulate model standards to be adopted by the financial ombudsman organization. These standards shall cover such matters as organizational format, dispute resolution procedures and dispute resolution standards. Furthermore, the new organization shall actively promote and encourage the adoption of the model standards (excluding matters related to organizational format and other matters specific to a unified financial ombudsman organization) by the following: members of the new organization's founding industries and their industry-based financial ADR organizations, other financial industry associations, and other existing financial ADR organizations.

The model standards shall satisfy the eight requirements (design concepts for organization establishment) indicated in Section 1 (2), which all financial ADR organizations are expected to meet. The contents of the standards shall be consistent with the investigation standards of the dispute resolution system of the Financial Services Agency. The underlying philosophy of the standards shall accord with the principles and code of conduct contained in the International Organization for Standardization's "Quality management – Customer satisfaction – Guidelines for complaints handling in organizations" (ISO 10001-10003).

Step Three: Develop unified network for financial ADR organizations – Progress toward comprehensiveness

To promote progress toward the establishment of a comprehensive financial ADR organization, a new organizational network (tentative title: Financial Ombudsman Network) shall be developed comprising existing financial ADR organizations that have satisfied the requirements of the model standards created by the new organization. Under this arrangement, while existing financial ADR organizations will remain separate, they will effectively form a network of franchises functioning under unified standards.

This process will result in the emergence of a unified nationwide network of financial ADR organizations that satisfy the various requirements for financial services dispute resolution as listed in Section 1 above.

Furthermore, the new organization could itself handle complaints and disputes arising in areas where there are no participating financial ADR organizations. This would allow the network to cover all categories and types of financial services businesses throughout Japan and would contribute to the formation of a comprehensive and unified network of financial ADR organizations.

Step Four: Transition to one-stop comprehensive financial ADR organization spanning all segments of the industry – Realization of financial ombudsman organization

All financial ADR organizations participating in the Financial Ombudsman Network will have attained a certain degree of uniformity in terms of their organizational structure, dispute resolution procedures and judgment procedures. At this point, the participating organizations can be unified to complete the transition to a unified one-stop comprehensive financial ADR organization spanning all segments of the financial industry. This would constitute the creation of a financial ombudsman organization, which is the ultimate goal of this Proposal.

(2) Immediate Goals

Step Four will not be easy to reach immediately.

Therefore, the immediate goal should be to realize Step One (Internal reform of existing industry-based financial ADR organizations – Achieving flexibility) and Step Two (Establish/expand complaint receiving channel, and adopt/promote model standards).

4. Contributions of the Financial ADR Organization to the Financial and Capital Markets

Section 4 of "II. Details of the Proposal" outlines the merits and benefits that will result from the adoption of the principles and ideals of the financial ombudsman organization proposed in this document among pertinent persons. The speedy establishment of an ideal financial ADR organization based on the principles and ideals of this Proposal will provide the following benefits to financial services markets, users of financial services and financial services enterprises.

(1) Developing Financial and Capital Markets Infrastructure and Promoting Use of Financial Services

An effective and reliable financial dispute resolution system constitutes an indispensable element in the infrastructure of financial and capital markets. The improvement of this infrastructure through funding provided by related enterprises can be expected to promote the use of a wide range of financial services in the financial and capital markets. The establishment and expansion of a unified receiving channel, the adoption and promotion of model standards, the development of a unified network for financial ADR organizations and the establishment of a financial ombudsman organization will raise the level of confidence and convenience for participants in Japan's financial and capital markets, and will lead to

increased market liquidity and stability. This will facilitate the development of internationally competitive financial and capital markets.

The financial ombudsman organization will be able to gather extensive information on financial services related problems. By widely publicizing this information, it will be able to provide accurate information on financial services dispute resolution to users of financial services. By utilizing this shared information and engaging in mutual communication, financial services enterprises and users will be able to contribute to the continued improvement of financial services dispute resolution systems.

(2) Benefits to Financial Services Users

The establishment of reasonable, flexible, speedy and simple means for processing complaints and resolving disputes would provide the following benefits to users of financial services.

(A) Means for Reasonable Dispute Resolution

Functioning as a third-party organization, a financial ombudsman organization can overcome various problems that are inherent to existing industry-based ADR organizations, other dispute resolution systems and to the judicial system. By offering a means to fair and "reasonable and flexible dispute resolution," the financial ombudsman organization will be able to provide users of financial services with a convincing and justified means for the handling of complaints and resolution of disputes.

(B) Speedy Relief

A financial ombudsman organization will provide effective and reliable relief in a flexible and speedy manner to correspond to the particulars and degree of a dispute.

(C) Ease of Access

The establishment of a financial ombudsman network and financial ombudsman organization will eliminate the problems of vertically segregated organizations and can avoid the "run-around" of sending complainants from one complaint receiving organization to another. Furthermore, by releasing information on a regular basis, easy access can be ensured for financial services users who are part of the general public.

(D) Predictability of Dispute Resolution

A financial ombudsman organization will be in a position to provide financial services users with information on filings of complaints against financial services enterprises and how disputes between financial services enterprises and users are being handled and resolved. By utilizing this information, financial services users would be able to more readily predict how a dispute would be resolved by the financial ombudsman organization.

(3) Benefits to Financial Services Enterprises

The sharing of the principles of a financial ombudsman organization, efforts made toward its establishment and the ultimate establishment of an ideal financial ADR organization would provide the following benefits to financial services enterprises.

(A) Ensuring the Independence and Neutrality of Administrators of the System

The basic philosophy underlying the design of the financial ombudsman organization would be as follows. As a third party acting independently and neutrally of both consumer organizations and financial services enterprises, the staff of the organization would take into account asymmetry in access to information and differences in position between users filing complaints and financial services enterprises. Based on this, they would effectively ensure fair treatment of both parties by not being strictly bound by superficial procedural requirements.

By abiding by the provisions of this Proposal, it will be possible to gain the confidence of participating financial services enterprises, while also overcoming issues related to the independence and neutrality of ADR operators, which have often been the target of criticism in industry-based ADR organizations.

(B) Participating in Formulation of Criteria for Reasonable and Flexible Dispute Resolution

Financial services enterprises shall not be permitted to exercise any influence over individual dispute resolution decisions made by the financial ombudsman organization. However, by participating in the establishment of the financial ombudsman organization, financial services enterprises shall be able to participate, together with financial services users, in the process for formulating the criteria for achieving "reasonable" financial dispute resolution. It is hoped that financial services enterprises will work with other enterprises to internally establish certain standards for financial services offered in the financial and capital markets. (By nature, such self-regulating standards are expected to reach for higher levels than what is required under laws and ordinances.) Using these self-imposed standards as a starting point, financial services enterprises would enter into ongoing communication with financial services users through the dispute resolution process of the financial ombudsman organization and would in this way participate in the formulation of criteria for reasonable dispute resolution.

(C) Strengthening Expertise

Through the gradual accumulation of experience and ongoing training and education, the staff members of the financial ombudsman organization will be able to foster the knowledge, creativity and ability to respond needed to deal with cases requiring high levels of expertise. The involvement of such highly trained and capable expert mediators in dispute resolution will contribute to gaining the confidence of financial services enterprises.

(D) Improving Operational Efficiency and Cutting Costs

Today, financial services enterprises face the following demands: improvement of compliance and internal control systems; and development and continuous improvement of such matters as code of conduct for customer satisfaction and other integrated self-regulatory

measures and internal rules. Given this environment, participation in the financial ombudsman organization will allow financial services enterprises to work in tandem with the organization to develop more efficient procedures for dispute resolution and to thereby improve their operational efficiencies over a broad range of operational areas. Some examples are provided below.

- Certain cases can be resolved at the financial ombudsman organization's reception stage (simple questions, clearly inappropriate complaints and claims). Prompt resolution of such cases will reduce the number of "complaints and disputes" that a participating financial services enterprise will actually have to handle.
- By using the dispute resolution procedures and model standards provided by the financial ombudsman organization, a certain level of objectivity and justification can be maintained in the content of dispute resolution. This has various advantages, such as eliminating the need for confirmation of problematic conduct for which a customer is receiving compensation for damages.
- In cases of trouble involving financial services, it appears that complainants frequently emerge from the complaint process with a heightened sense of dissatisfaction, thus further complicating the case. For instance, the complainant may feel that the enterprise did not act sincerely after the loss was incurred, or may feel that his or her complaint was not properly handled. The use of the financial ombudsman organization and its network can be expected to contribute significantly to avoiding such negative developments.
- By participating in the establishment of the financial ombudsman organization, a financial services enterprise places itself in a position to receive a wide range of information pertaining to the operations of the dispute resolution system. It would be difficult for individual enterprises and industry associations to obtain this information on their own.
- By participating in the financial ombudsman organization, financial services enterprises can raise the level of consumer and user confidence in their enterprises and in their financial services. They can also appeal to users that a reliable and effective means for support and dispute resolution are available in case of any trouble.

As a result, various costs normally borne by individual financial services enterprises for handling user complaints and for communicating with complainants can effectively be reduced (e.g., legal fees and internal personnel expenses).

(E) Gaining Overall Picture of Complaints and Other Problem Situations

By participating in the establishment of the financial ombudsman organization, participating financial services enterprises will be able to gain an overall picture of complaints and other problem situations involving participating enterprises. This feedback of information to participating enterprises will enable participating financial services enterprises to gain a valuable perspective on the types of complaints

that are being lodged against the enterprises themselves, general trends in complaints lodged against the members of their own and other industries, as well as to identify where they themselves stand in relation to others in the types of complaints that they are receiving. Information on complaints and other problem situations constitutes critically important information regarding financial services markets. Access to information on a broad range of problem situations affecting one's own industry and all segments of the industry can be very helpful to individual financial services enterprises in developing their own appropriate and effective internal control systems. Furthermore, against the backdrop of increasing liberalization of financial services businesses, information obtained in this manner can prove invaluable in the development of financial products and business strategies.

(F) Reducing Risks Affecting Individual Financial Services Enterprises

By gaining and analyzing an overall picture of customer dissatisfaction, financial services enterprises can avoid and reduce the accumulation and amplification of compliance risks over the long run. Reporting information on current problems to the compliance department of the participating financial services enterprises will prompt these enterprises to take early action. Moreover, the provision of such information can also be expected to reduce or suppress problematic behavior on the part of financial services enterprises, including procedural omissions and illegal acts on the part of sales personnel, inappropriate sales approaches on the part of sales offices, and the development of trouble-prone financial products.

(G) Reducing Risks Existing Throughout the Entire Industry

The financial ombudsman organization can serve as a framework for exchanging information among enterprises on complaints and responses to complaints to identical or similar products and services as they arise in individual industries and categories of businesses. Access to this information will allow the financial services industry to speedily and accurately identify and reduce certain risks that may exist throughout the industry. The dispute resolution process will direct attention to inherent problems that exist in the following types of products: a series of risk products that are sold under different names in various segments of the industry, but which have the same economic rationale; and, compound risk products that combine assets and liabilities across industry lines, making it difficult to gain a full understanding of the product. The resolution of disputes pertaining to such products and the dissemination of related information will facilitate early problem solution. Furthermore, such a mechanism would also prove effective in coping with cases involving systemic problems that arise simultaneously and in large numbers (cases where the scale of each dispute is small, but the sheer number of disputes generates serious and massive problems for society and the markets as a whole). Specifically, this mechanism would facilitate early preventive action that would halt the spread of a problem and corresponding losses throughout the entire market.

5. Conclusion

The financial and capital markets provide an arena for the activities of numerous financial services enterprises, both large and small. These

markets are ultimately funded by individuals, given that even institutional investors are for the most part investing on behalf of individuals. The loss of confidence on the part of individuals will spell the immediate collapse of financial services enterprises. Thus, the financial and capital markets are in effect founded upon this foundation of the confidence of individuals.

Complaints and disputes lodged by financial services users must be speedily and appropriately resolved. Failure to do so can dangerously amplify user dissatisfaction. Moreover, this dissatisfaction will not only affect the financial services enterprise directly involved in the particular dispute, but will spill over to undermine confidence in financial services enterprises in general. Ultimately, this carries the risk of ending in a loss of confidence in the financial and capital markets in their entirety. In order to avoid this outcome, it is imperative to resolve disputes in a simple and speedy manner and to thereby ensure the continued confidence of individual customers in financial services enterprises. In this sense, a system capable of providing reasonable and flexible resolutions in financial disputes and complaints constitutes a key infrastructure element that is indispensable in maintaining the sound development of the financial and capital markets.

Here, we have outlined the importance of the financial and capital markets and have explained the significance of an ideal financial ADR system as an indispensable infrastructure element. It should be noted that these issues have all been approached from the perspective of contributing to the welfare of individuals as the constituent members of society. The aim of an ideal financial ADR organization would be to duly protect the financial assets of individual users of financial services and to ensure that these users are being treated fairly in the markets by financial services enterprises. From the perspective of financial services enterprises, disputes with individual users tend to involve relatively small amounts of money. But this does not detract from the importance of financial services enterprises accepting the responsibility of creating and offering a dispute resolution framework that will not ignore the relatively minor complaints of individuals but will instead act with due speed to provide just relief to individual complainants. This Proposal calls for the establishment of a financial ADR organization that will function as a key infrastructure element in the financial and capital markets in Japan, and which will ultimately contribute to the creation of a better society by protecting the interests and dignity of the individual constituent members of that society.

II. Details of the Proposal

Chapter 1 Model for Ideal Dispute Resolution Measures

1. The Research Group's Ideal Framework for Dispute Resolution

In this Proposal, the Research Group is proposing the establishment and operation of an "effective and reliable financial ADR" system designed to provide reasonable and flexible dispute resolution as a means to resolving complaints and disputes related to financial products.

In Japan today, there are 18 private complaint receiving and advisory organizations for specific types of financial services businesses.[3] In effect, these are organizations that correspond to existing business categories in the financial services sector. In the course of deregulation and the easing of restrictions on barriers between financial services categories, numerous financial products and services have been introduced that do not necessarily correspond to the traditional vertically segregated structure of the financial services sector. Similarly, the marketing channels used for selling these products and services have become increasingly diversified. For instance, banks are marketing life insurance and investment trust products, and are also providing securities brokerage services. The problem is that emerging financial products, financial services and marketing channels frequently overlap existing business categories. As a result, in the case of a dispute, users seeking to lodge a complaint do not know where to seek advice and where best to take the case. This phenomenon can be expected to become more common in the future. This situation points to the need for dispute resolution organizations operating within separate segments of the financial services industry to become integrated or to cooperate in creating a comprehensive dispute resolution organization equipped to cover all segments of the industry. Moreover, because segment-specific dispute resolution organizations tend to engender doubts about their fairness and neutrality, effective measures must be implemented to ensure appropriate levels of independence and transparency.

Complaints and disputes related to financial products are less likely to be caused by defects in the products themselves, and are more likely to reflect inappropriate marketing and solicitation (product explanation) methods adopted by the sellers of such financial products. For this reason, in the course of litigation, determination of the cause of a complaint or dispute frequently comes down to a futile exchange of "I said, you said." The outcome is often unfavorable to the litigant on whom the burden of proof rests. Litigation is certainly one method for realizing justice by determining the facts under very strict rules and reaching a resolution by

[3] Financial Futures Association of Japan, JF Marine Bank Consultation Office, Trust Companies Association of Japan, Life Insurance Association of Japan, Japanese Bankers Association, National JA Bank Consultation Office, National Association of Shinkin Banks, Community Bank Shinyo Kumiai, National Association of Labour Banks, Investment Trusts Association of Japan, Japan Financial Services Association, Japan Securities Dealers Association, Japan Securities Investment Advisers Association, Commodity Futures Association of Japan, Japan Commodities Fund Association, General Insurance Association of Japan, Association for Real Estate Securitization, Issuance of Advanced Payment Certificate Association.

subjecting the findings to the specific provisions contained in existing laws and ordinances. But such legal procedures have various drawbacks. First of all, litigation tends to result in an "all-or-nothing" resolution that lacks a proper degree of flexibility. Second, the procedures are time consuming and can significantly delay relief and restitution. Third, because of the high cost of litigation, the injured party frequently is forced to forego the pursuit of relief. Fourth, the residing judge may not necessarily be knowledgeable in the area of financial disputes. Finally, litigation carries the risk of the loss of confidentiality.

In cases where the financial institution is not at fault, investors making false claims or making a nuisance of themselves in the expectation of being paid off should not be tolerated. However, in many cases involving relatively small amounts, fault is ambiguous and one is caught between the feeling that "The investor did not exercise due caution when purchasing the financial product and the financial institution also failed to exercise due consideration at the time of sale (or that there was a mismatch in investment,)" and that "The financial service provided left much to be desired." Submitting a case such as this to litigation would require several years of deliberation to determine the fault ratio between the two parties. Suppose after making all the necessary efforts to prove one's point, the court rules that the financial institution should compensate 50 percent of the loss suffered by the investor. This outcome would certainly be unsatisfactory to both the investor and the financial institution. In such instances involving relatively small amounts, intervention by an impartial third party who is prepared to listen to both sides can be very productive. Suppose the intermediating party senses that fault is ambiguous, as in the above example. Then, instead of delving into the finer points of the case with legal exactness, if the intermediating party acts with due speed to propose a resolution involving the payment of 70 percent compensation by the financial institution to the investor, satisfaction on the investor side would improve greatly. Moreover, such a resolution would actually be cheaper for the financial institution than the former case, and would also serve to bolster investor confidence in the financial product, the financial industry and ultimately in the financial and capital markets. These present some very significant advantages. The reality of these advantages points to the need for a method for the resolution of disputes involving relatively small amounts that would be available as an alternative to formal litigation. That is, instead of determining the facts with legal exactness and subjecting the findings to the specific provisions contained in existing laws and ordinances in such a way as to ensure strict legal consistency, the alternative method for dispute resolution would focus on the specific features of the case on hand and the parties involved, and its dispute resolution procedures would prioritize arriving at a reasonable and flexible resolution in a speedy and simple manner.

The ultimate aim of this Proposal is to solve the problems described above. The solution presented here features the establishment and operation of an effective and reliable financial ADR system designed to provide reasonable and flexible dispute resolution. Finally, the proposed method for the realization of this objective calls for the cooperation of financial services enterprises covering as many segments and business categories as possible.

2. Background and Reasons for the Proposal

The following concrete cases are presented to explain the Research Group's understanding of the specific problems that currently exist.

(1) Case involving a bank selling a foreign-currency denominated personal pension insurance product

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"I am a 65-year old housewife living with my husband, a former civil servant. We are living on my husband's pension benefits. I took 5 million yen from my husband's severance payment and placed it in a five-year yen-denominated time deposit account with Bank X. The account was in my name. Upon maturity of the account, I went to the bank to again place the money in a five-year yen-denominated time deposit to cover our future living and medical expenses.

"At the bank, I was told about a "product that pays a much higher rate of interest than a yen-denominated time deposit." It was explained that I could earn about 3 percent on a five-year time deposit. I don't exactly remember the name of the product, but it had the word "insurance" in it. As the bank clerk had said, obviously it would be better to earn higher interest on a product with the same term. Although I had never before purchased a product that was described as "insurance," I accepted the bank's advice and signed the papers right away. I received a copy of the agreement, together with a package of other documents that said they "contained important information and should be read carefully." The package included a color-printed pamphlet, which I immediately opened to read. But the clerk said, "The information in this pamphlet covers all sorts of unlikely contingencies. This is a safe and profitable product, and is now very popular." This explanation made me feel safe, so I didn't bother to read the contents of the pamphlet later.

(Illustrated by Yuka Imabayashi)

"Three months later, my husband was suddenly hospitalized and we needed some money right away. So, I went to the bank to cancel the "insurance" that I had recently bought. But the bank clerk explained that cancellation before maturity would cost me several hundred thousand yen to cover the expenses incurred at the time of my purchase. Furthermore, the bank clerk explained that the product was denominated in American dollars. Because the exchange rate had changed from the time of my purchase, this would cost me another several hundred thousand yen. In total, he explained, I would have to give up 1.5 million yen and receive only 3.5 million yen.

"I thought this "insurance" product had the same level of safety as my previous yen-denominated time deposit and that even in the case of cancellation before maturity, I would at least receive the full amount of my original deposit. Moreover, I did not know that this product was denominated in American dollars and had no idea it would be affected by changes in the foreign exchange rate. I was terribly surprised."

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The housewife in this case went to the bank because she urgently needed money to cover her husband's medical expenses. So, she returned to the bank after a couple of days intent on recovering the full amount of her original investment. On her second visit, a manager of the bank gave her the following explanation.

* * * * *

"You have purchased a foreign-currency denominated personal pension insurance product. This product is subject to certain cancellation fees when cancelled before maturity. Also, it carries a foreign exchange risk. You say that you were not informed of this at the time of purchase. However, I have checked with the clerk who sold you this product, and the clerk states that a full explanation was given to you at the time of purchase regarding the name and category of the product, cancellation fees and foreign exchange risks. I am sorry to say this, but could it be that your memory of the transaction is not accurate? Given the facts of the situation, the bank cannot act as you have asked us to. Furthermore, since you have purchased an insurance product, the counterparty to your transaction is an insurance company. You will have to take the matter to Insurance Company Y to get the full amount of your money back."

* * * * *

The housewife received this explanation and was given the telephone number for Insurance Company Y. When she phoned the insurance company next day, she was given the following explanation.

* * * * *

"We have contacted Bank X to confirm whether any errors were made by them at the time of sale. Their response was that you were provided with a full explanation of cancellation charges and foreign exchange risks at the time of purchase. Furthermore, at the time of purchase, I believe you were handed a package of documents explaining the cancellation charges and foreign exchange risks. Did you take the trouble to carefully read the information that was handed to you?"

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The housewife remembered that she had received a package of information and admitted this fact to the insurance company before hanging up. After that, she searched her home and found a pamphlet entitled, "U.S. Bonds Personal Pension Insurance XX" and other documents. They did in fact contain sections explaining the applicable "cancellation fees" and "foreign exchange risks." At this point, the housewife deeply regretted the fact that she had not carefully read the information. She felt she should have read everything and asked the clerk about things she did not understand.

However, when she did read the documents, she found that they contained numerous matters that she did not really understand. Now she felt that the bank clerk should have given her a verbal explanation of the sections that were difficult to understand.

Wanting the full amount of her money back, the housewife consulted friends and relatives and learned that City Hall hosted a legal consultation desk once a week. To consult a lawyer would cost her 5,000 yen for 30 minutes. The housewife did not know any lawyers, and she also felt that with the help of a lawyer she would be able to immediately recover the full amount of her purchase, which was 5 million yen. So, she went ahead and made a reservation with City Hall to meet a lawyer the next week.

When she met the lawyer, the housewife explained her situation and received the following explanation from the lawyer.

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"I understand the trouble you are having with Bank X and Insurance Company Y. However, both companies are saying that you were given full and proper explanation at the time of the purchase, which directly contradicts your claim. Therefore, I believe this matter cannot be resolved easily. Furthermore, you are in possession of documents explaining the insurance product that you purchased. Consequently, it will be difficult to argue that you are completely without blame. My conclusion is that your intension to recover the 1.5 million yen to be deducted for cancellation charges and foreign exchange losses cannot be easily achieved.

"You have the option of referring this matter to a lawyer, who will negotiate on your behalf with Bank X and Insurance Company Y. If you were to assign this to me, I would charge you a flat-rate retainer[4] of 100,000 yen. If I succeed in fully recovering the withheld amount of 1.5 million yen, you would pay me an additional 200,000 yen as reward money.[5] Finally, I will charge you for all my expenses, including transportation, communication, the making of copies, etc. However, listening to your explanation, I feel that there is a possibility that Bank X and Insurance Company Y will not agree to negotiate for a resolution.

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[4] Fee to be paid to the lawyer at the start of the case, which is non-refundable regardless of the outcome of the case.

[5] Reward payable to the lawyer in case of successful negotiation.

"That brings you to your second option, which is to litigate. In that case, I would charge you a flat-rate retainer of 150,000 yen and a reward of 200,000 yen.[6] As you would be demanding the repayment of 1.5 million yen in this case, you would need to pay 13,000 yen for revenue stamps to cover the court filing charges. This would be payable by you.

"The time needed to reach a ruling in a civil case such as this has been significantly shortened in recent year. But still, from the time of filing, on average, the district court will take about a year[7] to reach a ruling. In a case such as yours, it would be possible to argue that Bank X and Insurance Company Y failed to provide you with adequate explanations. In addition, it could be argued that the transaction was problematic in that a risky financial product, such as a foreign-currency denominated personal pension insurance product, had been sold to someone with very little investment experience. But you can expect Bank X and Insurance Company Y to contest these claims. That means calling on witnesses to establish the facts of the case. There is a good possibility that you will need more than one year to obtain a ruling.

"Under court procedures, you will be called on to specifically state how and to what extent the bank clerk explained the advantages and risks of the "insurance" product that you purchased. If your statement conflicts with theirs, you will have to produce proof for your statement."

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The housewife did not know what to do. She felt that she obviously could not solve the problem on her own. On the other hand, retaining the lawyer would cost her several hundred thousand yen. Moreover, she needed the money right away to cover the husband's hospital expenses. In her situation, a time consuming solution was meaningless.

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[6] The Japan Federation of Bar Associations publishes a booklet entitled *Lawyer Fees Payable by Individual Citizens as Estimated from Questionnaire Surveys*. Although this booklet does not contain a case that is identical to that of this housewife, the following details are given for a hypothetical case brought against a commodity futures trading company accused of the following violations: solicitation under the provision of conclusive evaluations, and failure to provide adequate explanation of transactions. In case of fully successful litigation claiming the payment of 7 million yen in compensation, 40.6 percent of the respondents said that they would charge a retainer of about 300,000 yen, and 41.5 percent said that they would charge a reward payment of 700,000 yen, or 10 percent of the amount collected.

[7] According to *Court Data Book 2008* (p. 70) published by the Supreme Court, the average civil case in 2007 took 6.8 months to reach a first ruling (district court decision). In cases requiring the presence of both parties in court, the average time required for reaching a ruling was 11.9 months (computed only for cases that were concluded).

Also, the housewife was beginning to feel that she herself was at least partly to blame for buying a product without fully considering its merits and demerits. This led her to feel that it would just be better to take her losses and walk away with what she could get. The housewife very honestly explained her feelings to the lawyer and asked whether there were any other cheaper and speedier options to resolving the matter.

* * * * *

"For insurance company related disputes, you can go to the Life Insurance Consultation Centers operated by the Life Insurance Association of Japan. For bank related disputes, you can go to Consumer Relations Offices operated by the Japanese Bankers Association. I understand that you can consult with them for free. But since I have never used their services myself, I don't know the details."

* * * * *

The housewife decided to think it over a little more before retaining the lawyer. Also, she now had the contact address for the two advisory organizations. But she did not know which of the two organizations she should consult. She was also beginning to doubt that these advisory organizations could present her with a convincing solution. After all, they seemed to be closely related to Bank X and Insurance Company Y. She was now at a complete loss.

(2) Need to Protect Users of Financial Services

The above case contains the following issues and problems, which should not be tolerated or left unattended. (See Sub-section 3 below for detailed analysis of the issues and problems.)

A. Absence of Substitute for Litigation

Litigation procedures are subject to strict rules of evidence and require that disputes be resolved in accordance with the provisions of laws and ordinances. On the other hand, the above case requires the determination of facts that are highly specific to the case. The application of litigation procedures to a case of this kind frequently ends in resolutions that lack due flexibility. Because such resolutions may not correspond to the features of the individual case and the characteristics of the parties involved, some other form of dispute resolution procedure must be made available.

B. Cost Factor

Compared to the relief sought by the user, the cost of obtaining a resolution is very high. This renders it virtually impossible for an individual user to obtain relief. As a result, the user is left with no choice but to forego restitution.

C. Time Factor

If it takes a long time to obtain relief, this also can be equivalent to not

being able to obtain relief. Again, the user is left with no choice but to forego restitution.

D. Inaccessibility of Means to Dispute Resolution

Suppose that a dispute resolution system were available that was not subject to the cost and time factor problems noted under paragraphs B and C above. However, if users were uninformed, such a system would remain virtually inaccessible to the average individual. Thus, the outcome would be the same as if no such system existed.

3. Review of Available Means for Dispute Resolution

(1) Existing Channels for Complaint and Dispute Resolution

A. Existing Channels for Complaint and Dispute Resolution

At the present time, the following options are available to a financial services user wishing to lodge a complaint pertaining to financial services or seeking dispute resolution pertaining to financial services.

- File a suit with courts or apply for court arbitration
- Consult with National Consumer Affairs Center of Japan or local Consumer Affairs Centers
- Consult with legal advice desks of local bar associations and judicial scriveners associations
- Consult with Japan Legal Support Center (*Houterasu*)
- Consult with the ADR organizations operated by individual industry associations
- File for mediation by mediation organization (mediation and arbitration centers of bar associations)

B. Advantages and Limits of Existing Channels for Complaint and Dispute Resolution

From the perspective of users, the most accessible channels for complaint and dispute resolution probably consist of those provided by the National Consumer Affairs Center, local Consumer Affairs Centers and the Japan Legal Support Center (*Houterasu*). The main advantages of these channels are that they can be used without charge, are well known to users and are easily accessible. On the other hand, while the government is currently working to upgrade the dispute resolution functions of the National Consumer Affairs Center and local Consumer Affairs Centers, the resolution proposals presented by these organizations remain non-binding on enterprises. As for the Japan Legal Support Center (*Houterasu*), its functions are presently restricted to providing information on available means to dispute resolution. As a result, users taking their complaints and disputes to these channels can only expect to obtain a resolution in relatively simple cases. Moreover, these organizations are generally unsuited to handling more complicated cases of financial services disputes that require a higher degree of expertise.

The second option would be to obtain relief through litigation and court procedures, which have traditionally provided the most popular means to dispute resolution in Japan. The courts provide fair and neutral judgment by a third party. Moreover, because court rulings are binding on all parties, this channel ensures effective dispute resolution. On the other hand, while civil cases in recent years have been sped up through the amendment of the Code of Civil Procedure and administrative changes designed to achieve greater efficiency, court procedures continue to require a considerable amount of time to reach conclusion.[8] Furthermore, legal expenses, including payments to lawyers and certified judicial scriveners, can be expensive.[9] Finally, as discussed in Appendix 1, court procedures must be carried out under rigorous rules and processes. This provides an obstacle to users seeking simple and speedy resolution, and can virtually render court procedures an ineffective means to dispute resolution.

Other options are also available. These include filing for court arbitration, filing for mediation by a mediation organization and referring the matter to one of the various industry-based ADR organizations. None of these are as rigorous as court procedures, and relatively flexible procedures can be used to reach an agreement between the two parties or to design a resolution that corresponds to the features of the case as determined through consultation. However, both court arbitration and mediation by a mediation organization share a common drawback. That is, there is no assurance that an arbitrator or a mediator assigned to a case possesses expert knowledge on the type of financial service that is in dispute. This would render it very difficult to immediately understand the issues on hand and to speedily deliver an effective resolution proposal.

This particular problem can be avoided by using an industry-based ADR organization. Any personnel assigned to a case could certainly be expected to have the necessary expert knowledge. The issues on hand would be immediately grasped, and depending on the design and operation of the procedures, the user would be able to obtain an effective resolution that corresponds to the features of the case on hand. However, as discussed in Appendix 1, the existing industry-based ADR organizations that handle financial services are not without their own problems. While voluntary measures are being taken by these organizations to improve their systems and procedures, they are not well known in general society. Consequently, they remain somewhat inaccessible to users. Moreover, it appears that such industry-based ADR organizations have yet to gain the confidence of the average user as fair and neutral third-party entities.

As seen here, existing channels for complaint and dispute resolution do have certain strengths and advantages. On the other hand, there are indications that these existing channels remain unable to deliver what it takes to establish confidence in their dispute resolution processes. What users need is easy access to procedures designed to handle complex financial services related complaints and disputes requiring a high level of expertise. Just as importantly, users want a

[8] See footnote 7 under Chapter 1 Section 2 (1) of II. above.

[9] See footnote 6 under Chapter 1 Section 2 (1) of II. above.

flexible, fair, neutral and truly effective process capable of rendering speedy resolution.

(2) Design Concepts

Dispute resolution systems can be divided into two general categories: court procedures and out-of-court procedures (alternative dispute resolution systems). Of the two, court procedures have traditionally been the most popular channel for dispute resolution in Japan. However, litigation and court procedures do not necessarily represent the most suitable approach to the resolution of all disputes. Court procedures are based on very rigorous rules for the determination of the facts, and a court ruling involves the application of the provisions of laws and ordinances as interpreted under very strict conditions.[10] Normally, litigation is handled by lawyers acting as proxies. Such procedures tend to be relatively costly and time consuming. Consequently, in cases involving small amounts, cases in which black-and-white decisions are difficult to render and cases in which the livelihood of the complainant would be jeopardized unless a speedy payment or repayment of money is made (does not constitute true relief), an ADR process could be more suitable than court procedures. The choice would ultimately depend on such factors as the characteristics of the dispute, the scale of the dispute and the type of resolution that the two parties desire to obtain. Thus, in certain instances, speedy and low-cost dispute resolution through an ADR process would be preferable to strict court procedures that can be expected to be expensive and time consuming. Many financial services related disputes would match the above criteria. Moreover, an ADR process of dispute resolution would be particularly effective in such cases because investment in financial products always involves some level of monetary risk.

From this perspective, the Research Group examined the following question. Given the goal of creating an "effective and reliable financial ADR system capable of providing reasonable and flexible dispute resolution," how should a financial ADR system be designed to ensure that it can function as an effective and significant element of the infrastructure of financial and capital markets for users, enterprises and all other related parties? The Research Group concluded that eight specific design concepts

[10] Laws and ordinances are founded on certain basic values of human society concerning social order and rights and obligations that are shared by the people and form a common sentiment, such as justice, equality, freedom, fairness and balance. In other words, the provisions contained in laws and ordinances reflect this common sentiment as it applies to a specific area of the law and specific cases. Thus, individual laws and ordinances can be understood to be a codification of normative standards. A specific dispute can be resolved by applying the interpretations of the provisions of the laws and ordinances that pertain to it. As state-appointed institutions, courts provide a venue for this process, which is referred to as the process of litigation. Laws are enacted by the legislature, one of the three branches of government. The application of these laws to specific disputes is based on decisions and rulings rendered under the auspices of the powers of the judiciary. As such, the examination of evidence must be carried out under very strict rules. In this procedure, a professional judge carefully examines each piece of evidence to determine the facts of the case. Finally, based on these findings pertinent laws and ordinances are interpreted and applied to the case on hand to arrive at a black-and-white decision (an "all or nothing" ruling that allows for no ambiguity, or which establishes the "one and absolutely correct conclusion applicable to the case"). This is what a court decision represents.

should be incorporated into the structure of the financial ADR organization. Note that the design concepts discussed below represent the minimum standards that a financial ADR organization must satisfy and should not be taken as a set of exclusive criteria.[11]

A. Flexibility

"Flexibility" is the most important feature of a financial ADR organization, and is a feature that is missing in court procedures and other existing dispute resolution systems.

For a financial ADR organization to function as an effective element of the infrastructure of the financial and capital markets providing truly justified resolutions that correspond to the conditions of the problem and dispute on hand, it requires a system design capable of devising flexible resolutions. What is meant by "flexibility" in dispute resolution? A close example would be the "Ooka rulings" of medieval Japan. That is, the proposed resolution must resonate with commonly held sentiments reflecting certain basic and shared values of human society concerning justice, equality, freedom, fairness and balance. Moreover, the people must find the proposed resolution to be appropriately acceptable to their feelings. First of all, flexibility means not being bound by the strict procedures for examination of evidence and rules of evidence that apply in court procedures. It thereby implies that the facts of the case on hand will be investigated according to a flexible process that is acceptable to both parties to the dispute. Secondly, flexibility means not being strictly bound by the details of the provisions of existing laws and ordinances, and the application of the technical and highly specialized interpretations of such laws. Instead it implies the presentation of resolutions that conform to the above-mentioned common sentiment and which the people find appropriately acceptable to their feelings. The resolution of problems and disputes based on such a "flexible" fact-finding process and "flexible" resolution proposals can be referred to as a "reasonable resolution."

There may be some concern that flexibility may result in "sloppiness" and "negligence." However, the Research Group believes that such problems can be fully avoided as explained below.

What fundamental measures can be taken to avoid these problems? First of all, the goal must be to devise resolution proposals that conform to the common sense that underlies all laws and ordinances. Secondly, the principle that resolution proposals are only binding on one party must be accepted. (Users of financial services have the right to reject any proposed resolution, while financial services enterprises must abide by any proposed resolution, subject to the caveat that they may contest a resolution proposal in court or through mediation.) If

[11] As in the case of all industries, individual financial services related enterprises should obviously develop their own internal systems for appropriately handling complaints and criticisms of their products and services lodged by customers. The eight design concepts identified here are not meant to apply exclusively to a financial ADR system called for in this Proposal. All enterprises bear the fundamental responsibility of satisfying almost all of the design concept requirements in the establishment and operation of their internal systems.

the financial services user deems a proposed resolution to be unreasonable or unconvincing, the user will have the right to unilaterally reject it, in which case the proposal will fail. The frequent failure of proposed resolutions may ultimately undermine the viability of the ADR system itself. In other words, in order to develop a system that effectively contributes to the infrastructure of financial and capital markets by winning the broad support of financial services users, financial services enterprises and other related entities, the Research Group aims to create a compelling financial ADR system that obviates any concerns of "sloppiness" and "negligence," derives maximum benefit from "flexibility" and gradually builds up a body of precedents in reasonable dispute resolution. The financial ADR systems of other countries including the United Kingdom and other European countries are in fact founded on such central concepts as "reasonable and fair" and the principle of equity. It should be noted that the "flexible" ADR systems that operate in these countries on the basis of these concepts and principles are widely supported for their convincing resolutions by the consumers, financial services users and financial services enterprises of their respective countries.

The workflow in such a financial ADR organization would be as follows. First, an expert mediator debriefs both parties in accordance with procedures that can be readily modified to match the features of the case, and organizes the findings of the case and related materials. Based on this, the two parties are encouraged to make mutual concessions. Finally, a flexible and bold proposal for resolution is tendered to resolve the problem. This process can be expected to reach a mutually acceptable reasonable resolution that exactly matches the features of the case.

B. Speed

User satisfaction depends very importantly on the ability to achieve "speed" in resolutions that correspond to the features of the case and the type of procedures adopted. Speedy resolution is particularly important in disputes that arise when an investor facing an urgent need for money attempts to liquidate his or her financial product. Regardless of the final outcome of the dispute, lack of speed can effectively deny a financial services user of real resolution or relief. Speedy dispute resolution requires procedural and operational efficiency. Furthermore, the proper training and capabilities of the administrators of these procedures is of special importance. In this context, it is well worth considering the formulation of standard procedural models for each type of dispute and resolution procedure, as well as target timeframes (e.g., an indication of the maximum number of days to resolution). It would also be necessary to regularly provide financial services users with information on procedural matters and schedules. "Speed" requires a "flexibility" that allows for ready modification of the framework as needed. Conversely, "speed" is the natural outcome of "flexibility."

C. Simplicity

The prospect of complex dispute resolution procedures can deter users from filing for resolution. Moreover, to achieve "speed," "simplicity" of

procedures is necessary. The goal should be to develop "simple" procedures for dispute resolution that users can easily familiarize themselves with. However, this must be done while maintaining procedural guarantees for protecting the rights of users.

D. Expertise and Quality Assurance

A dispute resolution system must gain the confidence of users and must achieve a stable standing in society. For this, it is essential to maintain and constantly raise the level of expertise in dispute resolution and to thereby enhance the "quality" of the resolutions rendered. Quality assurance will depend on the capacity of the administrators of ADR procedures, as well as on the capacity of the staff and employees of the ADR organization. To rise to a certain level of capacity, it is important to provide appropriate training to such personnel and to allow for the accumulation of experience over time. While one of the goals is to achieve due "flexibility" by avoiding being bound by the strict application of the interpretations of the Financial Instruments and Exchange Act and its related regulations, the essential premise of the entire ADR process is that its resolutions must comply with the "rationale" that underlies existing laws and ordinances. As such, the core ADR procedural elements must be buttressed by an awareness of expert legal knowledge. Therefore, expert mediators and staff members must be provided with regular opportunities to acquire expert knowledge of laws and ordinances.

E. Ease of Access

An easy-to-use dispute resolution system is one that users can easily access (an open and familiar setting that does not "frighten" or "rebuff" users). Some key factors in "ease of access" include free or low-cost use of the system entailing minimum economic burden for individuals, and readiness to communicate with users by telephone, letters and other means that are familiar to individuals in their daily lives. A third factor involves informing the general public of the existence of the system through public relations activities and the distribution of information. Due attention must be paid to the fact that public relations activities and the distribution of information can effectively obstruct access if their contents are difficult to understand for the public. This implies that dispute resolution procedures must not be excessively technical or demanding. (In this sense also "simplicity" of procedures mentioned above is important.) Furthermore, it is desirable for the procedures to allow for due "flexibility" to match the features of the dispute, the scale of the dispute and the claims and demands that are being made by the opposing parties. It is also important to properly educate staff and personnel so that they can provide easy-to-understand explanations of procedures and other matters to individuals as needed. Finally, measures should be taken to facilitate the participation of the hearing and sight impaired. This implies providing information through audio, Braille and other means that do not rely on the written materials.

F. Comprehensiveness

As a rule, no restrictions should apply to the categories of financial

services covered by a financial ADR organization, so that it can function as a comprehensive channel for all types of complaints pertaining to financial services. This will enable a one-stop (or single-procedure) approach in cases where financial services cut across several industry segments, as in the case of banks selling insurance and investment trust products and providing securities brokerage services. This will also avoid such problems as users not knowing which industry-based ADR organization to contact, and users being given the run-around in the guise of "referrals" to other ADR organizations. There are of course further advantages to having a comprehensive and integrated dispute resolution system. For instance, numerous industry-based ADR organizations functioning under their own criteria and operational standards can result in widespread disparities in the availability of relief and the features of relief obtained. A comprehensive and integrated system will obviate this problem, and will contribute to improving user confidence in the entire financial services sector.

G. Fairness (Including Independence and Transparency)

In this Proposal, the expenses pertaining to dispute resolution are to be borne by industry associations that enlist as members of the financial ADR organization. This means that the administrators of the dispute resolution procedures are at least indirectly supported by one of the parties in the dispute. Given the expenses of operating the system and the need to keep the financial burden placed on individual users to a minimum, this monetary relationship cannot be eliminated. This makes it imperative to ensure the objectivity and impartiality of the dispute resolution procedures as well as the "independence" of the administrators of the procedures. Such arrangements are indispensable to achieving the procedural "fairness" needed to gain the confidence of the users.

