Submission to the APPG Inquiry on Fair Business Banking and ADR

This paper is a response to a request for written submissions to the All Party Parliamentary Groups ("APPG") on Fair Business Banking and Alternative Dispute Resolution (the "Inquiry") from Mr Manu Duggal. The scope and terms of reference for this response are assumed to be those in the APPG's "Call for Evidence" paper.

This response is intended to comment on the issues raised in that paper and to offer recommendations for a new process and dispute resolution forum. Readers with limited time may wish to start at section 11 ("General Recommendation") and read the author's recommendations and proposals before reading earlier sections which set out the analysis and reasoning.

The Respondent: Manu Duggal

I worked for fifteen years in investment banking at leading global banks. Experience in corporate finance, derivatives, capital markets, structured finance and Emerging Markets. Was Head of Fixed Income Arbitrage at Swiss Bank Corporation (now UBS) and Partner, Capital Markets at Lazard.

I have consulted with small and large companies on raising capital, contracts and disputes in Oil and Gas, Power Generation, EPC Construction, Commodities and Technology. I am an investor in small businesses and start-ups.

I have knowledge and first-hand experience of Arbitration, Tribunals and the English Courts. I sit on the Charity Tribunal and as a Magistrate in Central London. I have acted as adviser and party representative in commercial litigation and arbitration.

I hold an LLB and an LLM (International Commercial Law) from UCL, an MBA from LBS and a degree in Physics from Imperial. I am a Member of the Chartered Institute of Arbitrators (MCIArb).

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Time for a Financial Disputes Tribunal?

1. Background

1.1. The contribution and importance of SMEs to the UK economy has been well documented and the current government as well as senior politicians from all political parties have stated their desire to give such enterprises more support. It is apparent that they are a vulnerable class of counterparty for the behemoth that is UK banking and, need protection by way of state intervention. This is particularly important in a post-Brexit world where there is a risk of loss of protection under EU legislation.

1.2. The bigger corporates in the UK and individual consumers, for different reasons, have a degree of protection when they deal with banks and other providers of financial services ("Suppliers"). Large corporates have in-house financial experts and can shop internationally to drive a harder bargain with Suppliers. At the other extreme, consumers have the regulators, Ombudsman, watchdogs and consumer forums to ensure that a transparent and fair bargain is being entered into under standard consumer contracts.

1.3. Both these types of buyer also have recourse when there is wrongdoing by Suppliers. Big corporates have the firepower to litigate or pursue ADR[1] should things go wrong and consumers have the FOS and UCTA 1977 to fall back on. Unfortunately, SMEs fall between the two and the premise of the Inquiry is that SMEs too need some form of additional protection as they fall between two stools.

2. Standard vs Non-standard Financial products

2.1. Suppliers of financial services sell both standard (off-the-shelf) and bespoke products to SME businesses[2]. Standard financial products are sold under non-negotiable agreements whereas for Non-standard ones Suppliers are more amenable to negotiating the extent of their duties and obligations. The same is generally true with pricing.

[1] ADR clauses are rarely incorporated or used in financial agreements and the reasons for that are complex. However, historically Suppliers have preferred the certainty of litigation (the courts).

[2] An SME business can be a natural person trading as a business, a partnership or a company. An SME business is typically defined by its employees or financial means but there is no universally accepted definition.

2.2. When buying Non-standard products, most SMEs do not seem to consider that they can, at least in theory, improve on what is offered. Suppliers would suggest that this is a behavioural choice SMEs make and that party autonomy should be respected and, so their argument continues, it does not fall on the Supplier to take any action. However, even if an SME chose to try and negotiate, most do not have sufficient in-house expertise to identify what to aim for and how to go about it and, in any event, most SMEs cannot afford professional advice.

2.3. The net result is that Suppliers can use the advantage generated from information asymmetry (whereby the SME does not know if the pricing embedded into the bargain with the Supplier was at a fair market price), superior legal expertise and market power to create legally robust contracts which generate super profits for them at a cost to the SME. This in turn can lead to acrimonious disputes if, in the future, things do not turn out well for the SME.

