

# Banking Disputes Report 2022

Data-driven analysis and trends

# Foreword

This report looks at dispute resolution trends in the Banking and Finance sector with a focus on activity across the English courts; key arbitration institutions; and alternative dispute resolution services such as the Financial Ombudsman Service and British Banking Resolution Service.

We look back at activity across a number of years to identify key trends with a particular focus on where and how banking disputes are being determined in 2022 and what might lie ahead.

We hope that you find this report interesting and informative.



**Tom Dane**  
Partner  
Finance Disputes  
T +44 20 7524 6829  
E tom.dane@cms-cmno.com



**Vanessa Whitman**  
Partner  
Finance Disputes  
T +44 20 7367 3198  
E vanessa.whitman@cms-cmno.com



**Kushal Gandhi**  
Partner  
Finance Disputes  
T +44 20 7367 2664  
E kushal.gandhi@cms-cmno.com



**Philip Woodfield**  
Partner  
Finance Disputes  
T +44 20 7367 2157  
E philip.woodfield@cms-cmno.com

## Solomonic Litigation Intelligence

In preparing this report we are pleased to have partnered with Solomonic – a market leading litigation intelligence and analytics company dedicated to bringing structured data to the world of high-value legal disputes.

Solomonic helps lawyers, litigation funders, insurers, and in-house counsel obtain competitive advantage when managing disputes. Drawing on proprietary machine learning and expert input from qualified practitioners, Solomonic analyses thousands of High Court claims,

documents and court hearings to deliver data to see trends, identify risk and improve the quality of litigation decisions and predictions. Solomonic is the UK's most comprehensive and reliable litigation database, providing previously unseen insights and actionable information published in near real time.

For further information, please visit:

**Solomonic Litigation Intelligence**



# Executive Summary

## Volume of claims

- The Banking and Finance sector has been in the top two sectors for volume of High Court claims filed in years 2020, 2021 and for the half year (end of Q2) in 2022.
- High Court claim volumes involving key retail, investment and challenger banks have remained relatively steady from 2018 to 2021 (with retail banks having seen a considerable drop in volume of new claims issued between 2015 to 2018).
- New claims involving challenger banks overtook new claims involving investment banks for the first time in 2021.
- New claims data for the first half of 2022 (to the end of Q2) suggests a drop off in claims involving retail banks by almost 20% (when compared with 2021 data on a straight line basis). However, it is too early to draw any firm conclusions as to whether this reflects a more permanent downturn in claims involving retail banks.
- Based on the half year data, claim numbers involving both investment banks and challenger banks for 2022 look like they will be broadly consistent with 2021.

## Type of claims

- In 2021, the majority of claims filed involving banks related to contractual disputes with the next most common head of claim being fraud. Contractual interpretation was the most common type of claim and banks are more likely to be involved in Part 8 claims when compared with all claims issued in the High Court.
- Certain claims in 2022 are showing the impact on the financial sector from world events. For example, various claims have been filed as a result of parties refusing to make payments based on new Russian sanction laws.
- Class actions are on the rise across Europe. In the UK, claims involving banks have been at the forefront of legal and procedural developments in relation to High Court shareholder group actions and class actions before the Competition Appeal Tribunal.

“Banking and Finance has featured in the top two sectors for volume of cases in both the High Court and the LCIA in recent years”

### Venue for claims

- The English High Court remains a popular forum choice for domestic and international banks.
- The Financial List has handled 136 claims since its inception in 2015. The year 2020 saw the highest volume of claims issued in the Financial List (40). There are various examples of cases being determined promptly (including to appeal) and the recent FCA test case regarding Business Interruption insurance policy claims is an example of the Financial Market Test Case Scheme being used to good effect (taking 7 months to progress from claim being filed to judgment from the Supreme Court).
- Whilst a jurisdiction clause nominating the courts in England or New York will remain the most common choice for parties in the Banking and Finance sector, there is a growing acceptance that arbitration may be an appropriate dispute forum depending on the type of contract / counterparty.
- The London Court of International Arbitration, in particular, is receiving a consistent level of new arbitrations each year from Banking and Finance disputes (over 20% of its overall case load). Data for 2021 shows the Banking and Finance sector was responsible for the highest volume of new claims across the LCIA case load (26%).
- The Financial Ombudsman Service (FOS) has continued to receive a high volume of complaints against banks over recent years. Statistics for 2021/2022 show that new complaints relating to banking and credit (excluding PPI) accounted for 65% of all complaints to the FOS. High complaint volumes during the pandemic have given rise to significant operational challenges within the FOS and this in turn has prompted a programme of structural change. For 2022/2023, the FOS anticipates banking and credit complaints to remain high; driven by a continued rise in fraud related complaints and a likely uptick in complaints following the introduction of the new Consumer Duty in 2023.

- The British Banking Resolution Service (BBRS) has not been a success to date. Between its inception in February 2021 to 30 June 2022, there have been 829 cases registered, of which 117 cases remain “live”, and just 16 awards have been made (12 financial awards and 4 non-financial). The limited case load appears to be largely due to its complex eligibility requirements and a general lack of uptake from SMEs. It remains to be seen as to whether the BBRS will continue in its current form.

### Future claims

- Moving forwards during 2022 and into 2023 there are a number of risks on the horizon in the Banking and Finance sector which we comment on below, including: the scope and practical application of a bank’s duty to fraud victims; the introduction of a new Consumer Duty; complaints related to Covid-lending; LIBOR transition risks; ESG risks; impact of the Russian sanctions regime and related market disruption; cyber / operational resilience risks; and a growing trend of class actions which is particularly relevant in the context of securities litigation and data breaches.



# English Court Proceedings

The English High Court is a popular forum for determining high value banking disputes. Many international banking contracts are both English law governed and provide for English court jurisdiction (either on an exclusive jurisdiction basis or pursuant to an asymmetric jurisdiction clause).

There is a wide body of English case law on bank related disputes setting important precedents to assist parties to know where they stand when disputes arise. English law has long recognised the importance of certainty for commercial parties. That said, English common law is flexible and able to adjust to changes in the commercial world. It also has a wide range of remedies, both legal and equitable, to achieve its aims.

As to jurisdiction, the English High Court has a deserved reputation for its high quality, independent, impartial judiciary. Under the umbrella of the Business and Property Courts, there are number of specialist courts including the Financial List which is designed to determine high value Banking and Finance cases. London is home to many of the world's leading international law firms with a strong independent Bar and large pool of court experts and providers of other court services.

**We therefore start this report by considering activity before the English High Court.**



## County Courts

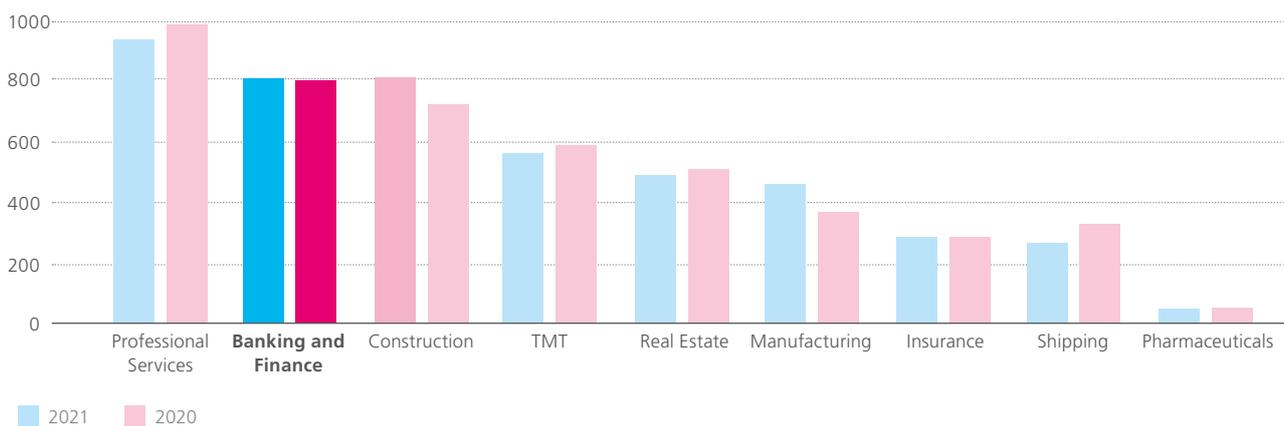
A detailed analysis of banking litigation in the County Courts is beyond the scope of this report. In particular, there is limited data available on sector specific actions. The County Courts provide an important forum for certain banking related disputes. It is where the majority of possession proceedings will take place and where high volume/ lower value disputes are determined such as the ongoing significant PPI claim case load.

# The High Court

## Sector analysis

The Banking and Finance sector generally has a greater volume of High Court activity when compared with other sectors.