With regard to the administrators of the procedures, this points to the critical importance of establishing standards on conflicts of interest and ethical norms, and designing a system that minimizes the repeated assignment of the same personnel to cases involving the same party. If any external circumstances exist between the administrators of the procedures and one of the parties to the dispute, the matter must be disclosed ("transparency") to avoid suspicions of bias. To ensure procedural fairness, necessary means must be available to allow parties to file formal objections. Furthermore, to underscore the "independence" of administrators of the procedures, a certain term of office should be assigned to their posts to ensure the independence of their activities. Other related rules and regulations should be adopted to prevent the dismissal of administrators of the procedures without due cause, as well as rules disallowing involvement in cases pertaining to the financial services enterprise where the administrators were previously employed within three years of their departure from such enterprises. All such rules and regulations must be fully disclosed in advance to users.

To ensure confidence in the financial ADR organization, it is necessary to maintain "transparency" in the system and the organization by providing full information on ADR procedures, results, and summary

of budget and expenditures to interested parties and to society in general. Concerning the methods for the dissemination of this information, the production of annual reports and the timely disclosure of information through websites should be particularly effective.

H. Confidentiality

Financial services related disputes frequently touch on matters of individual privacy and corporate confidentiality. Therefore, it is important to maintain the "confidentiality" of the proceedings in order to fully protect the privacy of users and to prevent the disclosure of corporate secrets. For instance, the internal rules of a financial ombudsman organization should contain provisions against revealing corporate secrets and personal information, unless required by law or previously consented to by the related parties. Another effective measure would be to require the chairperson, directors, expert mediators, filing officers, administrative officers and arbitration candidates to sworn non-disclosure agreements.

For the development of orderly financial and capital markets, information pertaining to disputes that have been resolved should be actively provided to financial services enterprises, users and to government agencies responsible for financial administration. However, such information should be released in a general and aggregated form to avoid identification of specific individuals, enterprises and disputes.

Chapter 2 Details of the Proposed Financial Ombudsman Organization

1. Flow of Dispute Resolution Procedures

(1) Overview

The financial ombudsman organization presented in this Proposal as an "effective and reliable financial ADR organization aimed at the realization of reasonable and flexible dispute resolution" shall implement the following three types of processes as its procedures for the resolution of problems, complaints and disputes.[12]

Various channels can be considered for directing complaints and disputes to the financial ombudsman organization. These can be categorized as follows: (1) complaints and disputes brought directly to the financial ombudsman organization by financial services users; (2) complaints and disputes taken by financial services users to the related financial services enterprise, which are then brought to the financial ombudsman organization; and (3) complaints and disputes brought to the financial ombudsman organization by other ADR organizations. Given that the aim of the financial ombudsman organization is to function as a financial ADR with comprehensive dispute resolution functions, necessary preparations should be made to accept complaints and disputes brought to it from any of the above channels.

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[12] Given the premise that the proposed financial ombudsman organization is to be certified under the Financial Instruments and Exchange Act as a certified investor protection organization, it would be appropriate for it to implement the procedures stipulated in this law for the resolution of complaints (Article 79-7 Paragraph 1-1) and for mediation (Article 79-7 Paragraph 1-2). (For details of types of disputes to be handled by the proposed financial ombudsman organization, see Chapter 2 Section 4.) Note that the "first process" and the "second process" described in the text of the Proposal respectively correspond to the provisions concerning resolution of complaints and mediation in the said law.

Mediation can be certified under the ADR Promotion Act as a dispute resolution procedure. Under the provisions of this law, the suspension of statutes of limitations and suspension of litigation procedures can be applied to dispute resolution procedures undertaken by private enterprises. Therefore, the financial ADR organization (financial ombudsman organization) presented in this Proposal is predicated on the assumption that it will be certified under the provisions of ADR Promotion Act. (Note that the purpose of this Proposal is to present a model outlining the features of an ideal financial ADR organization. As such, this Proposal does not consider how a financial ADR organization (financial ombudsman organization) should be established and operated in order to be in compliance with the provisions of existing laws and ordinances (including the Practicing Attorney Law). Nor does it delve into a detailed examination of the conditions that must be met in order for a financial ADR organization to be certified under the ADR Promotion Act and to be certified under the Financial Instruments and Exchange Act as a certified investor protection organization. These matters must be separately considered when a financial ADR organization is to be actually established, and must be undertaken in reference to the specific features and design of such an organization.

Complaint resolution and mediation are both procedures aimed at resolution through consensus of the parties involved. Therefore, procedures should be in place for binding and ultimate resolution of complaints and disputes to be invoked when consensus-based resolution has failed. This would include the option of arbitration.

Complaints and disputes brought to the financial ombudsman organization through a variety of channels shall be processed within the financial ombudsman organization to pass through the first process (debriefing by expert mediators and presentation of resolution proposal [stage-one resolution proposal]) and second process (deliberative mediation: deliberation by mediation commission and presentation of stage-two resolution proposal). Preparations must also be made to allow the parties to the dispute to opt for the third process of arbitration.

A. **First Process** (debriefing by expert mediators and presentation of resolution proposal)

The following complaints and disputes are received at the financial ombudsman organization's reception: complaints and disputes submitted directly by financial services users by telephone, facsimile, and electronic mail; complaints and disputes submitted by financial services enterprises; and, complaints and disputes submitted by other ADR organizations. These undergo routine screening at the reception stage. Simple inquiries, such as questions about telephone numbers, are immediately taken care of, while other complaints and disputes are referred to expert mediators. Complaints and disputes that may be amenable to simple solutions are first referred to a single expert mediator who attempts to resolve the problem. Although some more complex complaints and disputes requiring greater expertise may be suited for resolution through deliberative mediation or arbitration, these will also be directed to the initial process of review by a single expert mediator, unless the parties to the dispute explicitly indicate their willingness to refer the case immediately to deliberative mediation.

When a complaint or dispute is referred by reception to a specific expert mediator, this same mediator will be responsible for the case as it passes through the first and second processes (deliberative mediation stage).

In the first process, resolution needs to be attempted through various responses, the choice of which will depend on the specific features of each individual problem, complaint or dispute. However, it is generally desirable for the following responses to be taken. First, investigations centered on hearings should be undertaken as needed (debriefing of claims and explanations given by the financial services user, inquiries with related financial services enterprises, debriefing of financial services enterprises, investigation of literature). Second, a resolution proposal (stage-one resolution proposal) should be presented to attempt resolution of the dispute.

B. **Second Process** (deliberative mediation: deliberation by the mediation commission and presentation of stage-two resolution proposal)

Problems, complaints and disputes that are not resolved in the first process shall be referred to the process of deliberative mediation. A mediation commission consisting of three expert mediators shall be formed, one of whom shall be the expert mediator who handled the case in the first process. Following due deliberation, the mediation commission shall present a mediation proposal (stage-two mediation proposal).

C. **Third Process** (Arbitration)

An arbitration process shall begin when a filing is made for arbitration on a problem, complaint or dispute.

For details, see Sub-sections (2) through (4) below.

(2) First Process (debriefing by expert mediator and presentation of resolution proposal)

The financial ADR ombudsman organization shall launch its dispute resolution procedures when it has received a complaint from a financial services user. Basically, it is desirable that about 80 percent of all cases be resolved at this stage. For this reason, the first process is particularly important among the three dispute resolution processes.

A. **Flow of the First Process**

(a) **Receiving**

In the receiving stage, incoming communications will be checked to separate simple inquiries from complaints. Communications that clearly do not contain a complaint, such as inquiries on telephone numbers of specific financial institutions or organizations, will be immediately handled by reception. Any communication that cannot be clearly identified as an "inquiry"[13]

[13] If a reception desk is established for receiving complaints, it is likely that the reception desk will receive numerous communications other than complaints, such as simple inquiries and requests. Given the complexity of many financial products, the reception desk may receive numerous questions concerning the features of such products and requests for easier to understand explanations of these products. Unlike complaints, inquiries frequently require nothing more than the provision of information or the debriefing of requests (as well as providing later feedback of such requests to related financial services enterprises). In most cases, it is desirable that inquiries be handled in this way. Therefore, it is important to be able to properly distinguish between inquiries and complaints. The separation of inquiries from complaints has an added advantage. Information gathered from these two sets of communications can be used to establish certain standards and criteria that can be very useful in systematizing administrative functions for greater efficiency, or in preparing materials for analyzing the operations of related enterprises and the financial ombudsman organization. Some inquiries that contain no complaints may in fact reflect potential complaints and disputes that still remain in the background. Moreover, some inquiries that fall short of being complaints may be transformed into complaints if the related enterprises err in their response to the initial inquiry. Therefore, reception personnel and expert mediators must exercise due caution in examining communications that at first sight may not seem to constitute a complaint with the realization that an inquiry may reflect a potential complaint or dispute.

will be forwarded to an expert mediator for action.[14] The expert mediator receiving the communication will confirm whether the complainant has already tried to resolve the problem by directly approaching the financial services enterprise. If the complainant has not attempted to resolve the problem in this way, and if it is thought that the related financial services enterprise will be able to resolve the problem on its own, the complainant will be encouraged to first contact the financial services enterprise directly to seek a solution. The complainant will be instructed to refer the matter once again to the financial ombudsman organization if direct contact with the financial services enterprise fails to resolve the problem.[15] In this case, with the consent of the complainant, the expert mediator should directly report the content of the complaint to the related financial services enterprise, as this will facilitate efficient handling of the complaint once the complainant approaches the financial services enterprise. Next, suppose the complainant has already discussed the problem directly with the financial services enterprise, but has failed to reach a resolution. In this case, explanations should be given to the complainant that the process will now move on to the hearings stage outlined in (b) below. To get an idea of how the matter may be resolved, the complainant should be asked to specifically explain what his or her intentions are in seeking resolution. If the complainant indicates the intent to proceed carefully toward resolution, the complainant should be given an overall picture of the dispute resolution processes available in the financial ombudsman organization. Details of the second process (procedures for deliberative mediation) and the third process (arbitration) should also be given.

(b) Hearings Stage

The expert mediator is given wide discretion in the hearings process.

The expert mediator begins by examining the reception file to gain an accurate understanding of the complainant's complaint, the events leading up to the complaint, details of past contact between the complainant and the related financial services

[14] In the investigation stage, as well as in the reception stage, it is possible for the same complainant to contact the reception desk of the financial ombudsman organization on multiple occasions. In such instances, it is desirable for the expert mediator assigned to the case to respond to these follow-up communications. However, this may not always be possible; the original expert mediator may be on vacation or occupied with another case. In such situations, unless the complainant refuses to communicate with any other expert mediator, the matter should be handled by a second expert mediator for the sake of speed and simplicity. In this case, the second expert mediator will not know the details of the case. To facilitate the process, the second expert mediator should be able to electronically retrieve the reception file based on a filing number and to immediately familiarize himself/herself with the basic facts of the case and the contents of previous consultations.

[15] This approach has its advantages and disadvantages, and must be carefully considered. On the one hand, depending on the type of problem, this approach can result in speedy resolution of the problem. On the other hand, the complainant may misconstrue this as being given the run-around.

enterprise and the contents of pertinent documents.[16] If deemed necessary, the expert mediator may also contact reception to access other supplementary information that may help in the resolution of the complaint. For instance, this could include information on the feelings and state of mind of the complainant. Based on the available information, the expert mediator will examine the facts leading to the complaint and will design and implement an appropriate format for the hearings from the perspective of preparing for the resolution stage.[17]

Regarding the collection of information from related financial services enterprises and other organizations, in the first instance, this should be done on a voluntary basis. However, voluntary cooperation may not be forthcoming if the other party in the dispute is being asked to provide information. In such cases, if the information is being sought from a financial services enterprise designated under the provisions of the Financial Instruments and Exchange Act, a financial ombudsman organization certified under the same act would be legally empowered to demand the

[16] The details of the hearings should be filed and maintained under the filing number assigned to the complaint when first submitted to reception. Such files should be readily retrievable by other expert mediators to grasp the hearings results efficiently in case the original expert mediator is unavailable to carry the case forward. Materials and documents submitted by the complainant and the related financial services enterprise must also be added to the file. However, unlike the reception files, fully digital management of these materials may be difficult. Problems can be avoided by maintaining the following key information in the digital reception files: name of expert mediator in charge, starting date of investigation, and dates of interviews with related parties. By referring to this file, other expert mediators will be able to grasp the progress of the case in the investigation stage as well.

[17] At least one expert mediator will be assigned to each case that has proceeded to the hearings stage as the mediator with responsibility for the case. As a rule, the responsible expert mediator should not be changed while the case is in process. The following reasons can be given for not readily allowing changes in the responsible expert mediator. Replacement of the responsible expert mediator may undermine efficient processing. The new expert mediator will be unaware of matters known to the former expert mediator that are unrecorded, which can obstruct the appropriate resolution of the dispute. From the perspective of the complainant, the assignment of a new responsible expert mediator means having to go through the explanations all over again. This undermines the requirement of speedy processing. Furthermore, this could raise suspicions concerning fairness of the procedures. One of the issues to be considered in designing the personnel system is the length of term of an expert mediator. Shorter terms would make changes during the hearings process unavoidable. Even if longer terms were established, re-assignment due to unforeseen events would be unavoidable. Therefore, an option worthy of consideration would be the assignment of two responsible expert mediators to each case that proceeds to the hearings stage: one the primary mediator and the other the secondary mediator. In this case, the secondary mediator would take over if the primary mediator is incapacitated. Furthermore, the primary mediator would be able to consult the secondary mediator if the primary mediator finds it difficult to decide on how to appropriately proceed in the hearings. Another option for designing the personnel system would be to assign one expert mediator to each case and to back this up with a senior expert mediator responsible for overseeing the case. If an adequate number of senior expert mediators were maintained, such a system would function effectively and the arrangement would not deteriorate into a mere formality.

provision of the information either in writing or orally and the submission of documents and materials. Furthermore, the financial services enterprise would not be able to refuse this demand without justifiable grounds (Financial Instruments and Exchange Act, Article 79-12 and Article 77 Paragraphs 2 and 3). As such, the required information can be collected through the exercise of this power.[18]

The methods to be adopted in hearings will differ from case to case. But these should at least include the following: notification of the substance and contents of the complaint to the related financial services enterprise; debriefing of the financial services enterprise; disclosure and receiving of certain documents and materials; and, the inspection of these documents and materials. If the complainant has already had contact with the financial services enterprise, the financial services enterprise should be obligated to submit information concerning such contact. Upon inspection of this contact information, the complainant may be requested to submit additional materials and to undergo further debriefing. There should be no hesitation in requesting the complainant to submit information, nor should there be any hesitation in debriefing the complainant (including direct interview) to clarify the details of the case. After undertaking full

[18] Article 79-12 and Article 77 Paragraph 1 of the Financial Instruments and Exchange Act state the following. "When an investor files an application for resolution of a complaint concerning the business carried out by a Target Business Operator, a Certified Organization shall respond to a request for consultation, provide necessary advice to the applicant, investigate the circumstances pertaining to such complaint and notify said Target Business Operator of the substance and content of such complaint and demand that said Target Business Operator should process the complaint expeditiously." In other words, the law mandates a "certified organization" to act for the resolution of a complaint filed against a financial services enterprise. Specifically, a certified organization bears the following obligations: (1) to respond to a request for consultation; (2) to provide necessary advice; (3) to investigate the complaint; and, (4) to notify the related financial services enterprise of the complaint and to demand the expeditious processing of the complaint. To properly empower a certified organization to carry out these obligations, Article 79-12 and Article 77 Paragraph 2 of the Financial Instruments and Exchange Act state the following regarding the powers of a certified organization to investigate a target business operator. "When a Certified Organization finds it necessary for resolving the complaint pertaining to an application under the preceding paragraph, it may demand that the relevant Target Business Operator should provide a written or oral explanation or submit materials." Article 79-12 and Article 77 Paragraph 3 of the Financial Instruments and Exchange Act stipulate that the target business operator must cooperate with such investigations as follows. "When there has been a demand under the preceding paragraph from a Certified Organization, a Target Business Operator shall not refuse the demand without justifiable grounds."

However, note that there are no legal stipulations concerning penalization of a financial services enterprise that refuses to cooperate. Hence, the application of sanctions against such a financial services enterprise would require the invocation of some form of binding agreement (e.g., special agreement concerning cooperation between financial services enterprises and the financial ombudsman organization, or internal rules of the financial ombudsman organization that have been accepted by financial services enterprises as being binding on them).

and sufficient hearings, the expert mediator formulates and submits a resolution proposal. However, if the hearings have been incomplete, it is highly likely that one or both of the parties to the dispute will find the proposal unsatisfactory. Consequently, full and sufficient hearings are essential to effective dispute resolution.

Complainants should be updated on the progress of the hearings and to be apprised of the position taken by the financial services enterprise and the reasons for the same. Suppose the position taken by the financial services enterprise directly contradicts and is even hostile towards the complainant. Any attempt on the part of an expert mediator to resolve the dispute while hiding this fact from the complainant would undermine the principles of fairness and transparency, and would carry the risk of fundamentally jeopardizing the trust of the complainant in the financial ombudsman organization.

(c) Presentation of Resolution Proposal

In light of the results of the hearings stage, the responsible expert mediator will formulate a reasonable and flexible resolution proposal that he/she considers acceptable to both parties. The proposal is then presented to the complainant and the financial services enterprise to seek their consent. If the participation of organizations other than the related financial services enterprise is necessary for the smooth implementation of the resolution, subject to the prior consent of both parties, the expert mediator may convey the substance of the resolution proposal to this third party and request its cooperation in the smooth implementation of the resolution. The content of the proposal and the date it has been rendered should be entered into the reception file by the expert mediator to facilitate later reference. As a rule, the proposed resolution should be conveyed orally. This is because the requirement that the proposal be submitted in writing is very likely to undermine the speed of the procedures.

The expert mediator will convey each party's response to the proposal to the other party. If the dispute is not resolved with this proposal, the expert mediator will provide the complainant with an overall picture of the dispute resolution processes available in the financial ombudsman organization, including details of the second process (procedures for deliberative mediation) and the third process (arbitration).

(d) Proceeding to Second Process (Deliberative Mediation) or Third Process (Arbitration)

If the dispute is not resolved with the proposed resolution, on the request of the complainant, the case can proceed to the second process (deliberative mediation) or to the third process (arbitration).

If the case proceeds to the second process (deliberative mediation), all the materials submitted from both parties in the reception stage will be carried forward to ensure efficient processing of the

facts and the realization of simple and speedy dispute resolution. In a system designed in this way, financial services enterprises may tend not to cooperate with the financial ombudsman organization's requests for debriefing. However, if the financial services enterprise is a designated enterprise under the Financial Instruments and Exchange Act, the financial ombudsman organization can, as a certified organization, exercise the powers given to it under Article 79-12 and Article 77 Paragraphs 2 and 3 to demand explanations and the submission of related documents and materials.

B. Issues Concerning the First Process

To ensure speedy and appropriate resolution in the first process, it is helpful to be aware of various problems that may arise in the receiving of a complaint and the procedures that follow it. Some possible problems are identified below.

(a) Complainant's Inadequate Understanding of Facts and Problems

It would be desirable for complainants to have properly organized the facts and understood the relevant problems before filing a complaint. However, complaints may be frequently filed without adequate preparation. For the following reasons, this is particularly the case in disputes involving financial products. (1) Financial products tend to be complex, and materials explaining these products make use of financial and special terminology, making it difficult for the financial services user to fully understand the product (complexity of financial products). (2) Unlike manufactured products, financial products cannot be directly observed to confirm their characteristics (invisibility of financial products).

(b) Difficulty in Grasping the Facts and Problems of the Case by Financial Ombudsman Organization's Expert Mediators

Under various conditions, the expert mediators of the financial ombudsman organization may have trouble grasping the facts and problems of the case. This can occur when, as in (a) above, the complainant has not properly organized the facts and understood the relevant problems of the case. Similarly, the same can occur if the complainant is unable to lucidly explain the situation.

Given the complexity of financial products, the expert mediators of the financial ombudsman organization will need to have expert knowledge. However, similar problems will occur if the financial ombudsman organization is unable to recruit mediators with the required expert knowledge.

(c) Difficulty in Building Trust

The expert mediators of the financial ombudsman organization must adopt a neutral stance that is independent of both the complainant and the related financial services enterprise. Some complainants may, however, misconstrue the mediator to be a member of the related financial services enterprise, or to be on the

side of the related financial services enterprise. In such instances, the building of adequate trust between the expert mediator and the complainant will prove to be difficult. This distrust can obstruct the expert mediator's efforts to gather necessary information.

(d) Knowledge and Information Gap between Complainant and Financial Ombudsman Organization's Expert Mediators

The complainant is frequently not adequately informed of the characteristics of the financial product in dispute. On the other hand, the financial ombudsman organization's expert mediator responsible for the case can be expected to have considerable knowledge and experience. Consequently, information and other matters that the expert mediator assumes to be common sense may not be obvious to the complainant. This gap may prevent the development of a common understanding of the problem experienced by the complainant.

(e) Complainant Becoming Overly Emotional

When filing a complaint, a complainant may be overly emotional and unable to consider the problem that has occurred with the financial product from a calm perspective. In such situations, for the following reasons, the complainant may not be able to calmly explain the facts of the case or to accept the explanations given by the financial ombudsman organization's expert mediator. First, financial products can be subject to sharp market fluctuations and dramatic loss of value, or the features of the product may be other than what the complainant originally expected. Second, users of financial services often expect to be able to immediately liquidate their investments in financial products and make inordinately large investments or purchase financial products with funds other than surplus funds, such as savings set aside for old age. In such situations, the complainant is particularly prone to being overly emotional because of the major impact of the problem on his/her livelihood.

(f) Feelings of Being Given the Run-Around

Depending on the content of the complaint, the financial ombudsman organization receiving the complaint may not be able to appropriately handle the complaint. In such instances, the financial ombudsman organization may advise the complainant to contact the related enterprise on the grounds that it would be better equipped to handle the problem. A complainant may feel that he/she is being given the run-around and therefore become even more dissatisfied. The fact is that, once the case leaves the hands of the financial ombudsman organization, there is a relatively high possibility that the complainant will be given the run-around. This reflects the following characteristics of financial products. First, in the case of certain financial products, the product is developed and sold by two separate enterprises. Second, the investment may involve several layers of brokers and intermediaries. The involvement of multiple financial services

enterprises and multiple industry associations makes the run-around more likely.

(g) Explosive Increase in Number of Complaints

In recent years, there has been a clear movement of funds from savings to investment. In the course of this transition, numerous types of financial products and services have been developed and sold to a steadily growing segment of the general public. As a result, it is possible to have an explosive increase in the number of complaints lodged. Therefore, the system must be designed in advance to be able to cope with a large number of complaints. Otherwise, the system may not be able to produce appropriate and speedy resolutions.

(3) The Second Process (Deliberative Mediation)

A. Flow of the Second Process (Deliberative Mediation)[19]

(a) Filing

If a problem, complaint or dispute is not resolved in the first process, the responsible expert mediator explains to the two parties that the matter can be referred to the second process consisting of procedures for deliberative mediation conducted by a mediation commission consisting of expert mediators. Thereafter, the second process is started when one or both of the parties indicate the intent to use the second process (deliberative mediation procedures). From the perspective of providing financial services users with a wide range of choices of dispute resolution methods, the adoption of the following rule is worth considering. If the filing is made by the financial services user, the financial services enterprise is obligated to participate in the procedures. However, if the filing is made by the financial services enterprise, the user has the option of accepting or rejecting to participate.

From the perspective of reaching a simple and speedy dispute resolution, the transition from the first to second process should be as smooth as possible. The ADR Promotion Act Guidelines (section pertaining to Article 6 Paragraph 8 of the ADR Promotion Act) states that the ADR organization can make the following choices: "whether or not it is necessary to indicate the contents of a dispute submitted to an alternative dispute resolution organization by the parties to the dispute; if deemed necessary, the extent of information to be indicated; whether or not it is necessary to indicate this in writing (if deemed necessary, the

[19] According to Article 77 Paragraph 3 of the Financial Instruments and Exchange Act (applicable mutatis mutandis to mediation by a certified investor protection organization by provisions of Article 79-13 of the same act), the mediating functions of a certified investment protection organization are the following: (1) to hear opinions of the parties or witnesses, or request said persons to submit reports; (2) to request the parties to submit books and documents and other necessary articles that will be helpful; and (3) when deemed appropriate, prepare a mediation plan necessary for resolution of the case and recommend the parties to accept said plan.

format of the document and the information to be contained therein)." The Guidelines further state the following. "When one party to a dispute files for the implementation of alternative dispute resolution procedures, it is not necessarily required to indicate the claim that is being brought against the other party to the dispute. (Alternative dispute resolution procedures should allow for the option of the finalization of claims after the start of the procedures and following the presentation of rights, legal relations and the identification of the issues of the dispute.)" The following can be deduced from the foregoing. While the systems of a financial ombudsman organization must be designed to meet the requirements for certification under the ADR Promotion Act, it is fully possible to develop a simple and flexible filing procedure for the second process (deliberative mediation). For instance, if filing in writing is to be required from the perspective of maintaining clarity in procedures, this can be kept simple by requiring only very basic information, such as filing date, name of filing party, and type and name of financial service in dispute.

(b) Selection of Mediation Commission Members

The mediation commission will consist of three expert mediators, one of whom will be an expert mediator who handled the case during the first process. Of the remaining two expert mediators, one will be a senior expert mediator.

(c) Sessions of the Mediation Commission

The mediation commission shall hold one or more sessions. The expert mediators and both parties to the dispute shall be present at such sessions. In the course of the session or sessions, the expert mediators of the mediation commission will hear the opinions of both parties and will endeavor to promote a resolution that both parties find acceptable. When necessary, the mediation commission may request one or both parties to submit books and documents and other necessary articles (either before, during or after a session). When deemed necessary, the mediation commission may request persons other than the parties to the dispute to appear in a session as a witness and to express his/her opinion.

Upon examination of documents, the mediation commission may determine that it is unnecessary to hold mediation sessions. In such instances, the mediation commission may immediately recommend the acceptance of a mediation proposal without holding a mediation session.

(d) Recommendation to Accept Mediation Proposal

When deemed appropriate, the mediation commission may prepare a mediation proposal (stage-two resolution proposal) necessary for resolution of the case and recommend the parties to accept the proposal.

(e) Termination of Second Process

In the following instances, the mediation commission may terminate the second process: when the two parties to the dispute have reached an agreement on how to resolve the dispute (including cases in which the mediation proposal presented by the mediation commission has been accepted); when it has become evident that the two parties cannot reach an agreement; when the two parties have not been able to reach an agreement within a period of time from the start of the second process as determined in advance; when one of the parties to the dispute declares the intent to file for legal procedures or to file for arbitration by the financial ombudsman organization; and, when the mediation commission deems that it is not appropriate to continue deliberative mediation procedures.

B. Issues Concerning the Second Process

(a) Unilateral Obligation to Submit Documents

There is a very significant difference in the ability to collect information between financial services enterprises and customers. In light of this fact, from the perspective of consumer protection and the need to determine the facts of the case, the following rule should be adopted. That is, the financial services enterprise should be obligated to submit all books and documents and other necessary articles as requested by the mediation commission.

(b) Unilaterally Binding Mediation Commission's Mediation Proposal (Stage-two Proposal)[20]

From the perspective of achieving speedy and flexible dispute resolution, rules should be adopted to render the mediation commission's resolution proposals (stage-two proposals) unilaterally binding.

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[20] In many existing ADR organizations, enterprises are to some degree subject to unilaterally binding obligations in the form of obligation to respect resolution proposals or duty to litigate.

General Insurance Association of Japan: When an enterprise rejects a mediation proposal, it must explain its reasons for doing so to the Mediation Committee. If it finds that there are no justifiable grounds for the rejection, the Mediation Committee may release information on summary of the dispute and the final resolution proposal, the name of the company, and the reasons given by the company for rejecting the proposal.

Japan Securities Dealers Association: When an enterprise finds that it cannot accept a resolution proposal, it must immediately deposit with the Japan Securities Dealers Association the sum of money that it has been called on to pay in the resolution proposal and file a lawsuit for confirmation of non-liability.

Commodity Futures Association of Japan: (Mediation procedures) If an enterprise rejects without justifiable reasons a mediation proposal that has already been accepted by a user, necessary instructions are issued to the enterprise concerning the acceptance of the mediation proposal according to the provisions of the articles of incorporation of the Commodity Futures Association. If the enterprise rejects these instructions, it may be disciplined according to the provisions of the articles of incorporation of the Commodity Futures Association.

Unilaterally binding mediation denotes the following. When the mediation commission has recommended the acceptance of a mediation proposal (stage-two resolution proposal), if the financial services user accepts the mediation proposal, the financial services enterprise that is the counterparty in the dispute must, as a rule, accept the mediation proposal, and thereupon must carry out the obligations assigned to it in the mediation proposal without delay. Although the financial services enterprise may refuse the mediation proposal if it has justifiable reasons doing so, in such instances it must either file a lawsuit for confirmation of non-liability or file for arbitration under the financial ombudsman organizations.

(4) The Third Process (Arbitration)

A. Outline of Arbitration Procedures

When the two parties have failed to reach an agreement in the procedures of the first process and second process, dispute resolution through arbitration is attempted if there is a prior agreement between the two parties to submit the matter to arbitration, or if the two parties agree to submit the matter to arbitration.[21]

[21] Arbitration is a procedure in which the parties to a dispute freely agree to submit to the decision rendered for the resolution of the dispute by a third-party arbitrator. As such, arbitration is a form of private court. Arbitration is similar to civil litigation in that a decision is rendered by the third party. However, whereas civil litigation renders a resolution that is enforceable through the powers of state, arbitration is a voluntary and freely entered form of dispute resolution originating in the mutual agreement of the parties to a dispute. The salient feature of arbitration is that the rules to be applied to the resolution of the dispute can be freely established through mutual agreement of the two parties to suit the needs and characteristics of the case on hand.

"Arbitration agreement" is defined as follows: "An agreement by the parties to submit to one or more arbitrators the resolution of all or certain civil disputes which have arisen or which may arise in respect of a defined legal relationship (whether contractual or not) and to abide by their award." (Article 2 Paragraph 1 of the Arbitration Law) In other words, arbitration agreements are applicable to the following: (1) current civil disputes, and (2) future legal relations that meet certain conditions. Moreover, an arbitration agreement has the following effectiveness. If a civil dispute subject to a valid arbitration agreement is submitted for litigation, the court where the suit has been filed must, as a rule, dismiss the suit upon application of the defendant (Article 14 Paragraph 1 of the Arbitration Law: plea for prevention of litigation).

The arbitrators preside over the arbitration procedures and are placed in a position to resolve the dispute on hand by rendering an arbitration decision on the matters that have been referred to them. As such, they perform the role of private judges. However, unlike court judges, the position of an arbitrator is not an acquired position. Basically, an arbitrator is selected by the parties to the dispute, and the legal position of an arbitrator derives from the contract entered into with the parties to the dispute.

Under the Arbitration Law, an arbitral award is assigned the same effectiveness as a final and conclusive judgment (Arbitration Law, Article 45 Paragraph 1). However, the law does not provide for an appeal (protest) to be undertaken within the framework of arbitration procedures. Given this restriction on protesting an arbitral award, the arbitration procedures must be designed in such a way as to satisfy the users of the process. For this purpose, the following factors are extremely important. The deliberations must be undertaken by arbitrators with a wealth of knowledge of experience; the rectitude of the procedures must be ensured by an authoritative body capable of gaining the confidence of users based on its well-developed rules and regulations and the organizational structure of its secretariat; and, judgments must conform to certain norms to ensure a degree of uniformity (providing predictability to judgments).

However, under current Japanese dispute resolution practices,

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In principle, the rules of an arbitration procedure are determined through mutual agreement of the parties to the dispute (Article 26 of the Arbitration Law). However, this principle of self-rule cannot infringe upon the provisions concerning enforcement contained in the Arbitration Law. Specifically, the two parties cannot enter into an agreement that contravenes the fundamental principle of equal treatment of the parties as stipulated under Article 25 of the Arbitration Law. In the case of institutional arbitration, unless otherwise agreed upon, the arbitration rules and procedures of the organization selected by the parties to the dispute are deemed to constitute the rules agreed upon by the parties to the dispute.

One of the features of arbitration is that the proceedings are not public. Consequently, the procedures are conducive to the protection of business secrets and other confidential information. Furthermore, unlike court rulings, arbitration decisions are generally not made public.

The following applies to cases that have been referred to arbitral tribunals. If a settlement is arrived at between the opposing parties in a civil dispute that is currently being deliberated upon in an arbitral tribunal, upon application of both parties, the arbitral tribunal may hand down a decision mirroring the substance of the agreement arrived at in the settlement (Arbitration Law, Article 38 Paragraph 1). In this case, such a decision will have the same effect as an arbitral award (Article 38 Paragraph 2).

The opinions of an arbitrator that are based on the deliberations of an arbitral tribunal and expressed in an arbitral award have the same effect as a final ruling (Arbitration Law, Article 45 Paragraph 1). However, an arbitral award cannot be immediately enforced, and the issue of a writ requires the following process. An application must be filed with the courts for the issue of a ruling (enforcement ruling) authorizing civil enforcement based on the arbitral award, and a final decision must be handed down in support of the said ruling (Arbitration Law, Article 46; Civil Execution Act, Article 22 Paragraph 6-2). The courts are obligated to issue an enforcement ruling (Arbitration Law, Article 46 Paragraphs 7 and 8), unless the filing is dismissed on the grounds of justifiable reasons (Arbitration Law, Article 45 Paragraph 2) exist for the rejection of support for enforcement. Viable reasons for rejection are the following: when an arbitration agreement is null and void; when proper notification has not been served; when the composition or the procedures of an arbitral tribunal are in violation of laws and ordinances; when an arbitral award has not been finalized; when an arbitral award has been rendered on a dispute that is not eligible for arbitration; and, when an arbitral award is found to be in violation of public order and standards of decency. Arbitral award cannot be subjected to substantive deliberation, with the exception of matters related to the violation of public order and standards of decency.

arbitration is not necessarily a well-established option and its use remains at low levels. As a result, arbitration cannot necessarily be said to have taken firm root in Japanese legal culture.[22]

Therefore, the financial ombudsman organization does not necessarily have to have an arbitration function from the start. Under current conditions, it would be desirable to leave the door open for court-based dispute resolution. On the other hand, from the perspective of the advantages of dispute resolution through arbitration, it can be expected that arbitration under the financial ombudsman organization will come into active use in the future. Given this possibility, the desirable features of arbitration procedures under a financial ombudsman organization are discussed in the following section.

B. Issues Concerning the Third Process (Arbitration)

(a) Unilaterally Binding Consent to Arbitration

As previously noted, when the customer and financial services enterprise fail to reach an agreement in the second process (deliberative mediation), even if both parties are permitted to apply for the start of arbitration, neither party should be obligated to participate in arbitration because the option of court-based resolution remains. However, if the financial services enterprise were allowed to freely decide on whether to accept or reject participation in arbitration, the effectiveness of the third process would be gravely undermined. Therefore, when the user has applied for the start of arbitration, unilaterally forcing the financial services enterprise to comply can be a viable option.[23] However, because arbitration procedures do not make provisions for appeal, any system of forced participation in arbitration may be unacceptable to financial services enterprises, and even to the users of financial services. Furthermore, certain cases may be more suited to court-based settlement than to arbitration. Consequently, for cases that fail to reach resolution in the second process (deliberative mediation), it is desirable to maintain both options for court-based resolution and arbitration as available means for final dispute resolution.

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[22] Regarding the number of cases of international arbitration, about ten cases are handled per year by the Japan Commercial Arbitration Association (JCAA), a representative Japanese arbitration organization handling international cases. The largest annual number of cases handled by JCAA was 21 in 2004. The Construction Work Disputes Committees, a leading arbitration organization in Japan, annually handles an average of about 50 cases. The largest number of cases handled by this association in recent years was 77 in 1998. (Koichi Miki, "Chusai no genzai to shorai (jo)" [The present and future of arbitration: part 1], *JCA Journal* 55, no. 5, 2-3.)

[23] The Consumer Relations Offices of regionally-based Bankers Associations have established procedures for dispute resolution through consultation and what effectively amounts to mediated settlement. Under these procedures, when a resolution is not reached within a given period of time (two months in the case of Tokyo), under the provisions of agreements entered into with local bar associations, the services of the bar association's arbitration center can be used. When the customer opts to refer the case to an arbitration center, the counterparty (member financial institution) is obligated to participate.

(b) Relation with Second Process (Deliberative Mediation)

Should it be possible for disputes filed with the financial ombudsman organization to be immediately taken to arbitration, or should arbitration be made available only when the second process (deliberative mediation) has been exhausted? As previously discussed, this Proposal opts for the avoidance of unilaterally binding consent to arbitration and recommends freedom of choice in the use of either court-based procedures and arbitration procedures. Consequently, the placement of the second process (deliberative mediation) before arbitration will not be forced upon the parties to the dispute. In other words, if the two parties freely consent to arbitration and request immediate arbitration, the system should be designed to allow the start of arbitration procedures without having to go through the second process (deliberative mediation). However, in most cases, confirmation of rejection or consent to arbitration is established during the first or second processes, implying that in many cases the first and second processes will precede the start of arbitration procedures.

Nevertheless, in the interest of the avoidance of prejudice in the third process, the same person should not be allowed to serve as an expert mediator and an arbitrator in the same case. Moreover, it is desirable to adopt rules whereby the materials used in the second process are not also used in the third process as a matter of course.

The same principle should apply when the two parties in arbitration jointly agree to refer their case to settlement talks. Here again, from the perspective of ensuring the impartiality of the decisions of the arbitrator, the arbitrator handling the case should not be allowed to participate in the settlement talks. When a decision has been made to refer the case to settlement talks, the arbitration procedures should be halted. Thereupon, the case should be referred back to the second process, where an expert mediator other than the arbitrator in the arbitration procedures presides over the settlement talks.[24] By assigning the same expert mediator to the settlement talks as the one who presided over the second process, due consideration can be given to the efficient and speedy execution of the procedures.

(c) Range of Disputes to Be Handled

The range of disputes to be handled in the arbitration procedures of a financial ADR ombudsman organization is outlined in Sub-section 4 below.

(d) Appointment of Arbitrator

The second process (deliberative mediation) of the financial

[24] The arbitration rules of the Japan Shipping Exchange, Inc. (JSE) provides as follows. After an arbitration request has been accepted, if the case moves to mediation, the mediation is undertaken by one mediator appointed by the chairman of the Tokyo Marine Arbitration Commission (JSE Rules, Article 3 Paragraph 2). If the mediation fails, unless both parties have given their consent, the said mediator cannot participate as an arbitrator in the arbitration procedure that follows a failed mediation (JSE Rules, Article 3 Paragraph 6). Thus, as a rule, the two procedures are presided over by different persons.

ombudsman organization is to be carried out by a mediation commission comprised of full-time expert mediators with extensive knowledge and experience in the legal and financial fields. Given that the use of arbitration is encouraged on the grounds that it is specialized in finance-related disputes, there is good reason to opt for the participation of persons with expertise in financial products. On the other hand, the system also has to be fair for the users of financial services. From this perspective, it is necessary to provide for the participation of experts in consumer disputes (including attorneys). Furthermore, given that the arbitral award constitutes the final judgment for the parties to the dispute, and that the parties have no further recourse to the courts, it is also imperative to include persons with expert legal knowledge (lawyers, legal scriveners, etc.). In other words, it is desirable for arbitrators to be drawn from a wide range of experts. While the expert mediators participating in the second process should, as a rule, be full-time mediators, the candidate list of arbitrators is likely to include a large number of part-time personnel in order to ensure the assignment of a broad range of experts. In relation to this point, it is not necessary that all arbitrators be chosen from the candidate list of arbitrators. Rather, it is desirable to leave the door open for the possibility of assigning the role of arbitrator to full-time expert mediators or to others who do not appear on the candidate list.

However, as previously noted, when a case is moved from the second process to arbitration, in the interest of ensuring fairness in the judgment of the arbitrator, any person who has served as an expert mediator in the second process should not be allowed to serve as an arbitrator in the same case.

(e) Number of Arbitrators

Two options can be considered regarding the number of arbitrators: a group of three arbitrators per case, or a single arbitrator per case.[25] The choice between the two options could be made on the basis of the amount of money in dispute. In disputes involving relatively small amounts, the choice would be to adopt the rule of one arbitrator with the possibility of increasing this to three arbitrators, if so agreed upon by the parties to the dispute. This choice would be made from the perspective of speed and timeliness of procedures, the difficulty of finding appropriate candidates, and the expenses of the procedures. On the other hand, in cases involving relatively large amounts, a group of three arbitrators would be the rule. These two options could be kept available. In cases where only one arbitrator is appointed, the appointee may not have expert knowledge of the type of financial service in dispute. As described under (f) below, it is worth considering the compulsory participation of an assistant

[25] Under the provisions of the Arbitration Law, unless otherwise agreed upon by the parties to the dispute, a group of three arbitrators is assigned to cases involving two parties (Arbitration Law, Article 16 Paragraph 2). In existing private arbitration organizations, some have adopted the rule of three arbitrators (Japan Intellectual Property Arbitration Center (JIPAC), JSE, etc.), while others have adopted the rule of one arbitrator (Dai-ichi Tokyo Bar Association Arbitration Center, etc.).

arbitrator in such instances.
A desirable appointment process would be as follows. When one arbitrator is to be appointed, as a rule, an arbitrator should be chosen from the candidate list who is acceptable to both parties. If the two parties are unable to agree on an arbitrator, the choice should be made from the candidate list by the financial ombudsman organization. When three arbitrators are to be appointed, a fair process would be as follows. Each party will appoint one arbitrator, and the third one will be appointed from the candidate list by agreement between the two arbitrators chosen by each party.[26] Alternatively, the third arbitrator could be chosen from the list of candidates by the financial ombudsman organization.

(f) Assistant Arbitrator

It is worth considering a system that provides for the appointment of assistant arbitrators to serve as advisors as needed in light of the characteristics of the case. Under such a provision, an arbitrator would be allowed to appoint an expert mediator with expert knowledge of the financial service in dispute to serve as an assistant arbitrator.

(g) Distance Use

It is necessary to provide for the convenience of financial services users residing in distant locations by allowing them to participate in the procedures by telephone, facsimile or the Internet.

(h) Evidence Disclosure Order

There is a significant gap in the information gathering capabilities of financial services enterprises and their customers. From the perspective of consumer protection, it is desirable to empower arbitrators to issue orders for the disclosure of specified evidence when a request for the disclosure of evidence has been filed by the user.[27]

(i) Publication and Retrieval of Arbitral Awards

As previously mentioned, arbitration procedures are generally closed to the public and arbitral awards are not published.[28] However, if the contents of arbitral awards are not published and are not retrievable, the development of norms and predictability in arbitral awards is rendered more difficult, which in turn will be an obstacle to widespread use of arbitration procedures. Therefore, it is desirable to publish case summaries and to disclose the contents of arbitral awards while preserving anonymity.

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[26] This method is used by JCAA, the Dai-ichi Tokyo Bar Association Arbitration Center, JIPAC, JSE and others.

[27] The JCAA Commercial Arbitration Rules contain the following provisions for evidence disclosure orders. “A party may request the arbitral tribunal to order the other party to produce documents which it possesses.” (JCAA Commercial Arbitration Rules, Rule 37 Paragraph 4) However, the rules contain no provisions for failure to abide by evidence disclosure orders.