3. Information, Understanding and Bargaining Power

3.1. The Inquiry's request paper suggests that relevant information central to the bargain between the SME and the Supplier may not be sufficiently well understood by the SME when making its decision to deal with the Supplier. Further that the lack of choice for the SME results from market concentration (legality under competition law notwithstanding).

3.2. Although both fall under the rubric of unequal bargaining power, there is a need here to distinguish between misrepresentation by a Supplier, on the one hand, and its failure to ensure that a threshold of understanding was achieved by the SME. The former is a breach in law usually caused by maverick employees. Such cases are high visibility but not that common and the law is clear: the Supplier must right the wrong of the employee and the civil, and occasionally even criminal legal system takes over the claim.

3.3. Failing to present information in a sufficiently clear way and ensuring understanding by the SME, however, are the harder problems to analyse and solve. Misrepresentation, a legally well-defined wrong, and lack of clarity need to be distinguished when designing rules and procedure to deal with them. Then there is the issue of the standard to be applied in each case when the parties are

commercial counterparts, trading as willing buyer and willing seller, in an English law setting where *caveat emptor* still applies. It is undoubtedly a challenge to ensure Suppliers both provide information which is not misleading and furthermore do so clearly so as to ensure understanding by the recipient. The Inquiry should exercise caution in accusing Suppliers of acting unfairly, given that they are operating in a legal system where *caveat emptor* applies.

3.4. These thorny issues have to be dealt with by first having a framework in place, whether through legislation, regulatory rules / principles or even guidelines, before it can properly be argued that Suppliers are acting unfairly. It is suggested that the Inquiry needs to bear this distinction in mind when attempting to 'level the playing field' so as to avoid leaving Suppliers exposed to regulatory and legal whim while possibly leaving SMEs no better off.

4. Competition Issues

4.1. Lack of choice for an SME means few Suppliers and few variations of products or services whereas lack of bargaining power for an SME arises from having fewer Suppliers competing for its business. Although it is a basic tenet of competition law that a market with fewer suppliers creates the conditions for collusion (and so price fixing) against the buyer, the market for SME financial services has not as yet been found to be anti- competitive in the sense of breaching competition law. Banking and financial services markets are monitored carefully by regulators and competition authorities both locally in the UK and in the EU, in particular as to "abuse of a dominant position". These markets are, however, a sellers' market, meaning that they strongly favour Suppliers by giving them greater bargaining power. They are also highly profitable for Suppliers at the expense of SMEs.

4.2. When an SME does not have access to price information from the marketplace, it is hard to recognise, never mind avoid, predatory pricing by a Supplier. There is of course little incentive for Suppliers to publish price information[3] for SMEs to use for comparison purposes as it will reduce profits when the SME shops around. Another barrier to switching is the fact that the SME may choose not to buy a product based

[3] The UK utilities market represents a helpful cases study for analysing whether it is in fact helpful to the user of a service to force suppliers to carry out and communicate a price comparison of the market for its own service.

on price alone because it is a 'tied' customer with other products and much to lose from switching supplier. This too needs to be considered by the Inquiry noting the example of how utilities are forced by the regulator to show the consumer the best offer from a competitor.

4.3. Suppliers argue that any so-called dominance, even if it does exist, is temporary and unsustainable because economic theory says that eventually a renegade Supplier will try and increase its market share by breaking away from the 'oligopolists' price structure and / or offer the customer better contractual terms. In practice that is not persuasive as can be seen in the marketplace for financial products marketed to SMEs (e.g. loans and interest rate hedging products). The bargaining power between SMEs and Suppliers is unequal. For example, in practice Suppliers do not allow negotiation on clauses in agreements which will frequently give rise to huge penalties for early termination by the SME (although one common complaint against Suppliers has been that contracts have failed even to indicate the order of magnitude of these penalties). This limits switching opportunities for SMEs even for products for which there exists competition and a better deal elsewhere.

4.4. In contrast, Suppliers deal differently with bigger corporate customers who are more equally armed for negotiation and dispute resolution. In those agreements there is often a 'make whole' clause which effectively operates to allow switching between Suppliers upon payment of either a market-referenced 'damages' clause or a fixed 'liquidated damages' clause.