Number of claims involving a party in selected sectors in 2020 and 2021

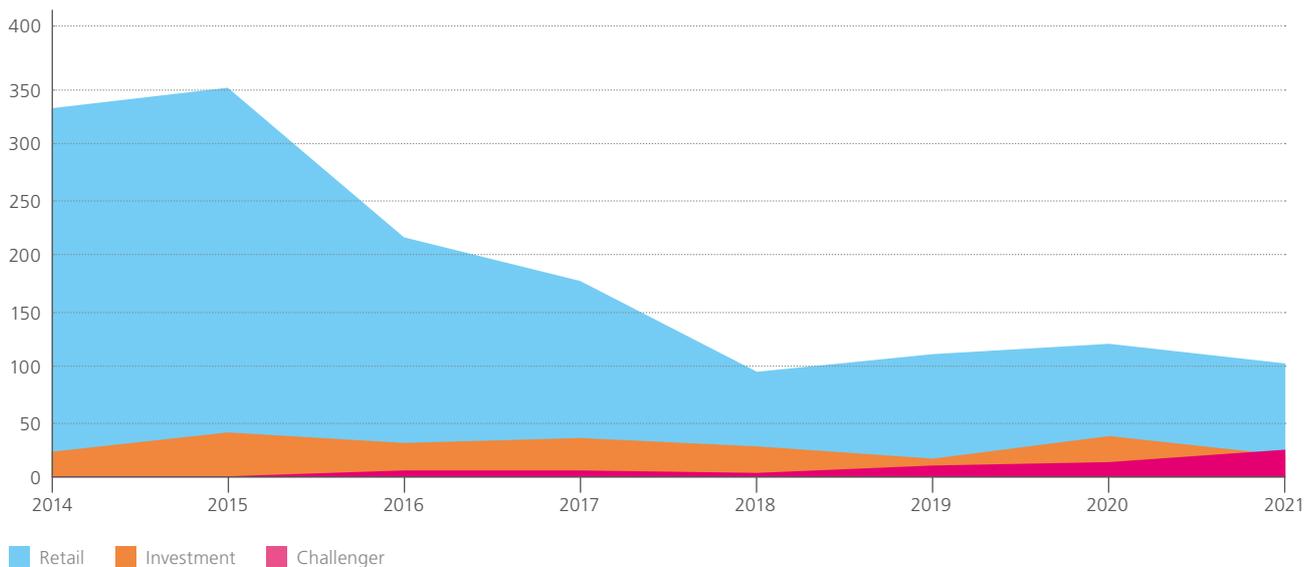


The data shows that over the last two years, the volume of High Court proceedings in the Banking and Finance sector is second only to the Professional Services sector. Further, between 2020 and 2021 there was only a 0.25% change in number of claims in the Banking and Finance sector demonstrating a consistent level of claims activity. In comparison, volumes of claims in other sectors are more volatile. For example, there was a 10% change in volume of claims in the Construction sector and a 25% change in Shipping claims between the two years.

## Claims involving banks

The analysis below looks at case data involving three types of bank: (i) retail banks (ii) investment banks and (iii) challenger banks<sup>1</sup>.

Bank claims by year



The data for volume of claims issued each year involving retail, investment or challenger banks as either claimant or defendant demonstrates a clear (and not unsurprising) divergence between each category.

- As regards retail banks, these have always led the way in terms of High Court activity across each year. This is to be expected given the higher volume of customers. The data shows a significant volume of cases issued in 2014/2015. This is a result of claims still flowing through in the aftermath of the Global Financial Crisis, including interest rate hedging product claims. Claim volumes involving retail banks reduced significantly from the 2015 peak to 2018 and has run at a steady rate (around 100 issued cases each year) between 2018 – 2021.
- Issued claims involving investment banks has seen steady activity at lower levels across the period 2014 – 2021 with fewer than 40 cases filed each year.
- The data for claims involving challenger banks shows an uptick of cases over time with challenger banks overtaking claims involving investment banks for the first time in 2021 (24 challenger bank cases issued in 2021 compared to 19 investment bank cases). This trajectory is unsurprising given the growing market share of challenger banks from a standing start with a retail client focus.

“Claims involving challenger banks overtook claims involving investment banks for the first time in 2021”

<sup>1</sup>This analysis is taken from case data involving the nine largest retail banks, investment banks, and challenger banks operating in the UK.

# Impact of the global pandemic?

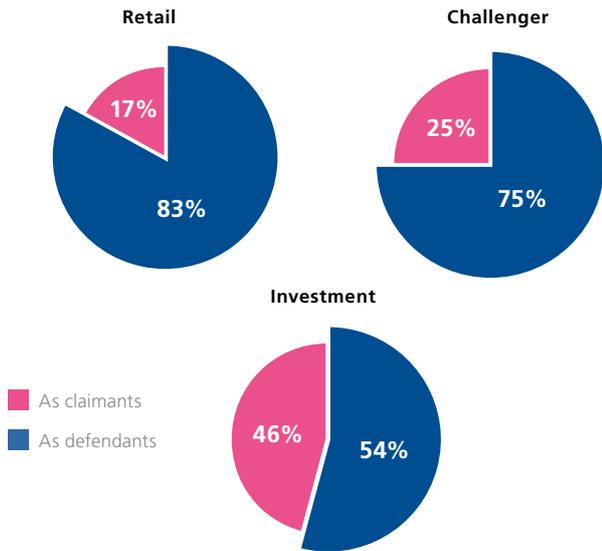
As regards the impact of the global pandemic on banking litigation, it appears from the data that this has, to date, had limited impact on claim volumes. There was a significant drop off in claims involving banks issued in 2018 (123 in total compared to 211 the previous year). Claim numbers rose slightly in 2019 to 133 claims. The first year of the pandemic saw claims rise again to 165 in 2020. This then dropped to 142 claims during 2021. However, it is important to consider (i) what this data shows about the appetite of claimants to pursue banking litigation claims during the pandemic and (ii) whether the pandemic has resulted in more claims being brought.

In relation to the former, the High Court has functioned well throughout the pandemic reverting to remote or hybrid hearings where necessary. The data suggest that claimants have not been put off bringing claims during the pandemic – there has been a reasonable increase in claims filed across years 2020/2021 (307) as compared to total claims filed in 2018/2019 (256).

It is too early to draw conclusions from the current data as to whether the pandemic will lead to an increased number of claims involving banks. Whilst there was an uptick in claims filed in 2020-2021, most of the claims filed in these years will relate to events that pre-date the pandemic. Claims arising from the pandemic itself will, in many cases, still be at the pre-action stage. What is clear is that the global pandemic is a very different crisis to the Global Financial Crisis in 2008 and it is therefore unlikely to give rise to the volume of banking litigation that we saw in the years following 2008.

# Annual data for 2021

In this section we take a deeper dive into the last available full year data.



## Claimant v Defendant

Unsurprisingly, banks collectively were more likely to feature as defendants than as claimants in claims filed during the calendar year 2021. Investment banks are much more likely to feature as claimants than retail or challenger banks. The vast majority of claims involving retail and challenger banks will involve them as defendants (over 80% and 75% of claims respectively). In contrast, investment banks appear as defendants in 54% of cases and claimant in 46% giving a much more balanced split due to the nature of their business and operations in the wholesale markets.

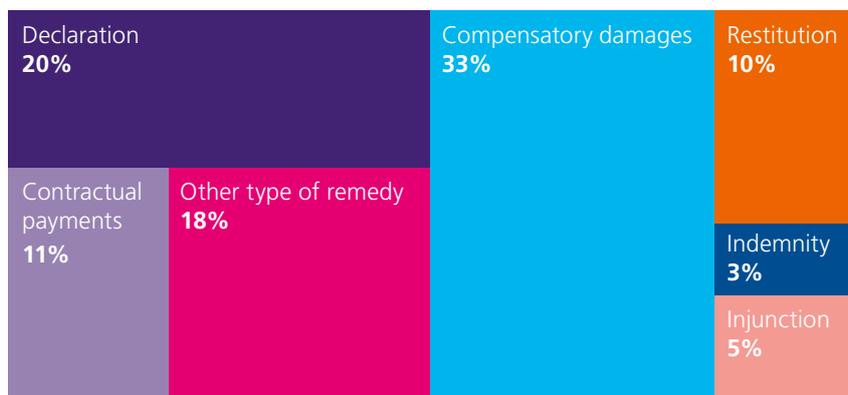
## Type of claim

The vast majority of claims involving banks are likely to involve contract or tort claims (91% of all claims in 2021). This is a higher proportion than claims in the High Court generally across all sectors in 2021 where contract and tort claims accounted for 58% of all claims.

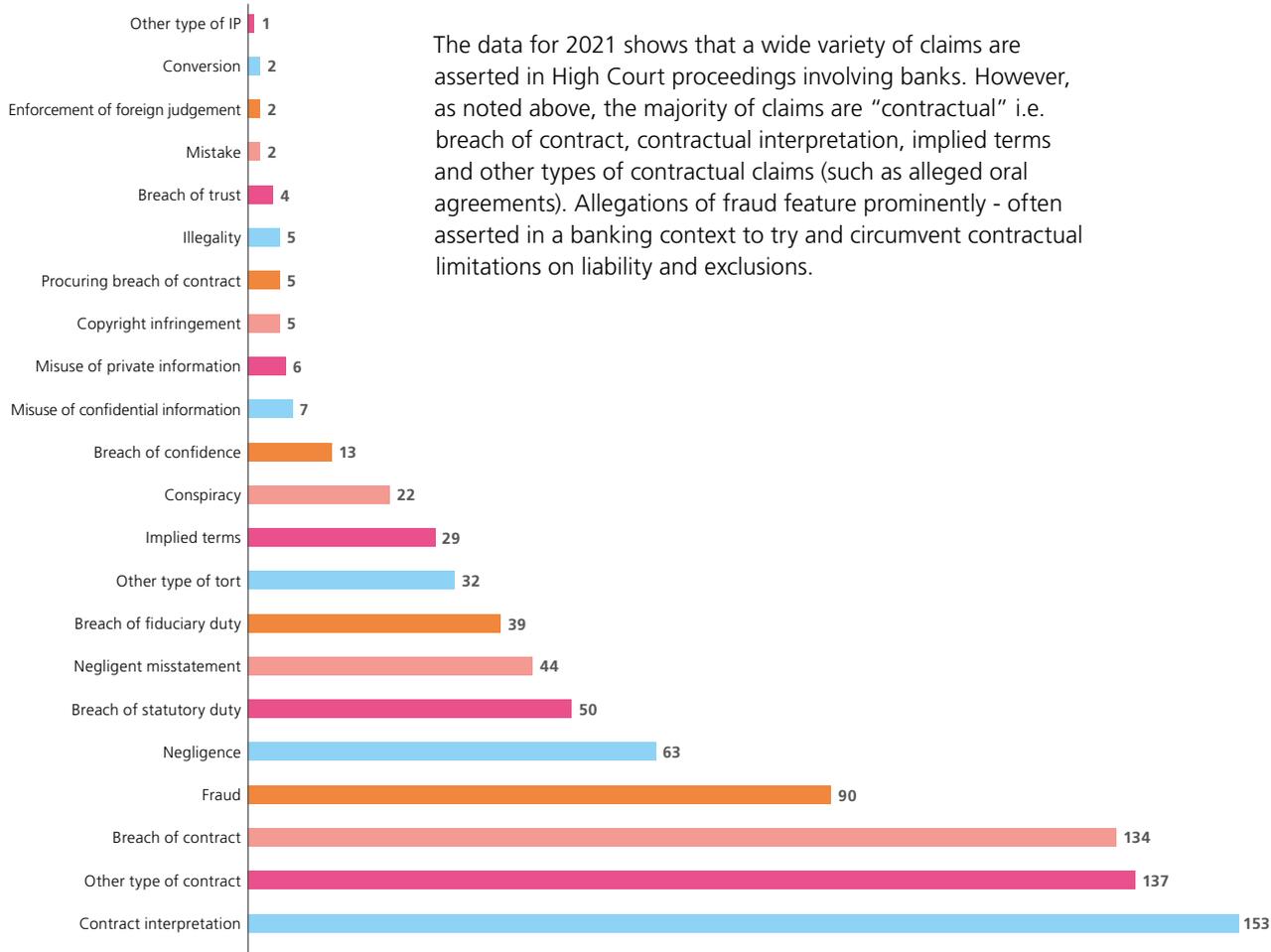


## Remedy sought

In the majority of cases involving banks in 2021, the claimant was seeking compensatory damages. Declarations are the next most common remedy sought reflecting the fact that banking disputes commonly involve issues of contractual interpretation.