[28] According to Rule 40 of the JCAA Commercial Arbitration Rules, the arbitration procedures and the record of the proceedings are to be closed to the public.

2. Organization

(1) Legal Features of Financial Ombudsman Organization

The organization of a financial ombudsman organization must meet the following essential requirements: (1) the organization must serve the public good, and (2) in the dispute resolution procedures as indicated under Section 1 above, the organization must maintain independence and neutrality in its relations with interested parties. In addition to these two essential requirements, the following conditions must also be met: (3) the organization should be established in a simple process, and depending on the decisions concerning the scope of operations of a financial ombudsman organization, it must be (4) capable of conducting profit-seeking activities while maintaining the aim of serving the public good. Independence and neutrality in individual cases of dispute resolution do not end with independence and neutrality from interested parties as indicated under (2). There is no question that independence and neutrality must also be maintained in relations with the parties to the dispute, as well as the financial services industry, consumer organizations and related government agencies. However, it is only natural that industry associations, consumer organizations and related government agencies will have a keen interest in the social role to be played by a financial ombudsman organization. In light of this fact, independence and neutrality of the financial ombudsman organization from these interested parties connotes the development of mutual and well-balanced relations that correspond to the objectives of the financial ombudsman organization. The following types of organizations may satisfy the requirements indicated above: general incorporated associations, joint-stock company, unincorporated associations. These are summarized below.

An unincorporated association is defined as an organization that is not a juridical entity. While it may take the form of a corporation, it is not treated under law as a juridical entity because it does not meet the legal requirements for incorporation. Examples include neighborhood associations and clubs. Unincorporated associations are not bound by the provision of laws in their definition of purpose, establishment, creation of organs and in their disbandment. Consequently, they do not have to have the internal organs required of joint-stock companies and general incorporated associations under the law. This provides an important advantage in the freedom of choice in organizational design. On the other hand, the absence of legal rights makes it more likely for unincorporated associations to become involved in problems with third parties with regard to the disposal of its assets and liabilities. Moreover, a certain level of internal organization and the formal assignment of authority make it easier to maintain neutrality in relations with industry associations and to gain the confidence of users.

The details of a joint-stock company do not bear repeating. Suffice it to say that revisions to Companies Act have eliminated minimum capitalization requirements and procedures for establishment have also been simplified. As for internal organs, in principle, the only requirements are the holding of shareholder general meetings and the appointment of one director. However, joint-stock companies are designed to function as profit-seeking organizations. As this is widely recognized by the public, a joint-stock company may not necessarily match the public nature of the financial

ombudsman organization's objectives and the generally held image of the organization. Moreover, a joint-stock company with assets exceeding certain levels is subject to legal requirements for the creation of increasingly complex organs. As such, it may not meet the general requirement of ease of establishment called for in financial ombudsman organizations.

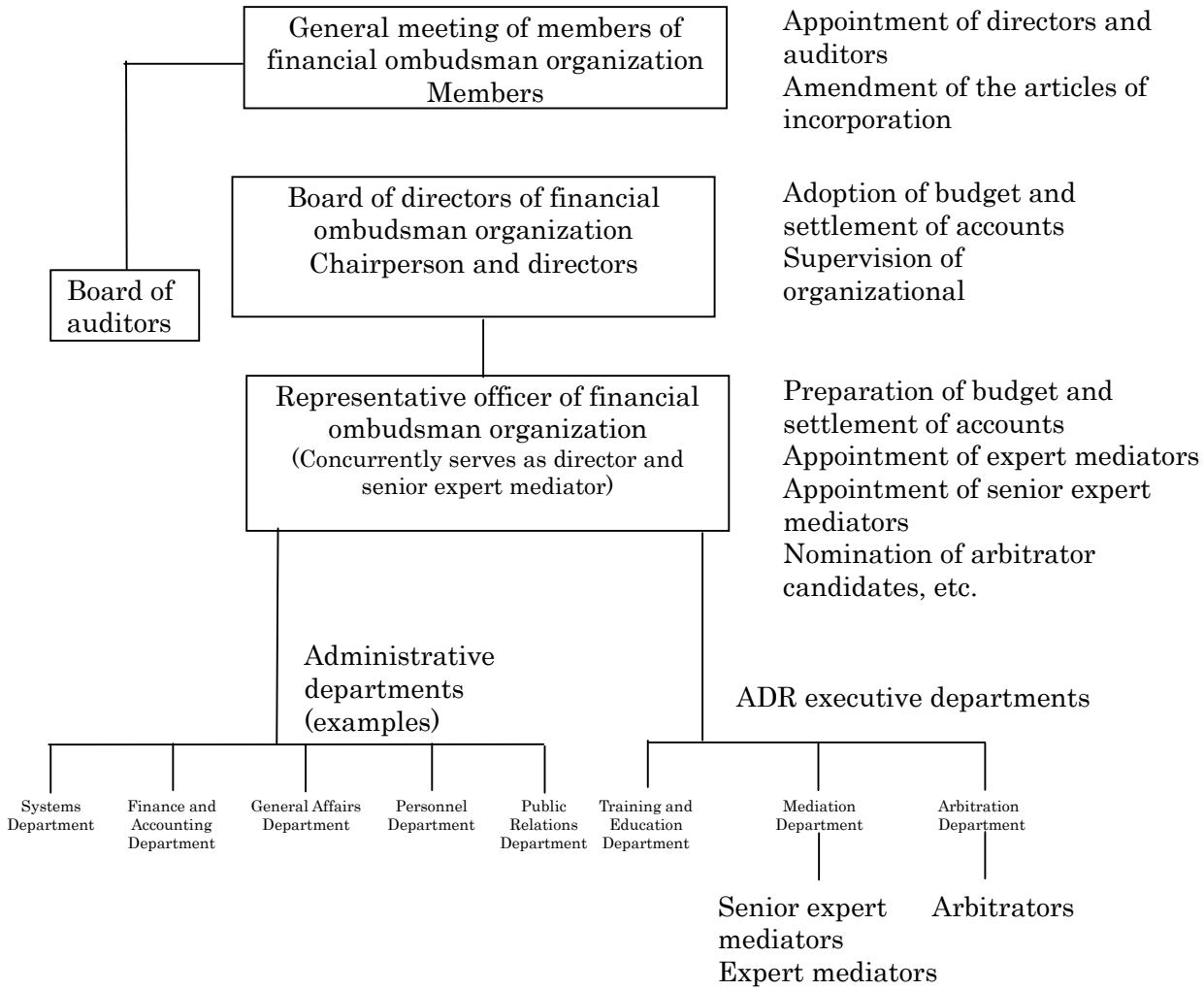
The third available option is the general incorporated association. General incorporated associations are established through legal registration under the provisions of the Act on General Incorporated Associations and General Incorporated Foundations and constitute incorporated associations whose purpose does not include the allocation of surplus funds. General incorporated associations are not subject to any restrictions on the activities that they can undertake. In addition to public benefit activities, they can engage in activities for the common benefit of members as well as a broad range of other activities. Establishment requires two or more members. Registration requires the drafting of articles of incorporation (to be notarized by notary public) and other legally mandated procedures. Members are liable for defraying the expenses of the incorporated association. The internal organs required consist of the general meeting of members and the appointment of at least one director to serve on the executive body. Other organs can be provided for in the articles of incorporations, including a board of directors and an auditor or an accounting auditor. An auditor must be appointed if a board of directors is established or if an accounting auditor is appointed. The general meeting of members is empowered to adopt resolutions on matters provided by law, the organization of the general incorporated association, management, control and all other matters pertaining to the general incorporated association. However, if a board of directors has been established, the general meeting of members is empowered only to adopt resolutions on matters provided by law and matters specified in the articles of incorporation. The directors and the auditors are appointed by the general meeting of members. The board of directors includes all directors and is responsible for making executive decisions, supervising the execution of the functions of directors, and the appointment and dismissal of the representative directors.

In light of the above, under current laws, a general incorporated association represents one form of organization that meets the requirements of a financial ombudsman organization.

(2) Organization and Management

The following is based on the assumption that a financial ombudsman organization is established as a general incorporated association.

Financial Ombudsman Organization (Principal Functions)



A. Members and General Meeting of Members

The general meeting of members is the supreme body of the financial ombudsman organization and is comprised of all members. It is responsible for making major organizational changes, such as revision of the articles of incorporation (including changes in membership of board of directors as discussed below). Appointments to the board of directors (appointment of directors) and appointments of auditors are made by the general meeting of members. It is assumed here that members consist of financial services enterprises that have made capital subscriptions and are participants in the financial ombudsman organization.

B. Directors and the Board of Directors

For the appropriate and smooth operation of the financial ombudsman organization, it is essential for the directors comprising the board of directors to have broad knowledge and experience concerning financial ombudsman organizations and the functions performed by them. To ensure the neutrality of the financial ombudsman organization, it is necessary to pay special attention to the number and makeup of directors. For example, it would be desirable for the directors to be drawn from each of the following categories: (a) representatives of financial industry associations with expert knowledge of financial services operations; (b) experts with knowledge and experience concerning the administration of dispute resolution (law practitioners, ADR experts, specialists in financial services operations, etc.); (c) representatives and experts of consumer organizations, journalists, academics and other learned persons who can facilitate the proper incorporation of the views of the public in the pursuit of the responsibilities and the exercise of the powers of the board of directors. The articles of incorporation will include provisions concerning the ratio of directors to be drawn from each of these categories. However, this ratio must be designed to gain the solid trust and confidence of the users of financial services.

The board of directors will perform the following functions: approval of budget and settlement of accounts; development of guidelines and policies for organizational management; approval of basic policies concerning procedures and various training programs; appointment of the representative officer of the financial ombudsman organization; and, supervision of the overall management of the organization. The functions of the board of directors are focused exclusively on the management of the financial ombudsman organization, with particular attention to the development of a solid financial foundation. That is, the board of directors has no say in the appointment and personnel matters pertaining to the expert mediators, senior expert mediators, and arbitrators. (The representative officer is exclusively responsible for such matters of personnel.)

Needless to say, the directors and the board of directors will not be permitted in any way to interfere or intervene in individual dispute resolution proceedings. Furthermore, they will not be permitted any access to information pertaining to individual dispute resolution proceedings, unless such access is specifically deemed necessary for the purposes of the management and operation of the organization.

C. Representative Officer of the Financial Ombudsman Organization

The representative officer of the financial ombudsman organization represents the organization and is responsible for the execution of its operations. As such, the representative officer is the most important officer of the financial ombudsman organization. The success of the financial ombudsman organization in functioning as an effective financial dispute resolution organization depends in great part on the capabilities and the performance of the representative officer.

The representative officer is appointed by the board of directors. This appointment will have a direct bearing on whether the financial

ombudsman organization is able to gain the trust and confidence of financial services enterprises, financial services users, consumer organizations and government agencies in the area of financial administration. The financial ombudsman organization will certainly lose this trust of financial services users and others if the office of the representative officer is filled on a rotating basis from among the members and member groups of the financial ombudsman organization. Therefore, the appointment process must be fully transparent and must be visible to the public. One approach would be to accept applications and nominations from the general public and to select the representative officer from this pool of applicants.

In light of the importance of its responsibilities, the representative officer must receive a sufficient compensation package. This is an essential requirement in recruiting persons who are fully equipped and suited to performing the important functions of leading the financial ombudsman organization. While a fixed term of office should be established, the representative officer should be able to remain in office for the duration necessary for coping with challenges facing the financial ombudsman organization. Therefore, there should be no hesitation in reappointing the same person.

The representative officer represents the financial ombudsman organization and is empowered and responsible for the execution of its operations. The functions of the representative officer include the following matters pertaining to administration: preparation of budgets and settlement of accounts; management of the personnel matters related to secretariat staff; and, management of the Public Relations Department and various administrative departments. The representative officer is also responsible for the following matters pertaining to the ADR executive departments: appointment of expert mediators and senior expert mediators and nomination of arbitrators; and, the training and education of expert mediators. The representative officer serves concurrently as a director and as a member of the board of directors. The representative officer is subject to the supervision of the board of directors and reports to it. Finally, the representative officer may participate in individual dispute resolution proceedings in the capacity of arbitrator or senior expert mediator.

D. Expert Mediators, Senior Expert Mediators and Candidates for Arbitrators

It is very important for a financial ombudsman organization to have a sufficient number of full-time experts. In the interest of speedy response to complaints filed, sufficient education within the organization, thorough adherence to rules for the realization of reasonable and flexible resolutions, and stable and dependable response to complaints, it is essential for such personnel to be full-time employees. The candidate list of arbitrators may include part-time arbitrators, but to ensure speedy resolution, such candidates must be persons prepared to concentrate on the functions of arbitrator.

E. Board of Auditors

To ensure neutrality and fairness, auditors will audit the directors of

the board of directions in the performance of their functions (excluding the disposal of specific cases). Auditors will be appointed by the general meeting of members. Auditors will report the result of their audits to the general meeting of members. When necessary, auditors may attend the board of directors meeting to state their opinions.

3. Finances

(1) Overview

The purpose of a financial ombudsman organization is to provide financial services users with free or inexpensive means for dispute resolution. Therefore, while the financial ombudsman organization may charge a fee to a financial services user involved in a dispute, such fees should be small in relation to the total financial needs of the financial ombudsman organization. It is assumed that the financial needs of a financial ombudsman organization will be primarily met by financial services enterprises. That is to say, the finances of a financial ombudsman organization need to be supported by participating members.

The following dilemma must be taken into account in considering the finances of a financial ombudsman organization. First, the cooperation of related industry organizations is essential for developing a solid financial foundation. On the other hand, to maintain its independence and neutrality, a financial ombudsman organization must be structured in a way that the opinions of the industry organizations cannot be directly reflected in its operations. This latter requirement may tend to undermine the interest of industry organizations in actively contributing to the finances of the financial ombudsman organization. In the case of the United Kingdom, the Financial Services and Markets Act (FSMA) legally obligates industry associations to contribute financially. It is this arrangement that provides the financial means for the operations of the U.K. Financial Ombudsman Service (Appendix 2). Drawing from this example, it would be ideal to legislate laws obligating industry associations and financial services enterprises to contribute financially. The explicit legislation of such provisions would promote and facilitate the unification of existing financial ADR organizations and the financial ombudsman organization in the not distant future. This will certainly provide an opportunity to advance toward Step Four and the establishment of a one-stop comprehensive financial ADR organization spanning all segments of the industry. Furthermore, the infusion of certain amounts of public funds should be considered in the development of a solid financial foundation. In this context, while the development of cooperative relations with government agencies will be pursued, as previously mentioned, the financial ombudsman organization must take care to maintain a certain distance from such government agencies with regard to the management and operation of its own functions. Aside from this, the government should adopt appropriate measures for promoting the activities of financial ombudsman organization. For example, financial services enterprises should be allowed to treat financial contributions made for the establishment and the operation of a financial ombudsman organization as cost.

It is assumed that, for the time being, all financial contributions made by industry associations will be voluntary. With this in mind, due thought

must be given to means for gaining the full cooperation of industry associations.

As stated earlier, one of the purposes of this Proposal is to present the Step Four establishment of a one-stop comprehensive financial ADR organization spanning all segments of the industry. Therefore, in the following section the sources of income and expenses necessary for the operation of the financial ombudsman organization are examined assuming the establishment of a one-stop comprehensive financial ADR organization spanning all segments of the industry as outlined in Chapter 3 below.

(2) Main Sources of Income

A. Fund or Capitalization

As indicated in Section 2 above, a financial ombudsman organization requires certain basic assets for its foundation. While these requirements will vary according to the type of organization adopted, provision for some form of basic fund is essential given that considerable expenses will have to be covered from the start. These unavoidable expenses include the cost of office space (rental), the cost of installations and equipment, and personnel expenses related to the hiring of full-time expert mediators, senior expert mediators, and reception and filing desks. Furthermore, efficient handling of complaints and disputes will require database development and IT systems. Given that the financial ombudsman organization is to be a private-sector led ADR, efforts should be made to provide for this basic fund through contributions from industry organizations and other private sources.

This basic fund should be large enough to defray any deficits in operating income that are incurred from year to year. In its overall finances, it is desirable for the financial ombudsman organization to maintain a basic balance between its annual income and annual expenditures.

B. Annual Contributions

Possible sources of annual income include contributions, fees collected for dispute resolution and income from other operations. Regarding contributions (dues), these are to be paid by industry associations that are members of the financial ombudsman organization. However, allotments may also be charged to all financial services enterprises that have consented to abide by dispute resolution provided by the financial ombudsman organization. As previously discussed, the computation of dues may be based on the size of the industry. However, because individual industries contain enterprises covering a broad range of categories and sizes, the assignment of fixed dues may discourage participation by small enterprises. To avoid a sense of unfairness among participants, one approach would be to develop a pro rata dues system that takes such matters into consideration as the number of complaints and consultations handled by exiting industry-based ADR organizations, and the scale of revenues. In other words, a fixed-rate “basic contribution amount” would be derived by adjusting for size. Added to this, a “beneficiary charge” would be determined

based on such factors as the number of complaints and disputes filed. However, an appeal can be made to the related industries regarding the indirect benefits of an ADR system that serves to enhance confidence in the entire industry. In this context, one option would be to charge only the "basic contribution amount" (to avoid the defection of problem enterprises subject to large numbers of complaints and disputes). Moreover, if dues are charged only on the basis of the number of complaints and disputes filed, industry associations may become hesitant to acknowledge complaints and disputes requiring resolution, which could obstruct the widespread use of the system. Therefore, careful attention must be paid to the computation and establishment of "beneficiary charges."

C. Fees Charged Per Case (Payable by Parties to Dispute)

(a) First-Process Filing Expenses

Users of financial services should be able to file their first-process complaints without payment of any charges. Two reasons can be given. First, this is necessary from the perspective of ease of access. Second, the collection of relatively low charges cannot be expected to make an important difference in financing the operations of the financial ombudsman organization. Although it would be possible to charge certain fees to the financial services enterprise involved in the dispute, a better solution would be to use the "beneficiary charges" to finance the expenses of the first process. In other words, at this stage of the process, financial services enterprises too would not be charged, or would be charged a relatively small fee.

(b) Second-Process Mediation Expenses

The second process (deliberative mediation) and the third process (arbitration) will entail considerable costs. Therefore, the option of charging both parties, including the financial services user, can be considered. However, high fees will undermine the principle of ease of access. Hence, due attention must be paid when determining these fees. If fees are to be charged, it should be borne in mind that mediation proposals that result from the second process (deliberative mediation) will not necessarily be to the benefit of the users of financial services in many cases. In light of this fact and from the perspective of the cost-benefit impact on users, one argument is that users should not be charged fees computed on the basis of the amount presented in the resolution proposal.

On the other hand, there would be no problem in charging financial services enterprises a fee that is higher than that charged to users. Likewise, it would be acceptable to charge them a fixed-rate fee based on the amount presented in the resolution proposal. However, such charges to financial services enterprises should be kept lower than comparable court and litigation charges. In other words, the fee structure must be such as to provide financial services enterprises with an incentive to participate in the procedures of the financial ombudsman organization.

D. Income from Other Operations (Publications, Training Programs, Lectures, Consulting)

The financial ombudsman organization would be able to earn income from providing timely access to its database of anonymous information and case studies pertaining to complaints handled and disputes resolved. Access could be charged or could be free for dues paying members. Utilizing its accumulated know-how in dispute resolution and in dispute prevention methods, the financial ombudsman organization could also earn income from providing consulting services to individual enterprises. Another option would be to provide individual enterprises with training programs on how to handle complaints. Such programs would be beneficial to both the financial ombudsman organization and to individual enterprises. These feedback channels would not only be a source of income for the financial ombudsman organization, but would also contribute to the promotion of compliance throughout the related industries. As such, these constitute important activities for the financial ombudsman organization.

(3) Operational Expenses

The principal expenses incurred by the financial ombudsman organization will be personnel expenses and costs related to the development and maintenance of databases. Both expenses are essential and indispensable for appropriate and efficient operation and must be fully budgeted. For the scale of expenditures of the U.K. FOS, see Appendix 2, "Section 7: Financial Foundations and Funding."

4. Range of Disputes to Be Handled

(1) Complaints and Disputes to Be Handled

A. Businesses of Certified Investor Protection Organization Stipulated in Financial Instruments and Exchange Act

It is assumed that the financial ombudsman organization will be certified as a certified investor protection organization as provided under Article 79-7 of the Financial Instruments and Exchange Act. Article 79-7 Paragraph 1 defines the businesses of a certified investor protection organization as follows.

A To resolve complaints filed with regard to financial instruments business conducted by a financial instruments business operator or a financial instruments intermediary service provider;

B To mediate in the case of disputes arisen from financial instruments business conducted by a financial instruments business operator or a financial instruments intermediary service provider;

C In addition to what is listed in the preceding two items, activities that would contribute to sound development of financial instruments business and protection of investors.

Article 79-11 stipulates the following concerning organizations eligible

for certification as certified investor protection organizations. A certified investor protection organization shall have the following as members: (i) financial instruments business operators or financial instruments intermediary service providers; or (ii) financial instruments business operators or financial instruments intermediary service providers which have agreed to be subject to the certified businesses, or any other person specified by a Cabinet Office Ordinance to become its target business operators. Regarding the range of target business operators that have agreed to be subject to the certified businesses set in (ii), from the perspective of facilitating the establishment of a comprehensive organization for dispute resolution and mediation that spans all segments of the industry, in addition to financial instruments business operators and financial instruments intermediary service providers, the act allows for the inclusion of a broad range of enterprises conducting businesses to which rules of conduct of Financial Instruments and Exchange Act are applied through their respective industry laws. Specifically, these include the following: (a) business operations involving specified deposit contracts and specified savings contracts undertaken by deposit-taking financial institutions, including banks, shinkin banks, credit cooperatives, labor banks, agricultural cooperatives and others; (b) business operations involving specified insurance contracts and specified mutual insurance contracts undertaken by insurance companies, agricultural cooperatives and others; (c) business operations pertaining to specified trust contracts undertaken by trust companies and others; (d) business operations pertaining to real estate specified joint enterprise contracts undertaken by real estate specified joint enterprises; and (e) trustees of futures transactions undertaken by overseas commodities trading enterprises in overseas commodities markets (Association Ordinance Article 31; Financial Instruments and Exchange Act Enforcement Order Article 18-4-3 Paragraph 5).[29]

Note that when undertaking business operations pertaining to registered financial institutions (registered financial institution business operations), registered financial institutions are deemed to be financial instruments business operators with regard to the application of the provisions of the Financial Instruments and Exchange Act Article 79-7 Paragraph 1 and Article 79-11 (Financial Instruments and Exchange Act Article 67-2 Paragraph 3).

Moreover, a certified investor protection organization may undertake business operations other than those listed under A through C above so long as the execution of the said business involves no risk of causing unfairness in any of the certified business operations (Financial Instruments and Exchange Act Article 79-7 Paragraph 3).

To summarize the above, the business operations of an investor protection organization certified under the provisions of the Financial Instruments and Exchange Act are as follows.

[29] See Naohiko Matsuo et al., "Kinyu shohin torihikigyo kyokai to, kinyu shohin torihikijo, yukashoken no torihiki to ni kansuru kisei" [Regulations related to Financial Instruments Firms Association, financial instruments exchanges and securities transactions], *Shoji Homu* 1820: 11.

(1) The following business operations undertaken by (i) financial instruments business operators (including registered financial institutions undertaking registered financial institution business operations) or financial instruments intermediary service providers; or (ii) financial instruments business operators or financial instruments intermediary service providers which have agreed to be subject to the certified businesses:

A Resolution of complaints filed with regard to financial instruments business conducted.

B Mediation in the case of disputes arisen from financial instruments business conducted.

(The business operations of (1) are those stipulated under the Financial Instruments and Exchange Act Article 79-7 Paragraphs 1-1 and 1-2.)

(2) The following business operations undertaken by persons who have agreed to be subject to the certified businesses as identified in the top column of the table appearing under Financial Instruments and Exchange Act Enforcement Order Article 18-4-3 Paragraph 5. (Specifically, this covers those persons engaged in business operations listed under (a) through (e) above).

A Resolution of complaints filed with regard to business operations listed in the middle column of the said table.

B Mediation in the case of disputes arisen with regard to business operations listed in the middle column of the said table.

(The business operations of (2) are those stipulated under the Financial Instruments and Exchange Act Article 79-7 Paragraph 1-3 [30] and are identified as "specified certified businesses" under Financial Instruments and Exchange Act Enforcement Order Article 18-4-3 Paragraph 5.)

(3) Business operations other than those mentioned under Financial Instruments and Exchange Act Article 79-7 Paragraph 1 so long as the execution of the said business involves no risk of causing unfairness in any of the mentioned businesses.

(The business operations of (3) are business operations that are permitted under Financial Instruments and Exchange Act Article 79-9-3. These include the resolution of complaints and mediation involving enterprises other than target business operators.[31])

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[30] See Mikio Yamaguchi et al., "Kinyu shohin torihikigyo kyokai to, kinyu shohin torihikijo" [Financial Instruments Firms Association, financial instruments exchanges], *Shoji Homu* 1780: 17. In this paper, complaint resolution and mediation related to business operations undertaken by "persons specified by a Cabinet Office Ordinance" as stipulated under the Financial Instruments and Exchange Act Article 79-11 are identified as business operations covered by the provisions of the Financial Instruments and Exchange Act Article 79-7 Paragraph 1-3.

[31] See Mikio Yamaguchi et al., "Kinyu shohin torihikigyo kyokai to," 17. This paper states the following. "Certified investor protection organizations may engage in business operations other than certified business operations, including complaint resolution and mediation involving enterprises other than target business operators, so long as the said business involves no risk of causing unfairness in any of the certified businesses (Article 79-9-3)."

B. Scope of Complaints and Disputes Handled by Financial Ombudsman Organization (Operations of Financial Ombudsman Organization)

The aim of the financial ombudsman organization is the development of a financial ADR organization that functions as a comprehensive dispute resolution organization cutting across industry lines. Given this feature of the financial ombudsman organization, the financial ombudsman organization should handle a broad range of complaints and disputes related to financial services in Japan. As outlined below, this Proposal defines enterprises engaged in financial services as "financial services enterprises" and recommends that the scope of complaints and disputes to be handled by the financial ombudsman organization (operations of the financial ombudsman organization) should be as enumerated under I through III below.[32]

I. Resolution of complaints filed with regard to business operations undertaken by financial services enterprises.

II. Mediation and arbitration in the case of disputes arisen with regard to business operations undertaken by financial services enterprises.

III. Operations that are ancillary and similar to those described in I and II above (including resolution of complaints filed with regard to business operations that are similar to those undertaken by financial services enterprises, or mediation and arbitration in the case of disputes arisen with regard to said business operations).

The aim of III above is to allow the financial ombudsman organization to handle complaints and disputes pertaining to business operations undertaken by unregistered enterprises and business operations that are not subject to regulation under current laws (transactions abusing legal loopholes).

"Financial services enterprises" include the following with the intent of covering a broad range of enterprises engaged in financial services.

- Financial instruments business operators (including registered financial institutions undertaking registered financial institution business operations).
- Financial instruments intermediary service providers.
- Persons mentioned in the top column of the table appearing under Financial Instruments and Exchange Act Enforcement Order Article 18-4-3 Paragraph 5 who are included under "a" through "s" below (such persons, with the exception of those explicitly specified ["p" through "s"], are not restricted to operations appearing in the middle column of the said table).[33]

[32] It is assumed that the operations enumerated under I through III in the text constitute the operations that will be assigned to the financial ombudsman organization in basic charter (equivalent to the articles of incorporation of a company).

[33] Persons mentioned in the top column of the table appearing under Financial Instruments and Exchange Act Enforcement Order Article 18-4-3 Paragraph 5 are arranged under "a" through "s" with some adjustments. Under the provisions of Paragraph 5, complaint resolution related to business operations appearing in the middle column of the said table constitute the only specified certified business operation. No such restrictions are made in the case of the financial ombudsman organization, which is intended to handle a wide

Banks and agents of banks as stipulated under Banking Act Article 2 Paragraph 15.
Long-term credit banks and agents of long-term credit banks as stipulated under Long-Term Credit Bank Act Article 16-5 Paragraph 3.
Insurance companies (insurance companies as stipulated under Insurance Business Act Article 2 Paragraph 2, including foreign insurance companies, etc. as stipulated under Article 2 Paragraph 7 of the same).
Small-amount short-term insurance providers as stipulated under Insurance Business Act Article 2 Paragraph 18.
Insurance solicitors as stipulated under Insurance Business Act Article 2 Paragraph 23, and insurance brokers as stipulated under Insurance Business Act Article 2 Paragraph 25.
Trust companies (licensed as stipulated under Trust Business Act Article 3 and Article 53 Paragraph 1), financial institutions licensed as stipulated under Act on Provisions, etc. of Trust Business by Financial Institutions Article 1 Paragraph 1, and life insurance companies licensed under the Insurance Business Act Enforcement Order Article 13-3 (excluding insurance companies mentioned under "c" above).
The Norinchukin Bank and agents of the Norinchukin Bank as stipulated under the Norinchukin Bank Act Article 95-2 Paragraph 3.
The Shoko Chukin Bank.
Cooperatives (excluding corporate cooperatives) as stipulated under Small and Medium-Sized Enterprise, Etc., Cooperatives Act Article 3, and agents of mutual aid cooperatives as stipulated under Article 9-7-5 Paragraph 2 of the same.
Agents of credit cooperatives as stipulated under Act on Financial Businesses by Cooperatives Article 6-3 Paragraph 3.
Shinkin banks, federations of shinkin banks, and agents of shinkin

range of complaints and disputes pertaining to the business operations of financial services enterprises. Therefore, under "a" through "s" above, previously mentioned enterprises are not mentioned again. Thus, regarding life insurance companies, "f" states, "excluding insurance companies mentioned under "c" above." Likewise, "j" only mentions agents of credit cooperatives and does not re-mention credit cooperatives and the Federation of Credit Cooperatives, which are included under "i." Note that corporate cooperatives have been excluded from "i" for the following reasons. First of all, the middle column of the said table stipulates as follows: "the entering into, acting as agent or intermediating of specified mutual insurance contracts as stipulated under Small and Medium-Sized Enterprise Cooperatives Act Article 9-7-5 Paragraph 3," and the provisions of Article 9-7-5 are not applicable mutatis mutandis to corporate cooperatives. Moreover, the top column of the said table does not appear to presume the inclusion of corporate cooperatives in "cooperatives as stipulated under Small and Medium-Sized Enterprise Cooperatives Act Article 3." Secondly, a review of the business operations of corporate cooperatives as stipulated under Article 9-10 of the said act indicates that these business operations are different from those of other cooperatives, in that there is no presumption of corporate cooperatives engaging in financial businesses with its members. Therefore, there appears to be no reason to include these in the definition of "financial services enterprises."

banks as stipulated under Shinkin Bank Act Article 85-2 Paragraph 3.

Labor banks, federations of labor banks, and agents of labor banks as stipulated under Labor Bank Act Article 89-3 Paragraph 3.

Agricultural cooperatives, federations of agricultural cooperatives, and specified credit providing businesses agents as stipulated under Agricultural Cooperatives Act Article 92-2 Paragraph 3.

However, "financial services enterprise" includes only those agricultural cooperatives and federations of agricultural cooperatives that are engaged in business operations stipulated under Agricultural Cooperatives Act Article 10 Paragraph 1-3 (credit providing businesses) or business operations stipulated under Article 10 Paragraph 1-10 (mutual aid related facilities).

Fisheries cooperatives, federations of fisheries cooperatives, marine products processing cooperatives, federations of marine products processing cooperatives, federations of mutual aid marine cooperatives, and specified credit providing businesses agents as stipulated under Marine Cooperatives Act Article 121-2 Paragraph 3.

However, regarding fisheries cooperatives, federations of fisheries cooperatives, marine products processing cooperatives, and federations of marine products processing cooperatives, "financial services enterprise" includes only those that are engaged in business operations stipulated under the following sections of Fisheries Cooperatives Act, respectively: those stipulated under Article 11 Paragraph 1-4 (credit providing businesses) or those stipulated under Article 11 Paragraph 1-11 (mutual aid businesses); those stipulated under Article 87 Paragraph 1-4 (credit providing businesses) or those stipulated under Article 93 Paragraph 1-2 (credit providing businesses); those stipulated under Article 93 Paragraph 1-6-2 (mutual aid businesses); and those stipulated under Article 97 Paragraph 1-2 (credit providing businesses).

Consumer cooperatives and federations of consumer cooperatives

However, "financial services enterprise" includes only those engaged in mutual aid businesses as stipulated under Consumer Cooperatives Act Article 10 Paragraph 2.

Overseas commodity trading operators

However, "financial services enterprise" includes only those engaged as trustees of futures transactions on overseas commodity markets as stipulated under Law Concerning Trusteeship of Futures Transaction on Overseas Commodity Markets Article 2 Paragraph 4 (transactions mentioned in the middle column of the table appearing under Financial Instruments and Exchange Act Enforcement Order Article 18-4-3 Paragraph 5).

Specified promoters, etc., as stipulated under Act on Securities Investment Trust and Securities Investment Corporations Article 197

However, "financial services enterprise" includes only those engaged in solicitation, etc. (transactions mentioned in the middle column of the table appearing under Financial Instruments and Exchange Act Enforcement Order Article 18-4-3 Paragraph 5) of investment securities issued by investment corporations.

Real estate specified joint enterprises

However, "financial services enterprise" includes only those entering into, acting as agents or intermediating in real estate specified joint enterprise contracts (transactions mentioned in the middle column of the table appearing under Financial Instruments and Exchange Act Enforcement Order Article 18-4-3 Paragraph 5).

Special purpose companies as specified under Act on the Securitization of Assets Article 2 Paragraph 3, specified transferrer as specified under Article 208 Paragraph 1, and original trustor as specified under Article 224.

However, "financial services enterprise" includes only those soliciting or handling solicitations of asset-backed securities, and those soliciting beneficiary securities (transactions mentioned in the middle column of the table appearing under Financial Instruments and Exchange Act Enforcement Order Article 18-4-3 Paragraph 5).

- Financial institutions as specified under Financial Instruments and Exchange Act Enforcement Order Article 1-9 (excluding insurance companies mentioned under "c" above and Shoko Chukin Bank mentioned under "h" above): mutual finance companies, securities financing companies, and tanshi companies.
- Commodities investment consulting companies
- Commodities investment sellers as specified under Law Concerning Control of Commodities Investment Business Article 35
- Futures commission merchants as specified under Commodity Exchange Act Article 2 Paragraph 18
- Money lending businesses
- Leasing businesses and credit card businesses

By defining the business operations of the financial ombudsman organization to be those mentioned under I through III above, it will be possible to achieve comprehensive coverage of complaints and disputes pertaining to all financial services that currently exist in Japan.

As already mentioned, the core functions and operations of certified investor protection organizations, as specified in the Financial Instruments and Exchange Act, consist of complaint resolution and mediation pertaining to certain "business operations" of certain "enterprises" including financial instruments business operators. The financial ombudsman organization presented in this Proposal is intended to handle complaints and disputes as outlined under I through III. However, the scope of the complaints and disputes that it

will handle will be extended in terms of both "business operations" and "enterprises."

Starting with the scope of "enterprises," the Financial Instruments and Exchange Act defines certified operations to be the resolution of complaints pertaining to certain business operations undertaken by financial instruments business operators, financial instruments intermediary service providers and those mentioned in the top column of the table appearing under the Financial Instruments and Exchange Act Enforcement Order Article 18-4-3 Paragraph 5. In addition to covering these enterprises that engage in certified business operations as stipulated under the Financial Instruments and Exchange Act, the financial ombudsman organization will also handle complaints and disputes pertaining to the following businesses: financial institutions as stipulated under Financial Instruments and Exchange Act Enforcement Order Article 1-9 (specifically, mutual finance companies, securities financing companies, and tanshi companies), commodities investment consulting companies, commodities investment sellers, futures commission merchants, money lending businesses, leasing businesses and credit card businesses. As can be seen from this, the financial ombudsman organization not only handles complaints and disputes pertaining to target business operators (that is, financial instruments business operators or financial instruments intermediary service providers who are members of the financial ombudsman organization, financial instruments business operators or financial instruments intermediary service providers which have agreed to be subject to certified businesses, or any others mentioned in the top column of the table appearing under Financial Instruments and Exchange Act Enforcement Order Article 18-4-3 Paragraph 5 [limited to those engaged in transactions mentioned in the middle column]), but it also handles complaints and disputes pertaining to enterprises other than the target business operators.

Regarding the scope of "business operations," Financial Instruments and Exchange Act Article 79-7 Paragraphs 1 and 2 define the function of certified investor protection organizations to be the resolution of complaints and disputes pertaining to "financial instruments businesses." However, in I and II above, the scope covered is complaint resolutions pertaining to "business operations" of financial services enterprises. The implication of this provision is that the financial ombudsman organization not only handles complaints and disputes pertaining to financial instruments businesses (core businesses) but also complaints and disputes pertaining to those business operations of financial instruments business operators that constitute incidental business operations (Financial Instruments and Exchange Act Article 35 Paragraph 1), business operations requiring notification (Article 35 Paragraph 2) and business operations requiring approval (Article 35 Paragraph 4). Furthermore, under the Financial Instruments and Exchange Act, the certified operations of a certified investor protection organization that are identified as specified certified business operations constitute the resolution of complaints pertaining to business operations mentioned in the middle column of the Financial Instruments and Exchange Act Enforcement Order Article 18-4-3 Paragraph 5 that are conducted by entities mentioned in the top

column of the said table. However, with certain exceptions, I and II above cover not only the resolution of complaints and disputes pertaining to the business operations mentioned in the middle column of the said table but also the resolution of complaints and disputes pertaining to the business operations conducted by entities mentioned in the top column of the said table. Among all of the business operations undertaken by these entities, the Financial Instruments and Exchange Act certifies as specified business only those business operations that involve financial instruments of a high investment nature. However, there is a need to resolve the complaints and disputes filed by users of financial services that do not fall within the scope of the certified specified business operations. In light of this fact, the intent of the financial ombudsman organization is to cover a wide range of complaints and disputes arising from the business operations undertaken by these entities in general.[34]

Complaints and disputes in the financial field are not limited to those filed against enterprises that are licensed, approved or registered under the relevant business laws. That is, complaints and disputes also arise that pertain to unlawful enterprises that have not been properly licensed, approved or registered under the relevant business laws (hereinafter referred to as unregistered enterprises). It can be predicted that such unregistered enterprises will include numerous unscrupulous enterprises, and it is particularly important to protect users in complaints and disputes pertaining to such enterprises. Therefore, the scope of the functions of the financial ombudsman organization should, as far as possible, cover complaints and disputes brought against unregistered enterprises that engage in the business operations of "financial services enterprises" without being properly licensed, approved or registered under the relevant business laws.

However, even if the financial ombudsman organization is assigned the resolution of complaints and disputes pertaining to unregistered enterprises, it is unlikely that such unregistered enterprises will consent to participate in the procedures of deliberative mediation and arbitration conducted under the financial ombudsman organization. Hence, there is considerable skepticism on whether effective dispute resolution can be achieved in cases involving unregistered enterprises. On the other hand, the financial ombudsman organization will

[34] The business operations of specified certified business operators (Financial Instruments and Exchange Act Enforcement Order Article 18-4-3 Paragraph 5) can be categorized as follows: (i) business operations involving financial instruments of a high investment nature to which the regulations of the Financial Instruments and Exchange Act apply mutatis mutandis under the respective business laws; (ii) business operations involving the general range of business operations subject to regulation under the respective business laws; and (iii) certain business operations that can be engaged in by persons who are not enterprises on the condition that they are subject to the same regulations as enterprises. Regarding (i), the financial ombudsman organization will not restrict its coverage to business operations involving financial instruments of a high investment nature, but will instead handle a wide range of complaints and disputes arising from the general business operations undertaken by individual enterprises. Regarding (ii) and (iii), it is assumed that the financial ombudsman organization will handle complaints and disputes pertaining to the same scope of business operations as are stipulated as specified certified business operations ("p" through "s" in the above definitions of "financial services enterprises.").

certainly be able to receive complaints pertaining to unregistered enterprises and to assist in the resolution of the dispute. For instance, the financial ombudsman organization could share related information with its members so that this information could be used in business operations and to draw the attention of customers to potential problems. Furthermore, the financial ombudsman organization could submit this information to government agencies and petition for supervision and rectification. These possibilities indicate that the financial ombudsman organization's handling of complaints pertaining to unregistered enterprises can play a significant role in enhancing confidence in Japan's financial services market.

(2) Parties to Disputes to Be Handled by Financial Ombudsman Organization

The scope of complaints and disputes to be handled by the financial ombudsman organization was specified under (1) above. However, it is necessary to clarify the scope of disputes to be handled from the perspective of the parties to a dispute. The intent of this Proposal is to provide individual investors and general users of financial services with access to a simple, speedy, professional, neutral and effective ADR organization. Recourse to an ADR organization provides a safety net for users of complex and diverse financial services in case of unforeseen damages. As a rule, this type of protection should be extended exclusively to individual users of financial services. An exception can be made for small enterprises that in effect can be regarded to be equivalent to individual users. In light of these considerations, the financial ombudsman organization shall handle disputes arising between the following categories of parties.[35]

(i) Between a financial services enterprise and an individual customer

(ii) Between a financial services enterprise and a corporate customer (provided the corporate customer is a small enterprise that can in effect be regarded to be equivalent to an individual customer)

The financial ombudsman organization should handle complaints and disputes that arise between parties as outlined under (1) and (2) above. Consequently, the financial ombudsman organization will not handle disputes between financial services enterprises.[36] However, this does not imply that the financial ombudsman organization will not consider any disputes that have arisen between financial services enterprises. Rather, the financial ombudsman organization should be allowed to handle disputes between financial services enterprises within a certain scope as deemed necessary for the resolution of disputes between the parties outlined under (1) and (2) above. For example, consider the following case. An individual customer has suffered losses in a case involving two or more financial services enterprises, and effective resolution requires that the

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[35] In the U.K. ombudsman system, complaints can be filed by the following: "private individual or business with annual turnover of less than one million pounds who is a customer of the company or a potential customer, or who has an indirect complaint." (See Financial Services Authority, "Dispute Resolution: Complaints," 2.4 in *FSA Handbook*,)

[36] ISO1003 is applicable to disputes pertaining to goods and products supplied by an organization to its customers, and appears to be inapplicable to disputes between businesses.

assignment of responsibility and liability be established among the enterprises that are involved. In such cases, it would be appropriate for the financial ombudsman organization to undertake dispute resolution that includes the assignment of responsibility and liability.

(3) Restrictions on Scope of Complaints and Disputes Handled by Financial Ombudsman Organization

The scope of complaints and disputes to be handled by the financial ombudsman organization has been delineated above. However, this delineation does not imply that the financial ombudsman organization must handle all cases without limit that fall within the said scope. In light of the purpose and intent of the establishment of the financial ombudsman organization, the following limits may be adopted.

A. Geographic Limits

The purpose of the financial ombudsman organization is to establish an ADR organization in Japan that covers the various segments of the financial services industry. It is believed that such an organization will contribute to the protection of individual investors and financial services users, and that this will enhance the convenience and confidence in Japan's overall financial services markets. Therefore, the complaints and disputes to be handled by the financial ombudsman organization should be limited to those that arise from the business operations of financial services enterprises undertaken within Japan.

