UK Response to AIDA Dispute Resolution Working Party Questionnaire on Insurance Ombudsman Schemes

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3) Yes. Some (but not all – see further details below) insurance and other financial services disputes may be dealt with by the Financial Ombudsman Service ("FOS"). The FOS has a website[1] which provides most (if not all) of the information about its functions that either a policyholder or an insurer could reasonably need.

4) Yes. The current FOS scheme is the creation of a statute, the Financial Services and Markets Act 2000 (as amended).[2] Part XVI of the Act (sections 225 to 234B) establishes the outlines of the scheme, and Schedule 17 contains supplementary provisions, including the duty of the relevant regulator (the Financial Conduct Authority, or FCA) to make rules dealing with matters such as jurisdiction, how complaints are to be handled, and funding of the service. The FCA is also charged with reviewing these rules as and when necessary; paragraph 2 of Schedule 17 provides that: "The FCA must take such steps as are necessary to ensure that the [FOS] is, at all times, capable of exercising the functions conferred on [its] operator by or under this Act."

5) All entities regulated by the FCA (including UK-domiciled insurers) are required to participate in the FOS scheme. Participation is voluntary (but in fact almost invariable) for some other financial services institutions, such as banks and insurers based in another member state of the European Union that are regulated primarily from their home states but have dealings with UK consumers. Notwithstanding Brexit, this situation is unlikely to change until all relevant policies have expired and all claims thereunder resolved. In the FOS terminology, all participating entities are known as "subject firms".

6) There are no excluded categories of insurance, although in practice the jurisdictional limits (see 8 below) rule out "industrial" or large commercial risks such as aviation policies. The FOS does handle marine insurance complaints, although these tend to be in relation to leisure craft owned by individuals rather than (e.g.) freighters.

7) Yes. Although the distinction between underwriting and claims disputes is more theoretical than practical in the UK (probably the majority of complaints that reach the FOS relate to declined claims, but the insurer's reason for declinature may be the discovery of a breach by the insured of the duty of fair presentation – which is an underwriting matter), the FOS could

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[1] www.financial-ombudsman.org.uk

[2] The FOS is not the original UK ombudsman scheme, but the successor to an earlier scheme – the Insurance Ombudsman Bureau, created in 1981 as a voluntary private enterprise by three leading UK insurance companies. For further information about the history of the insurance ombudsman service in the UK, see Peter J Tyldesley: "The Insurance Ombudsman Bureau – the early history" in (2003) 39 *Journal of Insurance Research and Practice*, pp 34-43.

adjudicate equally on a complaint (for example) that a policyholder was unfairly denied renewal of a policy by the underwriter.

8) The jurisdiction of the FOS is not limited by the amount in dispute, but there are limits to the maximum awards of compensation that it may make. These limits have increased significantly over the past decade. Up to January 2012, the limit had been £100,000. It was then increased to £150,000. Now, different limits apply depending on when the case was brought to the FOS, as follows:

- £355,000 for complaints referred on or after 1 April 2020 about acts or omissions by subject firms on or after 1 April 2019
- £350,000 for complaints referred between 1 April 2019 and 31 March 2020 about acts or omissions by firms on or after 1 April 2019
- £160,000 for complaints about acts or omissions by firms before 1 April 2019, and which are referred to the FOS after that date
- for complaints referred before 1 April 2019, the previous award limit of £150,000 applies.

The above figures are exclusive of interest (currently usually awarded at a rate of 8% per annum) and costs "reasonably incurred" – although costs awards are not common.

If the FOS considers that the amount of compensation that it should award is higher than the above limits, it can recommend that the subject firm pays more. Such recommendations are not enforceable, but the complainant may then have other means of redress.[3]

The categories of policyholders eligible to use the FOS are also restricted. Up to April 2019, only consumers and "micro-enterprises" (including small charities and trusts) were entitled to take their complaints to the service. Since then, "small businesses" (more usually described by the acronym "SME" – for "small to medium enterprises") have also been eligible. According to the FOS rules:

- a micro-enterprise is a business which:
  - has a turnover or annual balance sheet that does not exceed €2 million, and
  - employs fewer than 10 persons
- a small business is an enterprise which:
  - is not a micro-enterprise
  - has an annual turnover of less than £6.5 million

  and either
  - has a balance sheet total of less than £5 million, or employs fewer than 50 employees.