5. Understanding Banks

5.1. Banks are like any other business: they acquire capital, people, ideas and services to create products they sell to consumers at a higher price than it costs to put them together. They are similar to utilities in that no business can function without them.

5.2. There is in British society a strong bias, even a presumption, that banks are rapacious and likely to put their own interests before those of their customers. This is based on the systemic, widespread misbehaviour of many banks at one or other time in one or other of their businesses.

5.3. There are different types of banks: investment banks are different from clearing (high street) banks although there is a crossover between their activities.

Investment banks sell consultancy, advice and creative ideas to clearing banks and large corporate customers but not usually directly to individual and SME consumers. They are able to take risks (using hedging and financial engineering) which clearing banks are not geared to handle. They then sell these to clearing banks who bundle them with standard bank products (e.g. loans). The banks use their strong brands and distribution networks to sell the bundled product to SMEs. Many clearing banks have arms-length divisions and subsidiaries which are effectively Investment Banks with each such profit centre trying to extract as much profit from the value added chain as it can.

5.4. SME transactions with banks (particularly Non-standard transactions) are smaller in value and usually immensely profitable for banks. This is because they involve complex products created against a background of information asymmetry: SMEs do not have the ability to establish prices for the component parts of what they are buying and reassemble the product themselves. Nor the technical skills to unbundle (reverse engineer) them to establish a 'fair value'.

5.5. In summary, the following factors create opportunities for excessive profiteering by banks:

- Limited resources available to SMEs to negotiate balanced contractual terms,
- Legally effective liability disclaimers in agreements, especially ones which deem the SME not to have been "advised" by the bank even though advice (sometimes poor advice) has in fact been given, and
- Protection under the English law doctrine of *caveat emptor*

5.6. Seen from the bank's perspective, it has done nothing wrong by attaching a high price to a product sold to an SME. It is not an offence and it is the SME's duty to check for fair value and terms. Moreover, the bank would claim that an SME is not a consumer but a business quite capable of declining the bank's offer or negotiating harder. The bank might even argue that the government could have, but has chosen not to, create law or a scheme to regulate their dealing with SMEs. From the bank's perspective an SME, however small and unsophisticated, is in fact a willing buyer dealing with a willing seller, and should be able to assess risk and cost / benefit.

6. Banking Culture

6.1. The edifice of banking in the UK is built on a capitalist, free market model with light touch regulation, especially when it comes to SME banking. This invites the unfettered pursuit of legally made profits when dealing with SMEs. To do so banks need to (and do) hire highly educated, innovative, driven people to extract the last ounce of profit from the lowest hanging fruit.

6.2. Banks with their financial firepower and legal immunity from punitive damages have a very strong position when it comes to litigation. The fact that SMEs have limited access to legal advice and affordable dispute resolution, confers a further (and major) advantage to banks when it comes to dispute resolution. One which, due to their culture, they will ruthlessly exploit to create profit for senior management and shareholders. This approach is in the DNA of most banks and almost impossible to change quickly except through laws, regulation and criminal sanctions.

6.3. Some commentators have said that a major cause of the problem of predation by Banks, and the consequential financial harm to SMEs, is their inherent profiteering culture. This is undoubtedly true - assuming that informal pressure and other actions without the support of legal sanctions can magically create culture change is therefore naïve.

6.4. It has also been argued that creating a more efficient, competitive market for financial services can cause change in the behaviour of Banks because they can do better in the long run by adhering to higher (self-imposed) standards. This too is naïve; states and regulators cannot induce a market to be competitive and even with stricter anti-competitive legislation it could take a decade to achieve behavioural change.

6.5. Banks seem to only notice the benefits of being fair (and being seen to be fair) to SME customers when there is moral outrage or legal precedent. The argument that predatory behaviour towards SMEs will harm a bank's 'brand' and that should be a brake on such an approach is tenuous and does not appear to have worked in the past. Even though investors do question whether a bank is a valuable investment when there is a whiff of institutional culpability, it seems that most banks are apparently unaffected.