"Business operations undertaken within Japan" covers both those business operations that are provided within Japan and those that are provided from Japan. In this context, the question of whether the financial services user is located in Japan or not is irrelevant. Furthermore, the financial ombudsman organization should handle complaints and disputes involving financial services enterprises that are foreign individuals or foreign corporations so long as the business operation in question was undertaken within Japan.[37]

B. Limits on Amounts in Dispute

The scope of complaints and disputes to be handled by the financial ombudsman organization can also be limited from the perspective of the amounts in dispute. For example: (i) limit eligible cases for mediation by the financial ombudsman organization to cases within a certain amount (e.g., within 20 million yen); or (ii) when the second-stage mediation proposal exceeds a certain amount (e.g., 20 million yen), the amount exceeding the ceiling amount should not be binding on the financial services enterprise and instead should constitute a

[37] In the U.K. ombudsman system, eligible complaints are limited to those pertaining to company activities that take place in offices located within the U.K. (covering both business operations provided within the U.K. and those provided from the U.K.). In other words, the activities of the overseas branches and offices of U.K. financial institutions are not covered. Conversely, the activities of the U.K. branches and offices of foreign financial institutions are covered. (Financial Services Authority, "Dispute Resolution: Complaints," 2.7.1 in *FSA Handbook* and Shigehito Inukai and Keiko Tanaka, eds., *Nihonban kinyu ombuzuman e no koso* [*Towards a Japanese Financial Ombudsman System*] [Tokyo: LexisNexis, 2007], 101–2).

non-binding recommendation.[38]

The adoption of monetary limits should be considered for the following reasons. First, for disputes involving large amounts in excess of a certain limit, it is highly likely that the parties to the dispute will prefer not to refer to an ADR for simple and speedy resolution, and will instead opt for more exacting procedures of formal litigation that provide ample time for the presentation of arguments and evidence. Second, given that mediations rendered by the financial ombudsman organization are binding on financial services enterprises only, the adoption of monetary limits will make it easier for financial services enterprises to participate and cooperate in the dispute resolution procedures of the financial ombudsman organization.

C. Time Limits

The adoption of time limits on disputes to be handled by the financial ombudsman organization can be considered as in the following cases: (i) the financial ombudsman organization accepts filings of complaints or disputes only after the passage of a certain amount of time from the start of negotiations between the financial services enterprise and the individual user; or, (ii) the financial ombudsman organization no longer accepts filings of complaints or disputes after the passage of a certain amount of time from when it was initially appraised of valid grounds for complaint or dispute, or from the occurrence of the incident from which a complaint or dispute has arisen.[39]

While (i) above may have a positive effect of encouraging the parties to resolve the problem by themselves, due caution must be exercised in the adoption of such rules for the following reasons. First, such rules

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[38] The U.K. ombudsman system does not contain limits based on amounts in dispute. However, binding monetary rulings rendered by an ombudsman cannot exceed 100,000 pounds (Financial Services Authority, "Dispute Resolution: Complaints," 3.9.5 in *FSA Handbook*). If an ombudsman deems that the fair compensation amount exceeds this ceiling amount, the ombudsman can issue a non-binding recommendation against the financial company. (Shigehito Inukai and Keiko Tanaka, eds., *Nihonban kinyu ombuzuman e no koso* [*Towards a Japanese Financial Ombudsman System*], 135)

[39] The U.K. ombudsman system contains certain time limits and conditions for dispute resolution. Specifically, a complaint cannot be received in the following situations: (1) less than eight weeks have elapsed since the enterprise received the complaint; (2) more than six months have elapsed since the enterprise issued its final response to the complainant indicating that the matter can be referred to the ombudsman service; (3) after the lapse of the later of the following two dates: six years from the occurrence of the incident from which the complaint has arisen, or three years from when the complainant learned that there were grounds for a complaint (or, from the time the complainant could reasonably be expected to know that there were grounds for a complaint) (Financial Services Authority, "Dispute Resolution: Complaints," 2.3.1 in *FSA Handbook*). In the U.K. ombudsman system, enterprises are subject to FSA rules mandating them to establish procedures for the handling of complaints, to cope with complaints within a given period of time, to maintain records of complaints received and to report to the FSA ("Dispute Resolution: Complaints," 1-1 through 1-6 in *FSA Handbook*). The time limits and conditions indicated above correspond to these rules. According to the FOS *Annual Review 2006/2007* (p. 43), one out of five disputes pertaining to mortgage endowments concerned the time limit conditions indicated under (3) above.

may contradict the principle of speedy resolution. Second, the inability to use the procedures of the financial ombudsman organization for a certain amount of time from the occurrence of an incident may increase dissatisfaction and distrust among financial services users. Regarding (ii) above, the adoption of some form of time limit would be necessary from the perspective of maintaining legal stability. However, many financial products have a long maturity period and financial services users may not become aware of damages until the passage of considerable time from the date of purchase. Special attention must be paid to designing a system that does not restrict the filing of complaints in such cases.

D. Miscellaneous

Existing ADR organizations occasionally terminate dispute resolution procedures when they find they are not equipped to handle the case. Examples include cases requiring medical or other specialized knowledge and cases where the facts of the case are highly complex and difficult to determine.

Because the financial ombudsman organization is intended to handle a broad range of complaints and disputes in the financial field, it is conceivable that expert knowledge of other specialized fields may also be needed from time to time. Responding to such cases may require the input of substantial human and monetary resources. If this obstructs the financial ombudsman organization from handling the large volume of very general complaints and disputes, it would undermine the original purpose of the system. However, because the objective is to develop a financial ADR organization with comprehensive dispute resolution capabilities, the financial ombudsman organization should not be allowed to simply reject such cases. Instead, the financial ombudsman organization should, as far as possible, cope with cases requiring expert knowledge in non-financial fields by using appraisals and evaluations submitted by specialized institutions.

Likewise, the financial ombudsman organization should not terminate a case because the facts of the case are highly complex and difficult to determine. The parties to the dispute bring their dispute to the financial ombudsman organization with the hope that it can be resolved and if they are dissatisfied by the mediation proposal of the financial ombudsman organization, they have the option of taking the case to court. Therefore, even if the facts of the case are highly complex and difficult to determine, this should not be grounds for rejection or termination of the case.

On the other hand, it is conceivable that some disputes filed with the financial ombudsman organization are not suited for resolution through an ADR process. For example, this would include class-action type disputes involving large numbers of complainants, and cases that will have an obvious and significant impact on existing legal precedents and interpretation. It would be more appropriate to leave such cases to litigation and court procedures. When a dispute pertaining to such types of cases is filed with the financial ombudsman organization, it would not necessarily be appropriate for the financial ombudsman organization to force the relevant financial services

enterprise to participate in its procedures. For example, such a filing could be handled as follows. During the early stages of the deliberative mediation process, the financial services enterprise moves to terminate the procedures and gives its reasons for requesting termination. If the reasons are found to be justified at the mediation commission, the process of deliberative mediation will be terminated. Thereupon, the case is taken to court. It would be desirable to establish procedures for taking this option. However, given the objective of creating a comprehensive financial ADR organization, it will be necessary to explicitly determine the conditions under which termination of mediation is acceptable and to establish strict criteria for judgment on termination.

Chapter 3 Process for the Realization of Financial Ombudsman Organization

The establishment of a unified one-stop financial ADR organization spanning all segments of the financial services industry will prove extremely beneficial in providing speedy, simple, easy to access, professional and high quality resolution of complaints and disputes pertaining to financial services. However, it must be borne in mind that in Japan, 18 industry associations are already operating their own organizations for handling complaints and disputes. Thus, while the ultimate goal is to establish a financial ADR organization that spans all segments of the financial services industry, there is clearly a need to formulate a gradual process for the realization of this goal.

The following section examines a number of realistic steps that can be taken toward the ultimate realization of an ideal financial ADR organization that spans all segments of the financial services industry.

1. Gradual Expansion of Scope of Complaints and Disputes Handled

This Proposal presents the establishment of a unified one-stop financial ADR organization spanning all segments of the financial services industry as the ideal and ultimate form of financial ombudsman organization. However, it is not necessarily realistic to think that such ideal and ultimate form can be achieved immediately. A more realistic approach to arriving at this ideal would involve the gradual expansion of the scope of complaints and disputes handled by the financial ombudsman organization. Hence, the system must be designed to allow for such a gradual approach.

Sub-section 3 below outlines one option for a realistic process that would feature the use of existing ADR organizations and the gradual design and establishment of the financial ombudsman organization. In its first stages, this process would contain the following steps: implementation of internal reforms by existing industry-based financial ADR organizations; establishment and gradual expansion of a unified channel for receiving complaints and disputes; promotion and adoption of model standards; establishment of a unified financial ADR organizations network consisting of existing ADR organizations that have satisfied the model standards set by the financial ombudsman organization; the assignment of complaints received by the financial ombudsman organization to existing ADR organizations; and, as a rule, the resolution of complaints by existing ADR organizations. It is desirable to start this process as soon as possible with existing industry-based financial ADR organizations[40] that are involved in not only complaint resolution but also in mediation whose industry association and member enterprises are willing to participate and cooperate with this undertaking.

It is hoped that financial services enterprises will fully appreciate the significance and advantages (see Chapter 4 below) of the establishment of a private-sector led, unified one-stop financial ADR organization spanning all segments of the financial industry, and will voluntarily participate and

[40] Of the existing industry-based ADR organizations, the following are currently engaged in both complaint resolution and mediation of disputes: Japan Securities Dealers Association, Life Insurance Association of Japan, General Insurance Association of Japan, Financial Futures Association of Japan, and Commodity Futures Association of Japan.

cooperate with the financial ombudsman organization. However, given that the ideal is to create a financial ombudsman organization that covers a broad section of the financial sector, is it realistic to depend solely on voluntary participation and cooperation? It is conceivable that the ideal may not necessarily be easy to achieve on a voluntary basis. Therefore, government agencies should consider taking appropriate action through administrative guidance and supervision to encourage the participation and cooperation of enterprises in a financial ADR organization that meets the standards of this Proposal.

The functions of the financial ombudsman organization as outlined under I through III in Chapter 2 Section 4 (1) B include certain functions that are designed for coping with complaints pertaining to money lending businesses. A one-stop financial ADR organization would naturally be expected to handle complaints and disputes pertaining to money lending businesses. A review of cases handled by currently functioning ADR organizations shows that the number of complaints and disputes pertaining to money lending businesses is larger than for other segments of the industry. Furthermore, a significant number of cases pertaining to money lending businesses are processed by the courts and in particular arbitration. Taking these factors into consideration, it will be very meaningful for the ADR to be established by the financial ombudsman organization to handle complaints and disputes pertaining to money lending businesses. On the other hand, these complaints and disputes frequently involve a multiple number of enterprises (creditors), as in the case of heavily indebted individuals. It can be imagined that the resolution of such disputes will often resemble bankruptcy procedures and debt adjustment. Effective resolution would require that disputes with all enterprises (creditors) involved in the same case be resolved. In this setting, the achievement of effective dispute resolution may be obstructed if participation in ADR procedures is purely voluntary.[41] Therefore, in order for the financial ombudsman organization to provide effective dispute resolution in such cases, it will be necessary to consider various administrative (or judicial) mechanisms for prompting (or obligating) participation and cooperation with an ADR organization that satisfies the criteria of this Proposal.

2. Process for the Realization of Financial Ombudsman Organization (Relations with Existing ADR Organizations)

As mentioned in Chapter 1, what the Research Group considers to be ideal is the realization of a financial ADR organization that functions as a financial ombudsman organization and is capable of providing flexible and comprehensive dispute resolution.

However, the immediate creation of a one-stop financial ombudsman organization endowed with comprehensive dispute resolution capabilities faces a number of practical issues and problems, which include the

[41] Suppose an enterprise (creditor) refuses to participate in dispute resolution under the ADR organization. Even if a resolution were reached with other enterprises (creditors), this would not represent a full resolution from the perspective of the liable party. Moreover, the other enterprises would have less incentive to voluntarily accept a resolution proposal involving debt reduction or forgiveness if certain enterprises refuse to participate in the procedures.

following: (i) adjusting the relations with the existing industry-based ADR organizations; and (ii) finding the necessary financial and human resources. Without the solution of these problems and the participation and cooperation of a wide range of financial services enterprises, any newly formed organization will not be able to function realistically.

From this perspective, while the ultimate objective is the establishment of a one-stop financial ombudsman organization, the realization of this objective will require a gradual approach.

3. Specific Steps

The following presents an example of a gradual process considered by the Research Group. It is hoped that this presentation will serve as a reference point for persons seriously engaged in the solution of these problems.

Step One: Internal reform of existing industry-based financial ADR organizations – Achieving flexibility

First of all, it is hoped that the existing industry-based financial ADR organizations will undertake a process of internal reform inspired by this Proposal and improve their systems by adopting, to the greatest extent possible, the principles enunciated in this Proposal. Of the eight design concepts discussed earlier, the requirements of ease of access and comprehensiveness cannot be readily achieved through the efforts of any single organization. However, it is hoped that the existing ADR organizations will make necessary changes in their organizational structures, procedures and operations to satisfy the remaining requirements. Such internal reform would in itself constitute a major advance toward the realization of a reasonable, flexible, speedy and simple dispute resolution process.

Furthermore, it is hoped that such industries that currently do not have their own industry-based ADR organization will establish ADR organizations that adopt the provisions of this Proposal, or that alternatively they will join existing ADR organizations that have undergone internal reform.

Step Two: Establish/expand complaint receiving channel, and adopt/promote model standards – First step toward realization of comprehensiveness

(Establish/expand unified complaint receiving channel)

It is obvious that Step One will not be enough to achieve one of the main objectives of this Proposal: the establishment of a comprehensive dispute resolution organization. As a step toward the creation of a comprehensive organization, it is hoped that a number of industries and their industry-based financial ADR organizations, which to a significant degree have come to share the design concepts of this Proposal, will voluntarily move in the direction of amalgamation. As the first initiative in this direction, several existing organizations may jointly establish a new framework (referred to here as the "new organization" for sake of convenience) whose ultimate objective would be the establishment of a financial ombudsman organization. Such an organization could take various forms, ranging from an unincorporated body functioning as a liaison meeting or preparatory committee to a fully incorporated body that itself would ultimately be

transformed into a financial ombudsman organization. The new organization would take the first step toward the achievement of the two remaining requirements of ease of access and comprehensiveness by establishing a unified complaint-receiving channel that would serve all the constituent members of the organization. Thus, the process would start at the complaint receiving level. The new organization could conceivably provide a unified complaint-receiving channel for all financial services enterprises. Another option would be to transfer to this new organization all financial services related complaints and problems received by such organizations as the Japan Legal Support Center (*Houterasu*), the legal advice desks of bar associations and judicial scriveners associations, the National Consumer Affairs Center of Japan and the advice desks of local Consumer Affairs Centers. A nationally unified complaint-receiving channel for financial services complaints and disputes could be gradually developed and expanded through this process.

(Initial Response Functions of New Organization)

In addition to providing a unified channel for receiving complaints, the new organization could undertake some of the initial response functions of the "first process" (debriefing of complainant and presentation of resolution proposal) that was examined under Chapter 2 Section 1 (2). For example, this could include investigation by expert mediator. In such instances, the expert mediator would confirm the details of the complaint and thereupon hand over the case to an appropriate industry-based existing financial ADR organization. Where possible, the new organization may itself be able to carry the case forward to conclusion.

(Formulating Model Standards for Establishment of Unified Organization)

Taking into consideration the provisions of this Proposal and the views of existing industry-based financial ADR organizations, and drawing on its own knowledge accumulated through the above experiences, the new organization shall formulate model standards to be adopted by the financial ombudsman organization. These standards shall cover such matters as organizational format, dispute resolution procedures and dispute resolution standards. Furthermore, the new organization shall actively promote and encourage the adoption of the model standards (excluding matters related to organizational format and other matters specific to a unified financial ombudsman organization) by the following: members of the new organization's founding industries and their industry-based financial ADR organizations, other financial industry associations, and other existing financial ADR organizations.

The model standards shall satisfy the eight requirements outlined under Chapter 1 Section 3 (2), which all financial ADR organizations are expected to meet, and the design concept for organization establishment that they should satisfy based on these eight requirements. The contents of the standards shall be consistent with the investigation standards of the dispute resolution system of the Financial Services Agency. The underlying philosophy of the standards shall accord with the principles and code of conduct contained in the International Organization for Standardization's "Quality management – Customer satisfaction – Guidelines for complaints handling in organizations" (ISO 10001-10003).

It is hoped that the establishment of a unified receiving channel and efforts

made by existing industry-based ADR organizations to meet the model standards will lead to extremely significant overall improvements.

Step Three: Develop unified network for financial ADR organizations – Progress toward comprehensiveness

To promote progress toward the establishment of a comprehensive financial ADR organization, a new organizational network (tentative title: Financial Ombudsman Network) shall be developed comprising existing industry-based financial ADR organizations that have satisfied the requirements of the model standards created by the new organization. Under this arrangement, while existing financial ADR organizations will remain separate, they will effectively form a network of franchises functioning under unified standards.

In other words, existing industry-based ADR organizations that express an interest in participating in the Financial Ombudsman Network will be examined to ascertain whether they satisfy the various requirements of the model standards, and only those that are found in compliance with these criteria will be permitted to participate. Moreover, existing industry-based ADR organizations that join the network will be required to remain in compliance with the standards. Necessary follow-up will be undertaken by generally and individually reviewing the cases handled by them to ensure consistency, appropriateness and speed in overall complaint and dispute resolution procedures. With the participation of existing industry-based ADR organizations, the new organization will utilize the unified receiving channel created under Step Two to initiate integrated receiving of complaints and requests for consultation from financial services users. The new organization will then assign all such complaints and requests to participating industry-based ADR organizations and will delegate the actual process of complaint and dispute resolution to them. In Step Three, the participating industry-based ADR organizations will be required to resolve the cases assigned to them within a certain period of time. If the case is not resolved within the set period of time, or if one of the parties to the dispute remains dissatisfied with the conclusion arrived at by the industry-based ADR organization, the new organization will take it upon itself to resolve the dispute. Furthermore, a viable option would be to allow the new organization to directly undertake the mediation process of Step Two involving mediation by a mediation commission. As can be seen from this, the aim is to create a one-stop comprehensive financial ADR organization spanning all segments of the financial industry through the following graduated process: (i) creation of a unified complaint receiving channel; (ii) establishment of model standards; and (iii) final unification of judgments.

This process will ultimately lead to the emergence of a unified nationwide network of financial ADR organizations that satisfy the various requirements for financial services dispute resolution as outlined under Chapter 1 Section 3 (2).

Furthermore, the new organization could itself handle complaints and disputes arising in areas where there are no participating industry-based financial ADR organizations. This would allow the network to cover all categories and types of financial services businesses throughout Japan and would contribute to the formation of a comprehensive and unified network of financial ADR organizations.

Step Four: Transition to one-stop comprehensive financial ADR organization spanning all segments of the industry – Realization of financial ombudsman organization

All industry-based financial ADR organizations participating in the Financial Ombudsman Network will have attained a certain degree of uniformity in terms of their organizational structure, dispute resolution procedures and judgment procedures. At this point, the participating organizations can be unified to complete the transition to a unified one-stop comprehensive financial ADR organization spanning all segments of the financial industry. This would constitute the creation of a financial ombudsman organization, which is the ultimate goal of this Proposal.

Chapter 4 Contributions of the Financial ADR Organization to the Financial and Capital Markets

This final chapter considers the expected impact of the "financial ombudsman organization" that is being proposed by the Research Group. Specifically, the following question is considered. If the ideals and principles of the "financial ombudsman organization" are shared among pertinent persons and if a financial ADR organization supported by these new principles and framework were to be established with due speed, what benefits would this have for the financial and capital markets, for users of financial services and for financial services enterprises?

1. Financial and Capital Markets Infrastructure Development and Promoting the Use of Financial Services

Financial services users are not only users of financial services but they are simultaneously lenders (investors) and borrowers (procurers) of funds. Due to this characteristic, initiatives taken by financial services enterprises to develop, at their own expense, systems for effective and reliable dispute resolution with financial services users for the purpose of improving their services to users of financial services and consumers and for enhancing customer satisfaction constitute the development of financial and capital markets infrastructure. Such initiatives can be expected to increase the confidence of financial services users in financial services enterprises and to promote the use of a wide range of financial services in the financial and capital markets.

The proposal of the Research Group is to establish a financial ombudsman organization through the following gradual steps: the establishment and expansion of a unified receiving channel functioning under the new organization; the adoption and promotion of the model standards by existing industry-based financial ADR organizations; and, the development of a unified network of financial ADR organizations. These steps will generate the following benefits: they will increase confidence and convenience of market participants in Japan's financial and capital markets; they will promote greater liquidity and stability in the markets; they will promote investment by users; and, they will yield greater benefits to enterprises. The synergy effect produced by these benefits will generate a virtuous cycle of enhanced confidence and stability in Japan's financial and capital markets. As a result, they will contribute to the creation of markets with greater efficiency, depth and attractiveness for all types of market participants. In other words, these steps will facilitate the establishment of financial and capital markets that are internationally competitive.

The financial ombudsman organization will be in a position to collect extensive information on problems pertaining to a broad range of financial services. By widely publicizing this information, financial services users will be able to obtain accurate information on dispute resolution pertaining to financial services. By utilizing this shared information and engaging in mutual communication, financial services enterprises and users will be able to contribute to the continued improvement of dispute resolution systems for financial services.

2. Benefits to Financial Services Users

The environment surrounding financial services users and consumers are in a constant state of flux. Similarly, the problems and disputes arising from this environment are becoming increasingly diverse, complex and frequent. By sharing the basic principles of an effective and reliable "financial ombudsman organization," related persons and organizations will be able to promote action toward establishment of such an organization. The realization of this goal will enable users of financial services to seek "reasonable and flexible dispute resolution" for highly diversified, complex and increasingly frequent problems and disputes in the field of financial services. In other words, the financial ombudsman organization will generate the following benefits for users of financial services.

(1) Means for Reasonable Dispute Resolution

As a third-party organization, the financial ombudsman organization will be able to overcome the problems that are inherent to existing industry-based ADR organizations, other dispute resolution systems and to the judicial system, and will be able to provide fair and "reasonable and flexible dispute resolution." What this means is that the financial ombudsman organization will be able to provide users of financial systems with means for problem and dispute resolution that are acceptable and justified from the perspective of users.

(2) Speedy Relief

The financial ombudsman organization will provide flexible, speedy, effective and reliable forms of relief that correspond to the substance and degree of the dispute on hand.

(3) Ease of Access

The establishment of a financial ombudsman network and a financial ombudsman organization will eliminate problems associated with vertically segregated organizations and will avoid the problem of complainants being given the run-around between various complaint handling organizations. Financial services enterprises participating in the network and various related public relations media will be constantly providing information on the financial ombudsman organization and the Financial Ombudsman Network. This will also contribute to ensuring ease of access to financial services users who are members of the general public.

(4) Predictability of Dispute Resolution

The financial ombudsman organization will be in a position to provide the following information to financial services users: information on filings of complaints against financial services enterprises by financial services users, and information on how disputes between financial services enterprises and users are being handled and resolved. The provision of this information to users will increase the predictability of dispute resolution undertaken by the financial ombudsman organization.

3. Benefits to Financial Services Enterprises

The sharing of the principles of the financial ombudsman organization and

efforts made toward its establishment culminating in the realization of an ideal financial ADR organization will generate the following benefits for financial services enterprises.

(1) Ensuring the Independence and Neutrality of Administrators of the System

The basic philosophy underlying the design of the financial ombudsman organization would be as follows. As a third party acting independently and neutrally of both consumer organizations and financial services enterprises, the staff of the organization would take into account asymmetry in access to information and differences in position between users filing complaints and financial services enterprises. Based on this, they would effectively ensure fair treatment of both parties by not being strictly bound by superficial procedural requirements.

In this context, the realization of the contents of this Proposal will generate the following advantages. First, it will ensure a sense of confidence in participating financial services enterprises. Second, it will overcome the issues of inadequate independence and neutrality of ADR operators that have often been the target of criticism in industry-based ADR organizations.

(2) Participating in Formulation of Criteria for Reasonable and Flexible Dispute Resolution

Financial services enterprises shall not be allowed to exert any influence on decisions made by the financial ombudsman organization in the resolution of individual disputes. On the other hand, by participating in the development of the financial ombudsman organization, financial services enterprises will be able to participate jointly with financial services users in the process of the formulation of criteria for achieving "reasonable" financial dispute resolution that is acceptable to society in general. Financial services enterprises are expected to work with other enterprises in designing and developing internally certain standards pertaining to the financial services provided in the financial and capital markets. (By nature, such self-regulating standards are expected to reach for higher levels than what is required under laws and ordinances.) For financial services enterprises, such self-imposed standards represent a starting point for participating in the development of criteria for reasonable dispute resolution standards, by working through the financial ombudsman organization's dispute resolution process and developing sustained communications with financial services users.

(3) Strengthening Expertise

Financial services enterprises are in the business of selling intangible products and services. Because of this, the disputes that are referred to the administrators of the system may require high levels of expertise, creativity and experience. The staff of the financial ombudsman organization will be able to develop the knowledge, creativity and responsiveness required in handling highly specialized cases through the steady accumulation of experience and through sustained programs for training and education. The participation of expert mediators equipped with high levels of expertise will contribute to gaining the trust and confidence of financial services enterprises.

(4) Improving Operational Efficiency and Cutting Costs

Today, financial services enterprises face the following demands: improvement of compliance and internal control systems; and development and continuous improvement of such matters as code of conduct for customer satisfaction and other integrated self-regulatory measures and internal rules. Given this environment, participation in the financial ombudsman organization will allow financial services enterprises to work in tandem with the organization to develop more efficient procedures for dispute resolution and to thereby improve their operational efficiencies over a broad range of operational areas.

For example:

- Certain cases can be resolved at the reception stage of the financial ombudsman organization and its network (such as cases involving simple questions and obviously inappropriate complaints and claims). Prompt resolution at the reception stage will effectively reduce the number of "complaints and disputes" that reach and have to be handled by the enterprises and related ADR organizations that participate in the scheme.[42]
- By using the dispute resolution procedures and model standards provided by the financial ombudsman organization, a certain level of objectivity and justification can be maintained in the content of dispute resolution. This has various advantages, such as eliminating the need for confirmation of problematic conduct for which a customer is receiving compensation for damages.[43]
- Not all disputes pertaining to financial services are about whether losses suffered can be blamed on the financial services enterprise (such as failure to adequately explain the product) or not (such as losses due to market fluctuation). The fact is that in many cases, complaints become more serious due to customer dissatisfaction with the enterprise's lack of sincerity after a loss has been incurred, or from the complainant's emotional response to how his or her problem has been unjustly handled. The use of the financial ombudsman organization and its network can be expected to contribute significantly to avoiding such negative developments.
- By participating in the development of the financial ombudsman

[42] During fiscal 2007, the U.K. Financial Ombudsman Service (FOS) received a total of 627,814 complaints. Of this total, only about 15 percent, or 94,392 cases, were transferred from reception to adjudicators (FOS *Annual Review 2006/2007*). In other words, about 75 percent of all complaints appear to have been resolved at the reception stage.

[43] Confirmation of problematic conduct for which a customer is receiving compensation for damages incurred is not required in the following cases: settlement based on mediation by certified investor protection organization, and settlement based on certified dispute resolution procedures carried out by dispute resolution organizations authorized under the ADR Promotion Act (limited to disputes pertaining to securities transactions). (Financial Instruments and Exchange Act Article 39 Paragraph 3 proviso, Financial Instruments and Exchange Act Cabinet Office Ordinance Article 119 Paragraph 1 and Article 119 Paragraphs 1-4 and 1-7)

organization, financial services enterprises will be able to obtain a wide range of information generated from the management of the dispute resolution system. This information would be difficult for individual enterprises and industry associations to obtain on their own.

- Voluntary and active participation of financial services enterprises in a reliable and effective financial ombudsman organization will enhance consumer and user confidence in such enterprises and their financial services. The financial ombudsman organization will collect and publish information concerning various indicators, such as the status of complaints received, and absolute and relative figures for successful resolution rates and complainant satisfaction levels. This information can be used to appeal to users and to show that a reliable and effective means for support and dispute resolution are available in case of any trouble.

As a result, various costs defrayed by individual financial services enterprises for handling user complaints and for communicating with complainants can be effectively reduced (e.g., legal fees and internal personnel expenses).

(5) Gaining Overall Picture of Complaints and Other Problem Situations

By taking part in the process of establishing the financial ombudsman organization, participants will be able to gain an overall picture of complaints and other problem situations involving participating financial services enterprises. This feedback to participating financial services enterprises will provide them with the following: information on complaints lodged against the enterprise itself; information on the types of complaints lodged against all other enterprises in the related business field; information on general trends in complaints lodged in all segments of the industry; and, information on the relative position of complaints lodged against the enterprise itself. Information on complaints and other problem situations constitute highly important information regarding financial services markets. The financial ombudsman organization functions as a third-party organization making objective judgments on dispute resolution. Access to information on a broad range of problem situations pertaining to enterprises in the related business field and for all segments of the industry through the cooperation of the financial ombudsman organization has definite advantages for individual financial services enterprises. First, such information can help in developing appropriate and effective internal control systems. Second, information obtained in this manner provides important data for the development of financial products and the formulation of business strategies in an environment of ongoing financial liberalization.

(6) Reducing Risks Affecting Individual Financial Services Enterprises

Access to and analysis of a broad range of information pertaining to customer **dissatisfaction** can help reduce and avoid the accumulation and growth of compliance risks facing financial services enterprises over time. In certain instances, a series of claims can point to a problem that is unique to the head office and branches of a specific participating enterprise

(e.g., procedural omissions and illegal acts perpetrated by a specific sales person; inappropriate sales stance of a specific sales office; problems unique to a specific financial product). By reporting on such findings to the compliance department of the participating financial services enterprise in question, the financial ombudsman organization (or its predecessors) would be able to prompt the participating enterprise in question to take appropriate action. Moreover, the issuance of such reports can help prevent such problem behavior as procedural omissions and illegal acts perpetrated by sales personnel and the inappropriate sales stance of sales offices, and can also suppress the development of financial products that are prone to problems.

(7) Reducing Risks Existing Throughout the Entire Industry

Defects in financial services and financial products frequently become known only after the passage of several years from the time of purchase. This gives rise to the possibility that a defective service or product may continue to be sold to a wide range of customers until the defect is discovered. Information pertaining to disputes can serve as a starting point in uncovering such defects. Numerous disputes arising from identical or similar services and products point to the possibility of a defect. The financial ombudsman organization can be instrumental in creating a mechanism for exchanging information among enterprises on complaints and responses to complaints pertaining to identical or similar services and products as they arise in individual industries and categories of businesses. This exchange of information will allow the financial services industry to speedily and accurately identify and to reduce certain risks that may exist throughout the entire industry. The dispute resolution process will direct attention to inherent problems that exist in the following types of products: a series of risk products that are sold under different names in various segments of the industry, but which have the same economic rationale; and, compound risk products that combine assets and liabilities across industry line making them difficult to gain a full understanding of the product. The accumulation of resolution of disputes pertaining to such products and the dissemination of related information will facilitate early problem solution. Furthermore, such a mechanism would also prove effective in coping with cases involving systemic problems that arise simultaneously and in large numbers (cases where the scale of each dispute is small, but the sheer number of disputes generates serious and massive problems for society and the markets as a whole). Specifically, this mechanism would facilitate early preventive action that would halt the spread of a problem and corresponding losses throughout the entire market.

Chapter 5 Conclusion

Normally functioning financial and capital markets are an absolute requirement for maintaining a sound national economy and promoting its development. Because financial transactions take place across national borders, turmoil in the financial and capital markets of one country can undermine the real economies of countries throughout the world. This reality has been underscored by the serious impact of the recent turmoil in the U.S. financial and capital markets on the real economies of countries everywhere in the world.

The financial and capital markets require a foundation of trust and mutual confidence among market participants. They provide an arena for the business activities of a wide variety of both large and small financial services enterprises. These markets are ultimately funded by individuals, given that even institutional investors are for the most part investing on behalf of individuals. The loss of confidence on the part of individuals will spell the immediate collapse of financial institutions and financial services enterprises. Thus, the financial and capital markets are in effect founded upon this foundation of the confidence of individuals.

Complaints and disputes lodged by financial services users must be speedily and appropriately resolved. Failure to do so can dangerously amplify user dissatisfaction. Moreover, this dissatisfaction will not only affect the financial services enterprise directly involved in the particular dispute, but will spill over to undermine confidence in financial services enterprises in general. Ultimately, this carries the risk of ending in a loss of confidence in the financial and capital markets in their entirety. In order to avoid this outcome, it is imperative to resolve disputes in a simple and speedy manner and to thereby ensure the continued confidence of individual customers in financial services enterprises. In this sense, a system capable of providing reasonable and flexible resolutions in financial disputes and complaints constitutes a key infrastructure element that is indispensable in maintaining the sound development of the financial and capital markets.

This Proposal presents a model for an ideal financial ADR organization to serve as part of the infrastructure of Japan's financial and capital markets. This Proposal also outlines a process for the realization of this ideal financial ADR organization.

Throughout this Proposal, the importance of the financial and capital markets is emphasized and the significance of an ideal financial ADR system as an indispensable infrastructure element is explained. It should be noted that these issues were all approached from the perspective of contributing to the welfare of individuals as the constituent members of society. The aim of an ideal financial ADR organization would be to duly protect the financial assets of individual users of financial services and to ensure that these users are treated fairly in the markets by financial services enterprises. It is important that financial services enterprises accept the responsibility of creating and providing a framework under which these individual users are not treated lightly but are provided with just relief with due speed, even in financial disputes involving amounts that are very minor from the perspective of financial services enterprises. This Proposal calls for the establishment of a financial ADR organization

that will function as a key infrastructure element in the financial and capital markets in Japan, and which will ultimately contribute to the creation of a better society by protecting the interests and dignity of the individual constituent members of that society.

Appendices

Appendix 1. Characteristics of Judicial Processes and Existing ADRs

Section 1: Advantages and Problems Related to Existing Means for Complaint and Dispute Resolution

This section provides an overview of what is commonly believed to be the advantages and problems of existing means for the resolution of complaints and disputes related to financial services that are generally available to consumers as outlined below.

- Litigation in courts of law
- Consultation with local Consumer Affairs Centers (National Consumer Affairs Center of Japan)
- Consultation with the legal advice desks of local bar associations and judicial scriveners associations
- Consultation with the Japan Legal Support Center (*Houterasu*)
- Filing for arbitration in courts of law
- Filing for mediation by mediation organizations (including mediation and arbitration centers of bar associations)
- Consultation and filing of complaints with industry-based ADR organizations

1. Consultation at Various Consultation Desks

Consultation with local Consumer Affairs Centers (National Consumer Affairs Center of Japan), legal advice desks of local bar associations, the Japan Legal Support Center (*Houterasu*) and various other consultation desks generally have the following advantages and problems. Note that these points do not necessarily apply to all cases.

(1) Advantages

Advantages	Explanations
Access	The various consultation desks are relatively well known, and it is very easy for users facing legal trouble to access these services.
Cost	There is no charge for consulting with local Consumer Affairs Centers and *Houterasu*. There are fixed charges for consulting with local bar associations and judicial scriveners associations. Although they may vary according to type of consultation, these charges are not high compared to the cost of litigation. Note that additional charges may arise for obtaining appropriate advice when details of the case cannot be properly covered in one session of approximately 30 minutes, or when legal investigation is required.
Mediation by integrated desk (*Houterasu*)	The *Houterasu* provides an integrated desk for consultation on all types of legal problems, including advice on systems, procedures and related organizations. This provides speedy and low cost (free) information on access to available relief procedures for all forms of disputes, including disputes related to financial services, and facilitates filing with an appropriate dispute resolution organization.

(2) Problems

Limitations	Explanation
Effective dispute resolution	The various consultation desks do not perform dispute resolution functions[44] and are therefore frequently ineffective in resolving disputes.
Expertise	• The *Houterasu* is frequently chosen as the first point of contact by complainants. However, it is very likely that individual consultants do not have expert knowledge of financial services. • Local Consumer Affairs Centers have expert knowledge of matters that have developed into major social problems, which have resulted in the sharing of common know-how. However, they do not necessarily have sufficient expertise on disputes involving complex financial services. • Bar associations and judicial scriveners associations are manned by legal experts and have general expertise in dispute resolution. However, it is probable that they do not have expertise related to complex financial services.

[44] However, in certain instances, local Consumer Affairs Centers mediate between users and enterprises to resolve disputes.

2. Litigation in Courts of Law

(1) Advantages

Advantages	Explanations
Fairness and neutrality	Litigation procedures in courts of law are subject to strict judicial procedures and are undertaken in a fair and neutral setting. As a traditional and well-developed means for resolving disputes, litigation can in many cases be expected to result in legally justifiable resolutions.
Enforceability	Court decisions are binding and provide a means to enforce the resolution of disputes on counterparties.
Predictability	To a significant degree, courts are bound by legal precedents. Combined with the publication of court cases with high precedence value, the courts generally provide a high level of predictability for similar cases.

(2) Problems

Problems	Explanation
Time needed for resolution	In recent years, court procedures have been sped up by the revision of the Code of Civil Procedure and through more efficient management of court processes. However, given the systemic difficulties in conducting concentrated deliberations in civil cases, dispute resolution through litigation continues to require considerable time.
Cost	Disputes pertaining to financial services frequently involve relatively small amounts of money. However, litigation generally requires the hiring of a lawyer or a certified judicial scrivener, which involves substantial expenses. This may render litigation not worth the effort.
Expertise	Courts are involved in the resolution of all forms of disputes and are not restricted to disputes pertaining to financial services. Therefore, the courts do not necessarily have expert knowledge of specific financial services unless related disputes have developed into major social problems. As a result, in gathering information necessary for the resolution of a financial services related dispute, the courts may be unduly swayed by the assertions and evidence produced by parties to the dispute. However, a significant structural asymmetry exists between users and enterprises in their access to information. Because users are not necessarily able to produce sufficiently convincing assertions and evidence, it cannot be denied that the courts may be swayed by the assertions and evidence produced by enterprises.
Protection of privacy	In principle, court procedures are public. Because of this systemic characteristic, it is highly likely that the privacy of users will not be adequately protected.
Flexibility of procedures and resolution	When seeking relief through court procedures, the complainant must present his/her claim to the court and to the counterparty at the filing stage, and must establish the

Problems	Explanation
	cause of litigation and describe the legal rights and obligations involved. However, in some disputes involving financial services, it is difficult to legally establish the cause of claim.[45] Such disputes are generally unsuited for court procedures that are conducted under strict conditions. Moreover, in such disputes, it is important to arrive at a truly justified resolution (resolutions that are justified also from the perspective of the proportionality of the procedure) even if this means veering somewhat from strict legal interpretations. However, settlements reached through court procedures are significantly affected by such factors as the course of the litigation and the negotiating positions of counterparties, which are based on projections of the outcome of litigation. Therefore, such types of settlements may not necessarily provide an appropriate means for dispute resolution.
Familiarity	Combined with the above perspective, users may continue to hold the view that court procedures are difficult to understand and difficult to utilize.

[45] For instance, in disputes involving financial services transactions that may be considered to be inappropriate from the perspective of providing suitable financial services to general consumers, it may not be immediately apparent that the relevant enterprise is liable by reason of wrongdoing. While establishing the cause of litigation in such instances may prove difficult to do, the case may still merit a certain degree of protection. In such disputes, flexible and speedy resolutions are desirable such that users are not excessively burdened.

3. ADR Procedures of Judicial Institutions

Filing for arbitration in courts of law and mediation by mediation organizations (including the mediation and arbitration centers of bar associations) generally have the following advantages and problems.

(1) Advantages

Advantages	Explanations
Fairness and neutrality	Arbitration and mediation procedures using the courts of law and the mediation and arbitration centers of bar associations can be expected to provide fair and neutral decisions that are not biased for or against either of the two sides. This is because such procedures are conducted in a fair and neutral setting by committees comprised mainly of members of the legal community, academic experts and the general public.
Flexibility of procedures and resolutions	Unlike litigation, these procedures provide ample flexibility. In addition to evaluating the legal merits of a case, arbitrators and mediators can prompt the disputing parties toward compromise based on commonsense considerations. As such, with the consent of the disputing parties, arbitrators and mediators can be expected to shape resolutions that correspond to actual conditions.
Protection of privacy	Because the procedures are closed to the public, the privacy of users can be protected.

(2) Problems

Problems	Explanation
Expertise	Arbitrators and mediators may not necessarily have adequate expert knowledge of disputes pertaining to complex and advanced financial services. Therefore, users and enterprises may feel uncertain of the ability of arbitrators and mediators to fully understand the financial services problems pertaining to the case and to speedily arrive at an appropriate resolution proposal.
Dual consent	If the user opts for arbitration or mediation procedures, and if the enterprise involved in the dispute is reluctant to submit to these procedures, the enterprise may intentionally work toward failure of the procedures. This could undermine the effectiveness of arbitration and mediation as a means for dispute resolution.

4. ADR Procedures of Industry Associations

Consultation with and filing for ADR procedures with industry associations generally have the following advantages and problems. For a summary of the ADR organizations of major industries, see "Section 2: Overview of Industry-Based ADR Organizations."

(1) Advantages

Advantages	Explanation
Expertise	These organizations have the highest level of expert knowledge on the financial services provided by members of their own industry association, and can render decisions that correspond to the characteristics and contents of the financial service in question.
Unilaterally binding	The procedures of industry-based ADR organizations are not inherently binding or enforceable. For this reason, some industry associations have introduced measures to enhance the effectiveness of their procedures by obligating member enterprises to participate in ADR procedures or rendering resolution proposals unilaterally binding on enterprises, thus preventing enterprises from refusing to participate in arbitration or mediation without due cause.
Cost	As far as this Research Group has been able to ascertain, the complaint resolution support services provided by all industry associations can be used without charge. Similarly, in the case of many industry associations, dispute resolution support services are provided without charge or at low cost.
Flexibility of procedures and resolutions	Unlike litigation, these procedures provide ample flexibility. In addition to evaluating the legal merits of a case, a dispute resolution support staff can prompt the disputing parties toward compromise based on commonsense considerations. As such, with the consent of the disputing parties, a dispute resolution support staff can be expected to shape resolutions that correspond to actual conditions.
Protection of privacy	Because the procedures are closed to the public, the privacy of users can be protected.

(2) Problems

Problems	Explanation
Access	As far as this Research Group has been able to ascertain, access to industry-based ADR organizations by telephone and visits to consult on complaints is limited to weekday business hours. Very few industry associations allow for access by e-mail or the Internet. Furthermore, participation in dispute resolution support procedures that are based on interviews[46]

[46] On the other hand, interview-based procedures can be useful in sorting out the details of a case and promoting better understanding with both parties.