## Type of legal matter

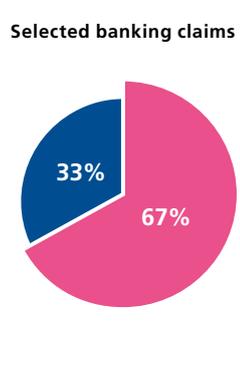
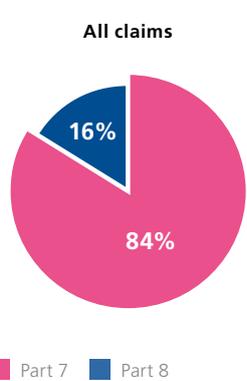
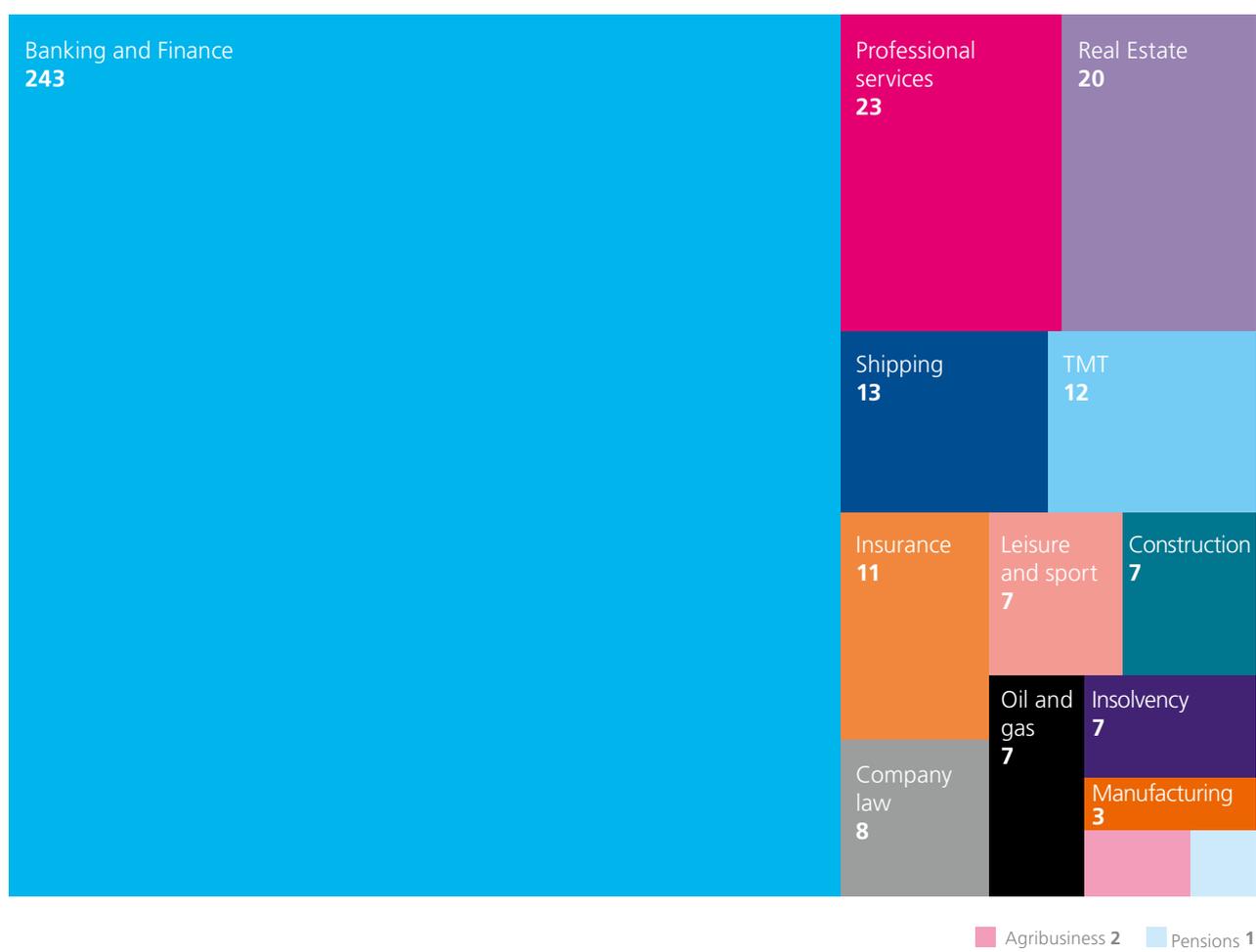


## Heads of claim

The data for 2021 shows that a wide variety of claims are asserted in High Court proceedings involving banks. However, as noted above, the majority of claims are “contractual” i.e. breach of contract, contractual interpretation, implied terms and other types of contractual claims (such as alleged oral agreements). Allegations of fraud feature prominently - often asserted in a banking context to try and circumvent contractual limitations on liability and exclusions.

## Factual subject matter

The vast majority of claims involving banks arise purely in a Banking and Finance factual context. However, this chart shows that in 2021 claims involving banks arose in various other factual contexts.



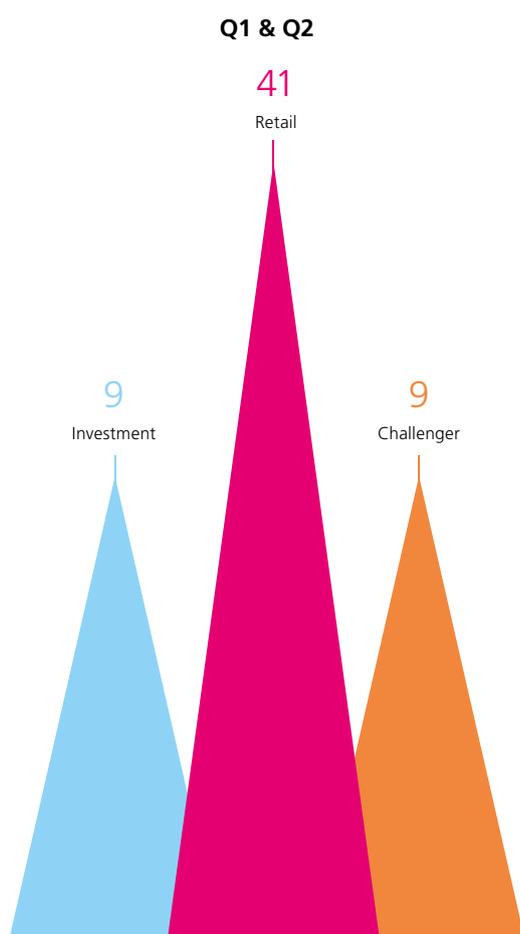
### Part 7 v Part 8 claims

The majority of claims across all sectors filed in the High Court are Part 7 claims (84%) with only 16% being Part 8 claims. In contrast, in 2021, claims involving banks had a higher proportion of Part 8 claims (33%). This is consistent with declarations featuring as a popular remedy in banking claims and issues of contractual interpretation being a popular head of claim.

# Claims up to 30 June 2022

In the first half of 2022, there have been 59 claims filed involving banks in our data set, with the majority (41) involving retail banks with 9 claims involving investment banks and 9 claims involving challenger banks. If this claim activity were replicated on a straight line basis across the remainder of the year it would see total bank claim activity for 2022 at c.120 claims, showing a gradual downward trend in claim volumes from 2020 (165) and 2021 (142). However, it is too soon to reach any firm conclusions in this regard and we should await the full year data for 2022 before comparing annual data sets.

Looking at the detail of claims issued in the first half of 2022, these show a mix of familiar claims and newer trends starting to emerge.



## As regards familiar claims:

- Claims are still being filed in respect of interest rate hedging products (with claimants seeking to address issues around limitation head on in particulars of claim).
- Investment banks are filing claims for declaratory relief in order to try and secure the jurisdiction of the English court in disputes with Italian counterparties.
- An individual is claiming damages against a retail bank for wrongly adding their details to the National Hunter Register and CIFAS (both UK fraud databases).
- Various claims have been filed against retail banks by litigants in person.
- A substantial claim has been filed against an investment bank relying on the bank having pleaded guilty to wire fraud charges brought by the US Department of Justice.
- Claims are continuing to be filed relying on alleged breach of the *Quincecare* duty.
- Banks are pursuing professional negligence claims against advisors.

## As regards newer trends:

- There has been a noticeable uptick in claims regarding aviation finance as a result of pressure on the aviation sector due to the Ukraine war.
- Various claims have been filed against banks seeking declarations confirming that the Russian sanctions regime does not have the effect of suspending the bank's payment obligations under letters of credit.
- Given the changing economic landscape and an increase in lender enforcement activity, there are claims by borrowers seeking declarations as to the invalidity of acceleration notices and there having been no events of default.