7. Types of Dispute between SME and Supplier

7.1. In most financial disputes between SMEs and Suppliers, the parties have a 'consensual' written agreement and the dispute has surfaced because the SME is under financial stress. The fact that the dispute surfaces in such circumstances creates a further advantage for the Supplier in that the SME is in a weakened state and will find it a struggle to take action to prepare its case, pursue the Supplier for a remedy. Moreover, in these circumstances the SME is likely to be even more reliant on the Supplier for support which may deter the SME from even considering whether the Supplier has been at fault, never mind pursuing him.

7.2. Although the facts of the dispute can vary a lot, the subject matter is fairly predictable: the Supplier is said to have

i) Committed a regulatory breach and / or

ii) Failed in its legal duty owed to the customer under their contract.

The failure of a Supplier to act in accordance with its legal duty breaks down into two areas:

a) Breach of the Supplier's obligations under the contract and

b) Fairness of commercial terms under the contract (restrictive terms, break clauses, discriminatory or excessive pricing).

7.3. Many claims brought by an SME will have no basis in law and the dispute resolution entity charged with assessing whether there is a legitimate dispute may find that there is 'no case to answer' for the Supplier. As an example, many SMEs believe that Suppliers have a duty to act in good faith in dealing with them[4]. This is too often a case of wishful thinking or misunderstanding by the SME because, despite certain exceptions found by the English Courts, no such duty can usually attach to a Supplier by the general operation of law.

8. Winners, Losers and Hedging

8.1. The aphorism '*for every winner there is a loser*' suggests that if, in the future, financial markets move against an SME which bought a banking product, the Supplier must surely benefit and vice versa. This is not strictly the case (in a bipartite Supplier–SME agreement) as Suppliers mostly hedge their risks so as to be

[4] Such as that which applies to a fiduciary relationship

neutralised against market moves and so lock in profits regardless. In other words, if markets move, Suppliers usually face a neutral outcome as a result of hedging and capture their margin at the outset.

8.2. In an adverse scenario for the SME, it can feel it has been misled, mis-sold or cheated because it is suffering financially even though that view is based on an 'after the event' analysis where no account has been taken of the fact that the market could also have moved in its favour. There is also the possibility, after a bad outcome, for the SME to be blind to the 'next best option' issue: what condition might be the SME be in today had it not, in the circumstances pertaining at the time, taken out the product now complained of? In other words, did the SME in fact have any other options at that time and was the product, even if it now looks a bad choice, simply the least bad option at the time? Memories are sometimes short and there is a selection bias 'after the event'. However difficult the situation an SME may find itself in, these are scenarios which need unbiased adjudication to ensure that claims are not permitted simply because the SME suffered a loss, and in particulars a loss because of a market move. Such losses are a function of the vicissitudes of commercial life and not a wrong committed by the Supplier. This is a true manifestation of the (often misunderstood) principle of *caveat emptor* – the SME as buyer of a financial product needs to accept that markets may go against it. And when they do, any resulting impact cannot be attributed to the Supplier.

8.3. This was not the case in some of the IRHP disputes for which the FSA set up its ill-fated dispute resolution scheme. The facts, when scrutinised, show clearly that some Suppliers had abused their market power and simply failed in the obligations they owed SMEs under black letter law.

9. Criminal Sanctions

9.1. The limited reach of criminal sanctions for individual bank employees involved in wrongdoing and the (unlikely) prospect of prosecutions even being brought let alone convictions secured in the UK, means that the criminal law currently plays little if any role in achieving culture change among employees of firms who are providers of financial services.

9.2. As stated above, banking culture will not change as a result of minor regulatory intervention for the same reason that a soft drug user does not usually give it up because it goes from being a Class C drug to a Class B one. Only the introduction of tougher criminal sanctions through statute, combined with rigorous policing to increase the chance of detection of illegal behaviour, and more aggressive prosecution, can make a difference. This will not come cheap but the rewards are certainly there in terms of the benefit to the economy and upholding the rule of law.