Problems	Explanation
	can prove to be very burdensome for users.[47]
Industry jurisdictions	In certain cases, it is difficult for financial services users to accurately determine which industry association has jurisdiction over the financial products or services that they have purchased. Therefore, in a system comprised solely of industry-based ADR organizations, users will have difficulty determining where to file their complaints and disputes.[48]
Public recognition	The existing industry-based ADR organizations are not as well known to the public as other complaint and dispute resolution support procedures.
Unilateral structure	Industry-based ADR organizations endeavor to maintain fair and appropriate management.[49] Notwithstanding these efforts, users are prone to thinking that ADR organizations established by industry associations to which their counterparties in dispute belong are unable to maintain neutrality in their decisions or that they are not neutral in their standing.

[47] Some industry associations have introduced measures to reduce the burden on users of dispute resolution support procedures. For instance, users living in distant locations are interviewed at the closest regional office using teleconferencing systems, or industry associations pay for the use of regional offices or other conference facilities located close to consumers where they can file for mediation.

[48] Some industry associations have jointly established rules for transferring problems that involve a multiple number of industry associations and disputes that relate to adjacent industries. In other cases, several industry associations make the referral and transferring of cases with consumer organizations. However, cases straddling a number of industries can easily lead to the problem of complainants getting the run-around. Note that the following organizations have established and are experimenting with a common switchboard for receiving telephone inquiries, which are then forwarded to the pertinent organizations based on the content of the inquiry: Japan Securities Dealers Association, Financial Futures Association of Japan, Japan Commodities Fund Association, Japan Securities Investment Advisers Association and Investment Trusts Association of Japan.

[49] Industry associations appear to be making various efforts to create systems to ensure fairness. For example, in the case of a number of industry associations, the arbitration and mediation committees of their ADR organizations include multiple numbers of lawyers, academic experts (scholars and others), consultants of consumer organizations and staff members and retired staff of the industry association.

Section 2: Overview of Industry-Based ADR Organizations

This section presents an overview of the ADR organizations of major industry associations related to financial services. Note that in addition to other public materials and results of questionnaire surveys of industry associations, this section makes extensive use of the following made available in meetings of the Financial Service Dispute Resolution Liaison Group established under the Financial Services Agency: "Efforts for Complaint and Dispute Resolution Support by Financial Industry and Self-Regulatory Organization (Fiscal 2006)" (hereinafter referred to as the FY2006 Report of the Financial Service Dispute Resolution Liaison Group) released in the 33rd meeting held on June 12, 2007; and "Efforts for Complaint and Dispute Resolution Support by Financial Industry and Self-Regulatory Organization (Fiscal 2007)" (hereinafter referred to as the FY2007 Report of the Financial Service Dispute Resolution Liaison Group) released in the 37th meeting held on June 17, 2008).

1. Major Industry Associations and ADR Organizations Related to Financial Services

(1) Industry Associations and Their ADR Organizations

Selected major industry associations[50] and their ADR organizations are listed below (for convenience, hereinafter referred to as "specified major industry associations" and "specified ADR organizations").

(Table 1)

Industry Association	Complaint Resolution Support Organization	Dispute Resolution Support Organization
Life Insurance Association of Japan (LIAJ)	Life Insurance Consultation Centers (54 locations)	Arbitration Council (1 location)
General Insurance Association of Japan (GIAJ)	General Insurance Counseling Centers (11 locations) Automobile Insurance Claims Counseling Centers (48 locations)	General Insurance Arbitration Committee (1 location)

[50] In the remainder of this section, unless otherwise noted, the term "industry association" refers to the following industry associations that are members of the Financial Service Dispute Resolution Liaison Group:
Financial Futures Association of Japan, JF Marine Bank Consultation Office, Trust Companies Association of Japan, Life Insurance Association of Japan, Japanese Bankers Association, National JA Bank Consultation Office, National Association of Shinkin Banks, Community Bank Shinyo Kumiai, National Association of Labour Banks, Investment Trusts Association of Japan, Japan Financial Services Association, Japan Securities Dealers Association, Japan Securities Investment Advisers Association, Commodity Futures Association of Japan, Japan Commodities Fund Association, General Insurance Association of Japan, Association for Real Estate Securitization, Issuance of Advanced Payment Certificate Association.

Industry Association	Complaint Resolution Support Organization	Dispute Resolution Support Organization
Japanese Bankers Association (JBA)	Consumer Relations Offices (51 locations)	Mediation Committee[51] (1 location)
Japan Financial Services Association[52] (JFSA)	Complaints consulting desks (48 locations)	None
Japan Securities Dealers Association (JSDA)	Securities mediation and consulting centers (2 locations)	Securities mediation and consulting centers[53] (2 locations)
Financial Futures Association of Japan (FFAJ)	Complaints consulting office (1 locations)	Complaints consulting office (1 location)
Commodity Futures Association of Japan (CFAJ)	Consulting centers (3 locations)	Mediation and arbitration commissions (3 locations)

(2) Member Enterprises

(Table 2)

Industry Association	Number of Members	Licensed/Approved/ Registered Enterprises	Membership Percentage
LIAJ	46 companies (as of Oct. 2008)	46 licensed life insurance companies (as of Aug. 27, 2008)	100%
GIAJ	26 companies (as of Apr. 18, 2008)	52 licensed general insurance companies (as of Apr. 1, 2008)	50%
JBA	190 banks (excluding bank holding companies and special members) (as of Oct. 14, 2008)	213 licensed banks (as of May 7, 2008)	89%
JFSA	3,561 companies (as of Sept. 24, 2008)	9,115 registered financial services companies (as of Mar. 31, 2008)	39%
JSDA	321 member companies (Type I financial instruments businesses) 211 special member	403 registered Type I financial instruments businesses (as of June 30, 2008) 1,157 registered financial institutions	80%

[51] In the past, the Japanese Bankers Association had delegated its dispute resolution support procedures to the mediation centers operated by local bar associations. However, as of October 1, 2008, the Japanese Bankers Association established its own "Mediation Committee" and has been certified as a certified investor protection organization under the provisions of the Financial Instruments and Exchange Act.

[52] The Japan Financial Services Association was established on December 19, 2007 and is licensed by the prime minister.

[53] The mediation procedures of the Japan Securities Dealers Association were certified under the ADR Promotion Act on June 30, 2008.

Industry Association	Number of Members	Licensed/Approved/ Registered Enterprises	Membership Percentage
	institutions (registered financial institutions) (as of Oct. 1, 2008)	(as of Aug. 31, 2008)	19%
FFAJ	211 member companies 5 special participating companies (as of Sept. 30, 2008)	Financial instruments companies engaged in financial futures trading, and registered financial institutions * Number of registered companies/institutions engaged in financial futures trading is not known	Not known
CFAJ	60 member companies (as of Sept. 29, 2008)	61 companies engaged in commodities trading (licensed to conduct commissioned commodities trading) (as of Aug. 29, 2008)	98%

(3) Number of Cases Handled

(Table 3) * Fiscal 2007

Industry Association	Consultations	Complaint Resolution Support (of which cases of failure)	Dispute Resolution Support (of which cases of failure)
LIAJ	9,989	3,822 (1,143)	55 (3)
GIAJ	92,975	2,131 (not known) *1,639 cases resolved	10 (1)
JBA	38,700	492 (53)	0 (-) [54]
JFSA	8,108	43 (3)	None
JSDA	6,438	773 (173)	194 (67)
FFAJ	12	139 (8)	10 (1)
CFAJ	2,901	200 (53)	182 (34)

[54] The Japanese Bankers Association previously delegated its dispute resolution support procedures to the mediation centers operated by local bar associations. This figure represents the number of cases of dispute resolution support undertaken by the mediation centers of bar associations during fiscal 2007.

(4) Average Period to Resolution

(Table 4) * Fiscal 2007

Industry Association	Complaint Resolution Support Procedures	Filing of Complaint – Dispute Resolution
LIAJ	42 days	160 days
GIAJ	Not known	148 days
JBA	Not known (many cases are resolved within one week)	N/A
JFSA	10 days	N/A
JSDA	6 days	81 days *from filing of dispute resolution support procedures to resolution
FFAJ	3 weeks	100 days
CFAJ	60 days	208 days

2. Organization

(1) Structure

A. Facilities Established

◎ Complaint Resolution Support Organizations

Facilities of Complaint Resolution Support Organizations	Industry Associations
1 location (Tokyo only)	FFAJ
2 locations (Tokyo, Osaka)	JSDA
3 locations (Tokyo, Osaka, Nagoya)	CFAJ
11 locations (in most Higher Court locations)	GIAJ (General Insurance Counseling Centers)
In most prefectures	LIAJ, GIAJ (Automobile Insurance Claims Consulting Centers), JBA, JFSA

◎ Dispute Resolution Support Organizations

Facilities of Dispute Resolution Support Organizations	Industry Associations
None	JFSA
1 location (Tokyo only)	LIAJ, GIAJ, JBA, FFAJ
2 locations (Tokyo, Osaka)	JSDA
3 locations (Tokyo, Osaka, Nagoya)	CFAJ

Based on the above number of facilities and "Number of Cases Handled" (Fiscal 2007) indicated in Section 1, it can be concluded that, with certain exceptions, the number of dispute resolution support cases generally corresponds to the number of facilities operated.

B. Staff

◎ Complaint Resolution Support Staff

Complaint resolution support staff members of ADR organizations headquartered in Tokyo (or with offices in Tokyo performing headquarter functions) are as follows. (Names of industry associations are withheld because Table 5 contains some non-public information.)

(Table 5)

	Complaint Resolution Support Staff Members	Description of Staff
Industry Association A	14 (adjunct / dedicated) members 6 (full-time / dedicated) members	Industry association employees only
Industry Association B	8 (full-time / dedicated) members	Industry association employees only
Industry Association C	19 (full-time / dedicated) members	Industry association employees only
Industry Association D	3 (full-time / non-dedicated) members	Industry association employees only
Industry Association E	6 (full-time) members	Industry association employees only
Industry Association F	24 members (8 full-time, 16 adjunct)	Industry association employees and temp staff (Work experience in the industry is taken into consideration)
Industry Association G	26 members (full-time)	Industry association employees, with the exception of 1 seconded staff[55]

Aside from the dispute resolution support staff members, in most cases, the general staff is drawn from among full-time employees of the industry association. While some industry associations employ temp staff, in such cases consideration is given to previous work experience in the industry.

◎ Complaint Resolution Support Staff

According to the FY2007 Report of the Financial Service Dispute Resolution Liaison Group, the number of dispute resolution support staff members in the specified ADR organizations is as follows. Note that in addition to the staff members below, industry associations generally have established a secretariat department, and in the case of certain industry associations, some complaint resolution staff members concurrently serve in the secretariat of the dispute resolution support

[55] The seconded staff member is in charge of administrative tasks pertaining to management of the ADR organization.

organization.[56]

(Table 6)

	Dispute Resolution Support Staff Members	Description of Staff
LIAJ	7 members	Lawyers, consumer affairs consultants
GIAJ	5 members	Lawyers, academic experts
JBA	Not known	Lawyers, academic experts, consumer affairs experts, JBA directors and employees, etc.
JFSA	N/A[57]	N/A
JSDA	31 members	Lawyers
FFAJ	2 members	Lawyers
CFAJ	42 members	Lawyers, legal scholars, etc.

Dispute resolution support staff members include lawyers, academic experts (scholars), consumer organization consultants, current and former employees of industry associations and others.

When a multiple number of staff members are brought together to form a mediation or arbitration committee in a specified ADR organization, the composition of such committees general takes the following forms.

(1) Committees comprised of equal numbers of legal professionals and consumer organization consultants[58] and one member from the industry association.

(2) Committees comprised of equal numbers of legal professionals, industry association personnel, scholars and consumer organization consultants.

(3) Committees comprised solely of legal professionals.

The above committee compositions do not raise any particular doubts concerning fairness.

The annual number of cases handled by each individual dispute resolution support staff member varies among industry associations. However, as far as this Research Group has been able to ascertain, the majority fall in the range of three to ten cases per year.

[56] In some of the specified ADR organizations, the complaint resolution support member who handles the complaint resolution procedures of a certain case also handles the dispute resolution support procedures for the same user. The assignment of the same staff member to all stages of the procedures has the merit of fostering the trust of the user. On the other hand, decisions in dispute resolution support procedures may be unduly influenced by impressions and prior knowledge gained by the staff member during the dispute resolution process.

[57] Japan Financial Services Association does not have a dispute resolution support organization.

[58] According to questionnaire surveys of the specified major industry associations, some industry associations make a conscious effort to include persons from outside the industry, such as by seeking the recommendations of the National Consumer Affairs Center in selection of consumer affairs consultants.

(2) Finances

A. Operating Expenses

The operational expenses of most of the specified ADR organizations are unknown, either because these figures are not publicized or because these expenditures are included in the overall budget of the industry association. However, as far as this Research Group has been able to ascertain, some industry associations generally spend in the range of several hundred million yen per year.

Major expenditure items consist of personnel, advertising and public relations, office equipment rental, communications, electricity and heating, and consumables. Office rental expenses are also incurred when offices are established outside the facilities of the industry association.

Furthermore, as far as this Research Group has been able to ascertain, the operating expenses of ADR organizations are paid out of the budget of the respective industry association.

B. Financial Burden on Users (for dispute resolution support systems)

(1) No charge to users: LIAJ, GIAJ, CFAJ, JBA[59]

(2) Filing fees charged to users: JSDA, FFAJ (in both cases, fees range between 2,000 – 50,000 yen, depending on the claim amount)

JSDA, which charges users for filing fees, handles a larger number of dispute resolution support cases (during fiscal 2007, JSDA handled the largest number of cases among all specified ADR organizations) than other specified ADR organizations (including those that do not charge filing fees). This indicates that relatively small fees charged to users (filing or resolution fees) do not have a negative impact on user access.

(3) Access

A. Office Hours

Generally, offices are open on weekdays during business hours only.

B. Contact Method

All complaint resolution organizations can be contacted by telephone, personal visit and mail (including facsimile). Some industry associations can be contacted by e-mail and through websites.

In a majority of cases, contact is made by telephone (accounting for more than 95 percent of all contact in most of the specified major industry associations). For industry associations with two or more offices, the share of contacts made at the Tokyo office varies widely, ranging between 30 and 90 percent of all contacts.

Some specified major industry associations that do not accept contact by e-

[59] The Japanese Bankers Association previously delegated its dispute resolution support procedures to the mediation centers operated by local bar associations. During this period, the Japanese Bankers Association paid for all filing and term fees, and the user defrayed half of the resolution fee in case of successful resolution. This arrangement is worth considering because fees charged to the user correspond to benefits received by the user, thus upholding a sense of fairness.

mail express concern that availability of e-mail contact may encourage an increase in irresponsible filings. However, given the fact that a number of ADR organizations are currently accepting contact by e-mail and other electronic means, the availability of e-mail contact should not necessarily give rise to operational problems.

The following specified major industry associations have established free telephone access: GIAJ, JSDA and FFAJ.[60] Reasons given by industry associations that have not established free telephone access include concerns for abuse and budgetary problems.

3. Coverage

(1) Complaint Resolution Support Procedures: "Consultation" and "Complaints"

Complaint resolution support procedures target both "consultation" and "complaints." Under the definitions adopted by the Financial Service Dispute Resolution Liaison Group, "consultation" and "complaints" are differentiated as follows.

"Complaint:" A demand for action by counterparty based on counterparty's responsibility or obligation; or, a notification of damages incurred, or possibility of damages to be incurred, due to the content of products or services purchased, or due to sales activities.

"Consultation:" All contact initiated by users excluding complaints.

Industry-based ADR organizations appear to have adopted these definitions in categorizing the cases that are brought to them.

(2) Dispute Resolution Support Procedures: Conciliation First Principle

As a rule, most industry associations only accept cases for dispute resolution support procedures when the disputing parties have engaged in mutual negotiations for a given period of time (1 – 3 months) under a complaint resolution support system and have failed to reach a resolution.[61]

A review of the published rules and regulations of the specified ADR organizations indicates that none include explicit provisions mandating that disputing parties must first attempt conciliation. On the other hand, many of the specified ADR organizations do enforce a general principle

[60] To facilitate speedy response to consultations and complaints from users experiencing trouble pertaining to financial products and services, JSDA and FFAJ have established a joint free telephone service for receiving complaints and consultation requests ("Complaints and Consultation Desk for Financial Products Transactions") with Investment Trusts Association of Japan, Japan Securities Investment Advisers Association, and Japan Commodities Fund Association. Users of this free telephone service are guided to choose among types of products and services. To avoid confusion, calls from users who are unable to choose the appropriate category are patched through to the JSDA consultation desk.

[61] On the other hand, in the case of certain specified ADR organizations, nearly 70 percent of all cases referred to dispute resolution support procedures are done so directly without first undergoing complaint resolution support procedures.

that a case must first undergo complaint resolution support procedures before being referred to dispute resolution. The reason given for this is that attempts at dispute resolution that are not preceded by negotiation between the parties can result in situations where the case on hand has not been properly explored and the issues adequately defined. Consequently, as shown in Table 4, a relatively long period of time, ranging between approximately three to seven months, is needed to go from the filing of a complaint to the conclusion of the dispute resolution support procedures.

4. Procedures

(1) Flow Chart of Complaint Resolution and Dispute Resolution Support Procedures

The following flow chart is generally applicable to most industry-based ADR organizations.

Complaint received

↓ Notice to enterprise and request for response

Negotiation between parties (→ resolution)

↓ Complaint resolution support, including debriefing, advice, etc.

Cases unresolved after fixed time period (1 – 3 months)

↓

Filing for dispute resolution support procedures[62]

↓ Eligibility review (→ rejection)

Submission of statements and hearings

↓ Eligibility review (→ termination)

Presentation of mediation or arbitration proposals (→ refusal)

↓

Acceptance

(2) Complaint Resolution Support Procedures

The various stages of the complaint resolution support procedures of most specified ADR organizations can be summarized as follows.

Response to request for consultation; referral to other industry associations; explanation of available procedures (including litigation); debriefing; general explanation of products and services in question and related contracts, and advice on what can be expected; debriefing of position of enterprise cited in complaint; notifying the complainant of the position of enterprise cited in the complaint; instruction to enterprise to enter into negotiations; instruction to enterprise to investigate the facts of the case and to report the results of mutual negotiations; explanation of

[62] CFAJ has a two-stage dispute resolution support system. The first stage consists of mediation procedures (presentation of mediation proposal by one mediator). Only when resolution cannot be reached in the first stage does a case go to arbitration under a deliberative arbitration committee.

the dispute resolution system; confirmation of the intent of the complainant, etc.

Certain industry associations that place special emphasis on prior negotiations between the parties to the dispute do not explain the dispute resolution support procedures when a complaint is first received, and such explanations are given only after the failure of complaint resolution support procedures. While this primarily reflects the emphasis placed on resolution through mutual negotiations in the complaint resolution support procedures, in certain respects, such arrangements are difficult to appreciate from the perspective of users.

While the two parties are engaged in negotiations in the complaint resolution support process, various specified major industry associations intervene at different levels of intensity in these talks. However, a questionnaire survey of the specified major industry associations indicates that, given the intent of the complaint resolution support process, a significant number of industry associations do not have a positive view of intervention at this stage. (A number of specified major industry associations indicated that, as a rule, they do not intervene.)

(3) Dispute Resolution Support Procedures

A. Process Flow

As indicated in (1) above, dispute resolution support procedures generally go through the processes of filing → submission of statements → hearings. Regarding the hearings process, the following variations are possible: (1) hearings can be done in the form of face-to-face interviews, teleconferencing, or review of documents; and (2) interviews/hearings can be conducted jointly or separately for the two parties. Regarding the choices under (1), choices will be affected when the complainant is living in a distance location and cannot readily be present in the hearings. The questionnaire survey of the specified major industry associations indicates that the industry associations subscribe to the following basic positions on this matter.

(Table 7)

	Interview/Teleconferencing or Documentary Review	Joint Hearings or Separate Hearings
Industry Association A	• As a rule, complainant must be physically present for interview.	Interviews/hearings are conducted separately.
Industry Association B	• Hearings are preceded by review of submitted statements to clarify the issues. • Distant persons are also expected to be physically present. • Persons unable to be physically present are encouraged to use small claims courts and other means.	Interviews/hearings are conducted separately.
Industry Association C	• Hearings are held at closest regional office for distant persons and those unable to be physically present for other reasons. • Hearings are held by teleconferencing.	Interviews/hearings are conducted separately.

	Interview/Teleconferencing or Documentary Review	Joint Hearings or Separate Hearings
	• In cases involving problems at time of contract, all complainants including distant persons are required to present themselves at the offices of the counterparty.	
Industry Association D	• Hearings are preceded by review of submitted statements to clarify the issues. • Physical presence at interview is required. • Attendance by attorney or other proxies is acceptable. • Burden of physically present has been reduced by expanding interview locations to all prefectures.	Interviews/hearings are conducted both separately and jointly.
Industry Association E	• As a rule, physical presence at interview is required. • Teleconferencing and documentary review are permitted in the case of distance persons whose cases are deemed to be uncomplicated.	Interviews/hearings are conducted both separately and jointly.
Industry Association F	• Physical presence at interview is required. • Teleconferencing and documentary review are not permitted under current rules.	Interviews/hearings are conducted both separately and jointly.

B. Unilaterally Binding

As outlined below, to some degree, all specified major industry associations allow for decisions to be unilaterally binding on enterprises. These provisions take such forms as the obligation to respect decisions and the obligation to institute a suit.

◎ LIAJ

When the Arbitration Council determines that the obligation to respect decisions has been violated, the relevant life insurance company is obligated to report to the council on the reasons for having committed the violation if asked to do so. If the council determines that there are no justifiable grounds for the violation, it can publicize the violation.

◎ GIAJ

When an enterprise refuses to comply by an arbitration proposal, it is obligated to explain the reasons for its non-compliance to the Arbitration Committee. If the committee determines that there are no justifiable grounds for non-compliance, it can publicize the summary of the dispute, the final proposal, the name of the enterprise, and the reasons given for non-compliance.

◎ JBA

Member banks cannot refuse a mediation proposal without just reason. In case of refusal, the bank must explain its reasons for non-compliance to the Mediation Committee in writing.

◎ JSDA

When a member enterprise refuses to comply with a mediation proposal, it must immediately deposit with JSDA the sum of money that it has been called on to pay in the mediation proposal and must file a lawsuit for confirmation of non-liability. The above does not apply if the user who is the counterparty in the dispute has filed a lawsuit concerning the dispute covered by the mediation proposal.

◎ FFAJ

When a member enterprise refuses to comply with a mediation proposal, it must immediately deposit with FFAJ the sum of money that it has been called on to pay in the mediation proposal and must file a lawsuit for confirmation of non-liability.

◎ CFAJ

(Regarding mediation procedures) If an enterprise rejects without justifiable reasons a mediation proposal that has already been accepted by a user, necessary instructions are issued to the enterprise concerning the acceptance of the mediation proposal according to the provisions of the articles of incorporation of CFAJ. If the enterprise rejects these instructions, it is disciplined according to the provisions of the articles of incorporation.

5. Public Information

(1) Raising Public Awareness

The complaint and dispute resolution support organizations of industry associations are not necessarily well known to the average consumer. Thus, to operate an ADR organization that users can readily access and trust, the question of how to effectively raise public awareness becomes an important issue.

A. Industry Association Initiatives

◎ Public Information Media

The main initiatives undertaken by the specified major industry associations to raise public awareness of their ADR organizations are as follows.

- Explanations contained in websites and pamphlets: Done by almost all specified major industry associations.
- Newspaper and magazine advertising: LIAJ, GIAJ, JBA, JFSA, CFAJ.
- Radio advertising: JBA.
- Other media: Yellow pages (JBA), PR activities carried out through

Consumer Affairs Centers (LIAJ, CFAJ), printed materials and e-mail to customers, posters.

Some specified major industry associations are carrying out public information activities through Consumer Affairs Centers. If public information strategies are designed from the perspective of "What is the first organization that users will go to with their complaints and disputes?" an effective approach would be to work through widely recognized Consumer Affairs Centers[63] and agencies of the central government (ministries and agencies with jurisdiction) and local governments. It would also be desirable to increase the level of public information activities undertaken through other consulting organizations (bar associations, judicial scriveners associations, etc.) that are not able to render final resolutions in disputes.

◎ Explaining Procedures at Intake of Complaints

As mentioned above, some of the industry associations operating ADR organizations do not, as a rule, explain their dispute resolution support procedures to complainants when a complaint is first brought in. Explanations are given only at a later stage depending on the course taken by the case. The reason given for this is the emphasis placed by these organizations on resolution and conciliation reached through negotiations between the two parties.

By screening for cases that are difficult to resolve through mutual negotiation, this method does have the advantage of increasing the efficiency of complaint and dispute resolution.

On the other hand, it is important to provide users with the option to immediately proceed to dispute resolution support procedures. Another problem with this method is that users can come to doubt the efficacy of complaint resolution support procedures in general or may feel alienated from the entire process. This frustration can lead complainants to forego the use of the ADR organizations of industry associations. Taking these disadvantages into consideration, it would seem to be more beneficial to present complainants with the full range of choices available to them at an early stage of the procedures.[64]

The GIAJ website summarizes the procedures of its own complaint and dispute resolution support organization and the procedures of other organizations (Japan Center for Settlement of Traffic Accident Disputes, Nichibenren Traffic Accident Consultation Center) and provides a table comparing the available functions ("consultation," "mediation," "arbitration," etc.). This approach should be commended for facilitating the choice of procedures by users.

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[63] According to the September 2007 final report of the Research Group on Consumer Affairs Centers, the National Consumer Affairs Center of Japan and the Consumer Affairs Centers located throughout the country processed approximately 1.1 million complaints and consultations during fiscal 2006.

[64] This relates to the question of whether or not to maintain the "conciliation first principle" in offering the use of dispute resolution support procedures. Regarding this issue, see Section 2-3 (2) above.

B. Initiatives Taken by Member Enterprises

When purchasing financial products and services, users interact with enterprises selling these products and services, and are almost never in direct contact with the related industry association. Consequently, efforts made by enterprises to raise public recognition of ADR organizations has an important impact on raising public recognition of the industry association's ADR organization. However, according to the FY2007 Report of the Financial Service Dispute Resolution Liaison Group, very few enterprises belonging to financial services industry associations provide information on complaint and dispute resolution support procedures at the time of sale.[65] According to the FY2006 Report of the Financial Service Dispute Resolution Liaison Group, many industry associations are not aware of the public information activities of their member enterprises. This indicates that positive actions are not necessarily being taken on the part of member enterprises to raise public recognition of ADR organizations or by industry associations to encourage such actions. The probable reason for this is that individual enterprises see the provision of the above type of information, which may suggest the existence of complaints and disputes, to be incongruous with their sales activities.

The most common forms of public information activities of member enterprises consist of dissemination of information through websites (including links to industry association websites) and the display and placement of posters and leaflets at sales offices. Additionally, there are cases in which newspaper ads are used (CFAJ).

From the perspective of maintaining long-term and uninterrupted programs, the task of raising public recognition of the ADR organization of an industry association should be undertaken by the industry association and not by individual enterprises. As for what individual enterprises should do, an effective measure would be to include information on industry association ADR organizations in "various types of media that users with complaints and disputes can manage themselves, or media that can be readily accessed by users." From this perspective, it is desirable for individual enterprises to present information in company websites (in links appearing on the top page or in other easy-to-find areas of the website), contract forms, product description literature and other documents presented to customers. It is worth considering using the same wording for each individual industry association or for all industry associations.

C. Source of Information for Complainants

For complainants, the most common sources of information concerning complaint and dispute resolution support organizations are websites, consumer organizations, government agencies, telephone books, introductions from other organizations, and inquiries with industry associations.

(2) Publication of Results

With the exception of JFSA, all of the specified major industry associations

[65] LIAJ, GIAJ and CFAJ explain their complaint and dispute resolution support procedures at the time of sale. CFAJ is mandated to provide such information in its statutory preliminary documents.

publish the results of their complaint and dispute resolution support programs in their websites and public relations magazines. The frequency of publication ranges from once per year to five times per year (GIAJ). In addition, some industry associations provide summarizations of both resolved and unresolved cases.

However, a review of the websites of industry associations indicates that the publication of results most frequently takes the form of corporate reports. These reports are not necessarily compiled for the reference of users, and therefore are not written in a manner that users can easily read. From the perspective of providing information to users, it would be beneficial to improve the quality of information that is convenient for users (e.g., FAQ).

LIAJ is engaged in the following interesting undertaking. The LIAJ website contains information concerning the processing of complaints by member enterprises (number of complaints received, quarterly trends, breakdown by type of complaint, details of complaints, and efforts being made toward improvement). Regarding efforts being made toward improvement, the LIAJ website contains links to the websites of individual enterprises where this information can be checked. From the perspective of users, this type of arrangement can be said to serve many uses.

(3) Evaluation by External Evaluators

Among the specified major industry associations, LIAJ and JBA undergo evaluation by third-party evaluators.[66] JSDA has not formed a third-party evaluation organization, but solicits the views and advice of third-party lawyers appointed as special advisers. In the case of CFAJ, because third-party experts make up a majority of its directors, the board of directors performs the function of external evaluation.

There are various views on the role of third-party evaluation and efforts to improve existing systems based on such evaluations. However, regular evaluation by independent evaluators, solicitation of the views of third parties and comparison with other industry-based ADR organizations in the evaluation and hearings process (made possible through uniform evaluations conducted across industries) should prove both important and beneficial in enhancing confidence in ADR organizations and thereby raising the public profile of these organizations.

6. Collaboration with Other Organizations

(1) Exchange of Information with Outside Organizations

According to the FY2007 Report of the Financial Service Dispute Resolution Liaison Group, the status of the exchange of information between specified major industry associations and outside organizations is as follows.

[66] LIAJ has established an Arbitration Council consisting of scholars, doctors and persons related to consumer organizations and hears their opinions concerning the management of the ADR organization twice annually. JBA has established a Meeting for Discussion of Operations of Consumer Relations Offices consisting of outside experts of scholars, representatives of consumer administration agencies, persons related to consumer organizations, and lawyers and hears their opinions on the management of the ADR organization twice annually.

(Table 8)

	Information Exchange Frequency	Counterparty Organizations	Method and Content of Information Exchange
LIAJ	(1) Once/year (monthly on manager level) (2) Once/year (3) Twice/year (4) Total: more than 500 times	(1) National Consumer Affairs Center of Japan, local Consumer Affairs Centers, consumer organizations (2) Liaison Meeting of OTC Insurance Sales Organizations[67] (3) JBA (4) Seminars and study meetings held with outside organizations at the Japan Institute of Life Insurance	(1) Information exchange on director and manager levels (2),(3) Information exchange on complaints pertaining to OTC insurance sales on manager level (4) Life insurance training meetings, study meetings and seminars (including seminars for consumers)
GIAJ	(1) Minimum once/year (2) Minimum once/year	(1) National Consumer Affairs Center of Japan, local Consumer Affairs Centers, consumer organizations (2) JSDA, LIAJ, JBA, Regional Banks Association of Japan, Second Association of Regional Banks, Trust Companies Association of Japan, National Association of Shinkin Banks, Community Bank Shinyo Kumiai, National Association of Labour Banks	(1) Information exchange on cases and processing of complaints on director and manager levels; study meetings on manager level (2) Information exchange on complaints pertaining to OTC insurance sales on manager level
JBA	(1) Four times/year (2) Once/year (3) Twice/year (4) Once or twice/year	(1) Liaison Meeting of Financial Organization Consulting Centers[68] (2) Liaison Meeting of OTC Insurance Sales Organizations (3) LIAJ (4) National Consumer Affairs Center of Japan, Nippon Association of Consumer Specialists, Japan Association of Consumer Affairs Specialists, Japan	(1) Information exchange on complaint/consulting cases and processing of complaints on manager level (2),(3) Information exchange on complaints pertaining to OTC insurance sales on manager level (3) Information exchange on details and trends in bank related complaints received by various organizations

[67] The Liaison Meeting of OTC Insurance Sales Organization comprises JBA, Regional Banks Association of Japan, Second Association of Regional Banks, Trust Companies Association of Japan, National Association of Shinkin Banks, Community Bank Shinyo Kumiai, National Association of Labour Banks, Shoko Chukin Bank, Norinchukin Bank, GIAJ, JSDA and LIAJ.

[68] Members of the Liaison Meeting of Financial Organization Consulting Centers consist of JBA, Regional Banks Association of Japan, Second Association of Regional Banks, Trust Companies Association of Japan, National Association of Shinkin Banks, Community Bank Shinyo Kumiai, JA-Zenchu, National Association of Labor Banks, Shoko Chukin Bank, and Norinchukin Bank.

	Information Exchange Frequency	Counterparty Organizations	Method and Content of Information Exchange
		Consumers' Association, Tokyo Metropolitan Consumer Affairs Center	
JFSA	None	N/A	N/A
JSDA	As occasion demands	JBA, GIAJ, Regional Banks Association of Japan, Second Association of Regional Banks, National Association of Shinkin Banks	Information exchange on securities and other transactions, and cases and processing of cases involving organizations in the left column
FFAJ	None	N/A	N/A
CFAJ	(1) Once/year (2) As occasion demands	National Consumer Affairs Center of Japan and local Consumer Affairs Centers	(1) Information exchange on director and manager levels (2) Dispatch of instructors to training sessions

As shown in the above table, the specified major industry associations engaging in regular exchange of information with outside organizations can be categorized as follows: (1) those engaged in exchange of information with related industry associations on products and services straddling two or more industries (e.g., Liaison Meeting of OTC Insurance Sales Organizations, (2) those engaged in exchange of information on actual cases and processing of cases with adjacent industry organizations (e.g., Liaison Meeting of Financial Organization Consulting Centers), and (3) those engaged in study meetings and training sessions with various types of consumer organizations.

(2) Transfer of Cases to Outside Organizations

According to the FY2007 Report of the Financial Service Dispute Resolution Liaison Group, the specified major industry associations have established the following rules concerning the referral and transfer of cases to outside organizations.

(Table 9)

	Transfer Rules Exist	Counterparty Organizations	Description of Transfer Rules
LIAJ	Yes	JBA, GIAJ, JSDA, Trust Companies Association of Japan, National Association of Shinkin Banks, National Associations of Labour Banks, Shoko Chukin Bank, Norinchukin Bank	• Complaints on OTC sales that cannot be resolved by the industry association to which the OTC seller belongs are transferred to the industry association to which the original vendor of the product or service belongs. • When a filing is made with the Arbitration Council of LIAJ or to the Arbitration Committee of GIAJ for dispute resolution support in a case involving OTC sales of insurance by a financial institution, the related financial institution is obligated to

	Transfer Rules Exist	Counterparty Organizations	Description of Transfer Rules
			participate in the proceedings and to abide by the results of the decision.
GIAJ	Yes	JBA, LIAJ, JSDA, Trust Companies Association of Japan, National Association of Shinkin Banks, Community Bank Shinyo Kumiai	• Complaints on OTC sales that cannot be resolved by the industry association to which the OTC seller belongs are transferred to the industry association to which the original vendor of the product or service belongs. • As a rule, filings pertaining to bank businesses, trusts businesses, securities businesses, and life insurance businesses are transferred to the industry association with jurisdiction.
JBA	Yes	LIAJ, GIAJ, JSDA and Trust Companies Association of Japan	• With the exception of complaints that can be resolved through negotiation between the member bank and user, filings are transferred to the industry associations in the left column. • Upon transfer of a case, notifications are given to the user and the organization to which the case is transferred.
JFSA	No	N/A	N/A
JSDA	Yes	Organizations with jurisdiction over businesses conducted by JSDA members	When a complaint is filed by a user concerning matters other than securities transactions, and when the matter cannot be resolved through mutual negotiation, the case is transferred to another organization upon request of the user.
FFAJ	No	N/A	N/A
CFAJ	No	National Consumer Affairs Center of Japan and local Consumer Affair Centers	(While no explicit transfer rules have been established, local Consumer Affair Centers share information on complaints and exchange reports on status and results of cases handled by CFAJ.

As shown in the above table, for cases involving OTC sales of insurance and other matters that straddle two or more industry associations, complaint and dispute transfer rules have been established with other industry associations in certain cases.

In industry associations that have not established transfer rules, in certain instances, contact points of related organizations are provided on a case-

by-case basis. However, in the case of most industry associations, transferred cases are not maintained in a shared database, implying the possibility that these industry associations are not informed of the disposal of cases that they have transferred to others.

Generally speaking, inadequate follow-up of transferred cases can lead to user frustration. This is particularly true when cases are transferred across industry lines or when they are transferred to adjacent industry associations that may be indistinguishable to users. Moreover, even when cases are appropriately transferred according to established rules, the possibility of psychological resistance on the part of users for having been given the "run-around" cannot be denied.

In the case of CFAJ, although explicit rules have not been established, CFAJ does collaborate with consumer organizations. As previously indicated, users tend to be familiar with local Consumer Affairs Centers and other consumer organizations. In addition to serving the purpose of a public information medium, routine collaboration with consumer organizations for identifying demand can play an important role in improving accessibility to users.

7. Databases and Feedback

According to the FY2006 Report of the Financial Service Dispute Resolution Liaison Group, databases on complaints and dispute resolution support operated by the specified major industry associations and the status of feedback channels is as follows.

(1) Databases in Use

- Almost all industry associations are able to determine the number of cases processed.
- In many cases, databases are not available for cases transferred to outside organizations.
- Many industry associations do not have access to details of cases of failed resolution.

The development of databases of consultations and complaints, more thorough analysis of this information, and the provision of this information to users in general in FAQ and other forms would be beneficial in raising the level of confidence in industry-based ADR organizations.

(2) Feedback of Information

- Comments and complaints received in meetings with consumer organizations are channeled to member enterprises (GIAJ and others), and are used in improving the operations of the industry association (JBA and others).
- Started accepting the transfer of complaints and disputes from consumer organizations (CFAJ).
- Data from individual member enterprises and analysis results are forwarded directly to the directors of member enterprises (LIAJ, GIAJ and others)

According to the above report, a relatively large number of industry associations are committed to upgrading the analysis of complaint and dispute resolution support procedures databases and the feedback of this

data to member enterprises, or to the use of this information in developing manuals and improving the skills of consulting personnel.

(3) Training Programs for Consulting Personnel
According to the FY2006 Report of the Financial Service Dispute Resolution Liaison Group and the results of questionnaire surveys of the specified major industry associations, many of the specified major industry associations depend on on-the-job training for improving the skills of their staff and the complaint resolution support members. Furthermore, in many instances, industry associations organize training sessions and seminars within their own organizations or in external training institutions (e.g., adjacent industry associations and others).

Certain industry associations participate in study meetings held jointly with consumer organizations. Such programs are beneficial as they raise the level of confidence in industry-based ADR organizations and can also be used for promoting public information through consumer organizations.

A common form of training is the sharing of case studies and reports on cases. The following unique program is offered by JBA. The Consumer Relations Office of the Tokyo Bankers Association, which receives the largest number of cases, has produced "Q&A: How to Respond to Inquiries and Consultations" (available in CD-ROM, which is updated annually), and distributes these to all consumer relations offices throughout Japan.

Section 3: Initiatives for the Improvement of Existing Financial ADR Organizations

Various measures have already been taken to develop non-judicial complaint and dispute resolution support systems in the financial field (financial ADR organizations). Responding to the June 27, 2000 recommendations of the Financial System Council, the Financial Service Dispute Resolution Liaison Group was established with the participation of consumer affairs administration agencies, consumer organizations, industry associations, self-regulatory organizations, bar associations and government financial authorities. Initiatives for the improvement of existing financial ADR organizations have been discussed in this forum over a number of years. Between September 7, 2000 and June 24, 2008, the Financial Service Dispute Resolution Liaison Group met a total of 38 times under the chairmanship of Professor Shinsaku Iwahara (University of Tokyo, Graduate Schools for Law and Politics). The main points of discussion were as follows: (1) improving inter-organization cooperation, (2) improving the transparency of complaint and dispute resolution support procedures, (3) improving follow-up of complaint and dispute resolution support cases, (4) more actively publicizing the record of achievements of complaint and dispute resolution support, and (5) improving consumer access including public relations activities. At the 38th meeting, these discussions concerning issues pertaining to the improvement of the financial ADR system were summarized in the form of a "chairman's memorandum."

According to this chairman's memorandum, there seems to be no disagreement among members of the Group on the following basic issue: To achieve fair, speedy and transparent resolution of complaints and disputes in the financial field, it is necessary to continue examining methods for further improving non-judicial dispute resolution functions in the financial field and to

establish a neutral system that can be widely used. On the other hand, the members have not necessarily reached a consensus on what constitutes the most effective method for the realization of such a system.

Various opinions have been voiced on the best approach. The first option advocated is the establishment of financial ADR organizations as self-regulatory bodies empowered to create rules that are binding on member enterprises. As in the case of the Japan Securities Dealers Association, this would be accomplished by providing for these rule-making powers in the business laws governing the respective industries. This approach would allow the development of binding self-regulatory rules in a flexible and speedy manner. Furthermore, these self-regulatory rules would provide a basis for the resolution of complaints and disputes, and would also facilitate improvements in marketing.

An opposing view holds that financial ADR organizations created as self-regulatory bodies based on business laws would not be able to ensure neutrality and fairness for users. Advocates of this position go on to argue that instead of re-writing the business laws to provide for the establishment of self-regulatory bodies, the effectiveness of ADR functions could be adequately ensured through more limited legislative action. One available course of action would be the following. First, establish a "financial ADR certification system" based on laws and ordinances defining the requirements for certification, such as assurance of neutrality and fairness, and the appointment of mediators and arbitrators with expert knowledge in financial matters. Second, mandate all financial enterprises to enter into contracts with certified ADR organizations as a prerequisite for licensing, and include the following obligations in these contracts: obligation to participate in procedures, obligation to negotiate in good faith, and obligation to comply with the outcome of procedures.

On this point, the chairman's memorandum of the Financial Service Dispute Resolution Liaison Group advocates a gradual and staged approach as follows. "For the future, it is desirable to establish a unified and comprehensive third-party type organization. However, the process of creating a unified and comprehensive system contains many challenges that remain to be overcome and which require careful consideration, such as how to properly ensure adequate levels of expertise and timeliness in procedures. In light of these challenges, many views were expressed in support of the following approach. Regarding the development of financial ADR organizations by various industry associations, the first step should be to raise organizational and operational standards to desirable levels through voluntary and legally mandated measures. Secondly, cooperative relationships among financial ADR organizations should be strengthened. Finally, medium- to long-term approaches should be examined while these steps are being implemented." The following example is presented in the chairman's memorandum as a template for such an approach. "Regarding a vision for a cross-industry ADR organization, members representing bar associations and industry associations expressed the following views. (1) Because a one-stop entry point is desirable, a cross-industry institution should be established that is assigned the intake function for all cases. (2) Received cases that require the making of actual decisions should then be transferred to industry-based ADR organizations that have the necessary expertise for dispute resolution. (3) The cross-industry institution assigned the intake function should follow up on and maintain files on complaint

and dispute cases. By widely publicizing this information, it would be possible to create a mechanism for checking the performance of industry-based ADR organizations."