# A focus on: the Financial List

The Financial List has been operational since 1 October 2015. It uses specialist judges from both the Chancery Division and the Commercial Court and is intended for (i) finance sector claims of GBP 50m or more; (ii) cases that require particular expertise in the financial markets; or (iii) cases that raise issues of general importance to the financial markets. The List provides for an innovative test case procedure, the aim of which is to facilitate the expeditious resolution of issues that affect the wider financial market where there is no clear English legal precedent.

The Financial List helps ensure that cases which would benefit from being managed and heard by a Judge with particular expertise in the law relating to the financial markets, or which raise issues of general importance to the financial markets, are dealt with by suitable Judges.

The List is governed by Part 63A of the Civil Procedure Rules which confirms that it is designed for the following types of cases:

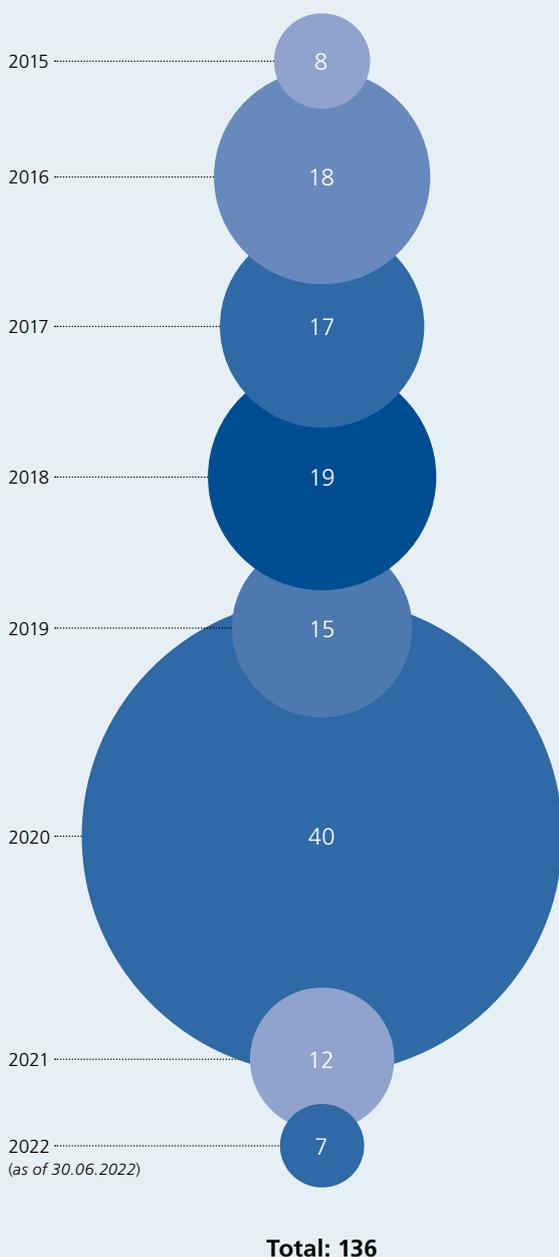
- those that relate to loans, project finance, banking transactions, derivatives and complex financial products, financial benchmark, capital or currency controls, bank guarantees, bonds, debt securities, private equity deals, hedge fund disputes, sovereign debt, or clearing and settlement, and are for more than GBP 50m or equivalent; or
- those that require particular expertise in the financial markets; or
- those that raise issues of general importance to the financial markets.

“Financial markets” for these purposes include the fixed income markets (covering repos, bonds, credit derivatives, debt securities and commercial paper generally), the equity markets, the derivatives markets, the loan markets, the foreign currency markets, and the commodities markets.

The Financial List is available for claims worth over GBP 50m provided it requires financial markets expertise. However, it is also available for claims under this threshold if the claim requires particular expertise in the financial markets or if it raises issues of general importance to the financial markets. A low value claim or a claim affecting a small business may be suitable for the List if it raises an issue with market-wide consequences.

The chart opposite records the number of cases filed each year in the Financial List. There is no particular reason so far as we can see from the case data for 2020 as to why so many cases were issued in the Financial List that year. There is one example of multiple related claims being filed but this alone does not account for the significant difference with other years.

Number of cases filed since the formation of the Financial List in October 2015:



## The Financial List in practice

The Financial List has been good to its word of resolving cases expeditiously. One example of this is the case of *National Bank of Kazakhstan (NBK) v The Bank of New York Mellon (BNYM)* [2017] EWHC 3512 (Comm); [2018] EWCA Civ 1390. The case concerned a claim for declaratory relief as to the effect of orders made by the Dutch and Belgian courts on their banking relationship with the respondent, and whether it required BNYM to freeze all assets which it held under a Global Custody Agreement with NBK. The Part 8 claim for a declaration was issued in November 2017. The hearing of the claim was expedited and was heard in December 2017. Judgment was given orally on 21 December 2017.

Permission to appeal was given in January 2018. The appeal was heard by the Court of Appeal in May 2018 and judgment was handed down on 19 June 2018.

Therefore, the case and its appeal were dealt with in less than 7 months from the date of issue of the proceedings.

## The Financial Market Test Case Scheme

One feature of the Financial List is the Financial Market Test Case Scheme. The Scheme was introduced to apply to any Financial List claim which raises issues of general importance in relation to which authoritative English law guidance is needed promptly. This procedure has only been used once, in 2020, in the context of the global pandemic where it was necessary to determine Business Interruption insurance policy coverage (*The Financial Conduct Authority v Arch and Others*).

On 9 June 2020, the Financial Conduct Authority (FCA) along with eight insurers agreed to participate in the Financial Markets Test Case Scheme with the aim of seeking clarification regarding terms used to determine Business Interruption policy coverage. Mr Justice Butcher at first instance considered that this case met the criteria for a test case and allowed the application made by the FCA, supported by the defendants for the case to be heard under the Scheme. The High Court handed down judgment on 15 September 2020. Permission was granted to appeal to the Supreme Court and judgment was handed down on 15 January 2021.

Through the test case, as many as 370,000 insureds obtained clarity as to whether their policy would pay out in relation to Business Interruption claims related to the pandemic, without having to fund legal proceedings themselves. The proceedings were commenced in June 2020 and the Supreme Court handed down judgment 7 months later in January 2021.



# A focus on: class actions

Cases involving banks have played an important role in shaping the developing class action landscape in the UK.

The shareholder class action brought by investors against The Royal Bank of Scotland who had bought shares in RBS' rights issue in 2008 represented an important step in the development of UK securities litigation. The RBS Rights Issue Litigation concerned claims brought under s90 of the Financial Services and Markets Act 2000 (FSMA) pursuant to a Group Litigation Order. Although the case did not go to trial, it has paved the way for other group actions under s90 / s90A FSMA.

The first judgment in a shareholder class action in England & Wales was handed down by the High Court in 2019 in another bank case *Sharp v Blank* [2019] EWHC 3078 (Ch) (the Lloyds/HBOS litigation). This was a claim brought outside of FSMA (alleging negligence and lack of adequate disclosures by directors). The investor claim was dismissed in full providing important guidance on shareholder claims brought under the common law outside of the FSMA regime.

Reports in July 2022 refer to a potential High Court group action against TSB brought by Northern Rock customers who entered into mortgage contracts between 2001 and 2007 (the portfolio of mortgages was acquired by TSB in 2016). The claimants argue they have been locked into mortgages with excessively high-interest rates. The claimant law firm pursuing the action says that up to 27,000 could join the group action.

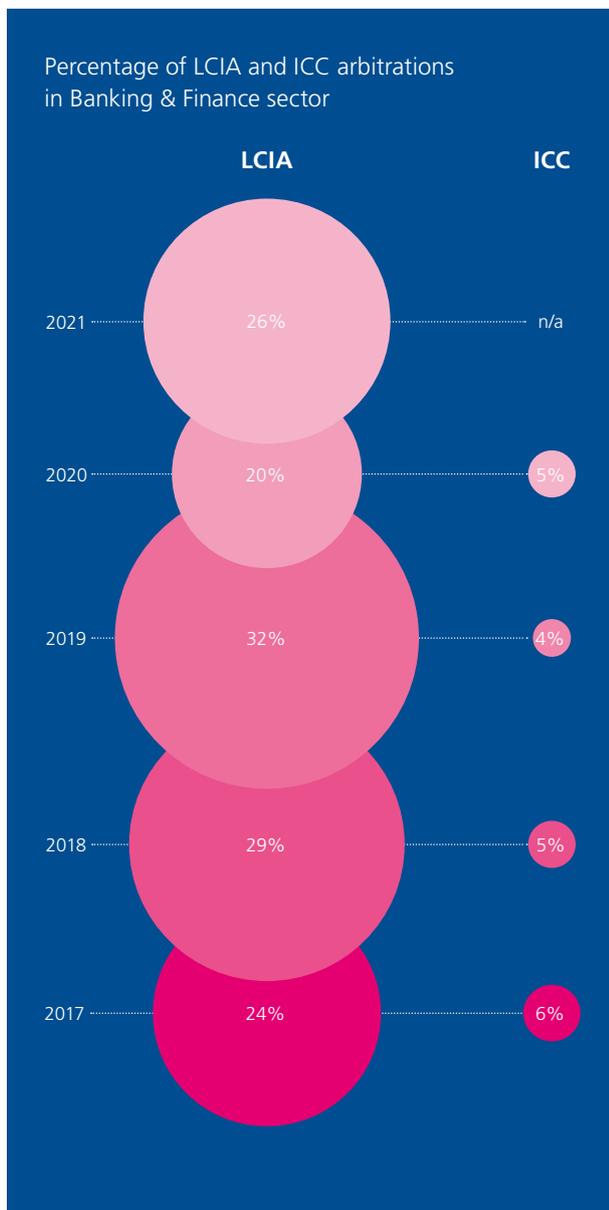
Banks have also featured in class actions before the UK Competition Appeal Tribunal (CAT) where various "follow on" claims are being pursued in relation to findings by the European Commission in 2019 that a number of banks operated two separate cartels in the foreign exchange market. These proceedings have given rise to important interim decisions, including most recently (March 2022) as to whether the claims should proceed on an "opt-out" or "opt-in" basis

Class action risk is growing across Europe (see our "[European Class Action Report 2022](#)") and legal principles are continuing to develop in the UK. Class action proceedings involving banks have been important in developing both substantive law and procedure in this area including in the context of: High Court Group Litigation Orders; claims under s90 FSMA; and opt-in/opt-out proceedings before the CAT.