10. The Role of ADR

10.1. ADR is generally understood to refer to private dispute resolution methods which avoid litigation in Court, namely arbitration and mediation. Both are explicitly recognised and encouraged by English Courts and most law firms. The former because it reduces pressure on an expensive, state–provided resource and the latter because they generate high paid work. In the case of arbitration, England, Wales and NI has a formidable governing Act (Arbitration Act 1996) recognised globally as the gold standard. The Mediation industry benefits from various private accreditation organisations and professional bodies but there is no formal state intervention.

10.2. In arbitration, a consensual process, the parties need to agree at the outset on the constitution of the tribunal, the rules and laws which will apply to the procedure and subject matter, and pick a 'seat' where local law can provide a framework to ensure the process benefits from of the choices of the parties and application of the chosen laws[5]. In the UK, a matter decided by arbitration is only appealable to the Courts on limited grounds[6] with awards being enforceable in almost every major country in the world[7].

10.3. Mediation is a different animal altogether. While there is sometimes a role in a dispute for an interactive process where a neutral third party assists in resolving conflict, it may safely be said that the types of dispute this Inquiry is addressing, will

[5] Subject usually to public policy considerations.
[6] Including procedural irregularity and an error of law.
[7] Under the "NY Convention 1958".

seldom result in the parties agreeing to subject themselves to such an unstructured and non-binding process, however 'sensible' that pathway may be.

10.4. Arbitration is said, mainly by its practitioners, to have several advantages over litigation including confidentiality, cost, speed, flexibility, party autonomy and enforceability. These claims have been tested over thousands of arbitrations by as many users, lawyers and assorted arbitrators across a broad range of disputes in a number of jurisdictions over several decades. Confidentiality and party autonomy aside[8], most of the other claims have been found to be wanting:

a) Arbitrations can last years as getting together a three-man group of in-demand lawyers, retired judges and busy professionals itself can take months;

b) Each arbitrator usually charges in excess of £1,000 per day (often 2 or 3 times that) and most arbitrations have three to minimise the risks of bias and capricious decisions;

c) The prevalence of disputants choosing (or being recommended) lawyers as representatives in arbitrations adds both to cost and to a cultural bias resulting in less flexibility[9].

d) As for enforceability, there are few SME – Supplier disputes which benefit from global enforcement[10], the disputing parties being UK domiciled.

10.5. This is not to decry the fact that (English) arbitration is hugely successful as a pathway for resolving commercial disputes; there are a large number of disputes where it is undoubtedly beneficial for the parties to choose arbitration over litigation. But it is less likely that in view of the specificities of SME – Supplier disputes, these drawbacks may not produce sufficient advantage or gain for SMEs in disputes against Suppliers.

10.6. Stretching the definition of ADR to include *all* non-court forums, means including the state-run alternative to litigation in England and Wales[11], namely hearings involving a (specialist) Tribunal. In addition to Courts, HMCTS also administers specialist Tribunals which, in contrast with Courts, offer procedural

[8] These being structural, non-discretionary benefits of arbitration

9 From following Court procedures, particularly on disclosure and discovery, and timetable.

[10] Unlike, say, ship owners and charterers who themselves operate globally.

[11] Scotland and NI have their own Acts.

informality, the use of specialist adjudicators, speed and relatively low cost. In some ways, Tribunals are similar to Courts in that jurisdiction, procedure and powers are defined in an Act of Parliament and decisions are made publicly to provide transparent guidance on substantive law to all concerned. Decisions have some precedent setting value, are appealable to the Upper Tier of the Tribunal and eventually to the High Court and beyond on matters of law (as opposed to on the facts). As such, Tribunals are well suited to disputes centring on factual evidence (rather than on pure points of law) and as the Inquiry reviews the types of dispute for which it is designing a forum, it may wish to bear this in mind.

10.7. It is worth remembering that claims of the type this Inquiry is focused on, that is to say wrongs in English law against SMEs by Suppliers, are almost always claims brought by SMEs against Suppliers (not the other way around). Also that although an agreement between a Supplier and an SME containing an arbitration clause would have the air of consensus, the inequality in terms of bargaining power when an SME - Supplier contract is being formed, would allow a Supplier to force through a self-serving arbitration clause relatively easily. Somewhat ironically, given the lack of attractiveness for SMEs of arbitration, the fact that Suppliers have not used arbitration clauses in agreements with SMEs suggests that it is not in their interest either. Suppliers have large legal departments aiming to protect their firms and could, with little pushback from SMEs, incorporate arbitration clauses easily. That they have deliberately chosen not to do so is confirmation that it is litigation which offers them advantage.