Appendix 2. The Financial Ombudsman Service of the United Kingdom

Japan Financial ADR/Ombudsman Research Group
Sub-Group for the Study of Financial ADR and Ombudsman Systems in the United Kingdom and Other Countries

Section 1: Introduction

In recent years, the Japanese financial system has undergone a series of reforms designed to promote optimal financial services through free competition encouraged by eliminating barriers between various segments of the industry. Similarly, government administration of financial affairs is moving the direction of changes that will shift the emphasis toward self-regulation. A liberalized financial framework needs as its foundation an effective private-sector based financial dispute resolution system that is widely supported as a fair system, not only by financial services enterprises but also by consumers. In a liberalized financial system, it is essential for market participants to take actions conducive to the establishment of various principles that will ensure fairness in the operation of the system. Against this backdrop and with this awareness, the Japan Financial ADR/Ombudsman Research Group was formed in April 2007 for the purpose of investigating the ideal private-sector based financial ADR organization, and for formulating recommendations and proposals contributing to its establishment.

The Research Group initially was divided into four sub-groups engaged in basic research. One of these sub-groups was assigned the task of "studying financial ombudsman systems in the United Kingdom and other countries." In considering what would constitute the ideal financial ADR system for Japan, it is of course essential to understand the conditions and problems that are specific to Japan. However, the research Group believed that it would also be beneficial to investigate the financial ADR systems of foreign countries and to glean various lessons and reference materials from their experiences.

The study of the financial ADR and ombudsman systems in foreign countries began with an investigation of the history and current status of financial ADR organizations in a number of countries and in the European Union (EU). The aim of this part of the study was to identify the following: the historical and social factors that prompted the development of such systems; problems and obstacles experienced in the development of these systems, and how they were overcome; details of currently operating systems; and, current problems and issues of these systems.

A survey of the financial ADR systems of various countries of the world indicates that the Financial Ombudsman Service (FOS) of the United Kingdom has the most interesting history. It has also had considerable influence on the development of systems adopted by other countries. Moreover, FOS appears to be the best functioning financial ADR system. London is a leading international financial center and its financial dispute resolution systems constitute a key element in the infrastructure of this center. Moreover, it is widely known that self-regulation by market participants has provided the foundation for the development of the London financial markets. For these reasons, the Research Group concluded that investigation and study of the U.K. financial ADR system

would yield many beneficial results.

The investigation and study of FOS was undertaken from this perspective and the results of this effort were shared with the entire Research Group. While the Research Group's recommendations and proposals for the establishment of an ideal financial ADR system will be separately published, the results of the investigation and study of FOS provide important background for better understanding the Research Group's recommendations and proposals. Moreover, the preservation of a full record of this study was thought to be meaningful in itself. Therefore, the results of the study of FOS are being preserved and presented in this document entitled "The Financial Ombudsman Service of the United Kingdom."

Section 2: History of the Establishment of the Financial ADR System in the United Kingdom

The history of the development of the U.K. non-judicial financial complaint resolution system is the history of the development of the "ombudsman system." The word "ombudsman" is borrowed from the Swedish where it has the meaning of mediator or arbitrator. In common use, the word has come to denote a person charged with the task of rendering a decision and rectifying a situation where some form of injustice or wrongdoing is suspected. For this reason, the U.K. financial industry came to use "ombudsman" to refer to persons charged with investigating and rendering decisions on complaints filed against financial companies by their customers. The U.K. "ombudsman system" developed as a complaint resolution institution centered on such ombudsmen. With this in mind, a historical survey of the financial ombudsman system in the United Kingdom will be attempted in this section. A key development in the history of the system occurred with the enactment of the Financial Services and Markets Act 2000 (FSMA 2000) whereby the various ombudsman systems that were functioning in each segment of the industry were integrated and unified into the Financial Ombudsman Service Limited (FOS) that is invested with the powers of jurisdiction and enforcement over the industry. Hence, the following historical review is divided into two sections covering the periods before and after the establishment of FOS.

1. Before FSMA 2000

(1) Creation of Ombudsman System

While the origins of the U.K. ombudsman system go back to 1967 and the establishment of a system for relief and compensation in cases of government maladministration[69], the type of financial ombudsman system envisioned in this study was first established in 1981. This was the Insurance Ombudsman Bureau (IOB) established voluntarily by a number of insurance companies.[70] This initiative was prompted by the enactment of the Insurance Companies Act 1975, which corresponds to Japan's

[69] Pursuant to the Parliamentary Commissioner Act, the Parliamentary Commissioner for Administration was established with commissioners playing the role of ombudsman. (Tsuyoshi Hiramatsu, *Onbuzuman seido* [Ombudsman system], Gendai gyoseiho taikei 3.

[70] Adam Samuel, *Consumer Complaints and Compensation: A Guide for the Financial Services Market* (London: City & Financial Publishing, 2005), 1.6.1.

Insurance Business Act, and the Insurance Brokers (Registration) Act 1977. Another contributing factor was the failure of a life insurance company in 1979. Note that a revised Insurance Companies Act was enacted in 1982.

Yet another contributing factor was the Unfair Contract Terms Act 1977.[71] This law placed certain restrictions on contractual exclusion clauses stipulating exclusion of liability in cases of breach of contract or negligence, and rendered unfair contract terms unenforceable. However, as stipulated in the exemptions of the First Schedule, insurance contracts were exempted from the provisions of this law (First Schedule 1.(a)).[72]

This exemption was adopted in response to the insurance industry's argument that the insurance business required the government's protection and did not need such a law because extensive self-regulatory rules already existed in the industry. However, the adoption of this exemption triggered a flood of complaints filed by individual insurance policyholders who argued: Unlike other industries, why are insurance companies accorded such significant contractual exclusions of liability? And if insurance contracts are subject to exclusions of liability, why does the insurance industry fail to explain these exclusions fully to customers before the purchase of insurance? As such, the complaints were directed toward the exemption as well as to the violation of duty of care on the part of insurance brokers.

To avoid further government regulation, the insurance industry was pressured to effectively respond to the flood of complaints by proving the reasonableness and certainty of its self-regulatory rules to the public. The insurance industry acted by designing IOB as an organization charged with supervising compliance with the industry's self-regulatory rules, and for processing policyholder complaints from a third-party perspective.[73]

To ensure its impartiality, IOB was designed as follows. Ombudsmen were appointed by a council comprised of scholars, persons related to consumer organizations and persons with ties to the insurance industry. The council was responsible for formulating the rules for dispute resolution, and was characterized as follows. (These characteristics were carried over to the U.K. ombudsman system that was later established.)

(1) The decisions rendered by ombudsmen were only binding on the enterprise, and an unsatisfied complainant retained the option to litigate (unilaterally binding decisions).

(2) Decisions were based on the criteria of "what is fair and reasonable." As such, decisions were not bound by laws, legal precedence or rules of evidence.

(3) Dispute resolution procedures were subject to the discretion of the ombudsman. Depending on the situation, the ombudsman was

[71] This can be accessed at http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?&actno=Reved-396&date=latest&method=part.

[72] See http://www.businesslink.gov.uk/bdotg/action/detail?type=RESOURCES&itemId=1074405689 and http://www.berr.gov.uk/consumers/buying-selling/sale-supply/unfair-contracts/act/index.html.

[73] Hiroto Dogauchi, "Eikoku ni okeru kinyu kankei onbuzuman seido – 1" [The U.K. financial ombudsman system – 1], *Horitsu Jiho* 64, no. 3 (1992).

empowered to opt for advice, mediation, informal recommendation, and decision.[74] The start of complaint resolution procedures by the ombudsman was predicated on the complainant's prior use of the internal complaint resolution procedures established by the counterparty enterprise.

While many insurance companies were reluctant to join IOB at the time of its establishment (fearing that ombudsmen with wide discretionary powers would act as "protectors of the consumers"), IOB took root in the insurance industry within few years. Subsequently, similar systems were established in other segments of the financial industry, beginning with the Office of the Banking Ombudsman in 1986. In the same year, the establishment of the Office of the Building Societies Ombudsman was mandated under the Building Societies Act.[75]

(2) Enactment of the Financial Services Act 1986

The Financial Services Act 1986 was enacted as the first comprehensive statutory regulation of the financial services industry. Respecting the City of London's long-standing tradition of self-regulation, the law established the Securities and Investment Board (SIB), under which were placed a number of self-regulatory organizations. The law stipulated that no one could engage in or attempt to engage in investment businesses unless they were members of a government approved self-regulatory organization (Articles 3 and 7). As such, the law mandated the establishment of self-regulatory organizations and membership in such organizations. Government approval as a self-regulatory organization required the establishment of effective rules for the investigation of complaints lodged against the organization and its members. (The law also contained measures for transferring all or part of the complaint investigation functions to an independent organization, which thereupon would take responsibility; Financial Services Act 1986, Schedule 2, 6.1, 6.2.) Following the enactment of this law, the Life Assurance and Unit Trust Regulatory Organization (LAUTRO) joined IOB,[76] while other various self-regulatory organizations started to establish their own complaint processing rules.[77]

(3) Development of the Ombudsman System Through Self-Regulatory Organizations

Following the enactment of the Financial Services Act 1986, the

[74] Takashi Kanzaki, "Kinyu sabisu ni okeru saibangai funsoshori seido no arikata –Eikoku no hoken onbuzuman wo chushin ni" [Alternative dispute resolution systems for financial services – The U.K. insurance ombudsman service], *Journal of Insurance Science* 567 (1999).

[75] Dogauchi, "Eikoku ni okeru kinyu kankei onbuzuman seido – 1," (1992).

[76] Complaints that IOB was not authorized to process were handled by the Complaints Sub-committee of the regulatory authority. Dogauchi, "Eikoku ni okeru kinyu kankei onbuzuman seido – 1," (1992).

[77] Tatsuo Uemura et al., *Kinyu sabisu shijo hosei no gurando dezain* [Grand design for financial services market regulation], (Tokyo: Toyo Keizai, Inc., 2007). Also see Dogauchi, "Eikoku ni okeru kinyu kankei onbuzuman seido – 1," (1992) and Hiroto Dogauchi, "Eikoku ni okeru kinyu kankei onbuzuman seido – 4" [The U.K. financial ombudsman system – 4], *Horitsu Jiho* 64, no. 3 (1992).

Investment Management Regulatory Organization (IMRO)[78] established an ombudsman system under the Office of the Investment Referee (hereinafter referred to as Investment Referee). According to the internal rules of IMRO, member enterprises had to establish and abide by their own internal systems for complaint resolution, which were required to be effective, appropriate and explicitly stipulated. Moreover, member enterprises were obligated to cooperate with the Investment Referee and the complaint resolution procedures established by IMRO.[79] Consequently, IMRO members were automatically obligated to comply with the ombudsman system operated under the Investment Referee. In 1994, the Financial Intermediaries Managers and Brokers Regulatory Association (FIMBRA), which was experiencing financial difficulties, merged with LAUTRO to create a new self-regulatory body, which was named the Personal Investment Authority (PIA). Following this action, the Personal Investment Authority Ombudsman Bureau (PIA Ombudsman) was created to handle complaints lodged against PIA member enterprises.[80] Thereby, as in the case of IMRO, PIA members became obligated to comply with the PIA Ombudsman system.[81] Thus, the enactment of the Financial Services Act 1986 provided the impetus for the development of ombudsman systems by self-regulatory organizations. In 1993, the United Kingdom Ombudsman Association was created as an association of various ombudsman systems (in both the private and public sectors). (This was later enlarged to also cover the Republic of Ireland, becoming the British and Irish Ombudsman Association.) Since then, this association has been engaged in providing information and advice on ombudsman services as well as establishing criteria for and recognition of ombudsman schemes.[82]

Ombudsman systems prior to FSMA 2000 were well received by both consumers and the financial services industry for their speed of resolution, and no-cost and simple procedures that did not require the participation of proxies. On the other hand, ombudsman systems were recognized to have the following problems: (1) the impartiality and independence of ombudsmen were not adequately maintained,[83] and (2) overlapping jurisdictions of ombudsman systems with differing procedures caused confusion among consumers.[84]

2. Changes After FSMA 2000

(1) Financial Systems Reform Under FSMA 2000

As mentioned above, under the Financial Services Act 1986, the United

[78] This was created jointly with FIMBRA, but FIMBRA withdrew in 1991.

[79] Dogauchi, "Eikoku ni okeru kinyu kankei onbuzuman seido – 4," (1992).

[80] Samuel (2005).

[81] Dogauchi, "Eikoku ni okeru kinyu kankei onbuzuman seido – 1,"(1992).

[82] See http://www.bioa.org.uk/index.php.

[83] It has also been argued that ombudsmen maintained adequate independence (from enterprises subject to their decisions).

[84] Hiroto Dogauchi, "Eikoku ni okeru kinyu kankei onbuzuman seido – 5" [The U.K. financial ombudsman system – 5], *Horitsu Jiho* 64, no. 9 (1992), and Dogauchi, "Eikoku ni okeru kinyu kankei onbuzuman seido – 1," (1992).

Kingdom had opted for a system that emphasized self-regulation. However, this approach came under review following a number of scandals in the financial sector, including a series of disputes involving personal pension solicitation and the Maxwell case (1991).[85] Following these events, on May 20, 1997, the Ministry of Finance announced a program for financial systems reform under FSMA 2000 citing the following considerations: (1) The delegation of supervisory responsibility to various self-regulatory organizations under the Financial Services Act 1986 had created confusion among investors. Moreover, the statutory system was ineffective and lacked sufficient explanation and clarification of the assignment of responsibilities. (2) Furthermore, due to the ambiguity in boundaries between various financial services businesses, under the existing statutory system, financial services enterprises were subject to excessive supervision by the self-regulatory organizations of other segments of the industry, resulting in high costs and low efficiency.[86] The specific features of the announced financial systems reform were as follows. First, supervisory authority over banks and other institutions would be transferred from the Bank of England to the Financial Services Authority (FSA; renamed from SIB). Second, the nine (self-) regulatory organizations[87] established under the Financial Services Act 1986 would be integrated into FSA to create a single regulatory institution with supervisory and regulatory powers over the entire financial services industry.[88]

(2) Reform of Ombudsman Systems Under FSMA 2000

As part of the financial systems reforms undertaken under FSMA 2000, the decision was made to reorganize the U.K. financial ombudsman system. Specifically, under FSMA 2000, just as FSA was placed in charge of supervising the entire financial sector, the eight existing financial

[85] Robert Maxwell, the owner of a major media company, abused his position as chairman of the company's pension board to redirect money from the pension fund for use in corporate investments. Following the failure of some investments, many employees were unable to receive pension benefits.

[86] Statement of the Chancellor to the House of Commons on the Bank of England, HC Debs, May 20, 1997. (http://www.hm-treasury.gov.uk/statement_chx_200597.htm)

[87] The nine regulatory organizations were: the Building Societies Commission (with jurisdiction over residential building societies), the Friendly Societies Commission (with jurisdiction over friendly societies), the Insurance Directorate (ID) of the Department of Trade and Industry (with jurisdiction over insurance businesses), IMRO (with jurisdiction over investment management), PIA (with jurisdiction over personal investment retail sales), the Registry of Friendly Societies (with jurisdiction over credit unions), the Securities and Futures Authority (SFA: with jurisdiction over securities and derivatives businesses), SIB (with jurisdiction over investment businesses), and the Supervision and Surveillance Division of the Bank of England (with jurisdiction over banking businesses).

[88] FSA, *Financial Services Authority: an outline* (October 1997)

ombudsman systems[89] were integrated into a single ombudsman system that took the name of Financial Services Ombudsman Scheme Ltd. (later renamed Financial Ombudsman Service Ltd.: hereinafter FOS). Pursuant to the provisions of FSMA 2000 Chapter 16 (Ombudsman Scheme), the new and comprehensive ombudsman system created through this reform was given powers of jurisdiction and enforcement (s226. FSMA 2000) over all financial services enterprises under FSA supervision. This framework is said to have had the following advantages: (1) provides single receiving channel for filing of complaints and unified procedures, (2) improves public recognition, (3) fills in the gaps between existing ombudsman systems, (4) yields economies of scale, and (5) establishes independence and transparency.[90] Basically, FOS has carried forward the three salient features of the pre-FSMA 2000 ombudsman systems (see 1.(1) of present section). Its objectives were enumerated as follows in its First Annual Report: (1) to provide a free one-stop complaint resolution service, (2) to provide speedy complaint resolution with minimum formality, (3) to provide user-friendly information and to promote dispute avoidance, (4) to render consistent, fair and reasonable decisions, (5) to achieve efficiency and cost-effectiveness, (6) to ensure access to the disadvantaged and vulnerable members of society, (7) to effectively utilize new technologies and to be forward-looking, adaptable and flexible, and (8) to earn the trust and respect of consumers, the industry and other interested parties. Since its founding, FOS has proven itself by handling a large number of cases. A total of 627,814 new inquiries were received during financial year 2007.[91] New complaints handled by adjudicators (see Section 4-2 below) and ombudsmen totaled 94,392 cases. Complaints resolved at the adjudicator stage totaled 104,831 cases, and those resolved at the ombudsman stage came to 6,842 cases.[92] The tables below indicate (i) number of new inquiries received by FOS, and (ii) number of new cases of complaints handled by adjudicators and ombudsmen in recent years.

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[89] These eight organizations were: the Office of the Banking Ombudsman (with jurisdiction over banks), the Office of the Building Societies Ombudsman (with jurisdiction over residential building societies), the Office of the Investment Ombudsman (with jurisdiction over companies regulated by IMRO), the Insurance Ombudsman Bureau (with jurisdiction over insurance companies and brokers), the Personal Investment Authority Ombudsman Bureau (with jurisdiction over companies regulated by PIA), the Personal Insurance Arbitration Service (with jurisdiction over insurance companies), the Securities and Futures Authority Complaints Bureau and Arbitration Service (with jurisdiction over companies regulated by SFA), and the FSA Complaints Unit and Independent Investigator (with jurisdiction over companies regulated by FSA (SIB)). (CP4)

[90] Joint Committee on Financial Services and Markets – First Report, dated April 27, 1999 (http://www.publications.parliament.uk/pa/jt199899/jtselect/jtfinser/328/32802.htm).

[91] Financial year refers to the 12-month period beginning on April 1 of the previous year and ending on March 31 of the designated year. Thus, financial year 2007 refers to the period between April 1, 2006 and March 31, 2007. The same applies hereafter.

[92] Figures are from FOS, *Annual Review* 2006/07.

(i) Number of New Inquiries Received

FY	Inquiries by telephone	Inquiries in writing	Total
2004	291,892	256,446	548,338
2005	328,999	285,149	614,148
2006	359,131	313,842	672,973
2007	341,455	286,359	627,814

(ii) Number of New Cases Handled by Adjudicators and Ombudsmen

FY	Number of New Cases
2001	31,347
2002	43,330
2003	62,170
2004	97,901
2005	110,963
2006	112,923
2007	94,392

(Above figures are from FOS *Annual Review* 2006/07.)

FOS has gradually expanded the scope of complaints handled. Complaints pertaining to mortgaged loan brokers and other housing loan financing companies were added in October 2004, followed by insurance brokers in January 2005, and consumer credit businesses on April 6, 2007 based on the Consumer Credit Act 2006. (Complaints pertaining to certain new consumer credit businesses were added in October 2008.)[93]

(3) FIN-NET

FIN-NET was established in February 2001 as a network of 48 financial services complaint resolution organizations centered on EU member countries.[94] The establishment of FIN-NET was prompted by the growing integration of Europe's retail financial markets and the need to maintain confidence in these markets by providing customers with a means to resolve disputes involving these markets through their own national schemes and using their own national languages.[95] FIN-NET is discussed in detail in "Section 6: Principles of FIN-NET," which is contained in "Appendix 3: Principles of European Financial Ombudsman Systems." The thinking that the existence of an easy-to-use complaint resolution system is essential to maintaining market confidence was also a motivating force in the creation of the comprehensive FOS in the United Kingdom. In fact, it appears that the creation and development of FOS played an important role in generating interest in establishing a network of complaint resolution organizations covering the entire EU.

[93] FOS, "Our Role in Settling Consumer-Credit Disputes." (http://www.financial-ombudsman.org.uk/publications/technical_notes/quick_guides.html)

[94] FIN-NET covers the EU, Iceland, Lichtenstein and Norway.

[95] FIN-NET, *FIN-NET Activity Report, 2001-2006*.

(4) INFO

The International Network of Financial Services Ombudsman (INFO) was established in the second half of 2007 as a worldwide organization of financial ombudsman systems providing non-judicial dispute resolution procedures in the financial field. Currently, dispute resolution organizations from 16 countries[96] are members of INFO.

The purpose of INFO is to promote the development of the dispute resolution capabilities of member organizations. INFO is engaged in referral of cross-border cases and the exchange of information concerning training, schemes and functions of ombudsman system, and governance. It promotes cooperation among member organizations by organizing conferences, workshops, training programs and internships.

While INFO is relatively new, it can be said that it has taken a step forward from the EU's FIN-NET to provide a global forum for the exchange of information on financial ombudsman systems throughout the world.

Section 3: Range of Disputes Covered

1. Financial Enterprises and Products Covered

FOS covers all of the approximately 26,000 financial enterprises in the United Kingdom and all of the financial products offered by these enterprises within the United Kingdom. Financial enterprises comprise the following: banks, building societies, mortgage companies and mortgage brokers, credit unions, companies handling electronic money, life insurance companies and other insurance companies and brokers of their respective products, pension systems, investment companies, investment consulting companies, securities companies, and securities brokers. As FOS covers all services provided within the United Kingdom, U.K. branches of foreign financial companies and transactions undertaken by these branches come under FOS jurisdiction. On the other hand, overseas branches of U.K. financial companies and transactions undertaken by these branches are excluded from FOS jurisdiction.

For financial year 2008, the breakdown by industry of new cases received was as follows. Complaints pertaining to banks accounted for 59 percent of all cases, followed by 14 percent for investment product-providers, 11 percent for general insurers, 4 percent for independent financial advisers, 4 percent for building societies, a combined 3 percent for fund managers, stock brokers and businesses with consumer-credit license, 3 percent for general insurance intermediaries, and 2 percent for mortgage intermediaries[97]

Products that come under FOS jurisdiction comprise all financial activities and financial services. For examples, these include deposits, loans, credit cards, debit cards, cash cards and mortgages.

For financial year 2008, the breakdown by product of new cases received was as follows. Complaints pertaining to bank transactions and credit

[96] These countries are Australia, Austria, Canada, Denmark, France, Greece, Ireland, Isle of Man, Italy, New Zealand, Peru, Trinidad and Tobago, South Africa, Switzerland, the United Kingdom, and the United States.

[97] FOS, *Annual Review* 2007/08, 64.

cards accounted for 56.5 percent of all cases (further broken down into 57 percent for current accounts, 20 percent for credit cards, 10 percent for mortgages, and 4 percent for unsecured loans). Insurance products accounts for 22 percent of all cases, followed by 11 percent for mortgage endowments (a combined insurance and loan product where the loan principal is repaid using the proceeds of the endowment policy at maturity) and 10.5 percent for investments and pensions.[98]

2. Complainants

Persons eligible to file complaints with FOS are the following: individual consumers and their proxies, small businesses with annual turnover equivalent to less than 200 million yen, charity organizations with annual income equivalent to less than 200 million yen, and trusts with trust assets equivalent to less than 200 million yen.[99]

Section 4: Complaint and Dispute Resolution Procedures and Dispute Resolution Standards

1. Complaint and Dispute Resolution Procedures as Defined by Rules

The complaint and dispute resolution procedures stipulated in the *FSA Handbook: Dispute Resolution: Complaints* (hereinafter FSA Handbook)[100] can be very roughly summarized as follows. The FSA Handbook assigns a central role to the ombudsmen, who are empowered to designate members of the staff of FOS to exercise any of the powers of the ombudsman relating to the consideration of a complaint apart from the power to render a final decision on a complaint. (Certain other powers relating to the determination of a complaint are also excluded.) (FSA Handbook, 3.9.1A) As discussed below, many of the functions are actually performed by receiving staff members, adjudicators and others. FOS procedures are discussed in Sub-section 2 below.

(1) Receiving of Complaints

When a complaint is received, the ombudsman must consider the following matters.

(i) Whether the complaint comes under the jurisdiction of FOS (FSA Handbook, 3.2)

(ii) Whether the complaint has been made within a certain period of time (FSA Handbook, 2.8 and 3.2.2)

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[98] FOS, *Annual Review* 2007/08, 21.

[99] Shigehito Inukai and Keiko Tanaka, eds., *Nihonban kinyu ombuzuman e no koso* [*Towards a Japanese Financial Ombudsman System*], LexisNexis, 102-3.

[100] The FSA Handbook is a compilation of the various rules and regulations established by FSA based on the powers given to it under FSMA 2000. The FSA Handbook is available through the Internet (http://www.fsa.gov.uk/Pages/handbook/), on CD-ROM and in print form. The Internet edition is updated daily (CD-ROM and print editions are updated monthly). The FSA Handbook is divided into a number of blocks, which are in turn divided into modules. *Dispute Resolution: Complaints* (DISP) is one of the modules of Block 5 (Redress) and contains rules and guidance on financial enterprises' internal processing of complaints concerning financial services provided, and guidelines on the management of FOS operations for ensuring speedy and flexible resolution of complaints.

(iii) Whether the complaint has been made by an eligible complainant (FSA Handbook, 2.7)

(iv) Whether the complaint should be dismissed without consideration (FSA Handbook, 3.3)

(2) Procedural Time Limits (FSA Handbook, 2.8, etc.)

Of the matters to be considered by the ombudsman as outlined under (1) above, item (ii) relates to certain procedural time limits. Specifically, the ombudsman cannot, as a rule, accept a complaint when any of the following conditions apply.

(a) If less than eight weeks have elapsed since the enterprise received the complaint (does not apply if the enterprise has already sent its final response to the complainant).

(b) If more than six months have elapsed since the enterprise sent its final response to the complainant.

(c) As a rule, if more than six years have elapsed since the event complained of, or (if later) more than three years have elapsed since the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint.

If less than eight weeks have elapsed since the enterprise received the complaint, the ombudsman must refer the matter to the enterprise cited in the complaint, unless the enterprise has already issued its final response (FSA Handbook, 3.2.2). The ombudsman becomes able to consider a complaint if the enterprise has not issued its final response within eight weeks from the date on which it received the complaint.

In very exceptional cases, if the ombudsman judges that it was not possible to observe the above time requirements, the ombudsman may consider a complaint even after the lapse of the time periods indicated above.

(3) Grounds for Dismissal (FSA Handbook, 3.3)

As indicated under (1)(iv) above, under certain conditions, FOS may dismiss a complaint without considerations. A total of 17 reasons for dismissal are defined (FSA Handbook, 3.3.4), the most important ones of which are as follows. The ombudsman may dismiss a complaint without considering its merits if the ombudsman deems that:

(i) The complainant has not suffered (or is unlikely to suffer) financial loss, material distress or material inconvenience.

(ii) The complaint is frivolous or vexatious.

(iii)The complaint clearly does not have any reasonable prospect of success.

(iv) The responding enterprise has already made an offer of compensation (or goodwill payment) that is fair and reasonable in relation to the circumstances alleged by the complainant, and is still open for acceptance.

(v) The subject matter of the complaint is being dealt with by a comparable independent complaints scheme or dispute resolution process, or is the subject of current court proceedings, unless proceedings are stayed or sisted (by agreement of all parties, or order

of the court) in order that the matter may be considered under FOS).

(vi) The complaint is about investment performance.

(4) Resolution of Complaints by the Ombudsman (FSA Handbook, 3.5, etc.)

The ombudsman is required to attempt to resolve complaints at the earliest possible stage and by whatever means appear to be most appropriate (FSA Handbook, 3.5.1). The ombudsman may inform the complainant that it might be appropriate to complain against some other enterprise (FSA Handbook, 3.5.2). The ombudsman may conduct an investigation when deemed necessary (FSA Handbook, 3.5.4). In the course of the investigation, the ombudsman may invite the parties to take part in a hearing (FSA Handbook, 3.5.5) and can direct the parties to submit evidence (FSA Handbook, 3.5.11). The ombudsman can include evidence that would not be admissible in court, and can accept information in confidence (so that only an edited version, summary or description is disclosed to the other party) (FSA Handbook, 3.5.9). The ombudsman can fix (and extend) time limits for any aspect of the consideration of a complaint by FOS (FSA Handbook, 3.5.13). Finally, the ombudsman can refer a complaint to another complaint scheme when he considers that it would be more suitable for the matter to be determined by that scheme (FSA Handbook, 3.4.1).

(5) Awards by the Ombudsman (FSA Handbook, 3.7)

Where a complaint is determined in favor of the complainant, the ombudsman's determination may include one or more of the following: money award, interest award, cost award, and direction to the responding enterprise (FSA Handbook, 3.7.1). The ombudsman can make a money award deemed fair compensation for financial loss, pain and suffering, damage to reputation, and distress or inconvenience (FSA Handbook, 3.7.2). A money award may be made regardless of whether or not a court would award compensation.

The maximum money award that the ombudsman can make is £100,000 (FSA Handbook, 3.7.4). Regardless of this limit, if the ombudsman deems that fair compensation required payment of a larger amount, he may recommend that the responding enterprise pay the balance of the amount to the complainant (FSA Handbook, 3.7.6).

An interest award provides for the amount payable under the money award to bear interest at a given rate from the date specified in the award (FSA Handbook, 3.7.8). A cost award is an amount the ombudsman considers to be fair, which covers some or all of the costs reasonably incurred by the complainant in respect of the complaint (and may include interest on that amount) (FSA Handbook, 3.7.9). However, the following guidance is provided regarding cost awards. Because in most cases complainants should not need to have professional advisers to bring complaints to FOS, awards of costs are unlikely to be common (FSA Handbook, 3.7.10).

The ombudsman may issue a direction requiring the responding enterprise to take such steps in relation to the complainant as the ombudsman considers just and appropriate (whether or not a court could order those steps to be taken) (FSA Handbook, 3.7.11).

Decisions made by the ombudsman are unilaterally binding on the responding enterprise. The responding enterprise must comply promptly with any award or direction made by the ombudsman, and any settlement to which it has agreed at an earlier stage of the procedures (FSA Handbook, 3.7.12).

2. Actual FOS Procedures[101]

Inquiries and complaints brought by consumers to FOS are initially processed by the Customer Contact Division. Such complaints can be made by telephone, in writing and through the FOS website. To help socially disadvantaged complainants, staff members are available for filling out forms on behalf of complainants. Support in minority languages is also provided.

One of the features of the system is the effort made toward resolution of complaints at an early stage. For this purpose, Customer Contact Division staff members are directed to provide the most appropriate response possible at the receiving stage. In other words, instead of only giving very general explanations, the receiving staff members are allowed to resolve simple cases (simple misunderstandings, requests for second opinion, etc.) on their own. No case fee is charged at this stage.

When deemed necessary, cases that cannot be handled by receiving staff alone are transferred to an adjudicator. While a case fee arises at this point, the fee is payable only by the responding enterprise. At this stage, the adjudicator obtains additional information needed in the investigation and separates cases that do not come under FOS jurisdiction (such as cases subject to dismissal as outlined above). Next, based on an understanding of the positions of both parties, the adjudicator attempts to resolve the case by proposing a resolution. At this stage, based on investigations, the initial view of the resolution proposal is presented.

Cases that are not resolved at this stage are forwarded to further investigation and adjudication. Following further investigation and attempts at mediation, a mediation proposal is presented in writing. If both parties accept this proposal, the dispute is resolved at this point.

Cases that remain unresolved are forwarded to the final stage for the decision of the ombudsman. As indicated above, the decision rendered by the ombudsman is binding only on the responding enterprise. In actual practice, only a very small percentage of cases make it to the final stage of decision by ombudsman.

3. Dispute Resolution Standards

The ombudsman renders his decision on a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case (FSMA 2000 s. 228 (2), FSA Handbook, 3.6.1). In determining what is fair and reasonable in all the circumstances of the case, the ombudsman takes into account (1) relevant [1] laws and regulations, [2] regulators' rules, guidance and standards, and [3] codes of practice. Furthermore, (2) the ombudsman (where appropriate) takes into account what he considers to

[101] For fuller description of procedures, see Yoshiyuki Otsuki, "Eikoku kinyu onbuzuman seido no kenkyu *(II)*" [Research on U.K. financial ombudsman system (II)], *Songai Hoken Kenkyu* 66, no. 3 (Nov. 2004), 54-.

have been good industry practice at the relevant time (FSA Handbook, 3.6.4). Consequently, the ombudsman can provide relief to a consumer who has suffered damages as a result of the "inappropriate" (but not illegal) actions of a financial institution.[102] Unlike court procedures, the ombudsman's complaint resolution procedures are extremely flexible, so long as they are basically fair and reasonable. Thus, the system is intended to provide speedy, real and appropriate resolutions to disputes.

Dispute resolution under these standards provides individual dispute resolution personnel with considerable discretion, giving rise to the possibility of inconsistencies in outcome. However, the adjudicators (who are responsible for cases prior to submission to the ombudsman for a determination) work on the same teams as the ombudsman and are close to each other. Consequently, adjudicators can frequently ask the ombudsman's opinion on guidelines for the resolution of a case and the existence of similar and prior cases. This exchange ensures a level of consistency in outcome.[103] In the training sessions conducted to cover the skills and information needed by staff working at FOS, special attention is also paid to developing a common understanding of "what is fair."[104]

Various measures are taken to increase predictability from the perspective of financial companies. For instance, a technical advice desk (http://www.financial-ombudsman.org.uk/contact/tech-advice.htm) has been established to provide the complaint resolution staff of financial companies with professional advice on complaint resolution. Various lecture programs and publications are also undertaken to actively publicize the cases processed by FOS, the conclusions reached and the thinking of FOS.

The following are two case studies presented at a sub-session of the INFO 2007 London Conference (2007 conference of the International Network of Financial Services Ombudsmen) to promote understanding of ombudsman decision standards.

Case 1:

Mr. X sought investment advice from an investment consulting company. Mr. X had invested in the stock market prior to retirement, and was now looking for better investments. In the case under

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[102] The following portion of the judgment rendered in *R v. Financial Ombudsman Service*, EWHC 1153 (2005) was cited in the judgment rendered in a case filed against FOS by an investment consulting company *R v. Financial Ombudsman Service and Simon Lodge*, EWCA Civ 624 (2008). "… the scheme does not require the ombudsman to make a decision in accordance with English law. If the ombudsman considers that what is fair and reasonable differs from English law, or the result that there would in English law, he is free to make an award in accordance with that view, assuming it to be a reasonable view in all the circumstances." In the latter judgment indicated above, the judge stated that he has arrived at the same conclusion as in the cited judgment, and goes on to state the following. "I do not find this conclusion surprising, given that their expressed object is to create 'a scheme under which… disputes may be resolved quickly and with minimum formality." This matter is also discussed in Inukai and Tanaka, *Nihonban kinyu ombuzuman e no koso* [*Towards a Japanese Financial Ombudsman System*], LexisNexis, 128.

[103] Ibid, 126.

[104] Ibid, 151.

consideration, two investments were made in "high risk" bonds in 2000 as follows: £60,000 (about 12 million yen) was invested in Series 3 bonds, and £53,000 (about 10.6 million yen) in Series 5 bonds. These were linked to a financial product, which in turn was linked to the Eurostoxx 50 index. At maturity, both investments showed losses. Mr. X lodged a complaint on the grounds that the investment consulting company had assured him that there was no risk of the financial product falling below par.

The investment consulting company stated that the investment they had recommended was consistent with the stock investment portfolio and prior experience of the complainant.

The ombudsman determined that, given the complainant's advanced age and the fact that the investment amounted to 40 percent of his personal funds, the investment in this financial product was inappropriate. However, the ombudsman did not support the complaint with regard to the first investment in Series 3, which amounted to 20 percent of the complainant's funds, on the grounds that the complainant was aware of the risk involved. Thus, the complaint was accepted with regard to the second investment in Series 5 in consideration of the investor's age and on the grounds that it was inappropriate to raise the stake in a high-risk investment to 40 percent of the complainant's funds.

Case 2:

Mr. and Mrs. T are living together. Mr. T does not work because he is not well, and his wife also does not work. The couple depends on government benefits paid to Mr. T.

In April 2004, Mrs. T applied for a loan of £13,000 (about 2.6 million yen) for the purpose of consolidating a number of existing debts. The bank approved this loan based on the couple's income. At the same time, the bank sold a repayment insurance policy to Mrs. T at the cost of £2,816.41 (about 560,000 yen), and added this amount to its loan. As a result, the total loan amount came to £15,816.41 (about 3.16 million yen), which was to be repaid over a five-year period in monthly installments of £339.41 (about 68,000 yen).

In January 2005, Mr. and Mrs. T made plans for a vacation. For this purpose, they jointly applied for a loan of £10,000 (about 2 million yen) to be repaid in two installments of £3,000 and £7,000. The bank approved this loan, and again attached a repayment insurance policy at a cost of £2,166.45 (about 430,000 yen), which was added to the loan. Thus, the second loan amounted to a total of £12,166.45 (about 2.43 million yen), which was to be repaid over a five-year period in monthly installments of £261.08 (about 52,000 yen). Mrs. T was identified as the primary borrower.

After March 2005, Mr. and Mrs. T were no longer able to make their monthly payments of £600 (about 120,000 yen).

In the case study sub-session, there was no discussion of whether or not the complainants in the two cases had understood the explanations given them by the financial companies concerning their transactions. Furthermore, there was no opposition voiced against the position that

both Mr. X and Mr. and Mrs. T should be compensated, and most of the discussion revolved around the details of compensation. In Case 1, the advice given by the investment consulting company was deemed inappropriate. In Case 2, the provision of excessive loans was deemed inappropriate. In both cases, it was determined that relief should be provided to the complainant because the transactions veered from good industry practices of providing fair and reasonable financial services.

4. Relation to Judicial Procedures

FSMA 2000 contains no provisions defining the relation between determination of the ombudsman and judicial procedures. However, as FOS is a public institution, financial services companies naturally have the right to pose the following questions for judicial review. Does the substance and process of the ombudsman's determination exceed the scope of the discretionary powers assigned by FSMA 2000 to the ombudsman? Does the determination violate the rule of law, or does it in any way infringe upon constitutional rights?[105] If the ombudsman's determination is rejected in court, the court would be expected to hand down a ruling nullifying the ombudsman's determination and instructing the ombudsman to reconsider the case in accordance with guidelines provided by the court.[106]

However, in order for the courts to reject a determination made by the ombudsman, the respondent must prove one or more of the following to be true for the case under consideration: (1) that the ombudsman has exceeded the scope of his jurisdiction in resolving a dispute, (2) that the principle of natural justice has been violated, (3) that the determination is unreasonable (a determination that could not have been reached by a reasonable ombudsman in all the circumstances of the case). In a certain court case where the ombudsman admitted that he had erred in the application of the law, the case was nevertheless dismissed on the grounds that condition (3) above had not been violated. As in this instance, it appears to be difficult for the courts to reject an ombudsman's determination.[107]

On the other hand, pursuant to the provisions of FSMA 2000, a complainant can enforce any money award registered by the ombudsman or a direction made by the ombudsman through the courts (FSA Handbook, 3.7.13).

Section 5: Outline of Organization and Personnel (including decision-making on management policies)

1. Organization

FOS is a public and independent organization established under the provisions of Part XVI and Schedule 17 of FSMA 2000, and Section 59 of the Consumer Credit Act 2006.

FOS is constituted as a "Company limited by guarantee" as provided for in

[105] *R v. Financial Ombudsman Service and Simon Lodge*, EWCA Civ 624 (2008).

[106] Inukai and Tanaka, *Nihonban kinyu ombuzuman e no koso* [*Towards a Japanese Financial Ombudsman System*], LexisNexis, 130.

[107] Samuel, *Consumer Complaints and Compensation*, 625. Also see the court judgments referred to in footnotes 102 and 105.

the Companies Act 1985. FOS is not capitalized, and the liability of each member in the event of dissolution is limited to £1. This liability extends to all FOS members at the time of dissolution and all previous members who have left FOS less than one year before dissolution, and covers the debts and liabilities contracted by FOS before the member ceases to be a member of FOS.[108] In other words, FOS nominally has shares, but is constituted as a limited liability company without capital in the form of a fund.

2. Outline of Organization

The members of FOS consist of the subscriber to the Memorandum of Association and any director who agrees to be a member.[109] General meetings of members can be convened as annual general meetings or specially convened general meetings. In both instances, each member has one vote. The functions of the annual general meeting are as follows.[110]

(1) Receive and examine accounting records and audit reports.

(2) Appoint auditors.

(3) Approval of transactions and businesses requiring approval by general meeting

FOS also has a board, which currently is comprised of nine directors. FSA appoints the directors and appoints one of them as chairman of the board. The appointment of the chairman of the board requires the approval of HM Treasury.[111] As a rule, the term of office of a director is three years, but a director may be reappointed by FSA. In case of reappointment, a director can serve for no more than ten years from the time of his/her initial appointment. The term of office of the chairman of the board is five years. In case of reappointment by FSA and approval by HM Treasury, the chairman of the board can serve for no more than ten years from the time of his/her initial appointment.[112] Directors cannot have anything to do with the processing of individual cases. The functions of the board are as follows.[113]

(1) To conduct the affairs and business of FOS for the year concerned.

(2) To prepare a draft financial budget for the year concerned for approval by FSA.

(3) To determine who shall represent FOS in legal proceedings.

(4) To appoint individual ombudsmen and a chief ombudsman while endeavoring to maintain the independence of ombudsmen.

(5) To prepare and publish annual reports.

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[108] Memorandum of Association of Financial Ombudsman Service Limited (hereinafter Memorandum of Association), Article 8.

[109] Articles of Association of Financial Ombudsman Service Limited (hereinafter Articles of Association), Article 2.

[110] Articles of Association, Articles 39 – 43.

[111] Memorandum of Association, Article 4 (b) and (c).

[112] Memorandum of Association, Article 4 (e) and (f).

[113] Articles of Association, Article 6-15.

(6) To formulate and adopt internal rules, subject to FSA approval.

(7) To obtain money for the purposes of FOS, subject to FSA approval.

An ombudsman makes recommendations for the resolution of complaints in accordance with FOS rules.[114] During financial year 2008, FOS had a total of 37 ombudsmen, of which one was the chief ombudsman and two were principal ombudsmen. Almost all ombudsmen were attorneys at law.[115]

In addition to the above, FOS has a total of about 1,000 employees, including adjudicators and the staff members of the Customer Contact Division, and the IT, accounting, personnel and general affairs divisions.[116]

3. Income and Expenditures

For the ratio of personnel expenses in total FOS expenditures, see "Section 7: Financial Foundations and Funding."

Section 6: Designs for Ensuring Confidence and Promoting Use (including soliciting of participating enterprises)

Financial services companies operating in the United Kingdom are required by law to participate in FOS (compulsory jurisdiction). On the other hand, various measures have been taken to encourage consumers to use FOS. First, consumers are not charged any form of fee. Second, as previously noted, the system is devised to provide, to the greatest extent possible, flexible resolutions that are speedy, fair and reasonable. The above may be considered to be designs for promoting use. Another factor encouraging use by consumers is that determinations of the ombudsman are unilaterally binding on enterprises. Finally, to maintain the level of quality required for the resolution of financial disputes, FOS provides its employees with various training programs.