The FOS can also assist charities with an annual income of less than £6.5 million and trusts with a net asset value of less than £5 million.

9) The effect of an ombudsman's award[4] depends on the decision of the policyholder alone. If the policyholder accepts the award, it then becomes final and binding on both parties. The insurer has no such option. If the policyholder is not satisfied with the award, it need not be accepted, and the policyholder may resort to legal proceedings.[5] If however the FOS has, in addition to making an award within the limits of its compensatory jurisdiction, also recommended that the

[3] See further the responses to questions 9 and 14 below.

[4] See also the response to question 12 below for an explanation of the stages of the FOS process.

[5] See further the response to question 14 below.

insurer pay a higher amount exceeding that jurisdiction,[6] the policyholder cannot accept the enforceable part of the award and still proceed against the insurer for the additional compensation; finality cuts both ways.[7]

10) No – the FOS service is free for policyholders.

11) The FOS is funded by subject firms, in part by an annual levy imposed and administered by the FCA, and in part by case fees. Both types of funding are reviewed annually in order to ensure that the FOS has an adequate budget.

    The amount of the levy varies according to the nature and size of the business concerned; the current range is from under £50 for a small firm of financial advisers to over £1 million for a high-street bank. A major insurer could expect to pay a figure towards the mid-point of this range.

    Case fees are not charged for the first 25 complaints against a subject firm in each financial year. From the 26th complaint onwards, a case fee of £650 becomes chargeable. The fee must be paid if a case needs to be investigated, regardless of the outcome.

12) The FOS complaints resolution process involves two stages. Initially, an adjudicator or investigator will attempt to sort out the problem informally and as quickly as possible and make a recommendation. If the policyholder or the insurer rejects this recommendation, the case will (at the request of either party) be reviewed by an ombudsman – a more senior and experienced member of the FOS staff. Ombudsmen's decisions are final in the sense that no appeal against them lies to any other tribunal (including the courts) but, as the FOS is a public body, judicial review of its decisions is possible. This is however a remedy that is rarely invoked and even less frequently successful. Judicial review focuses on the decision-making process rather than the evidence or outcome of the dispute, and the applicant has to show that no ombudsman, properly directing himself or herself, could reasonably have arrived at the decision actually made. This sets the bar for success very high.

13) In reaching a decision, the FOS must have regard to the evidence (at the risk of stating the obvious) and the law. Complete disregard of either could form the grounds for a successful judicial review. The principal criterion used, however, is fairness and reasonableness. As the FOS website puts it: "We have a duty to make decisions based on what we think is fair and reasonable in all circumstances of the case."[8] Consistency is always sought, although previous decisions are not necessarily regarded as setting formal precedents because of the possibility of subtle differences in the factual background.

14) If legal proceedings concerning the subject matter of the relevant complaint have been commenced in a court or other tribunal (or have been concluded with a judgment on the merits) before the FOS becomes involved, the FOS will in practice not entertain that complaint,

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[6] As explained in the response to question 8 above.

[7] *Clark v In Focus Asset Management & Tax Solutions* [2014] EWCA Civ 118

[8] The section of the FCA Handbook dealing with Dispute Resolution: Complaints (DISP), chapter 3 of which covers Complaint handling procedures of the Financial Ombudsman Service, provides at DISP 3.6.4 R that: "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."

although in principle it retains a discretion to do so. Likewise, the commencement of proceedings while the FOS is considering a matter will lead to the FOS's withdrawal, unless those proceedings are stayed. The main reasons are obvious: avoidance of duplication of costs and time; and the possibility of inconsistent outcomes because of the different criteria by which judicial and ombudsman decisions respectively are reached. Once a FOS decision has been made, however, if the policyholder does not accept that decision, the parties are then free to litigate. As also indicated in the responses to questions 8 and 9 above, the FOS may make a non-enforceable recommendation for compensation in an amount exceeding its jurisdictional limits. In such cases, it is not open to the policyholder to accept the enforceable part of the FOS decision and to litigate against the insurer for the amount of the additional compensation recommended;[9] the policyholder must choose between acceptance of the award (which will then bind both parties) or rejection – possibly in the hope that the insurer, mindful of the FOS recommendation, will offer more than the enforceable award to settle the claim if the policyholder proceeds to litigation.

[9] See *Clark's* case, cited at footnote 7.