# Arbitrating Banking and Finance disputes

Traditionally, the Banking and Finance sector has favoured court proceedings rather than arbitration as a means of resolving disputes. However, there are signs that arbitration is becoming a more accepted method of dispute resolution in appropriate contractual situations across the Banking and Finance sector.



As arbitration is a confidential process there is limited data available to track the number of Banking and Finance disputes that are arbitrated. However, some arbitral institutions such as LCIA and ICC publish data that categorises cases by sectors.

The LCIA Annual Casework Report for 2021 confirms that disputes in the Banking and Finance sector had climbed to 26% of disputes registered with the LCIA in 2021, making it the sector with the largest number of issued claims in 2021 (overtaking Energy and Resources disputes), although these numbers were boosted by a group of 27 related cases being issued.

It is apparent from this data that there is now a relatively consistent number of claims in the Banking and Finance sector that are determined by way of arbitration. The LCIA data, in particular, shows that over 20% of its case load over recent years has involved banking/finance arbitrations. This represents a growing proportion of banking/finance related disputes, particularly in comparison to previous decades.

Below we look at some of the reasons why litigation has historically been favoured for determining disputes in the Banking and Finance sector and why arbitration is now becoming a more accepted form of dispute resolution.

# The dominance of court proceedings over arbitration

Court proceedings have long been the favoured process for dispute resolution in the Banking and Finance sector. There are a number of reasons for this – partly because court proceedings have been the default option and there has been no pressing need to depart from this – and partly because of certain perceived advantages of the court process over arbitration.

There are a number of factors that need to be weighed up before deciding whether to include an arbitration agreement in a contract and there are pros and cons to any chosen dispute resolution method. However, below are some of the factors that have seen the Banking and Finance sector typically favour court proceedings:



## **Binding system of precedent:**

Courts in leading jurisdictions such as London and New York issue public judgments that create precedents. Arbitration awards are confidential and do not create precedent. It is generally helpful for banking disputes on key market wide issues to be subject to a public court judgment which will impact on how many other claims may be brought on a similar basis.



## **Availability of summary and default judgments:**

Court procedures in common law jurisdictions allow for summary and default judgments, which have historically been unavailable in arbitral proceedings. These procedures make it quicker to obtain a judgment when the respondent raises no reasonable defence to a claim.



## **Restricted right of appeal:**

The restricted rights of appeal (if any) in an arbitration setting can be seen as an advantage or disadvantage. However, it is often the case that parties involved in high value disputes prefer the comfort of having broader rights of appeal.



## **Certainty of outcome:**

The traditionally favoured courts of New York and London have a reputation for upholding contractual bargains and permitting only limited defences for the non-performance of contractual obligations. In contrast, there can be a perception – which is not always the reality of course – that tribunals of three arbitrators (one selected by each party and a third appointed by the chosen arbitrators) may look to render a compromise award which offers something to both parties.

# The push to promote the use of arbitration in banking and finance disputes

There have been various attempts over recent years to promote the use of arbitration in the Banking and Finance sector. By way of example:

## ISDA consultation

The International Swaps and Derivatives Association, Inc (ISDA) began a consultation process in 2012 on the potential incorporation of arbitration clauses within its Master Agreements. That consultation resulted in a Guide to Arbitration being published by ISDA in 2013 with various options for arbitration clauses to insert in ISDA Master Agreements.

The ISDA Guide to Arbitration was updated in 2018 following a further consultation by ISDA and a further update was published in May 2022.

The ISDA Guide includes a useful summary of the key features of arbitration and their interplay with derivative disputes. Importantly, the ISDA Guide includes multiple variations of arbitration clauses that can be easily used when entering into Master Agreements.

## ICC Report

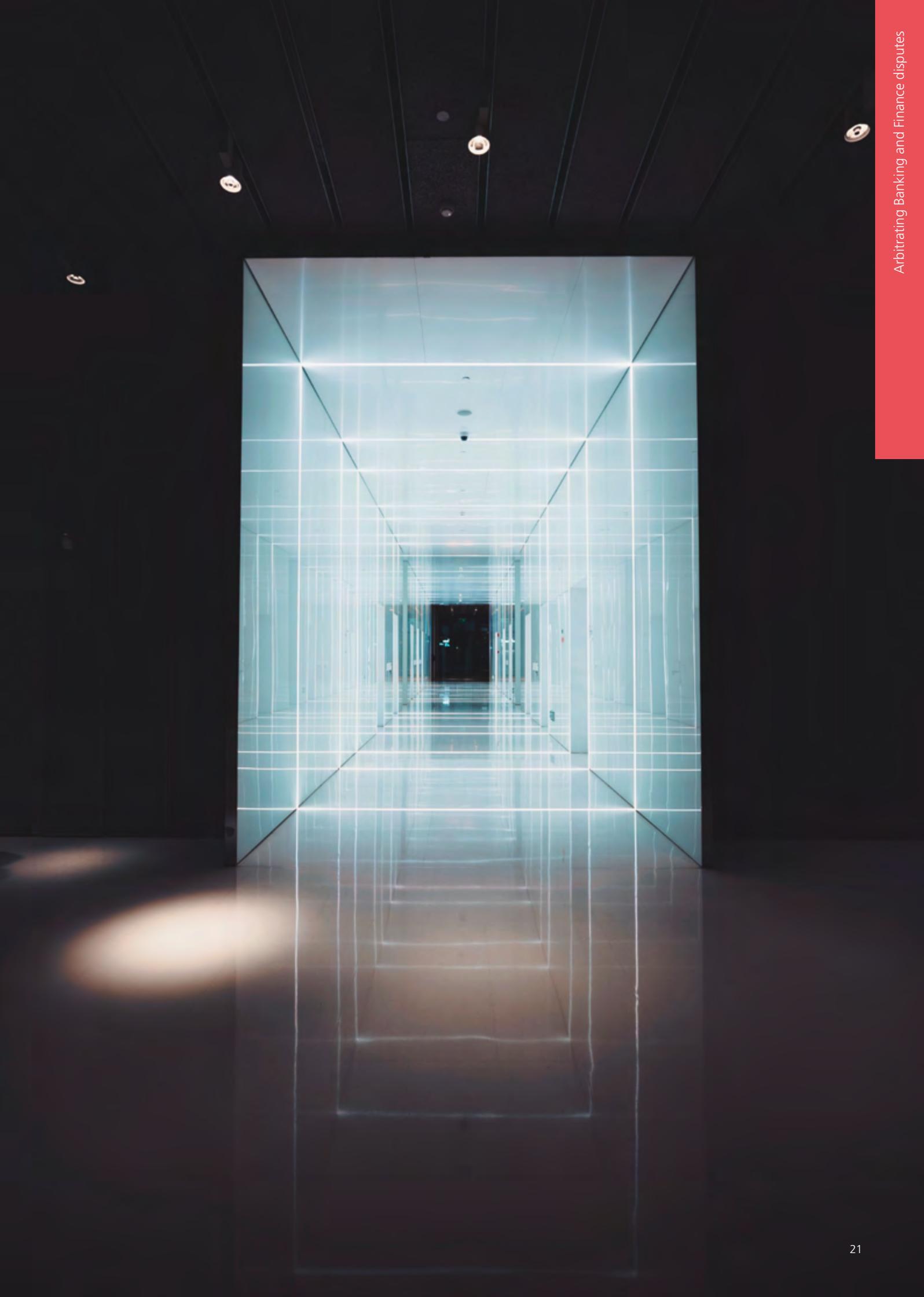
In November 2016 the ICC published a report of the ICC Commission on Arbitration and ADR Task Force on Financial Institutions and International Arbitration.

The Task Force members conducted interviews with approximately 50 financial institutions and banking counsel from around the globe. The findings and recommendations in the Report were based on these interviews and a review of documents made available by institutions such as internal policies.

The Task Force found that there were some common misconceptions and an overall lack of awareness of the potential benefits of international commercial arbitration and investment arbitration in banking and financial matters.

Another finding by the Task Force was that financial institutions tend to favour arbitration when: (i) the transaction is significant or particularly complex; (ii) confidentiality is a concern; (iii) the counterparty is a state-owned entity; and/or (iv) the counterparty is in a jurisdiction where the recognition of foreign judgments is problematic or where it is expected that enforcement of an arbitral award under the New York Convention will be easier than enforcement of a court judgment.

“Research has suggested that there has historically been a lack of awareness of the potential benefits of arbitration in Banking and Finance matters”



# Steps taken to encourage greater uptake of arbitration

To encourage banks and other financial institutions to use arbitration, certain arbitration institutions with a specific focus on the finance sector have been formed. For example, the Panel of Recognised International Market Experts in Finance, or P.R.I.M.E. Finance.

P.R.I.M.E. Finance was launched in January 2012 to determine complex financial disputes in the global financial markets. It provides specialist arbitrators drawn from a list of experts maintained by the institution. However, it appears that, to date at least, P.R.I.M.E. Finance has not been used as a chosen arbitral institution in many contracts. This may be because where arbitration is chosen by Banking and Finance parties they are content to use more generalist institution rules (such as the LCIA). There is also a risk of some counterparties perceiving P.R.I.M.E. Finance as being an institution developed by banks.

## Changes in rules

A number of the perceived disadvantages to the use of arbitration in Banking and Finance disputes have been targeted via updates to rules of international arbitral institutions. For example, P.R.I.M.E. Finance has recently published a new updated set of arbitration rules (effective 1 January 2022), LCIA updated their rules in 2020 and the ICC update their rules in 2021. These changes have included:

### Expedited proceedings:

Several arbitral institutions have introduced measures to increase the speed and efficiency of arbitral proceedings. For example, Article 17 of the P.R.I.M.E. Finance Arbitration Rules includes a procedure for expedited proceedings that can result in an award in 180 days after constitution of the tribunal. Article 9A of the LCIA Rules provides for the expedited formation of an arbitral tribunal in exceptional circumstances. These measures help to provide a viable alternative to summary and default judgments.