FOS is assured an independent status and is vested with various rights and powers by law, as outlined above. Moreover, the principles of speedy, fair and reasonable resolution contribute to ensuring the confidence of both consumers and enterprises in FOS.

Section 7: Financial Foundations and Funding

1. Overview

FOS is required to prepare an annual budget before the start of each financial year and to seek the approval of FSA. (The budget can be altered with the approval of FSA.) The annual budget must include an indication of the distribution of resources deployed in the operation of FOS, and the amounts of income FOS arising or expected to arise from the operation of the scheme, distinguishing between compulsory and voluntary jurisdiction (FSMA 2000, Schedule 17, para. 9). The main sources of income indicated in the budget, or the financial underpinnings of FOS, are the following: (1)

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[114] Articles of Association, Article 23.

[115] Inukai and Tanaka, *Nihonban kinyu ombuzuman e no koso* [*Towards a Japanese Financial Ombudsman System*], LexisNexis, 150.

[116] Ibid, 139.

payments made by associations under the jurisdiction of FOS, and (2) fees paid for complaint resolution. FSA has the legal authority to establish rules concerning payments to be made by associations under the jurisdiction of FOS and fees payable to FOS (FSMA 2000, s. 234 and Schedule 17, para. 15, 16, 18). Pursuant to this, rules pertaining to (1) and (2) are stipulated in *FSA Handbook*, Reference code FEEDS5: "Financial Ombudsman Service Funding." The income and expenditures of FOS in recent years is summarized in the table below.

(Unit: £ million and ¥ million, except resolution cost per case)
(Unless otherwise indicated, all figures are based on exchange rate of September 1, 2008: £194.8/¥)

Income	2006/07 (Final amounts) £ million (¥ million)	2007/08 (Budget amounts) £ million (¥ million)	2008/09 (Budget amounts) £ million (¥ million)
Payments	16.6 (3,233.68)	19.4 (3,779.12)	21.7 (4,227.16)
Case fees	36.1 (7,032.28)	37.9 (7,382.92)	33.6 (6,545.28)
Others	0.4 (77.92)	0.4 (77.92)	0.3 (58.44)
Uncollectible	(0.6) (116.88)	(0.4) (77.92)	(0.4) (77.92)
Total	52.5 (10,227)	57.3 (11,162.04)	55.2 (10,752.96)

Expenditures	2006/07 (Final amounts) £ million (¥ million)	2007/08 (Budget amounts) £ million (¥ million)	2008/09 (Budget amounts) £ million (¥ million)
Personnel and other staff related expenses	42.4 (8,259.52)	43.6 (8,493.28)	37.7 (7,343.96)
Professionals	0.7 (136.36)	0.8 (155.84)	0.9 (175.32)
IT	1.8 (350.64)	2.3 (448.04)	1.7 (331.16)
Rent and facilities related expenses	6.0 (1,168.8)	6.4 (1,246.72)	5.8 (1,129.84)
Other expenses	0.6 (116.88)	0.7 (136.36)	0.7 (136.36)
Depreciation	2.5 (487)	3.2 (623.36)	2.2 (428.56)
Sub-total	54.0 (10,519.2)	57.0 (11,103.6)	49.0 (9,545.2)
Interest payments	0.2 (38.96)	0.3 (58.44)	0.4 (77.92)

Expenditures	2006/07 (Final amounts) £ million (¥ million)	2007/08 (Budget amounts) £ million (¥ million)	2008/09 (Budget amounts) £ million (¥ million)
Total	54.2 (10,558.16)	57.3 (11,162.04)	49.4 (9,623.12)
Restructuring expenses	0 (0)	0.0 (0.0)	0 (0)
Income minus expenditures (deficit amount)	(1.7) (331.16)	0.0 (0)	5.8 (1,129.84)
Total number of cases resolved	111,673	106,500	84,000
Resolution cost per case	£ 484 (¥ 94,283.2)	£ 535 (¥ 104,218)	£ 584 (¥ 113,763.2)

2. Payments

Enterprises and associations engaged in businesses under the jurisdiction of the ombudsman system operated by FOS (those subject to compulsory jurisdiction, to the consumer credit jurisdiction[117], and to voluntary jurisdiction) are required to make payments to FOS for covering its expenses. Through consultation, FSA and FOS determine the amount of the budget to be defrayed by payments collected from participating enterprises and associations. Based on this, FSA determines the amount of payment to be made by each industry block. (This allocation ratio is computed based on the number of staff members assumed to be needed for resolving the complaints pertaining to each industry block.) Industry blocks with high allocation ratios in financial year 2008 were the following: Industry block 4 (35.5 percent) consisting of insurance companies subject to both regulations pertaining to soundness and business activities (long-term life insurers); Industry block 8 (25.3 percent) consisting of advisory arrangers, dealers and brokers holding or controlling client money and/or assets; Industry block 1 (10.0 percent) consisting of deposit acceptors and mortgage lenders and administrators; Industry block 2 (8.9 percent) consisting of insurance companies subject only to regulations pertaining to soundness; and, Industry block 9 (8.0 percent) consisting of advisory arrangers, dealers and brokers not holding or controlling client money and/or assets. In combination, these industry blocks account for nearly 90 percent of total allocations. After the allocation for each individual industry block has been determined, the allocated amount is divided among enterprises and associations corresponding to their business scale (a flat rate is charged in some industry blocks). In the case of a small-scale financial advisory enterprise, this amount comes to about £100 per year. For major banks and large insurance companies, the amount exceeded

[117] Consumer credit operations were placed under the compulsory jurisdiction of the ombudsman system of FOS under the provisions of the Consumer Credit Act 2006. For this reason, the computation of payments differs from that applicable to other associations subject to compulsory jurisdiction. Regarding entities that obtained or renewed their licenses for consumer credit operations during financial year 2007, payment amounts were determined by the Office of Fair Trading.

£300,000 per year.[118] The following table indicates the amounts of payments made by enterprises of varying types and scales.

Regulated Enterprises and Associations	2006/07 Total paid £	2007/08 Total paid £	2008/09 Total paid £
Bank or building society with more than 2 million relevant accounts	11,630	18,000	35,600
General insurance company with £100 million of relevant gross premium income	5,500	6,500	16,500
Life insurance companies with £200 million of relevant adjusted gross premium income	24,800	24,000	14,600
Investment advisory holding client money and has 50 relevant approved persons	8,000	7,500	6,500
Three-partner firm of independent financial advisers not holding client money	135	135	150
Mortgaged loans and insurance broker	50	50	60

3. Case Fees

Case fees are payable to FOS by enterprises and associations involved in cases that are referred to adjudicators. These fees apply to approximately one in six cases filed with FOS.[119] For all individual enterprises and associations, case fees are not charged for the first two cases in each year that are referred to adjudicators. Beginning with the third case, a flat fee of £400 is charged.[120]

Section 8: Postscript – Toward an Ideal Financial ADR System for Japan

As stated at the beginning of this report, this study of the U.K. Financial Ombudsman Service (FOS) was undertaken to contribute to research by the Japan Financial ADR/Ombudsman Research Group for formulating proposals for an ideal financial ADR system in light of existing conditions in Japan. Consequently, the results of this study as summarized in this document may not necessarily present a balanced and comprehensive view of FOS.

What can be done to establish an effective financial ADR organization in Japan? With this question in mind, let us review the main features of FOS to examine the reasons for its success, which can be summarized as follows. (1) Before accepting a case, FOS requires individual enterprises to process complaints and to submit the record to FOS. This encourages enterprises to work seriously toward resolution before the case goes to FOS.[121] (2) FOS officers and staff are highly trained. Therefore, when the first mediation

[118] See http://www.financial-ombudsman.org.uk/publications/pb08/index.html and FOS, "A Quick Guide to Funding and Case Fees" (http://www.financial-ombudsman.org.uk/faq/answers/research_a5.html).

[119] Fees are not charged until a case is resolved or otherwise concluded.

[120] Samuel, *Consumer Complaints and Compensation*, 1.6.1.

[121] This point is examined in detail in Samuel, *Consumer Complaints and Compensation*.

proposal is presented, it is not impossible for both parties to effectively predict what the final FOS determination will be. (3) In addition to the predictability of the final determination, the fee schedule is designed to encourage resolution at an early stage. (4) While FOS is a public organization, its officers and staff are independent of government agencies and are separated from the functions of government agencies aimed at promoting the development of financial services industries. This allows FOS personnel to concentrate on their own function of reaching fair resolutions in financial services disputes. (5) FOS is a public organization and its employees are all public servants. This avoids the problem that a private organization would naturally have in terms of bias favoring the financial services enterprises that financially support the system. (6) The criteria that apply in FOS decisions are "fair and reasonable." The application of these criteria to individual cases allows FOS to aim for flexibility in resolving complaints.[122] Ombudsmen are given considerable discretionary powers in both the management of procedures and in rendering of decisions, so long the principles of fairness and reasonable are adhered to. FOS is thus able to deliver speedy and effective compensation. Though this may be somewhat imprudent, the criteria that provide the basis for decisions rendered by FOS may be rephrased as follows to give them greater clarity. That is, FOS does not pursue an exact and precise form of justice. Rather, it seeks a form of justice that falls within the scope of what is reasonable. In other words, it pursues "justice in moderation."[123] However, the discretionary powers given to ombudsmen are exercised to realize the aim of FOS as stipulated in FSMA 2000, which is to achieve simple and speedy resolution of disputes in light of what constitutes good practice in financial services. Thus, in this sense, FOS is in fact pursuing justice as defined by law.

To research and to formulate proposals for the establishment of an ideal financial ADR system for Japan, it is necessary to take one step forward from understanding FOS to analyzing the factors in British society that have made FOS possible. Looking back to the above list of factors underlying the success of FOS, it is obvious that some can be readily adopted in Japan, while others will require the enactment of new legislation. Finally, some of the other factors cannot be expected to function similarly in Japan as they have done in the United Kingdom due to

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[122] This analysis of the causes of FOS success draws heavily from a paper entitled "Towards a New Approach for Resolving Consumer Insurance Disputes" by Daniel Schwarcz, professor at the University of Minnesota Law School (http://ssrn.com/abstracts=1183482). In the paper entitled "A Comparative Analysis of the Financial Ombudsman Systems in the U.K. and Japan," *Journal of International Banking Regulation 5* (July 1, 2004), Mamiko Yokoi-Arai, lecturer at Queen Mary, University of London, identifies the following as issues requiring immediate consideration in Japan: (1) the need to establish a single entry and single exit, (2) the need for financial regulatory authorities to play a greater role, at least in the establishment of the system, (3) the need to increase the number of independent experts available for full-time employment, (4) the need to clearly establish that the objective of a financial dispute resolution system is to compensate victims on the basis of "equity," which differs from the objective of ADR organizations in general.

[123] Strictly speaking, the law does not accept "justice in moderation." What the law accepts is "justice." Taking into account the time and cost needed to realize justice, there is good reason why the law accepts this as "justice."

differences in legal history. The factors underlying the success of FOS must be carefully examined to determine whether the same or similar conditions exist in Japan. This must be followed by an analysis of what elements of FOS can be used and what elements need to be adjusted before they can contribute to the realization of an ideal financial ADR organization in Japan.

What supports the operations of FOS? Its direct support comes from two sources: the annual payments made by financial services enterprises, and the officers and staff who work in this organization from day to day. Why are financial services enterprises prepared to make these annual payments? What motivates people to work for FOS and to strive to develop their professional capacities? The answer must be that the society as a whole, including financial market participants and consumers, as well as politicians and financial supervisory authorities, shares a common understanding concerning the need for FOS. Furthermore, society must hold the functions performed by FOS in high regard. Otherwise, faced with their shareholders, financial services enterprises would not be able to justify their payments to FOS as just and necessary. Likewise, highly talented experts and professionals with considerable experience working for law firms, financial services enterprises and financial supervisory authorities would not be prepared to leave their former jobs to work for FOS, in the process rejecting other offers in the private sector. The key question is: Why do people in the United Kingdom have this shared and highly developed awareness of the importance of FOS? It cannot be said that this awareness and willingness to work for FOS that supports this organization in the United Kingdom is shared among Japanese financial services enterprises and by Japanese society in general. What accounts for this situation in Japan? What is an awareness that can be shared among all relevant parties in Japan today? What kind of financial ADR should be created in Japan to ensure that society will arrive at a shared awareness of its importance and will highly value its contributions? What proposals should be made for a financial ADR in Japan to nurture a shared awareness of its necessity among interested persons and to prompt them to act toward its realization?

A reading of Shakespeare brings to life characters that are burning with ambition and desire, while a look back into history and a review of stories and dramas shows that the desire to make others do one's will through deceit or force is common to both East and West. On the other hand, wise solutions can be found for difficult impasses. The West has Shakespeare's Merchant of Venice, and Japan has the famous ruling rendered by the medieval Magistrate Ooka for the "three-way sharing of losses." In the former case, someone who has freely entered into an agreement with extremely severe consequences is given a reprieve, while in the latter instance, all parties to a case involving major losses share equally in covering the losses. In both stories, a wise solution provides an opportunity to escape the present impasse and to build new relations for the future. In re-reading these tales, one is led to think that in Japan, as in the United Kingdom, there are financial disputes caused by greed that will convince society of the need for a financial ADR. By the same token, there exists the wisdom to find fair resolutions to these disputes and to thereby provide reassurance to society.

Since the Meiji Period (1868-1912), Japan's dispute resolution system has

been centered on judicial processes. It is only in the past few years that Japanese society has become aware of the importance of alternative dispute resolution and has made conscious efforts toward promoting the establishment of ADR systems. Similar developments have been seen in the international arena where ongoing globalization has in recent years highlighted the importance of ADR systems that provide non-judicial avenues to dispute resolution by drawing on the wisdom of the private sector. The financial services industry is one of the most globalized industries. In the globalized economy, funds cross national borders and move freely around the world. As a result, Japan's financial markets are now inexorably linked to the financial markets of other countries. In order for it to be effectively utilized, the ideal financial ADR organization for Japan must be one that is supported by the realities of Japanese society. At the same time, the principles that guide the operations of such an organization must be ones that are readily accepted and appreciated internationally.

Appendix 3: Principles of European Financial Ombudsman Systems

The main text of this Proposal refers to the "ideal financial ADR system for Japan." In considering what constitutes an ideal system for Japan, there are three points that need to be considered in advance. As outlined below, these concern the principles applicable to the market, to enterprises and to dispute resolution organizations.

(1) Market: Financial institutions, financial services enterprises, and dispute resolution organizations comprise key elements of market infrastructure. As such, what principles should apply to the broadly defined legal regulatory system (market governance) in the financial and capital markets?

(2) Enterprises: What principles pertaining to norms and codes of conduct should apply to financial institutions and other corporate organizations and management and individual members?

(3) Dispute resolution organizations: What principles (design concepts) should apply to financial dispute resolution organizations? What leading principles, or uniform standards, should apply to networks of dispute resolution organizations?

First, the meaning and significance of these principles, the interrelation of these principles and related matters will be examined. This will be followed by cases studies and some comments on the co-regulation model of governance that has emerged in Europe and is now being adopted elsewhere as part of the global trend toward the establishment of single financial ombudsman systems covering all segments of the industry.

1. What Are Principles? What Are Codes of Conduct? What Is Reasonable Dispute Resolution?

(What Are Principles?)

In simple terms, principles constitute the policies and guidelines that direct the conduct of organizations and individual members of all types of enterprises and enterprise associations. Principles also define the original starting point to which these entities return when faced with confusion, difficulty or failure. In this sense, principles provide these entities with a certain set of absolutes that form a foundation that stands above reproach and criticism.

The dictionary defines principle as a "foundation for a system of belief or behavior." In short, principles provide a foundation that is immovable under all conditions. Principles constitute the fundamental propositions, beliefs and concepts that organizations and individual members of enterprises and enterprise association are not prepared to compromise or yield on.

Furthermore, principles stand at the center and provide the pillars for the norms and codes of conduct which organizations, individual members of enterprises and enterprise association consider to be ideal. Principles are transformed into codes of conduct (or by whatever other name they go) by documenting the latter in written form. Codes of conduct are developed over periods of 10 years, 20 years or 30 years based on the experiences and failures of enterprises or enterprise associations. In many instances, they reflect the various interpretations and modifications that have been made from time to time to meet the immediate needs of the organization. Through this process, codes of conduct come to cover a certain range and are acknowledged as universal or legitimate.

What principles, norms and codes of conduct direct the day-to-day actions of organizations and individual members of enterprises and enterprise associations? Alternatively, what standards should guide these actions? In the case of Japanese enterprises and associations, these questions frequently are not answered explicitly. Consequently, special efforts have to be made to uncover these unwritten principles, norms and codes of conduct.

(What Are Norms?)

Norms refer to a certain set of common values and evaluation criteria that are shared by the members of a given social group as representing the ideals that they subscribe to or should aspire to. Under normal circumstances, the presence of norms within a group ensures that certain values are accepted as universal and legitimate.

Norms also connote regulations (rules and other regulations that must be observed) that mandate or prohibit certain types of behavior. By juxtaposing the two terms "philosophy" and "norms," the difference between the two can be highlighted. First, norms are not directly related to the question of whether observance is forcibly mandated, or whether observance is voluntary and based on the individual's own beliefs and conviction. For example, the observance of norms is seen to emerge from the following pattern: an individual observes a norm because his or her superiors indicate that this is what is expected, or because non-observance entails certain penalties. By contrast, philosophy is unrelated to the presence of any external force. The individual observes and abides by the philosophy because he or she has internalized it as his or her own belief.

Norms constitute an element of a culture. Through the process of "internalization," norms take root in individual personalities, and through the process of "institutionalization," norms take root in the social system to provide continuity and consistency to the social life of the individual.

(What Are Codes of Conduct?)

A code of conduct is a uniform standard of behavior based on a set of evaluation criteria shared by the members of a given social group. Alternatively, a code of conduct comprises certain standards that are kept in mind when taking concrete action. Efforts are made not to veer from these standards, which are used as a reference in judging actions.

Needless to say, codes of conduct vary from one social group to another. Codes of conduct frequently represent the rules and laws that must be strictly observed by the members of a social group. Non-observance of these rules constitutes the violation of a "gentleman's agreement," which can imply a situation that renders continued membership in the group unbearable or untenable (see footnote 137).

(Loss of Awareness of Norms)

In the case of Japan, it is frequently said that the awareness of norms is being eroded or completely lost, and that this phenomenon is spreading to all levels of all social groups.

When the conduct of an organization and its members veers from their original purpose and goals, the inevitable result is that both society and the customer lose confidence in the organization.

As Nehru once said, “Failure comes only when we forget our ideals and objectives and principles.”

While there are some differences among groups and organizations, the general problem in Japan is that principles, norms and codes of conduct are not clearly enunciated. In many cases, these are not expressed in easy-to-understand language. They are not shared among interested persons, and no continuous effort is made to ensure respect and observance. Consequently, it is not rare to see groups and organizations whose members have not arrived at shared norms and values.

(What Is Reasonable and What Is Reasonable Dispute Resolution?)

At an even more fundamental level, the conduct and behavior of individuals is guided by a widely shared conception of what is reasonable and what constitutes common sense. However, one of the problems in real society is that there is no guarantee that these conceptions are held in common.

While this Research Group has freely employed the term “reasonable” in the context of dispute resolution, it must be noted that there is no guarantee that a general consensus exists on what constitutes “reasonable.” Even if a common understanding does exist, the enterprises and staff members belonging to a given industry may lack the proper incentives and motivation to act reasonably. While this may not apply to all industries, it is quite possibly an accurate description of prevailing conditions in Japan.

“Reasonable dispute resolution” must take into account asymmetries in access to information and differences in the positions of complainants (financial services users) and the general public, and financial services enterprises. Next, in the implementation of dispute resolution procedures, “reasonable dispute resolution” implies that the procedures will not be bound by superficial procedural exactness, but will instead seek to reach a resolution that is effective, fair and equitable for both parties. In other words, the fundamental goal is to reach a “fair, just and reasonable resolution of problems and disputes that is user oriented at all times, and which is humane and considerate.”

(Accumulation and Publication of Necessary Precedents in Dispute Resolution)

A considerable body of legal precedents pertaining to financial disputes already exists in Japan. This accumulated body of information provides the foundation for case law, which can serve as an organic asset for the prevention of future disputes. However, in Japan, case law has not been presented in a sufficiently integrated and codified manner that would facilitate systematic use in educating and informing consumers and vendors. The fact is that many problems remain in this area. If specific cases were to be used in educating and informing the public, investors could then be expected to base their investment decisions on a deeper understanding of financial products and their risks and returns, as well as on more thorough examination of these matters. However, due to the lack of sufficient education and information, investment decisions are made in an environment that is not conducive to careful examination. When losses result, the investor feels frustrated and this frustration gives rise to disputes. Observations indicate that a considerable number of cases are generated in this manner. The same applies to vendors and enterprises who are not properly educated and informed of past disputes. If properly informed, they would be able to better predict how their customers (investors) would react to the outcome of their sales activities. For instance, they would be able

to know what products to sell to what type of customer under what type of condition. Furthermore, they would be able to predict what misunderstandings, disappointments and frustrations would result if they veered from such guidelines and how this could lead to the loss of customer confidence and ultimately to disputes. With this knowledge, in many cases, vendors and enterprises would be able to prevent complaints and disputes. Here again observations indicate that a considerable number of disputes could have been avoided if vendors and enterprises had been properly educated and informed concerning the specifics of past disputes.

Greater efforts should be made to incorporate information from existing judicial dispute resolution cases in education and information programs. By the same token, dispute resolution organizations should endeavor to contribute to better education and information so that both consumers and vendors and enterprises can work effectively toward avoiding the misunderstandings, confusions and frustrations that are in fact avoidable. To do this, dispute resolution organizations must first clarify the criteria and principles that underlie their decisions. Second, dispute resolution organizations must build up a body of case law centered on past disputes that have been resolved based on these criteria and principles. Third, this body of case law must be expanded, published and collated in such a way that it can enter the consciousness of the public and be used widely throughout society.

Therefore, dispute resolution organizations should assign special importance to accumulating a body of case law consisting of the decisions that have been rendered in past disputes, and to publishing this body of case law in order to effectively establish certain norms among both consumers and enterprises.

As a preliminary step, it is important for consumers and enterprises to have an awareness that occurrence of disputes and other problematic situations and dealing with dispute resolutions are nothing to be ashamed of, and that a positive attitude toward dispute resolution is necessary and commendable. Both consumers and enterprises should also understand that utilizing the specific resolution case norms to close the gap between the awareness of consumers and the awareness of enterprises is of vital importance. Otherwise, it will not be possible to justify to society the costs of establishing and operating dispute resolution organizations. Proposals that are made must take this perspective into account.

(Flexible Dispute Resolution)

Stated differently, the basic idea is to provide the financial and capital markets with an infrastructure for flexible dispute resolution that provides for truly fair, just and reasonable resolutions that correspond to the substantive conditions and issues of the dispute on hand (with special consideration paid to the fact that the complaints have been lodged by individuals in a weak position). The development of this infrastructure requires the establishment of certain design concepts and principles that make flexible dispute resolution possible.

Some examples of flexible dispute resolution can be found in what are known as "Ooka rulings"[124] in Japan. Ooka rulings mirrored the people's commonly held basic values of justice, equality, freedom, righteousness and fairness, and were designed to be compelling and convincing to both parties in a dispute.

[124] A reference to fair and humane judgments rendered by Magistrate Tadasuke Ooka, a judge in criminal and civil cases in 18th century Edo (present-day Tokyo).

This parallels the structure of a financial ADR organization that is designed to render resolutions that are compelling and convincing to both parties by making maximum use of the advantages of "flexibility" while gradually accumulating a body of reasonable resolutions.

Specifically, this will involve two procedural steps. First, the procedures will not be bound by the strict rules of evidence and proof that apply in judicial processes. Instead, the facts of the case will be investigated through a flexible process that is compelling and convincing to both parties, and also corresponds to the substantive conditions and issues of the dispute on hand. Second, the procedures will not be bound by the strict technical and specialized interpretations of the details of relevant laws and ordinances. Instead, the procedures will mirror the public's commonly held basic values and will feature thorough communication that helps reveal the thinking and position of both parties. Finally, the procedures will attempt to provide resolution proposals that satisfy the sentiments of both sides.

In other words, dispute resolution based on flexible investigation of the facts and the presentation of flexible resolution proposals can be referred to as "reasonable resolution."

(Financial Ombudsman Systems in Developed Countries)

Today, financial dispute resolution organizations are found in many countries throughout the world. Examples include the Financial Ombudsman Service (FOS) in the United Kingdom and similar organizations in many of the former British Commonwealth countries, and organizations in the member nations of the European Union and other developed countries. (These organizations are widely referred to in these countries as "ombudsman organizations." Following their example, the term "financial ombudsman" is used in this document as a common term for financial ADR organizations.) At the core of the leading principles that guides the operations of these organizations are the concepts of "fair and reasonable" and the "principle of equity," which define the criteria on which decisions are made.

Over the past decade, financial ombudsman systems that are characterized by these concepts and principles, the flexibility of their procedures, the high level of predictability of outcome (and the corresponding principle of binding ruling), and by the transparency of their procedures have spread throughout many developed countries. Primarily in Europe and other developed countries, they have gained understanding and basic recognition from the public, financial services users and many enterprises, and are operating with the broad support of society.

(High Levels of Predictability and Transparency Essential to Maintaining Confidence)

In order for organizations, industry associations and their member enterprises to gain the public's confidence, the dispute resolution procedures that they employ when a complaint has been filed or in the case of other forms of trouble should meet the following essential requirements. (These requirements should be met regardless of whether the procedures employed are the internal procedures of the responding enterprise or the procedures of systems external to the enterprise.) (1) The level of predictability of outcome must be high. (2) Procedures must be fully transparent and should provide for disclosure of information on disputes resolved and criteria applied in the resolution of

disputes.

The series of processes for dispute resolution consist of (1) the initial stage in which the responding enterprise endeavors to internally resolve the dispute; (2) the response by external dispute resolution systems that follows in case of failure of internal resolution; and (3) the entire process including the above two processes. Without organic cooperation including the sharing of certain fundamental concepts and principles, it will be difficult to ultimately gain the public's confidence in the organization and the system in this series of processes.

(Design Concepts of External Dispute Resolution System and Internal Enterprise Norms Should be Established as Single Set)

To achieve above factors, the following must be established with a high level of transparency as one set that is linked organically and is mutually related as two sides of the same coin:[125] (1) the establishment of certain concepts of institutional design; most importantly, criteria for decisions made by the dispute resolution organization created outside of corporate organizations, and furthermore (2) the establishment of certain leading principles within industry associations and their member enterprises for initial and voluntary responses for dispute resolution and norms, codes of conduct and best practices that should be established internally with these principles as a core.

In Japan, various groups of enterprises are already moving in this direction. However, for society as a whole, the time has now come for establishing internal norms for industry associations and enterprises. Full-fledged efforts must be made by the management and individual members of financial institutions and other industry groups toward making these norms into visible, standardized and well-established codes of conduct.

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[125] See the explanations below provided by David Thomas, principal ombudsman and corporate director, of FOS. In the case of the United Kingdom's FOS, decisions made by FOS itself are based on the criteria of "fair and reasonable" (as explicitly stated in the FSA rules). However, codes of conduct and operational practices of financial services enterprises are also taken into account in determining what constitutes "fair and reasonable." (Excerpted from materials from the "International Conference in New York on Financial ADR" organized by the Waseda University GCOE held in New York on October 2, 2008.) (References below to DISP point to "Dispute resolution: Complaints," which constitutes the core concept in "Block 4: Redress" contained in the *FSA Handbook* of rules and guidance.)

"DISP 3.6.1: The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case.

"DISP 3.6.4: In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account: (1) relevant (a) law and regulations; (b) regulators' rules, guidance and standards; (c) codes of practice; and (2) (where appropriate) what he considers to have been good industry practice at the relevant time."

You will see that we take codes of conduct (for example, the banking code – http://www.bankingcode.org.uk/thecodes.htm) into account under our rules. Note that we will take account of any relevant code, even if the individual financial provider in the case did not sign up to it. We take account of any relevant code of conduct, whether it complies with ISO or not. But we are only required to take account of it, not necessarily follow it. So we will not follow the code if we think it produces an outcome which is unfair.

2. Principles Applicable to Market Governance (Principles of Co-regulatory Governance)

It is notable that in recent years, the concepts of "social market economy" and "market citizenship" are beginning to be widely used in the European countries. The important point here is that "society," "market" and "citizen" are not being used as conflicting concepts.

A key element of the basic market infrastructure of the financial and capital market and various other markets includes systems of statutory regulation. In the past, and especially in Japan, the government and a relatively small group of major corporations were the sole participants in the development of market infrastructure. This represented a "closed form governance" with strong tendencies toward unidirectional decision-making.

However, this will have to change in the future. In moving toward the major goal of creating a high quality market structure, with the collaboration and cooperation of a wide range of entities, which supports fair price formation as well as fair, just and rational market operation, probably the most important factor will be the realization of a bidirectional and participatory type of governance characterized by "co-regulation as an open form of governance." Certainly, this is the form of governance needed for the 21st century.

(Co-regulation as Open Form of Governance)

An open form of governance based on co-regulation can be said to contain the following three elements.

(1) Governance systems centered on statutory regulations and administrative controls based on the exercise of public (bureaucratic) power from above (including governance from above based on existing business laws, and out-of-court public complaint and dispute response systems initiated by the bureaucracy (government administration)).

(2) Broadly defined "soft law" governance systems featuring governance from below (private-sector governance), including voluntary self-regulation and private dispute resolution organizations that have been organized and established by enterprises and industry associations. Such private dispute resolution organizations would be focused on citizens as users of the market, and would meet the requirements of, for example, quality management standards aimed at improving customer satisfaction.

(3) New financial ombudsman systems providing a co-regulation type of dispute resolution (co-regulatory governance system) created as a result of collaboration, cooperation, coordination and partnership between the two types of systems outlined above.

Speaking in very general terms, the developmental process can be expected to follow the order of (1) → (2) → (3). However, the developmental process can also be expected to vary from one country to another.

(Principles of Co-regulatory Governance)

European Governance,[126] a White Paper issued by the European Commission in July 2001, advocates the importance of market co-regulation (a regulatory system based not on unidirectional government regulation but on the participation and initiative of civil society, including citizens and market

[126] http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf

participants). This concept has significant points of similarity with the concept of "co-regulation as an open form of governance."

(Five Supporting Principles of Good Governance)

According to the above White Paper, good governance is supported by the following five principles.

(1) Openness
(2) Participation by civil society, including consumers and market participants
(3) Accountability
(4) Effectiveness
(5) Coherence

The White Paper argues that the five supporting principles have a real meaning when they are implemented in a more inclusive way.

Furthermore, the White Paper states that the implementation of these five principles will reinforce the two central principles of the EU, which are the "principle of subsidiarity"[127] and the "principle of proportionality."[128] ("Subsidiarity:" resolution of local problems should be attempted by local citizens; problems that cannot be resolved locally are referred to the regional community; and, problems that cannot be resolved regionally are referred to the European Union. "Proportionality:" regulations and interventions are means to achieving certain goals and therefore should be kept at minimum necessary levels.)

(Seven Principles of Good Regulations)

The European Commission identifies seven principles for what it defines to be "good regulations."

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[127] The principle of subsidiarity advocates that what can be effectively handled by smaller and lower authorities must not be co-opted by larger and higher authorities. The European Union is based on the principle of subsidiarity, which states that national sovereignty should be ceded in areas where a group (community of citizens) approach is more effective than individual, local or national approaches.
"The subsidiarity principle is intended to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made as to whether action at Community level is justified in the light of the possibilities available at national, regional or local level. Specifically, it is the principle whereby the Union does not take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level. It is closely bound up with the principles of proportionality and necessity, which require that any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaty." http://europa.eu/scadplus/glossary/subsidiarity_en.htm

[128] **The principle of proportionality** advocates that the levels of regulation and intervention should not exceed the scope of what is required to realize the intended goal (regulations and interventions should remain at minimum necessary levels). Because the demands for regulation and intervention vary among different fields, the level, cost, means, practices and procedures of regulations and interventions should be appropriate and proportionate to the importance of an individual field, the level of confidence required, the seriousness of damages that may be suffered if regulations and interventions are contravened, and the probability and range of contravention. The principle highlights the importance of proportionality between regulations and interventions and the needed effect of such regulations and interventions, and that power exceeding what is minimally necessary to correct illegality should not be exercised.

(1) Proportionality
(2) Proximity[129]
(3) Coherence
(4) Legal certainty
(5) Timeliness
(6) High standards (criteria and norms should be authoritative and of high standards)
(7) Enforceability

3. Principles and Codes of Conduct to Be Applied to Enterprise Groups for Dispute Resolution

The following should apply if an open form of governance based on co-regulation is to be pursued.

(1) General and comprehensive principles that underlie the statutory regulation system should be established.
(2) With equal or even greater importance than the above, the following principles should be simultaneously established: leading principles, as well as standards (including norms, codes of conduct, etc.) that are codified based on the leading principles, and which are applicable to the organizations and management and individual members of enterprise groups and others.

Greater attention should be paid to the fact that constant efforts are being made in Europe at various levels of government administration and by enterprises and industry associations to codify these principles in easy-to-understand forms and to firmly establish and promulgate them. These efforts are being made by various industry associations and non-governmental organizations, such as the International Organization for Standardization (ISO).

The next section presents a case of the formulation of a code of conduct as a uniform standard and continuous efforts made toward codification and standardization of such standards.

(Banking Code[130] of the British Bankers' Association[131])

The British Bankers' Association has voluntarily established a Banking Code and provided guidance for developing a broader and deeper understanding of the Banking Code, both of which are periodically reviewed. Currently, two Banking Codes have been established for individuals and for corporations.

The Banking Code for individuals contains a "fairness commitment." This section uses the expression, "treat you fairly and reasonably," to indicate that the Banking Code is based on the same standard of "fair and reasonable" that has been adopted by FOS, the U.K. financial dispute resolution organization.

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[129] **The principle of proximity** advocates that government administrative functions should be performed by the administrative entity that is closest to the citizens. Specifically, it states that the functions of local government should not be transferred to the central government and other administrative entities unless necessitated by technical reasons and demands of economic efficiency, and unless justified by reason of benefits to citizens. This principle is applied together with the principle of subsidiarity.

[130] http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=103

[131] http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=140

The following is excerpted from the Banking Code.

Fairness commitment

We promise we will treat you fairly and reasonably when providing you with products and services covered in this Code. We will keep this promise by meeting all of the key commitments shown below.

- We will make sure that our advertising and promotional literature is clear and not misleading and that you are given clear information about our products and services.
- We will give you clear information about accounts and services, how they work, their terms and conditions and the interest rates which may apply.
- We will help you use your account or service by sending you regular statements (where appropriate) and we will keep you informed about changes in the interest rates, charges or terms and conditions.
- We will help you to switch your current account between financial institutions that subscribe to this Code.
- We will lend responsibly.
- We will deal quickly and sympathetically with things that go wrong and consider all cases of financial difficulty sympathetically and positively.
- We will treat all your personal information as private and confidential, and provide secure and reliable banking and payment systems.
- We will publicize this Code, have copies available and make sure that our staff are trained to put it into practice.

To meet these promises, we will, as a minimum, take the steps and meet the standards set out in the rest of this Code.

The Banking Code goes on to state that banks will help customers choose products and services that meet their needs; that customer complaints will be processed fairly and quickly according to internal procedures that meet the requirements of FSA (Financial Services Authority: the U.K. financial services regulatory authority); that if a bank cannot provide a final response to a complaint within eight weeks, it will provide written notification of this fact; and that banks will refer complaints to FOS, a third-party dispute resolution organization that will handle complaints for free.

Furthermore, the Banking Code of the British Bankers' Association is subject to constant review by the Banking Code Standards Board,[132] a third-party body established in 1999 and primarily comprised of outside experts.

Synchronicity (mutually effective reference and coordination) exists, or mutual efforts are being made to establish a certain synchronicity, among FOS operational standards and decision criteria (including FSA rules) for complaints handling and dispute resolution, the Banking Code of the British Bankers' Association and other codes of conduct of financial services enterprises, and the good practices of these industries. The fact that this synchronicity is the source of added-value creation is a valuable lesson for Japan to learn. An example of this is presented below in some detail.

(Eight-Week Rule for Initial Response)

As can be seen in the Banking Code above, in the case of the United Kingdom, a citizen lodging a complaint with a bank knows with considerable certainty that if no progress is made in the case, the complaint will be referred to FOS, a third-party comprehensive dispute resolution organization. When referred to FOS, the complaint is handled according to the FSA/FOS rules, which provide for dispute resolution procedures that are widely recognized to be fair and reasonable. The referral sets in motion a flexible and private process (which differs from litigation in courts of law).

[132] http://www.bankingcode.org.uk/thecodes.htm

For both customer/complainants and financial institutions, the existence of this eight-week rule for initial response is an important element in ensuring a high level of predictability in the outcome of disputes. Furthermore, the outcome of disputes resolved by FOS are categorized, recorded and published in an anonymous form that avoids infringement of privacy and revelation of trade secrets. This body of information can be said to constitute a form of case law.

This arrangement is a source of security and relief for users of financial services. Moreover, in many cases, it also provides financial institutions with effective and valuable information that can be used to formulate guidelines for responding to customers within the initial eight-week period (by showing that neglecting a complaint is not a good course of action, and by providing a certain degree of predictability of outcome through the accumulation of information from FOS indicating that "this type of outcome is likely in this type of case").

(Development of Co-regulatory Governance Model in the United Kingdom)

The U.K. insurance industry[133] also has its own code of conduct. At the time of the enactment of the Financial Services and Markets Act in 2000, the insurance industry code was incorporated into the FSA rules. This can be seen as an example of the birth of governance through co-regulation. That is, a code of conduct that had been privately and voluntarily formulated by an industry was eventually adopted as a public rule under FSA.

Another example is the Takeover Code, which defines the rules for corporate takeovers in the United Kingdom. Originally formulated in the private sector by the Takeover Panel, its mechanisms were eventually incorporated into FSMA. Furthermore, its ten general principles provided the foundation for the formulation of the EU Takeover Directive. Finally, the contents of this Takeover Directive were reflected in the revision of the U.K. Takeover Code.

As seen in this case, the development of co-regulatory governance models is making steady progress in various fields in the developed countries, such as the United Kingdom and the EU.

4. Principles of Financial Ombudsman Systems

(Financial Ombudsmen as a Co-regulatory Governance Model)

Some further observations on the co-regulatory governance model are in order.

The U.K. Financial Ombudsman Service (FOS) and the financial ombudsman systems of many developed countries are legally mandated under existing laws and stand as part of the public system. Among these systems, under the provisions of the U.K. Financial Services and Markets Act (FSMA) enacted in 2000, the U.K. FOS has been granted certain powers of enforcement covering all types of financial services. (The power of enforcement comprises the power to establish certain rules and the power to enforce these rules upon financial services enterprises. For instance, FOS is empowered as follows: to determine whether or not a complaint lodged by a customer is a fair and reasonable complaint; to order financial services enterprises to submit evidence; to determine which of their actions (acts and omissions in presenting customers with explanations) are or are not fair and reasonable; and to issue orders to

[133] http://www.abi.org.uk/default/asp

financial services enterprises pursuant to determinations based on the standards of "fair and reasonable."[134])

However, FOS has its origins in the private ombudsman scheme created by the industry during the 1980s. Even following the enactment of legislature, FOS remains totally dependent on funds from the industry to finance its activities.

That is, while FOS does possess certain powers of enforcement, it remains true to the traditions of a private-sector ombudsman system based on self-regulated flexible procedures and operating principles.

In other words, it can be said that FOS is a concrete example of "co-regulation as an open form of governance," and an example of a successful "co-regulatory governance model."

(Proposed Design Concepts and Principles for Dispute Resolution Organization)

The main text of this Proposal contains the following statement concerning the necessary elements for a financial ADR organization and the basic design concepts for its organization. "To successfully engage in dispute resolution in financial services, the ideal financial ADR organization must satisfy eight basic requirements (design concepts): flexibility, speed, simplicity, expertise and quality assurance, ease of access, comprehensiveness and fairness (including independence and transparency) and confidentiality. Therefore, the organization must be designed and operated to satisfy these requirements. These basic requirements (design concepts) are mutually interrelated, and must be able to serve as an appropriate code of conduct for enterprises acting on their own to resolve complaints and disputes."

These eight requirements can be considered to constitute the basic principles for a dispute resolution organization.

(Global Trend toward Establishment of a Comprehensive and Unified

[134] The following explanations were given by David Thomas, principal ombudsman and corporate director of FOS. (Excerpted from materials from the "International Conference in New York on Financial ADR" organized by the Waseda University GCOE held in New York on October 2, 2008.)

"Section 228(2) of FSMA says that, in compulsory jurisdiction, 'a complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case." Schedule 16 paragraph 14(2)(a) of FSMA gives FOS power to make rules which 'specify matters to be taken into account in determining whether an act or omission was fair and reasonable.'

"These provisions were extended to our consumer credit jurisdiction by the Consumer Credit Act 2006. Our rules apply similar provisions to our voluntary jurisdiction."

"So the relevant procedural rules for FOS (http://www.fsahandbook.info/FSA/html/handbook/DISP/3/6) say, in respect of all three jurisdictions –

DISP 3.6.1: The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case.

'DISP 3.6.4: In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account: (1) relevant (a) law and regulations; (b) regulators' rules, guidance and standards; (c) codes of practice; and (2) (where appropriate) what he considers to have been good industry practice at the relevant time.'"

Financial Ombudsman System)

The proposed design concepts are discussed in detail in the main text of the Proposal. In this section, the discussion will be limited to and focused on the element of comprehensiveness. Related comments will be made on the global trend that started in Europe and in its advanced countries, which is now spreading throughout the world.

Mr. David Thomas, a principal ombudsman of FOS, has recently provided a very interesting response to the following question. (See below for his response.) "Are FOS and other European financial ombudsman systems making the transition from voluntary to statutory schemes?"

According to Mr. Thomas, the general global trend is to establish a "unified financial ombudsman system" that covers all financial services.

Of the above eight requirements (design concepts) contained in our Proposal, the principle of comprehensiveness (coverage extending to all financial services related industries and business formats) is relatively difficult to achieve. Because of this, the goal of achieving comprehensiveness was placed in the third and fourth stages of the four steps contained in the Proposal. In this context, the ultimate goal was identified as being the creation of a unified financial ombudsman system. Mr. David Thomas's following comments[135] point to a strong trend toward the establishment of unified financial ombudsman systems with comprehensive coverage over the entire financial sector as seen in major developed countries, such as the United Kingdom, Ireland, the Netherlands, Finland, Canada and Australia.