10.8. Whether that advantage is due to the fact that SMEs cannot typically afford litigation costs, or whether they are scared off by lack of familiarity with the process or lack of clear information on their rights, or the slowness of the process, should be further investigated by the Inquiry. If only so that the Inquiry may inform itself as to what needs to be improved in the process and forum eventually recommended.

11. General Recommendation

11.1. Under the section “The way forward” in its paper, the Inquiry discusses the characteristics of what it describes as “Alternative Dispute Resolution”. That paper also sets out clearly what the objectives of a dispute resolution solution needs to

deliver. These include ease of access, availability of relevant professional expertise, affordable cost, transparency, quality of outcome, levelling of the playing field, creating precedent etc. The paper leaves the way open for a solution to be found using private law or state-run mechanisms and even a combination of the two.

11.2. Operating under the optimistic expectation that the market and munificent English legal system will keep banks in line when it comes to taking unfair advantage in SME banking is a non-starter. Moreover, as a result of the recent interest rate swaps (IRHP) dispute resolution debacle, regulators have learnt of the dangers of using light-touch, self-managed, regulatory regimes when it comes to banks. All commentators seem to accept that a new dispute resolution model must be found.

11.3. Many lawyers and commentators appear to accept that the time has come for the creation of a Financial Disputes Tribunal. The author of this response believes unequivocally that this would be the optimal solution and that this can best be achieved through the 'Regulator + Tribunal' model: a regulatory regime supported by an appellate Tribunal[12]. This would be a combined regime which, through the creation of a specialist regulatory body, sets rules, defines standards of conduct, promulgates best practice guidelines, follows up with decisions when a *prima facie* claim of misconduct is presented, has enforcement powers for those decisions and allows appeals through a specialist, first-instance dispute resolution Tribunal.

12. Which 'Tribunal' Model?

12.1. Statutory Tribunals in the UK are heterogeneous but they share a common reason for their formation: they are all designed to deal with a specialist area where there is a need for a relaxation of court procedures, specialisation and an alternative to litigation because of the type of user and the need to control costs but still produce robust, precedent-setting, enforceable decisions quickly.

12.2. In some Tribunals, an example being Employment, there is no statutory regulator but an independent entity (ACAS) which advises and mediates disputes in

[12] The General Regulatory Chamber (GRC) of HMCTS has a large, heterogeneous number of living examples of how to do it well.

the hope of preventing the disputants from going to the Tribunal[13]. In other jurisdictions, like Charity, there is a governmental regulator (the Charity Commission) with an associated Tribunal providing an appellate jurisdiction for that regulator's decisions. The difference is important and the Inquiry needs to consider which it finds most suitable for the specific features of SME financial disputes taking into account the type of dispute and users.

12.3. There are three main choices: a) form a properly empowered regulatory body (let's call it the Small Business Finance Regulator) to review the case in the first instance or b) set up a new independent body along the lines of ACAS which, with careful design, could even sit within the FCA or c) rely on an independent institute (such as the CIArb) to try and encourage the parties to settle consensually. All three pathways will still require a Tribunal to hear appeals where settlement was not achieved.

12.4. Where the case load is frequently expected to involve wrongdoing involving a regulatory breach by a Supplier, it might make sense to have a state-run regulator but, on the other hand, for disputes relating to contractual performance or tortious wrongs, an independent ADR pathway might be more suitable. Given that the FCA would always have a presence, and possibly even ultimate responsibility for regulation of Suppliers, the Inquiry should be alert to the danger of 'competing' regulators giving out mixed messages or getting bogged down in inter-regulator discussion. This can be avoided through thoughtful design in terms of scope and powers of the concerned regulatory bodies.