### Availability of urgent provisional measures:

Article 9B of the LCIA Rules and Article 29 of the ICC Rules both provide for emergency arbitral proceedings, allowing parties to apply for urgent provisional measures which cannot await the constitution of a tribunal.

### Consolidation and joinder:

Finance transactions can involve multiple parties and a large suite of interconnected transaction documents. If and when a dispute arises it can be important to ensure that there is flexibility in the process to add parties as required and to ensure the proceedings are run efficiently. Article 22A of the LCIA Rules and Articles 7 and 10 of the ICC Rules now provide for consolidation and joinder where there is an arbitration agreement in place between the parties.

# Reasons behind increased acceptance of arbitration

As can be seen from the above, significant efforts have been made over many years to promote the use of arbitration in the Banking and Finance sector and the available data shows that some progress has been made.

In some cases arbitration will have clear advantages over court proceedings. The most obvious advantage is ease of enforcement. The enforceability of foreign court judgments in local courts can become an issue due to the lack of comprehensive reciprocal arrangements between jurisdictions. For example, Brexit has meant that reciprocal arrangements for enforcement of English court judgments across the EU and EEA, i.e. the Brussels and Lugano regimes (applicable to the EU and EEA countries respectively) have ceased to apply to the UK. As between the UK, Gibraltar, the EU, Mexico, Montenegro and Singapore, the Hague Convention on Choice of Court Agreements will apply. This provides a more basic regime that only recognises exclusive jurisdiction clauses and is currently largely untested. Outside of the Hague Convention, parties need to fall back on any bi-lateral treaties or domestic rules around enforcement of foreign judgments.

In contrast, arbitration benefits from a comprehensive enforcement regime - the New York Convention - which provides for a relatively straightforward process for enforcing an award without a review of its merits. The New York Convention has broad global application (having been signed by over 150 countries) and includes almost every major trading nation. Therefore, arbitration awards are widely enforced under the New York Convention, which is independent of the EU and unaffected by Brexit. This can also be particularly important when contracting with counterparties from emerging markets where there may not be a reliable regime in place for enforcing court judgments but an arbitration award could be enforced under the New York Convention.

## Best of both worlds?

A "hybrid" dispute resolution clause provides for both court jurisdiction and arbitration together with an agreed mechanism giving a party the right to choose between national court litigation or international arbitration when a dispute arises. These clauses can be incorporated to let the bank decide which forum it prefers once a dispute arises. For example, if the bank considers that the counterparty has no proper defence to the claim, it may prefer to commence proceedings before the English courts where the matter can be determined by way of summary judgment. Alternatively, if the counterparty has significant assets in a jurisdiction where there may be an enforcement risk with a court judgment, the bank can choose to go to international arbitration.

However, care should be taken with these types of clauses. Hybrid clauses can give rise to jurisdictional disputes. Also, some jurisdictions may not enforce hybrid clauses (and awards arising from them).

## Conclusion

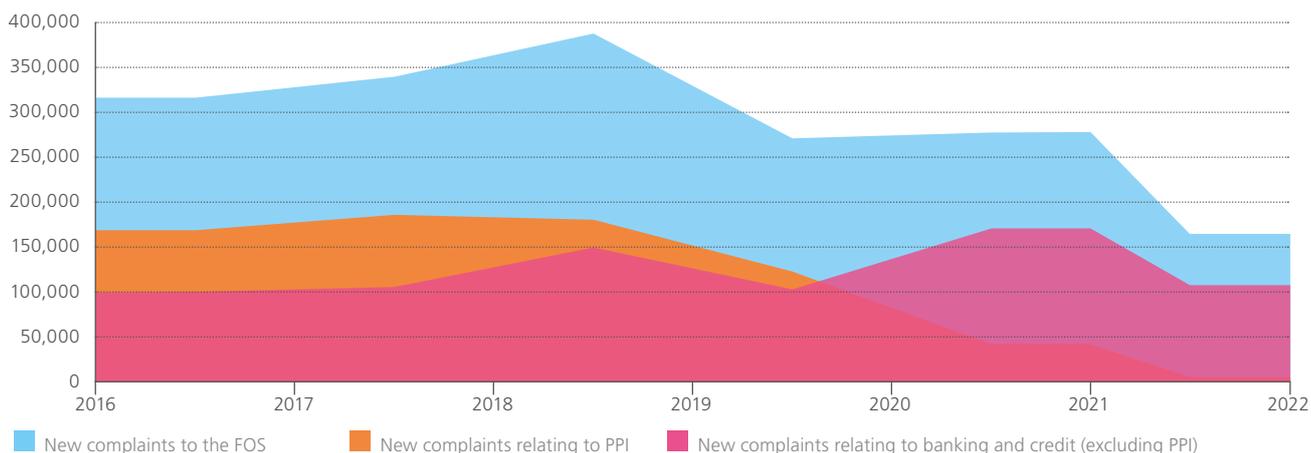
In summary, the data shows that the LCIA in particular are receiving a consistent level of new arbitrations each year from Banking and Finance disputes (over 20% of their overall case load) and data for 2021 shows the Banking and Finance sector was responsible for the most issued claims across the LCIA case load. A jurisdiction clause nominating the courts in England or New York will remain the most common choice for parties in the Banking and Finance sector. However, it seems that there is a growing acceptance that arbitration may be an appropriate dispute forum for certain situations depending on the type of contract / counterparty.

# Financial Ombudsman Service (FOS)

## FOS performance data

The pandemic had a significant impact on volumes of complaints to the FOS. The FOS's annual report for 2020/2021 confirmed that the number of new complaints received by the FOS (excluding PPI) was 63% higher than originally planned. The table below tracks the new complaints received by the FOS per year. The total figure for new complaints in 2020/2021 is not high in this context but it is important to recognise that the FOS was planning for a significant drop off in PPI-related complaints and had only budgeted for 145,000 new non-PPI complaints in 2020/2021 (compared to c. 230,000 received). The volume of new complaints relating to banking and credit (excluding PPI) rose significantly in 2020/2021 (c.170,000) compared to 2019/2020 (c.103,000):

New complaints by year



There are a number of factors behind the increase in complaints during the pandemic:

- There was a rise in scams/fraud during the pandemic. The number of complaints regarding APP fraud increased and the FOS continues to uphold a large number of complaints about how banks have responded to victims of APP fraud. The FOS has reported seeing inconsistencies in how signatories of the Contingent Reimbursement Model were applying this voluntary code, which was established in May 2019.
- Data published by the FOS in September 2021, highlighted that scams/fraud complaints remain one of their largest sources of complaints with the number of people affected by fraud rising by 66% in the first quarter of the 2021/22 financial year, going from 3,028 to 5,025 cases.
- There were operational pressures on financial institutions during the pandemic caused by transitioning to remote working leading to higher numbers of consumer complaints about administration, customer service and online banking than the previous year.

Annual data for 2021/2022 is more encouraging for the FOS with complaint volumes being comparable to pre-pandemic levels and in line with their forecasts for the year. The FOS resolved 218,740 complaints in 2021/2022 with an uphold rate of 38%. Bank current accounts were the most complained about product with a substantial number of complaints coming from the victims of APP frauds or other scams involving social media and fake investments. Complaints about APP fraud increased by more than 20% year on year. There was also an increase in complaints regarding second charge loans (where a loan is secured on a property separately to the main mortgage provider). PPI complaints have now reduced significantly and in 2021/2022 PPI represented only 3% of total complaints (in comparison to years 2016 – 2020 when PPI complaints represented around 50% of total complaint volumes each year).



## What is the FOS?

The FOS is a free service available to determine complaints made by individual consumers, micro-enterprises and certain small businesses about financial services businesses.

The FOS was created in 2001 by the Financial Services and Markets Act as an alternative to the court system. The FOS aims to resolve all disputes in a fair and impartial way, taking into consideration the individual circumstances of each case. In particular, the FOS decides cases by reference to what is, in their opinion, fair and reasonable in all the circumstances of the case taking into account the law; regulatory rules, guidance and standards; codes of practice; and (where appropriate) what is considered to have been good industry practice at the relevant time. Therefore, the approach taken by the FOS to considering complaints is much broader and more flexible than how a claim would be determined before a court.

The process is intended to be simple allowing eligible parties to participate without legal representation. The customer is required to contact the business in the first instance and if not satisfied with the response received to the complaint they can refer the complaint to the FOS. The complaint will be considered by a case investigator who will make an initial determination. If not satisfied with that decision, the customer can ask that an Ombudsman review the case file and make its own determination. At the end of that process, the customer can decide whether to accept the decision of the FOS or reject it (in which case the complaint could be pursued elsewhere such as via court proceedings).



## Current FOS award limits

Different award limits apply depending on when the case was referred to the FOS and the date of the events complained about:

- For complaints relating to events after 1 April 2019, there is a sliding scale of award limits depending on when the complaint is referred to the FOS. The maximum award limit currently is GBP 375,000 for complaints referred on or after 1 April 2022 about acts or omissions by firms on or after 1 April 2019.
- For complaints about acts or omissions by firms before 1 April 2019, the award limit is GBP 160,000.



# Reform of the FOS

There have been various steps that the FOS has taken to address concerns about a backlog of cases and to make structural reforms:

## 1. Temporary outcomes code initiative

In November 2021, the FOS implemented proposals to temporarily amend the approach to publishing firm-specific complaints data until the end of March 2022. Under this scheme, the FOS considered batches of cases and provided firms with an indication of possible outcomes to encourage the firm to settle the cases without appointing an investigator and going through the full adjudication process. For the limited period (November 2021 – March 2022), if firms settled their complaints proactively then those complaints were not published as “upholds” but reported separately. This was a tactical initiative by the FOS to help to drive down the unallocated backlog that resulted during 2020/2021 – which has now reduced considerably, down from 90,000 at April 2021. More than 90 businesses participated in this initiative which resulted in 6,877 offers being made to customers and secured up to GBP 22m in redress for customers. It remains to be seen whether this type of initiative will be repeated or integrated in a more regular way.