"Our knowledge is primarily focused on what is happening in Europe and also English-speaking countries (mainly in the British Commonwealth). I am not sure that there is necessarily a trend away from voluntary to statutory – but there does appear to be a trend towards a single ombudsman scheme for all financial sectors. This has happened in the U.K., Ireland, Netherlands, Finland (from 2009), Canada and Australia. In some places (for example, Netherlands) this has been brought about by the government threatening to create a single statutory scheme if the voluntary schemes fail to amalgamate. Also Armenia has just passed a law to create an ombudsman service on the FOS model."

(Possibility of Success of Co-regulatory Governance in Japan)

In Japan, banks and other financial services industries have been lobbying for the abolition of the policy of the separation of banking and securities businesses mandated under Article 65 of the Securities and Exchange Law (and Article 33 of the current Financial Instruments and Exchange Act). While this in part relates to how the current policy of the separation of the production and sales (of financial products) should be evaluated, the fact is that gradual progress is being made toward the abolition of the separation of banking and securities businesses. For instance, the government's deliberative councils are currently reviewing this policy, and some deregulation is already beginning to occur.

The separation of production and sales, which allows financial products to be

[135] Excerpted from materials provided by Mr. David Thomas as part of the Q&A section in the "International Conference in New York on Financial ADR" organized by the Waseda University GCOE held in New York on October 2, 2008.

produced and sold by different companies, permits "one-stop shops" that transcend traditional industry boundaries to handle securities, trusts, insurance and various other financial products. Thus, it has become very normal to see the phenomenon of universal banking in the sales sections of financial institutions. This implies that a gap has emerged between what is actually taking place on the frontlines of sales and the principle of separation of banking and securities businesses as provided under related business laws. In a typical example, products such as investment trusts are no longer sold exclusively by securities companies. Consumers have been able to purchase such products at banks since about ten years ago, and at post offices since about three years ago.

However, if undertaken in the absence of the necessary systemic infrastructure for ensuring the smooth operations of the market such as dispute resolution systems from the perspective of users, the review and abolition of the separation of banking and securities can result in "destruction without a vision." For instance, availability of financial products at banks and post offices may engender the misconception that purchasers of these products are protected against any loss of principal. Furthermore, the continued lowering of the barriers between various segments of the financial services industry can lead to an increase in complaints and other forms of trouble from customers claiming, "This is not what I thought I was buying." Liberalization and deregulation must be accompanied by the development of appropriate systems for responding to such customers and their complaints. Failure to do so will result in a lopsided and unsatisfactory development of liberalization and deregulation.

A fundamental revamping of currently existing systems and the design of new systems must be undertaken from the perspective of total optimization, which reflects the position of financial services enterprises as well as that of their customers. Statements made by an executive officer of the Financial Services Agency are in agreement with this.[136]

For this reason, the establishment of a highly effective financial dispute resolution organization, the theme of this Proposal, represents an important goal in Japan's financial system infrastructure development.

However, the establishment of a system does not ensure that people will act as expected under the jurisdiction of such a system. Regardless of the design of the system, full use of the system cannot be made in Japan's social and economic setting unless accompanied by the commitment and necessary sensibilities of those who use the system.

[136] See special lecture entitled "Systems and Personnel" delivered by Yasuhito Omori, Director of the Planning Division, Planning and Coordination Bureau of the Financial Services Agency, on January 19, 2008 at the "A Financial Ombudsman System for Japan" program jointly organized by Waseda University COE and NIRA. http://www.21coe-win-cls.org/activity/pdf/16/09.pdf

Professor Tatsuo Uemura[137] of Waseda University has made the following point. "British laws have evolved from the self-regulatory rules adopted by various industries. It is because of this origin that the laws are able to function among gentlemen." If this is so, then Japan must consider how to educate gentlemen in a process paralleling the development of systems and institutions.

Various European models of governance based on the concept of co-regulation were discussed above. To advocate the adoption of such models in Japan, we must first examine whether the prerequisites for this concept exist in Japan, or whether they can be achieved in the future. If the requisite conditions do not exist in Japan, it will be necessary to discuss how to develop the systemic framework (market infrastructure) while taking into account positive and

[137] See lecture entitled "Legislative Framework of the Financial and Capital Markets: The British Model and Options Available to Japan" delivered by Professor Tatsuo Uemura of Waseda University on January 19, 2008 at the "A Financial Ombudsman System for Japan" program jointly organized by Waseda University GCOE and NIRA. The following is excerpted from the above with some modifications. "Rules of organizations are of special importance, particularly in Europe. But why is this so? The French Revolution did not provide for the freedom of association on the grounds that the formation of associations and juridical persons inevitably infringes upon the dignity and freedom of the individual. Thus, the citizen's revolution battled against the forces of monarchy, church and associations. Arguing that nothing good came from associations, the Le Chaplier Law placed a total ban on associations, a ban that was finally lifted in 1901 under the Associations Law. Prior to that, even if associations were believed to be evil, their necessity could not be denied. Examples included the establishment of companies and self-regulating organizations. So, if associations were necessary evils, they needed to be subject to extremely strict rules. Any violation results in lifetime banishment. For example, violations of the rules of baseball result in lifetime banishment from baseball. Similarly, violations of the rules of the securities industry result in lifetime banishment from the securities industry. Mechanisms for the strict enforcement of rules can be very burdensome, and the question arises whether the Japanese people are capable of maintaining and abiding by such a system. In the United Kingdom, the principles for corporate takeover present an interesting example. I had an opportunity to pose the following question to an executive member of the Takeover Panel. 'How do you make people obey the rules?' He looked very puzzled and said, 'I don't understand the meaning of your question.' He went on to say, 'It is obvious that people will obey the rules. If they don't, they simply cannot remain in the industry where they work.' This obviously applies to the individual violator, but also extends to his family. It seems that this form of banishment from the trade is even more severe than the practice of '80 percent ostracism' that existed in traditional Japanese village communities. Young people are educated as future gentlemen so that when they enter into associations later in life, they will act and behave in proper compliance with the rules. In other words, in this type of society, people are placing their lives and reputations on the line. If this is correct, the question is whether the Japanese can really adopt such a framework. The American people place a premium on the maximization of personal liberty. Consequently, American society has its sheriffs to force compliance upon those who fail to obey the rules. This is where John Wayne comes in with his ready rifle, and this is why American society must have its anti-conspiracy laws. If you opt for the American style of freedom, you cannot avoid the American style of discipline. Is it really possible to incorporate all of these elements into the Japanese system? Then, although an overnight transformation is unrealistic, this brings us back to the British model where rules are obeyed as a matter of course. But to adopt and succeed with the British model, Japan will probably have to make a grand detour that begins with public re-education and the training of 'financial gentlemen.' I feel that Japan will have to create a solid foundation where rules are obeyed as a matter of course." http://www.21coe-win-cls.org/activity/pdf/16/07.pdf

passive advantages and disadvantages which will ensure such prerequisites.

The examination of specific measures to be adopted for the realization of the concepts contained in the European model for governance through co-regulation goes beyond the immediate objective of this Proposal and this report. Therefore, for now, the issues will be categorized and classified as separate issues and tasks for the future.

Next, the question of the enforcement of principles, or how to breathe spirit into the principles, will be considered. The principles of the British and Irish Ombudsman Association (BIOA), principles of FIN-NET, and ISO standards for quality management and customer satisfaction will be reviewed in an effort to identify challenges that stand in the way of Japan.

5. Principles of the British and Irish Ombudsman Association (BIOA)

For purposes of reference, the principles deemed necessary for out-of-court dispute resolution by BIOA are outlined below.

Guide to Principles of Good Complaint Handling
<Firm on principles, flexible on process>

1. Clarity of purpose → A clear statement of the scheme's role, intent and scope.
2. Accessibility → A service that is free, open and available to all who need it.
3. Flexibility → Procedures, which are responsive to the needs of individuals.
4. Openness and transparency → Public information, which demystifies our service.
5. Proportionality → Process and resolution that is appropriate to the complaint.
6. Efficiency → A service that strives to meet challenging standards of good administration.
7. Quality outcomes → Complaint resolution leading to positive change.

Source: The British and Irish Ombudsman Association (BIOA)
http://www.bioa.org.uk/docs/BIOAGoodComplaintHandling.pdf

The above principles are closely related to the European Commission's principles for good governance. In particular, "proportionality" is a fundamental principle for the EU. As previously discussed, the principles of "proportionality" and "subsidiarity" are constantly used as a pair.

6. Principles of FIN-NET

(Outline of FIN-NET)

FIN-NET refers to the European network of financial dispute resolution organizations that handle disputes between consumers and financial services enterprises. Established in 2001 by the European Commission, the purpose of FIN-NET is to facilitate cooperation among financial dispute resolution organizations in cross-border cases and to provide consumers with access to ADR procedures for the filing of complaints.

FIN-NET generally functions as follows. When a consumer has a complaint against a financial services enterprise domiciled in a foreign country, the consumer can contact a financial ADR organization in his or her own country. Thereupon, this financial ADR organization identifies the appropriate financial ADR organization in the foreign country and provides the consumer with necessary information concerning complaint procedures.

If the consumer decides to file a complaint, the consumer can undertake the necessary procedures through the financial ADR organization in his or her

home country. Thereupon, this financial ADR organization transfers the complaint to the appropriate financial ADR organization in the foreign country.

One of the important features of FIN-NET is that consumers involved in cross-border cases are able to file complaints in their own languages. (See http://ec.europa.eu/internal_market/fin-net/how_en.htm for features of FIN-NET and details of how the system can be used.)

(Principles Established by FIN-NET)

When a financial dispute resolution organization receives a complaint through FIN-NET, it processes the complaint in accordance with its own rules, but must also take into consideration the following principles specified in Commission Recommendation 98/257/EC (Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes).

(1) Principle of independence

The independence of the decision-making body is ensured in order to guarantee the impartiality of its actions. Specifically:

- When the decision is taken by an individual, this independence is in particular guaranteed by the following measures: (1) the person appointed possesses the abilities, experience and competence, particularly in the field of law, required to carry out his function; (2) the person appointed is granted a period of office of sufficient duration to ensure the independence of his action and shall not be liable to be relieved of his duties without just cause; and (3) if the person concerned is appointed or remunerated by a professional association or an enterprise, he must not, during the three years prior to assuming his present function, have worked for this professional association or for one of its members or for the enterprise concerned.
- When the decision is taken by a collegiate body, the independence of the body responsible for taking the decision must be ensured by giving equal representation to consumers and professionals or by complying with the criteria set out above.

(2) Principle of transparency

Appropriate measures are taken to ensure the transparency of the procedure. Specifically:

- Provision of the following information, in writing or any other suitable form, to any persons requesting it: (1) a precise description of the types of dispute which may be referred to the body concerned, as well as any existing restrictions in regard to territorial coverage and the value of the dispute; (2) procedural rules, notably those concerning the written or oral nature of the procedure, attendance in person and the languages of the procedure; (3) cost of the procedures; (4) summary of rules; (5) the decision-making arrangements within the body; and (6) legal force of the decision taken.
- Requirement of publication of annual report (enabling assessment of results and identification of nature of disputes).

(3) Adversarial principle

Procedures allow all the parties concerned to present their viewpoint before the competent body and to hear the arguments and facts put forward by the other party, and any experts' statements.

(4) Principle of effectiveness

The effectiveness of the procedure is ensured through measures guaranteeing: (1) that the consumer has access to the procedure without being obliged to use a legal representative; (2) that the procedure is free of charges or of moderate costs; (3) that only short periods elapse between the referral of a matter and the decision; and (4) that the competent body is given an active role, thus enabling it to take into consideration any factors conducive to a settlement of the dispute.

(5) Principle of legality

The consumer is not deprived of the protection afforded under the laws of the country of his residence.

(6) Principle of liberty

The decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. The consumer's recourse to the out-of-court procedure may not be the result of a commitment prior to the materialization of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.

(7) Principle of representation

The procedure does not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.

7. ISO Standards for Quality Management and Customer Satisfaction

Thus far, the formation of the uniform Banking Code of the British Bankers' Association and the development of uniform and comprehensive financial ombudsman systems of European and other developed countries have been reviewed. We have observed how the basic concepts and principles of these organizations have been established and standardized in easy-to-understand language, and how a broad range of market participants, including government agencies, the financial sector and citizens, have constantly endeavored to create an environment ensuring that the average citizen is able to readily access the market and the market infrastructure.

As part of these efforts, ISO standards have been established for quality management (customer satisfaction) pertaining to the response of enterprises to complaints, problems and disputes. The following section provides an overview of the principles contained in these standards.

(What Are ISO Standards?)

ISO standards refer to the "International Standards" established by the International Organization for Standardization (ISO), an international NGO network with member organizations from 157 countries. In light of the fact that transactions of products and services involving consumers and enterprises are taking place on a global scale, ISO standards aim to ensure the reliability of these products and services over a broad range of situations. In Japan,

certifications for the quality related ISO 9001 (Quality management systems – Requirements) and the environmental management systems related ISO 14001 have been widely acquired.

In recent years, the coverage of ISO standards has been shifting from products and services to softer issues, such as customer satisfaction. Given that interaction with customers has a major impact on customer satisfaction, ISO has issued three standards related to complaints and disputes. These constitute quality management standards to be pursued by the management of enterprises and organizations and their employees. These standards are closely related to such better-known standards as ISO 9001 and ISO 9004 (Quality management systems – Guidelines for performance improvements).

The following three models of ISO standards cover the following matters: how the internal organizations of financial institutions and other corporate organizations should respond to complaints and problems; how external third-party dispute resolution organizations should respond to complaints referred to them; and normative guidelines and leading principles in quality management that underlie the corporate organization's pursuit of customer satisfaction.

ISO 10001 (Quality management – Customer satisfaction – Guidelines for codes of conduct for organizations)
ISO 10002 (Quality management – Customer satisfaction – Guidelines for complaints handling in organizations)
ISO 10003 (Quality management – Customer satisfaction – Guidelines for dispute resolution external to organizations)

Note that the individual standards are formulated by members of Working Groups, and that ISO 10001 and ISO 10003 were formulated by the same members. All members participate as impartial experts and do not represent the national interests of their respective countries. A total of nine countries (United States, Australia, United Kingdom, the Netherlands, Canada, Germany, Sweden, South Africa, Japan) participated in these Working Groups. At all times, between 15 and 20 individuals participated in the formulation process. The professional background of the participants was as follows: legal experts (lawyers and university professors), experts in standards (university professors), government administrators, staff members of standardization organizations, representatives of consumer organizations, and employees of enterprises.

Japan is developing JIS standards that closely parallel the contents of ISO 10001, 10002 and 10003. ISO 10002 was issued as a Japanese language standard in 2004 and can be purchased for 2,100 yen (http://www.webstore.jsa.or.jp/webstore/top/index.jsp). ISO 10001 and 10003 are scheduled to be issued as JIS standards during fiscal 2008.

In Japan, ISO 9001 is well known as a quality management standard for businesses and other organizations. On the other hand, the significance of ISO 10001 and 10003 is not widely appreciated in Japan for the following reasons: these standards were only recently issued (issued at the end of 2007, and in 2008 in Japan; ISO 10002 was issued in 2004, and in 2005 in Japan); and ISO

10001-10003 are not certification standards but are instead self-declared standards. Furthermore, the interrelation between these three ISO standards is not well known, and even where they are known, there has been no general interest in acquiring these standards. These standards are not even well known among manufacturers, who constitute the primary addressees of ISO standards and, at least in the past, far less known among financial services enterprises. However, there have been some recent reports of financial institutions working to satisfy ISO 10002.

(ISO Standards as Soft Law)

At a recent forum organized by Waseda University GCOE (August 27, 2008), Professor Aya Yamada of Kyoto University Law School made the following statements. "ISO standards constitute so-called soft laws. While they are more flexible and maneuverable than hard laws, they imply the pursuit of a certain level of international standardization and the stabilization of related transactions."

(Three ISO Standards for Customer Satisfaction)

(Adopted from materials presented by Professor Aya Yamada of Kyoto University)

ISO No.	Title	ISO Deliberations	Adoption into JIS
ISO 9000	Quality Management – Customer Satisfaction	Adopted by ISO Committee on Consumer Policy (COPOLCO) in 1998	
ISO 10001	Guidelines for codes of conduct for organizations	Deliberations started in October 2003 in TC176-SC3-WG13; issued in December 2007	Adoption into JIS currently in progress; scheduled to be issued during fiscal 2008
ISO 10002	Guidelines for complaints handling in organizations	Deliberations started in May 2001 in TC176-SC3-WG10; issued in July 2004	Preceded by issuance of JIS Z9920 (October 2000) → Japanese translation JIS Q10002 issued in June 2005
ISO 10003	Guidelines for dispute resolution external to organizations	Deliberations started in October 2003 in TC176-SC3-WG12; issued in December 2007	Adoption into JIS currently in progress; scheduled to be issued during fiscal 2008

(Importance of Understanding Continuity of ISO 10001 through 10003)

ISO 10001 through 10003 contain explicit statements of their guiding principles. With regard to responses to complaints and disputes by corporate organizations, it is important to understand the continuity that exists from ISO 10001 through 10003. This is equally true for all industries and organizations. In other words, it is necessary to understand that an organic link exists between the standards that apply to internal responses to complaints and the standards that apply to dispute resolution external to organizations.

(ISO 10000 Series and Its Relation to Japan's Financial Dispute Resolution Organization)

As indicated in the Proposals of the Japan Financial ADR/Ombudsman Research Group, the immediate issue at hand is: "What form should a financial dispute resolution organization take in Japan to have truly effective, reliable and comprehensive dispute resolution functions?" When considering

this question, it would be correct to say that it does not concern the dispute resolution organization how a complaint or dispute may have been handled internally by a financial organization or other enterprise before being referred by the customer to an external dispute resolution organization.

However, from the perspective of fostering confidence in the financial and capital markets as well as confidence in financial institutions and other financial services enterprises, this question cannot be overlooked. Whether complaints and disputes against financial services enterprises are being properly handled, and how these complaints and disputes are or are not being resolved has a very important bearing on fostering confidence. That is, from the perspective of the financial and capital markets as a whole, the initial response of financial services enterprises to complaints and disputes is of extreme importance.

In this context, it is notable that the Banking Code of the British Bankers' Association is directly linked to the operational standards of FOS. As previously discussed, in the initial stage, the respondent has eight weeks to work toward resolution. The Banking Code explicitly states that if a resolution is not reached within this period, the customer can take the dispute to FOS for resolution.

In comparison, the Code of Conduct formulated by the Japanese Bankers Association currently contains no such provision. On the other hand, similar provisions are contained in the explanatory materials produced by the Consumer Relations Offices and Mediation Committee that have been established by the Japanese Bankers Association. According to these explanations, when the complainant (customer) does not receive a satisfactory response within two months of filing a complaint, the Consumer Relations Offices (the banking industry's ADR organization) explains to the customer that the customer can apply for mediation by the Japanese Bankers Association's Mediation Committee (established on October 1, 2008) and confirms whether the customer intends to apply for the use of this service. This indicates that a certain amount of progress has been made in this area.

From the perspective of customer satisfaction, it is important for financial institutions (as well as other types of enterprises) to be fully committed to fulfilling their duties in processing complaints, disputes and other forms of problems. This commitment must also extend to include the latter stages of dispute resolution involving external organizations, such as the FOS as well as the initial internal response stages of financial institutions. In this context, it can be said that ISO is also emphasizing the importance of recognizing the continuity that exists in the standards contained in ISO 10001 through 10003.

In the U.K. system, enterprises have eight weeks to respond to a complaint. In the case of Japanese banks, the initial response period is set at two months. It would be very meaningful for enterprises to voluntarily adopt a uniform period ("preliminary period;" however, in the Japanese case, the two-month preliminary period has not been officially established). In situations where codes of conduct and other rules have already been established, the adoption of a uniform preliminary period would have an extremely significant impact on both consumers and enterprises and other service providers as it would raise the predictability of outcomes.

In the Japanese case, although it may differ among industries and individual enterprises, it is reported that generally speaking, many cases are immediately referred to external ADR organizations. But it is possible that

this merely reflects a failure among enterprises to maintain proper data on the initial expression of complaints by customers.

The fact is that until quite recently, there was an ongoing debate on how to differentiate between customer requests for advice versus customer complaints and claims, and how to record these customer filings. As such, financial services enterprises had not adopted standard definitions for the various types of customer contact. It is possible that this shortcoming also has something to do with the above observation.

Here again, it is important for industries to establish internal codes of conduct that are fully transparent and easy to understand from outside the industry.

To study, formulate plans and make recommendations that relate solely to the operations of external dispute resolution organizations (the building of frameworks) without paying due attention to the processing of complaints and disputes within individual enterprises and their industry organizations would not go beyond putting the necessary pieces in place. That is, this would not constitute a fundamental response to the problem.

(Guiding Principles of ISO 10001-10003)

The guiding principles of ISO 10001-10003 were codified and standardized following extensive discussion by experts and market administrators gathered from the United Kingdom, Europe and other countries throughout the world. Japan should carefully examine these standards and consider them with due respect.

The standards adopted by FOS are not directly related to ISO 10001-10003. This is because FOS and its antecedent industry-based ombudsman systems predated the ISO standards. Conversely, it can be said that the development of financial ombudsman systems in the United Kingdom has had a major impact on the guiding principles contained in these ISO standards.

Principal Ombudsman Thomas of FOS comments as follows in the previously cited material.

"ISO 10003 is primarily a standard, for those who provide goods and services, about how they should handle complaints about themselves – although it does include reference to external 'appeal' arrangements, such as provided by FOS. The private-sector ombudsman model in the U.K. was invented before ISO 10003 – and in our case is based on the law set out in the Financial Services and Markets Act 2000 (FSMA) – but is consistent with the external 'appeal' provisions of ISO 10003."

As Japan proceeds toward creating a financial ombudsman system, it will be necessary for it to understand the mechanisms of FOS as well as to examine the relation between these mechanisms and ISO 10001-10003. With regard to procedures that precede the arrival of the complainant at the doorway of the external dispute resolution organization, it is particularly important to understand the relation between the guiding principles and ISO 10001 and 10002. In other words, the question of how to ensure full and appropriate opportunities for resolution prior to the referral of unresolved complaints and disputes to external dispute resolution organizations is of particular importance in the case of Japan.

The table below describes the individual components of the guiding principles for the three ISO standards. The order of the individual components has been

adjusted in places to facilitate comparison and to emphasize the similarities among the guiding principles. (The lecture and materials presented by Professor Aya Yamada of Kyoto University Law School at the August 27, 2008 forum organized by the Waseda University GCOE were used in compiling this table.)

- **Comparison of the Guiding Principles**

ISO Quality management – Customer satisfaction –		
ISO 10001: Guidelines for codes of conduct for organizations	ISO 10002: Guidelines for complaints handling in organizations	ISO 10003: Guidelines for dispute resolution external to organizations
4.1 General Effective and efficient planning, design, development, implementation, maintenance and improvement of a code is based on adherence to the customer-focused guiding principles.	4.1 General Adherence to the guiding principles set out in 4.2 to 4.10 is recommended for effective handling of complaints.	4.1 General The foundation of effective and efficient dispute resolution is based on adherence to the guiding principles in clauses 4.2 to 4.12.
4.2 Commitment An organization should be actively committed to the adoption and dissemination of a code and the fulfillment of its promises.		
		4.2 Consent to participate Participation of the complainants in dispute resolution offered by an organization should be voluntary. Consent to participate should be based on full knowledge and understanding of the process and possible outcomes. When the customer is an individual purchasing or using goods, property or services for personal or household purposes, consent should not be a required condition for receiving the product (see Annex C).
4.3 Capacity An organization should make sufficient resources available for code planning, design, development, implementation, maintenance and improvement and manage them effectively and efficiently.		
4.4 Visibility A code should be well publicized to customers, personnel and other interested parties.	4.2 Visibility Information on how and where to complain should be well publicized to customers, personnel and other interested parties.	
4.5 Accessibility A code and relevant information about it should be easy to find and use.	4.3 Accessibility The complaints-handling process should be easily accessible to all complainants.	4.3 Accessibility A dispute resolution process should be easy to find and use (see Annex D).
		4.6 Competence Organization personnel, providers and dispute resolvers should have the personal attributes, skills, training and experience necessary to discharge their responsibilities in a satisfactory manner (see Annex G).

		4.11 Capacity Sufficient resources should be made available and committed to dispute resolution, and managed effectively and efficiently.
4.6 Responsiveness A code should respond to the needs of customers and expectations of interested parties, such as immediately acknowledging the receipt of each complaint to the customer. Responses should be based on a customer-focused approach.	4.4 Responsiveness	
		4.7 Timeliness Dispute resolution should be delivered as expeditiously as feasible given the nature of the dispute and the nature of the process used. It is helpful to establish time frames (see Annex H).
4.7 Accuracy An organization should ensure that its code, and information about its code are accurate, not misleading, verifiable and in compliance with relevant statutory and regulatory requirements.		
	4.5 Objectivity Each complaint should be addressed in an equitable, objective and unbiased manner through the complaints-handling process.	
		4.5 Fairness The organization should engage in dispute resolution with the intent of fairly and honestly resolving the dispute with the complainant. The provider, dispute resolution personnel and dispute resolvers engaged in dispute resolution should be impartial and objective so that processes, recommendations and determinative decisions are fair to both parties and are recognized as being made independently (see Annex F).
	4.6 Charges Access to the complaints-handling process should be free of charge to the complainant.	
		4.4 Suitability The type of dispute resolution method offered to parties to a dispute (see Annex A) and the potential remedies available to a complainant should be suitable to the nature of the dispute (see Annex E).
	4.8 Customer-focused approach The organization should adopt a customer-focused approach, should be open to feedback including complaints, and should show commitment to resolving complaints by its actions.	

	4.7 Confidentiality	4.8 Confidentiality Personally identifiable information and trade secrets, should be kept confidential and protected, unless disclosure is required by law or consent is obtained. Note: To encourage the voluntary participation of organizations in dispute resolution, it is sometimes necessary to protect the identity of the organization unless disclosure is required by law.
4.8 Accountability The organization should address accountability for and reporting on the actions and decisions with respect to its code.	4.9 Accountability	
		4.9 Transparency Sufficient information about the dispute resolution process, the provider and its performance should be disclosed to complainants, organizations and the public (see Annex I). Note: Transparency refers to information about the dispute resolution process, the provider and its performance, as opposed to personal information about the complainant and trade secrets of the organization.
		4.10 Legality A dispute resolution process should be operated in accordance with applicable law and the agreement of the parties.
4.9 Continual improvement Increased effectiveness and efficiency of the code should be a permanent objective of the organization (implementation of PDCA cycle).	4.10 Continual improvement	4.12 Continual improvement Increased effectiveness and efficiency of the dispute resolution process should be a permanent objective.

The ISO 10003 guidelines for external (third-party) dispute resolution organizations (as seen from the perspective of respondent organizations) and guiding principles for dispute resolution organizations are summarized below.

Note that the guidelines are outlined here for reference purposes only, and that this Proposal is not recommending that these items be directly incorporated into the design of future dispute resolution organizations in Japan.

ISO 10003: Quality management – Customer satisfaction – Guidelines for dispute resolution external to organizations

A. Outline of ISO 10003

(a) Scope of ISO 10003

The formal title of ISO 10003 (hereinafter referred to as "this International Standard") is "Quality management – Customer satisfaction – Guidelines for dispute resolution external to organizations." This International Standard provides guidance for organizations (as defined under Section 3.8[138]) to plan, design, develop, operate, maintain and improve effective and efficient external dispute

[138] Organizations are defined as "group of people and facilities with an arrangement of responsibilities, authorities and relationships."

resolution for product-and service-related disputes for the purpose of enhancing customer satisfaction.

The purpose of this International Standard is related to that of ISO 10001 (Quality management – Customer satisfaction – Guidelines for codes of conduct of organizations) and ISO 10002 (Quality management – Customer satisfaction – Guidelines for complaints handling in organizations), and is aimed at enhancing customer satisfaction and improving product quality by appropriately developing systems for processing disputes that are referred by organizations to external organizations (dispute resolution organizations).

(b) Nature of ISO 1003

While this International Standard is directed to organizations that are parties to disputes, insofar as it provides guidance on how organizations that are parties to disputes can establish procedures for using external organizations for dispute resolution, this International Standard also identifies the principles that should be adopted by dispute resolution organizations.

These principles that are applicable to dispute resolution organizations are examined below as extracted primarily from Annexes C through I of this International Standard's "Section 4. Guiding principles."

B. Outline of Principles Applicable to Dispute Resolution Organizations

(a) Guidance on consent (Annex C)
To preserve the customers' right of recourse to court procedures, it is extremely important that participation in dispute resolution be based on voluntary consent. Given that consent to participate should be based on full knowledge and understanding of the process and possible outcomes, the following conditions should be met:

(1) The following information about dispute resolution should be provided to customers and complainants prior to consent: the method or methods of dispute resolution used; the scope of authority of the dispute resolution organization (provider); the fees complainants will have to pay; possible types of remedies, maximum compensation that might be awarded, and possible reimbursement for expenses that have been incurred in dispute resolution; the criteria against which the dispute will be evaluated; significant differences from court procedures; a statement of the precise dispute or type(s) of dispute to which the consent applies; the name of the provider and how to access the process and how to obtain a copy of the applicable dispute resolution procedures; expected time frames for the completion of each different method; and whether the complainant will be giving up the right to go to court if not satisfied with the determinative decision. (Section C.1: Information prior to consent)

(2) In principle, the obtainment of consent to participate prior to the dispute arising is undesirable. To achieve many of the same benefits of pre-dispute clauses, the organization can instead provide for facilitative methods and determinative methods that

are binding only when the complainant accepts the decision. (See footnote[139] for function-based terminology related to dispute resolution methods.)

(3) Where consent to participate in determinative dispute resolution is obtained after a dispute arises, the parties should sign an agreement containing the name of the provider, the scope of the dispute resolver's authority, and other matters. (C.3: Consent to participate – after the dispute arises)

(b) Guidance on accessibility (Annex D)

Ease of access to dispute resolution process is an important condition for the widespread use of dispute resolution systems. The following measures are suggested to enhance accessibility.

(1) Information on dispute resolution systems should be provided when products and services are offered and when complaints are filed.

(2) Explanations should be given that if internal dispute resolution

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[139] Annex A provides the following definitions for the function-based terminology related to dispute resolution methods used in ISO 10003. The terms "mediation," "conciliation" and "arbitration" are not used because their definitions vary throughout the world. Instead, ISO 10003 uses the terms "facilitative methods," "advisory methods" and "determinative methods" as defined below.

Facilitative methods:

- Passive method: Assistance from the provider's personnel is limited to helping the parties in their communications and appropriately recording any agreement that is reached. Such assistance may include the use of a provider's personnel or software technology for facilitating communications (transmission of the parties' positions and proposed solutions) and recording any agreement that is reached.
- Active method: Participation of a dispute resolver intended not to present a conclusion but to assist the parties identify the issues, generate options, consider alternatives and endeavor to reach an agreement. Such assistance may include Internet-based ADR (ODR) services.

Advisory methods:

- Suggestions are given on how factual, legal and other issues should be resolved, possible outcomes and how they might be achieved and, in some cases, recommendations. The provider's personnel are not empowered to make a determinative decision. (In the Japanese context, advisory methods would be seen as a form of arbitration.) However, solutions can be proposed on factual, legal and other issues, and advice can be given on possible outcomes. This type of method is sometimes called non-binding arbitration or evaluation, and is clearly differentiated from facilitative methods.
- Examples of advisory methods include "mini-trials" and ombudsman procedures.
- Acceptance/rejection of non-binding arbitration: When a proposal is rejected, the reasons for rejection must be indicated in accordance with the procedures of the ADR organization or the organization's internal code of conduct.

Determinative methods: (During ISO deliberations, this was referred to as "determinative procedures:" a legally binding decision)

- The decision rendered by the provider's personnel is binding. Binding arbitration is a typical example of this method.
- The dispute is evaluated, and decisions on factual issues are documented.
- Generally, the decision is legally binding and enforceable in court.
- Determinative methods may also take the form of evaluation and decisions binding on only one party; examples include arbitration, evaluation and ombudsman procedures.

procedures fail, the matter can be referred to external dispute resolution organizations.

(3) Information should be made available not only in print form but also in other formats, such as audio and Braille.

(4) Appropriately trained personnel should be assigned to provide explanations on dispute resolution organizations.

(5) Dispute resolution costs should be moderate (or free of charge).

(6) Participation by telephone and in writing should be permitted.

(7) The process should be kept as informal as appropriate to the circumstances of the dispute.

(c) Guidance on suitability (Annex E)

The type of dispute resolution should be suitable to the nature of the dispute. The following factors should be considered in choice of method: customer preferences, the likely duration of dispute resolution, costs, complexity of issues, need for external enforcement, features of the dispute, availability of competent dispute resolver (suitability of methods), and the suitability of remedies.

(d) Guidance on fairness (Annex F)

The following factors play a part in achieving fairness in the procedures.

(1) Fairness of procedures (advisory or determinative methods)

- Published procedures should be made available prior to initiation of any process. It must be established that any recommendations or decisions are based on the evidence and arguments presented to the dispute resolver.
- Procedures and their application should provide all parties with full, fair and equivalent opportunities to participate in any methods.
- Criteria used for recommendations or determinate decisions should be disclosed to the parties in advance.
- Recommendation (or decision) and its rationale should be communicated to the parties in writing.

(2) Ensuring the objectivity and impartiality of dispute resolvers

- If a dispute resolver is employed by one of the parties to a dispute, the dispute resolver may not be able to maintain objectivity.
- Assuring that compensation (if any) of dispute resolvers is not affected by the nature of settlement. Not relieving dispute resolvers of duties without just cause.
- Prior disclosure of any relationship the dispute resolver has with either party that might reasonably be perceived as affecting impartiality. The parties should be allowed an opportunity to challenge the selection of any dispute resolver for good cause.
- Dispute resolvers should be assigned in a manner that minimizes repeated service with any particular party.
- Clearly communicating to the parties the dispute resolver's

scope of authority and assuring that any recommendation or determinative decision is within the scope of that authority.

(3) Objectivity and impartiality of other related persons

- Adopting conflict of interest policies and ethical codes for personnel, management and dispute resolvers.

(4) Objectivity of dispute resolution organization

- Funding relationship between parties and dispute resolution organization (principle of transparency).
  - Prohibition of direct involvement in resolution of any dispute by provider's dispute resolution personnel and management.
  - Above prohibition excludes ensuring that eligibility requirements of the dispute are met and procedures are properly observed.

(5) Providing services of technical experts

- Documentation in writing of accepted settlement to ensure enforceability.

(6) Determining whether the parties have complied with any settlement or determinative decision.

(e) Guidance on competence (Annex G)
Organization personnel, providers and dispute resolvers should receive appropriate training corresponding to methods of dispute resolution and remedies, should be qualified and have necessary experience.

(f) Guidance on timeliness (Annex H)
Dispute resolution should be delivered as expeditiously as feasible given the nature of the dispute and the nature of the process used. Expected time frames for the completion of each different method offered should be established in advance. In particular, it is necessary to ensure the predictability of the speed of progress of each type method for consumers.

(g) Guidance on transparency (Annex I)
To maintain confidence in the dispute resolution organization, sufficient information about the dispute resolution process, methods and performance should be disclosed to complainants, organizations and the public. The publication of annual reports is an effective means for this purpose.

(h) Confidentiality (Section 4.8)
Personally identifiable information and trade secrets should be kept confidential and protected, unless disclosure is required by law or consent is obtained.

Appendix 4. The First Proposal of Financial ADR/Ombudsman Research Group

April 18, 2007

1. The party who is making a proposal:

The Financial ADR/Ombudsman Research Group

2. Objective of the proposal:

1) The realization of an expertised ADR organization and system for financial services that adopts the perspective of users of financial services, is trusted by both businesses providing financial services and their customers, and offers benefits to all parties involved.
   (Creation of the Japanese Financial Ombudsman System)
2) The proposed ADR system is to function as a mechanism for the resolution of individual disputes, but it is expected that ultimately, by means of the realization of specialized, comprehensive and boundary-crossing ADR functions and organizations, the reliability and convenience of the financial services market as a whole will be increased, producing a market that is attractive to all users, including individual investors.

3. Proposal:

Summing up, concerned parties should take the initiative as early as possible in moving towards the establishment of a financial ADR system in Japan, assuming the use of the system of certified investor protection organizations provided by the Financial Instruments and Exchange Law as a prerequisite, in addition to considering the establishment of a consultation center in the Japan Legal Support Center.
This would enable the realization of a fair and effective ADR system for financial services that adopts the perspective of users of financial services, is trusted by both businesses providing financial services and their customers, and offers benefits to all parties involved.

4. Conditions for the proposed Financial ADR System to be realized in Japan:

The establishment of a rapid and integrated ADR system that is fair to all of these users of financial services would be of considerable significance from the following perspectives:

1) Simplicity,
2) Speed (timeliness),
3) Minimal economic burden (cost),
4) Complainants' protection of privacy (confidentiality),

5) Compatible as a whole,
6) Effective. And,
7) System operator's expertise is sufficiently effective,
8) The ADR system and its operators must be trusted by both users and businesses.

In order to achieve above factors, the financial services market requires a financial ADR system that can rapidly respond to changes in the market.
Even though it may starts with treating from a limited number of financial instruments and services, should be ultimately comprehensive, boundary-crossing, and effective, and should be convenient and readily accessible for users of financial services.

5. Necessity of comprehensive and effective Financial ADR functions:

Court-annexed ADR and resolution of disputes before the courts are good methods for dispute resolution. They have been improved their systems over the past several years.

However, from the point of general users of the financial services including individual investors, dispute resolution by litigation entails considerable expenditure in order to file and maintain a suit, and a great deal of time is generally required to reach a settlement. It may also be difficult for individuals to present evidence. In addition, we cannot ignore the reduction of damages due to comparative negligence, and problems in terms of the protection of the privacy of individuals and families can also be indicated.

By contrast with conditions in Japan, an ADR system specializing in financial disputes has been focused as an attractive alternative in recent years.
This ADR system offers individuals the freedom to file a lawsuit.

There are various consultation services or organizations other than judicial trials available in Japan. There are several Industry-based financial ADR institutions, providing private ADR. Court mediation is available as judicial ADR. In addition, administrative ADR institutions such as the National Consumer

Affairs Center of Japan or the consumer centers of local governments provide consultation services.

These institutions all respond in their specific manners, but individuals who have problems have no idea where to go, and even if individuals consult with one of these institutions, it does not always lead to an effective resolution.

These types of ADR are neither sufficiently functional as measures for settling financial disputes, nor easy to use for users of financial services, for the following reasons:

1) Traditionally, the statute of limitations stipulated by the Civil Code has not been interrupted even if an application for ADR procedures has been filed. (This problem has recently been resolved to some extent by the ADR Act)
2) Because no institutional infrastructure has been developed, even if an agreement is reached through ADR procedures, no court procedures are taken to enforce the agreement, and it is difficult to ensure that it will be voluntarily honored.
3) Most existing ADR systems limit their services to consultation. Therefore, it is unlikely that their services will lead to the arbitration and assistance required by users of financial services who want to settle disputes.
4) From the perspective of users, existing measures do not always maintain sufficient neutrality.

Laws and other regulations related to the financial services market in Japan are being improved. However, in addition to the fact that this process has not yet been completed, mechanisms relating to many financial products and services are complex and based on highly specialized knowledge.
It is therefore sometimes difficult for ordinary users of financial services, including individual investors, to fully understand the details of financial products and services, and in some cases they suffer unexpected negative consequences.

In addition, even if financial products have similar economic effects, if they are designated by different names and are dealt in by different types of industries and businesses, there are cases in which the providers of ADR services are neither sufficiently specialized nor sufficiently effective from the perspective of the users of financial services.

It remains the case that there is no ADR system that is highly effective, easy to utilize, and widely used to enable users of financial services to recover from negative effects.

The financial services market in twenty-first century Japan requires a financial ADR system that can rapidly respond to changes in the market, is comprehensive, boundary-crossing, and effective, and is convenient and readily accessible for users of financial services.

6. Points of particular importance in the establishment of an ADR system for financial services are as follows:

1) Expertise: The operators of the system must fully understand the features of financial products and services, make effective use of their expertise, and provide follow-up for users according to the features of the specific product or service.
2) Reliability: Neutrality and fairness must be guaranteed for both businesses providing various types of financial services and their users, and the

ADR system and its operators must be trusted by both users and businesses.
3) Effectiveness: The necessity of an effective ADR organization must be understood by businesses providing financial services, and based on this, the effectiveness of the organization must be increased by creating an environment in which the businesses themselves can readily accept being bound by ombudsman awards.
4) Merits for businesses providing financial services: It is necessary to design an institution the use of which has merits for businesses providing financial services. For example, the provision of a system enabling businesses to settle disputes rapidly and with minimal economic burden will increase trust in the businesses, and can be expected to encourage a wide range of users of financial services to use the system. In addition, this should enable the creation of a mechanism by means of which the funds to operate the system are obtained on the basis of voluntary cooperation among businesses.
5) Utilization of existing institutions: The establishment of a consultation area in the Japan Legal Support Center ("Houterasu," established as a comprehensive consultation center in 2006) should be considered.
6) Utilization of the system of certified investor protection organizations: The use of the system of certified investor protection organizations in the Financial Instruments and Exchange Law, which came into force at the end of September 2007, is a prerequisite for the operation of the system.

7. The significance of a new financial ADR system and expected effects:

It is not only those who use and consume financial services who are users of financial services, but also providers of funds (investors) and recipients of funds.

The establishment of a rapid and integrated ADR system that is fair to all of these users of financial services would be of considerable significance from the following perspectives:

The system would increase the trust of users of financial services in those services and the businesses that provide them.
The system would be of benefit not only to the users of financial services, but also to businesses that provide these services, because it could be expected to promote increased use of financial services.
Consequently, the system could be expected to increase the efficiency and attractiveness of financial services, and to expand and stabilize the market for financial services in Japan.
The ability to make use of rapid and rational dispute settlement provided by financial ADR organizations with expertise in the area therefore has merits for users of financial services and the businesses that provide financial services.

Put another way, the type of dispute settlement system for financial services discussed here is an essential infrastructure to ensure the stability of the financial system, the foundation of Japan's economy.

The proposed ADR system is to function as a mechanism for the resolution of individual disputes, but it is expected that ultimately, by means of the realization of specialized, comprehensive and boundary-crossing ADR functions and organizations, the reliability and convenience of the financial services market as a whole will be increased, producing a market that is attractive to all users, including individual investors.

8. Establishment of the Japan Financial ADR / Ombudsman Research Group:

In order to enable this, we believe that it will be necessary for concerned volunteers to begin conducting independent joint research on a model for an optimal financial ADR organization.

As a first step to attain objective we have set up the Japan Financial ADR / Ombudsman Research Group as a voluntary group by individuals who share the goals outlined above at the date of April 18, 2007, and will conduct research on financial ADR.
On the same date we have announced this first proposal.

Please refer charter of the Japan Financial ADR / Ombudsman Research Group.
(Omitted. Please refer http://www.kinyu-adr.jp/)

Proposal: A Model for a Financial ADR Organization and Measures for Its Realization

Toward the Development of an Effective and Reliable Financial ADR System for Reasonable and Flexible Dispute Resolution

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