12.5. Using a regulator as a gateway to the Tribunal is better if there are well understood, pre-existing standards of conduct to consider and if it has statutory authority to order the parties to comply. Only within such a framework, can a regulator take a decision and make an Order specifying a course of action to deal with the issue in dispute, or possibly even make a monetary Award.

[13] There are also a host of private mediation schemes and companies with the same aim such as the Chartered Institute of Arbitrators (CIArb).

13. Creating a Tribunal from Scratch

13.1. The Inquiry needs to first decide on its teleological objectives. These might include the encouragement of fair conduct between Suppliers and SMEs, clarifying and developing the law on financial contracts between SMEs and Suppliers, providing justice to SMEs by levelling the playing field and so on.

13.2. Creating a Financial Disputes Tribunal to hear disputes which make it past the 'gateway', whether that is a regulator or independent body, requires legislation which provides bright lines to guide Suppliers and set the expectations of SMEs.

13.3. The less risky approach, in view of the IRHP debacle, is to avoid hybrids and to minimise risk by sticking with what is known to work: a new, specialist, appropriately designed, easily accessible and affordable Financial Disputes Tribunal. This also makes better sense because there are a large number of precedents (HMCTS run Tribunals[14]) from which lessons can be drawn to establish a new, effective state-run alternative dispute resolution mechanism which is an alternative to court litigation.

13.4. This will need specific legislation defining the type of disputes which will be accepted, combined with issuing relevant regulatory principles or guidelines. It will also require setting up separately a new regulator and an appellate dispute resolution forum (tribunal) or, in the interim, one body that performs both functions. As time is of the essence, all of this should be brought in quickly (possibly under interim powers) while consultations are undertaken and legislation is drafted and enacted.

13.5. Important issues to be considered during the review and design of the 'system' which will handle SME – Supplier disputes include:

- Evaluating whether the duties in the FCA Handbook are sufficient and enforceable or whether an Act or Statutory code of practice is needed.
- Providing a comprehensive 'Handbook' for Suppliers to know where they stand as regards standards of conduct (e.g. good practice, good faith, duty of care, disclosure, use of plain language).

[14] The General Regulatory Chamber under the Tribunals service of HMCTS hosts a vast number of specialist tribunals from which much can be drawn in designing a Financial Disputes Tribunal.

- Defining the types of claims that will be admitted, the policy on disclosure, who prepares hearing bundles and costs.
- The powers of the Tribunal: whether they replicate those of the regulator (if it exists) or go beyond that (e.g. waive time limitations, damages, consequential loss).
- Costs for users. The need for asymmetric cost structures for SMEs and Suppliers to counter the deterrence effect of Tribunal fees on users with limited resources[15]).

13.6. Any dispute resolution system, whether a Tribunal or other form of facilitated ADR outside of the court system, needs to recognise that it is not designed just for SME claimants - banks will also be users. As banks have extensive and well-manned legal departments, they are well positioned to face a higher burden in terms of disclosure and document preparation.

13.7. Banks also have financial resources which can be used to pay for the solution Because of the protection the state provides banks as lender of last resort, they should not be seen as ordinary corporate entities within the private sector. Their state-sanctioned licence means that they can be requested to provide significant funding both for their own regulation as well as resolution of disputes in their dealings with SMEs. This will inevitably face resistance and push back. Succeeding in getting banks to fund a new Tribunal through legislative order, administrative order or even fiat will undoubtedly require 'consultation' and a lot of political will. Users will need to be assured that a tribunal funded by the banks is not biased towards the banks.

13.8. Much has been said about the need for providing SMEs a forum where they can have their 'day in court'. Without in any way demeaning the emotional and human aspects of SME – Supplier disputes, it is suggested that this is patronising. Most SMEs wish to obtain a just and fair outcome (including damages and rectification), quickly and cheaply so they can go about their business; by comparison, cathartic release is secondary.

[15] The Inquiry is undoubtedly aware of the recent Supreme Court decision in favour of Unison's claim as to Employment Tribunal Fees.

13.9. That being said, a common aggravating factors for business owners is the absence of an apology or acknowledgement of the distress /difficulty caused. Tribunals are particularly well suited to address this in a way which formal litigation and this can only help achieve a faster resolution.

8 August, 2017