## 2. Structural changes

The FOS is in the process of implementing various structural changes to reform the service. The CEO of the FOS stepped down in March 2021 after seven years in the role. An independent review of the FOS published by Oaklin Consulting in December 2021 made a number of findings including:

- Timeliness needed to improve: It was, on average, 5 months before a case was allocated to an Investigator and there were over 1,800 cases that were more than 3 years old in the stock of open cases.
- The Investigation Model, designed for a steady operation without queues and to service a market with a simpler range of complaints, is now strained.
- The FOS did well to clear the hurdles of PPI mis-selling cases, but these were followed by a continued influx of large volume complaints such as short term loans and packaged bank account complaints.
- The overwhelming impression from spending time in the FOS was that it was an organisation whose staff are ready for change. At Investigator, Ombudsman Manager and Ombudsman Leader levels, and among staff in the supporting functions, the sense is that change is urgently needed.



In December 2021, the FOS published an Action Plan setting out a number of actions in response to the above review. These include:

- Moving to a simpler, more empowered and accountable casework operating model.
- Greater use of specialist teams for certain products.
- Reshaping casework operations to create clear accountability for the attainment of targets.
- Development of a digital portal to make it easier and more efficient for customers to engage and to offer more choice.
- Greater use of intelligent automation (IA) solutions.
- Drive prevention with industry - the volume and variety of work that the FOS is having to deal with is a product of financial service companies facing record numbers of complaints and not resolving them to the satisfaction of their customers.

## Future trends

As part of the December 2021 Action Plan, the FOS consulted with key stakeholders and identified various areas of concern for future complaint activity in 2022/2023:

- Most major banks, as well as some industry bodies and consumer groups, said they expected banking and credit complaints to remain high.
- Major banks said fraud and scams complaints were likely to increase, particularly in the context of Covid 19, and the emergence of cryptocurrency scams. Increasing sophistication in fraud and scams was a significant concern.
- Many respondents noted that the introduction of the new FCA Consumer Duty (the FCA published its final rules and guidance on 27 July 2022, which will apply to all new products and services from 31 July 2023) is likely to lead to increased complaints to the FOS – particularly in the short term. It will be important for the FOS/FCA to provide early guidance on the application of the new duty.

In its report on annual complaints data for 2021/2022 (published in June 2022), the FOS also noted that it expected to see more complaints related to:

- The cost of living crisis driven by high inflation and high fuel and energy prices.
- A rise in people unable to access credit.
- People being exposed to more sophisticated scams.
- People struggling with new and existing debts.

# British Banking Resolution Service (BBRS)

The BBRS was introduced with good intentions but so far it has not been a success. Prior to the introduction of the BBRS, SMEs had two options for resolving disputes with banks: (i) for some SMEs it may be possible to refer lower value claims to the FOS (available to businesses with a turnover of up to GBP 6.5m and either fewer than 50 employees or a balance sheet total of less than GBP 5m); alternatively, (ii) for claims of higher value or otherwise outside the remit of the FOS the SME could bring court proceedings.

The BBRS was intended to provide a new option for SMEs falling outside of the FOS criteria to avoid potentially costly litigation. However, the statistics show that the BBRS has been used far less than was anticipated on its formation. Since going live on 15 February 2021 to 30 June 2022, there have been:



The low award volume is partly a product of the application of tight eligibility criteria for complaints and partly a lack of take up. Certain stakeholders that had been supportive of the BBRS being set up (such as the SME Alliance and All Party Parliamentary Group for Fair Business Banking) have withdrawn support for the BBRS claiming that it is not fit for purpose. Some have called for the scheme to be scrapped in favour of increasing qualification limits for businesses at the FOS.

In its defence, the BBRS has noted that it is subject to the eligibility criteria that has been set by policymakers and it can only look at cases that fall within those set criteria. By running awareness raising campaigns, the BBRS is actively seeking out more eligible cases.

In summary, the future direction of the BBRS remains uncertain at this stage. It needs to increase its number of live cases and award volumes to justify its existence. It may be that new thematic issues such as Covid-lending to SMEs could provide an uptick in BBRS referrals and/or a change in eligibility criteria may be needed to bring more complaints within scope.

“Certain stakeholders have withdrawn support for the BBRS claiming that it is not fit for purpose”



## What is the BBRS?

In March 2018, UK Finance launched a review into the banking complaints landscape for the UK's SME market. In response, the Walker Review was published in October 2018.

The Walker Review recommended the establishment of a voluntary ombudsman scheme for larger SMEs (who were ineligible for the FOS) and a voluntary scheme to consider historic SME banking disputes.

The BBRS was launched on 15 February 2021 to provide a new form of alternative dispute resolution for eligible SMEs and participating banks to resolve complaints.

Seven of the UK's largest retail banks have signed up to the BBRS and they fund the scheme (although the BBRS is impartial and independently governed).

The BBRS offers a free and independent service, using a combination of adjudication powers and other alternative dispute resolution (ADR) techniques, such as mediation.

The BBRS has developed two schemes to categorise complaints:

- Historical scheme: this covers cases from 1 December 2001 to 31 March 2019 for SMEs with a turnover up to GBP 6.5m per annum and total assets up to GBP 5m; and
- Contemporary scheme: this covers cases from 1 April 2019 onwards for SMEs with a turnover up to GBP 10m and total assets up to GBP 7.5m.

Depending on the size of the SME and when the complaint relates to, financial awards can range up to a limit of GBP 350,000 for the historical scheme and GBP 600,000 for the contemporary scheme.

# Current and future risks

There are a range of existing and upcoming risk areas for banks that will likely give rise to disputes in the second half of 2022 and beyond in addition to the steady volume of “business as usual” disputes that make up the bedrock of existing claim volumes. Below we summarise some of the key risk areas to watch.

## Bank duties to fraud victims:

Authorised Push Payment (APP) fraud has increased year on year with further record levels during the pandemic presenting a real challenge to the banking industry (according to the UK Finance 2021 Fraud Report, instances of APP fraud in the UK rose by 39% in 2021 amounting to GBP 583.2m of stolen funds). An industry-wide contingent reimbursement model (CRM) code is in place with the major retail banks providing a framework for reimbursing victims of APP fraud. However, there have been a steady flow of recent cases regarding the proper scope and application of the *Quincecare* duty (i.e. the duty on banks not to follow their customer’s instructions when they are ‘put on enquiry’ that the instruction might facilitate a fraud on their customer). The recent *Philipp v Barclays* decision confirmed that the *Quincecare* duty could, in principle, apply to instructions given by an individual that was victim of APP fraud (previously it had been thought to be confined to situations where an agent of a corporate customer was giving instructions). This broadens the scope of potential claimants bringing a *Quincecare* duty claim. However, in practice, it seems more likely that the majority of APP related complaints by individuals will continue to be dealt with under the CRM code and/or via the FOS rather than court proceedings due to the value of such claims and the advantages in having a complaint determined without the legal costs of court proceedings.

In May 2022, there were two decisions that took a narrow approach to the scope of a bank’s duties in this area: the Privy Council decision in *Royal Bank of Scotland International Ltd v JP SPC 4* and another confirmed that the *Quincecare* duty is owed only to the bank’s customer (and not third parties), and in *Tecnimont Arabia Limited v National Westminster Bank plc* the High Court decided that the recipient bank in an APP fraud was not liable to a (non-customer) victim. In June 2022, the High Court dismissed a USD 1.7bn claim by the Federal Republic of Nigeria based on breach of the *Quincecare* duty (*JP Morgan Chase Bank N.A v The Federal Republic of Nigeria*). In doing so, the High Court provided helpful clarification regarding notice requirements, red flags, and the impact of limitations in bank terms and conditions.

At the time of preparing this report, we await the Supreme Court decision in *Stanford International Bank Ltd (in liquidation) v HSBC Bank Plc* which is likely to provide further guidance regarding the boundaries of this duty.

The claims data for 2022 shows claims continue to be filed based on alleged breaches of the *Quincecare* duty. Therefore, whilst the most recent court decisions (in May and June 2022) suggest there are challenges to claimants succeeding with these claims (and the only successful claim for breach of the *Quincecare* duty remains *Singularis Holdings v Daiwa Capital Markets* [2019]), this remains a risk area for banks.

## LIBOR transition:

When the discontinuance of LIBOR was first announced in 2017 it was accompanied by a prediction of a tsunami of litigation given both the volume and value of contracts affected. In the following years, whilst regulators continued to encourage market participants to grapple with transitioning all contracts to alternative risk free rates, a number of legislative changes were introduced in the US and UK (amongst other jurisdictions). These changes have sought to soften the impact of a cliff edge discontinuance of LIBOR, particularly in respect of so called “tough legacy” contracts. For example, the FCA will continue to compel the ICE Benchmark Administration to publish ‘synthetic’ LIBOR rates for certain tenors for 12 months from 1 January 2022. Also, pursuant to recent UK legislation, synthetic LIBOR will be deemed to replace references to certain LIBOR rates in existing contracts. These legislative changes are intended to reduce the risk of litigation arising out of legacy contracts and are likely to be effective in the majority of cases. However, given how embedded LIBOR has been across the financial sector it remains likely that there will be some litigation arising from the transition – either in relation to tough legacy contracts or newly repapered contracts - in the coming months and years even if it is not on the scale that some predicted when the discontinuation of LIBOR was first announced.

## ESG:

There is currently significant focus on ESG across all sectors. In the Banking and Finance sector this gives rise to both regulatory and litigation risks.

In particular, financial institutions are under increasingly onerous disclosure obligations. This gives rise to the risk of legal or regulatory action regarding inaccurate or misleading disclosures. Financial institutions are exposed to “greenwashing” allegations where investments may be promoted as sustainable investments when they do not in fact meet such standards. There have been a number of high profile regulatory investigations in the US and Germany in 2022 to date regarding alleged “greenwashing” and we can anticipate that UK financial regulators will follow suit. Alleged “greenwashing” also brings with it the risks of civil claims from investors. In addition, there is now increased risk around corporate lending where there is an increasing focus on parties that enable high carbon-emitting companies or projects in all forms including via providing financing.

Financial institutions are therefore likely to face increased regulatory intervention in this area and increased litigation both from activists looking to drive behavioural change and other claimants seeking damages

## Sanctions:

The Russia/Ukraine conflict has given rise to a significant volume of new sanctions that directly impact financial markets and financial contracts with Russian counterparties. Banks are likely to be involved in disputes as to how they have applied the sanctions regime and the impact on individual accounts / payment instructions. By way of example, we have already seen claims issued in the first half of 2022 against banks for allegedly unlawfully failing to pay under a letter of credit on the basis that they were prevented from doing so under Russian sanctions laws. Investment banks are likely to be affected in relation to derivatives and foreign exchange transactions governed by ISDA master agreements where one party is unable to pay due to sanctions giving rise to questions around whether the contract can be terminated and how to calculate Close-Out Amounts. These disputes could involve significant sums (with enforcement risks where the counterparty is Russian based) that may result in court proceedings. There is also likely to be general financial market disruption caused by the insolvency of the UK branches of certain Russian owned banks with the potential for these defaults to give rise to wider disputes.

## Market disruption:

History tells us that whenever there is general financial market disruption, then disputes will follow. We are currently in a volatile period with a UK cost of living crisis; rising global inflation and rising interest rates; volatile equity markets; widening and ever more stringent sanctions rules; geo-political tensions and uncertainty. All of these factors point to a period of ongoing financial market disruption that will lead to disputes involving banks and other financial institutions.

## Covid lending:

Given the volume of Covid lending (over GBP 75bn via CBILs and BBILs) and the speed at which agreements were concluded, disputes in this area are inevitable. On the one hand there is the collection and recovery action by the banks, including possible disputes with the government as to the ability to recover under the government backed guarantee. On the other hand, there will be complaints from customers (which may be raised defensively as and when action is started to recover the loans). Complaints to date have typically related to situations where applications were refused or not processed quickly enough. Recent FOS data shows that there have been around 250 published decisions on complaints relating to loans under BBLs, less than half of

which have been upheld. FOS compensation awards for these types of complaint have been limited (typically a few hundred pounds for inconvenience). Other areas of complaint are likely to centre around the suitability of the funding or the level of the customers understanding of the terms. Given the volume of customers that took out Covid-lending this is an area that claims management companies may explore.

## Consumer Duty:

The FCA's new rules and guidance implementing a "Consumer Duty" are intended to "fundamentally shift the mindset of firms". The FCA published its final rules and guidance on 27 July 2022, which will apply to all new products and services from 31 July 2023 and closed products and services from 31 July 2024. The proposals from the FCA are aimed at addressing the poor customer outcomes that have been identified in retail markets, giving the FCA a greater ability to hold firms and senior management to account. The FCA has decided that there will be no private right of action for breaches of the Consumer Duty for now (although this will be kept under review). This removes the risk of consumers being able to take direct court action against banks based on an alleged breach of the Consumer Duty. Instead, most complaints are likely to be dealt with by the Financial Ombudsman Service (working closely with the FCA to ensure consistency in approach). This is likely to be a fertile ground for complaints once the Consumer Duty is implemented and there will follow an important "bedding in" period where the FOS (and FCA) are considering the appropriate scope and application of the new Duty which will set the parameters for the future claims landscape.

## Cyber/operational resilience:

Throughout the pandemic banks have had to deal with various customer facing and internal challenges. As regards their customer base, banks have had to respond to national lockdowns, temporary closures of branches and an increased demand for online banking services. In parallel, banks have had to accommodate their own staff working remotely on a large scale. Banks are responsible for managing their IT risks and keeping their IT systems operational without significant interruptions to customer service. Any cyber incident that interrupts customer facing services for any length of time has the potential to cause significant reputational damage, give rise to regulatory action (including significant fines) and disputes with customers. Cyber/technology risks therefore remain top of the agenda for banks in 2022 with an increased risk of cyberattacks arising from the Russia/Ukraine conflict.

## Class actions:

As noted in the “*A focus on: class actions*” section above, class action risk is growing across Europe (see our “**European Class Action Report 2022**”) and legal principles are continuing to develop in the UK. Class action proceedings involving banks have been important in developing both substantive law and procedure in this area including in the context of High Court Group Litigation Orders and opt-in/opt-out proceedings before the CAT.

Particular class action risk areas include:

1. Securities litigation: there have been a growing number of shareholder group actions in the UK, including major claims against banks. Shareholders can bring claims under the statutory liability regime under the

Financial Services and Markets Act 2000 (FSMA) and common law claims.

2. Data breach: banks hold significant volumes of personal data regarding customers giving rise to risks of potential data breach claims. The 2021 Supreme Court decision in *Lloyd v Google* was unhelpful for claimant law firms and funders looking to pursue mass data breach class actions in England but it remains possible that class actions for data breach will be pursued in the future.
3. Customer claims: having a large retail customer base gives rise to an increased risk of group actions where customers are complaining about the same product. For example, there have been recent reports of an intended High Court group action against a major retail bank where the claimants argue they were locked into mortgages with excessively high-interest rates.

## Crypto:

The Bank of England Financial Policy Committee report in March 2022 (“Financial Stability in Focus: Cryptoassets and decentralised finance”) provides commentary on the growing risks for banks in this area. The report notes that where banks have begun to cater to cryptoassets it has mostly been international banks facilitating client trading in cryptoasset derivatives (although this activity is currently limited). However, banks plan to undertake cryptoasset market-making activities, thereby providing liquidity to cryptoasset markets. The report warns that this is likely to lead to a growth in direct cryptoasset exposures, which could create financial risks to these banks, depending on their positioning and hedging strategies. According to the report, no major UK bank has reported direct exposures to cryptoassets as yet. However, some are seeking to offer

cryptoasset custody services in the near future. Traditional custody services provide the settlement, safekeeping and reporting of customers’ securities and cash. The main role of cryptoasset custody services is to ensure that private keys – which allow users to access their digital assets – are secure. The report notes that “*this creates new operational risks for banks to manage. A security breach could have harmful reputational ramifications, which could in turn reduce the overall level of confidence in those banks.*” In summary, the involvement of banks with cryptoassets over the coming years is likely to increase and this will inevitably give rise to increased legal risk and the potential for disputes. At a retail level, the FOS has noted the emergence of cryptocurrency scams as being a risk area for complaints in 2022/2023.

# Conclusion

The Banking and Finance sector is a broad one and covers a multitude of different institutions who are contracting with different counterparties in different contexts. Whilst an arbitration clause may be suitable for a bank providing project finance to a foreign counterparty, it will not be suitable for a contract with a domestic retail customer. It is therefore unsurprising that the sector makes use of a variety of different dispute resolution processes.

The High Court data in this report focuses on the position regarding the leading retail, investment and challenger banks in the UK. The Banking and Finance sector remains in the top two sectors for High Court claims issued year on year. Volumes of claims involving retail banks remain the highest between the three categories of banks. Data for the first half of 2022 points to a continuing downward trend of claims involving retail banks although it is too soon to draw firm conclusions on this and we should await the full year data. Volume of claims involving investment banks have remained steady over recent years whereas claims involving challenger banks are on an upward trajectory (given their increasing market share).

The data shows that the Financial List within the High Court has been used successfully by parties since its introduction in 2015. Also, as class action risk grows across all sectors, the Banking and Finance sector has been involved in some of the leading class actions to date before the High Court and Competition Appeal Tribunal.

Data from the LCIA shows a growing trend of arbitration being used in the Banking and Finance sector more generally. It is likely that this case load will involve a broad spectrum of financial institutions from multiple jurisdictions rather than the more narrow cohort of banks that form part of the High Court analysis above. However, whilst there is still further work to be done to encourage financial institutions to be comfortable in choosing arbitration over court proceedings, the data suggests a growing acceptance that arbitration agreements can be advantageous in particular situations when contracting with particular counterparties.

As regards statutory schemes offering alternative dispute resolution services for consumers and SMEs, the current picture is less positive. The FOS data points to a service that is under strain and ready for reform. The main issue is one of high volume of complaints with a lack of resources to deal with them promptly and efficiently. It remains to be seen whether claim volumes will start to reduce and what reforms will be introduced to improve the FOS service. The BBRs suffers from a different problem – a lack of take up – which appears to be due principally to its tight eligibility criteria. Reform is needed if the BBRs is to continue as a viable alternative dispute resolution service.

The current and future risks that we have identified in this report again demonstrate the breadth of the Banking and Finance sector. Not all of these risks will apply to all banks to the same extent, but the fact that a variety of risks for disputes exist for all institutions over the coming years remains clear.

The UK offers a broad range of dispute resolution services. The High Court remains one of the pre-eminent courts for determining Banking and Finance disputes on the global stage, the use of arbitration in appropriate contracts is here to stay, the UK statutory schemes offering alternative dispute resolution services for consumers and SMEs exist to provide effective dispute resolution services at no or limited cost and we anticipate that reforms will be made in the short term to improve these services. We look forward to monitoring the trends that will emerge from future data and considering new dispute resolution processes that will inevitably be introduced to ensure that Banking and Finance disputes continue to be resolved effectively and efficiently.

# Methodology

- The data in relation to volume and types of High Court claims was provided by Solomonik in relation to the nine largest retail, investment, and challenger banks operating in the UK.
- The data in relation to claims issued in the Financial List is taken from the results of a public case search via HM Courts & Tribunals Public Search & Office Copies.
- The arbitration data is taken from the annual reports of the LCIA and ICC.
- The FOS data is taken from the FOS annual reports and the FOS December 2021 Action Plan.
- The BBRs data is taken from the BBRs annual report (31.12.21) and BBRs reporting data as at 30.06.22.



# CMS Law-Now™

**Your free online legal information service.**

A subscription service for legal articles on a variety of topics delivered by email.  
**[cms-lawnow.com](https://cms-lawnow.com)**

-----  
The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

**CMS locations:**

Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Beirut, Belgrade, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Moscow, Munich, Muscat, Nairobi, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Seville, Shanghai, Sheffield, Singapore, Skopje, Sofia, Strasbourg, Stuttgart, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

-----  
**[cms.law](https://cms.law)**