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Companies should be allowed to choose how best to deliver justice

Ned Beale

It has taken many years longer than it should have done, but there is finally a consensus that small and medium-sized companies deserve better options for resolving disputes with high street banks.

The problem is that the government doesn't agree with the preferred method of many business owners, campaigners and MPs for levelling the playing field — the creation of a financial services tribunal to resolve such disputes.

The debate hinges on whether small companies are better served by independent arbitration, as groups including the Treasury select committee believe, or by an expansion of the remit of the existing Financial Ombudsman Service, the solution favoured by the government and banks.

In December John Glen, the City minister, gave five reasons why the ombudsman was a better route than a tribunal. With growing support across all six political parties for both options to co-exist, I suggest that the government's arguments miss the bigger picture.

First, Mr Glen states that a tribunal would impose an unnecesary regulatory burden on banks, given that lenders have signed up to new standards governing fair treatment of customers. However, there is no sanction if lenders breach these voluntary guidelines. The standards will be meaningless without an effective enforcement mechanism. Rules need teeth to have bite.

He also argues that a tribunal can only apply strict legal principles, whereas the Financial Ombudsman Service can rule on a "fair and reasonable" basis, leading to better outcomes for consumers. That is not necessarily correct. There is a long established legal concept of tribunals ruling on an "on right and good" basis. Parties arbitrating under the rules also can agree to be bound by additional substantive rules, for example the FCA Principles for Businesses.

Third, the minister suggests that going to arbitration will be more expensive for consumers than going to the ombudsman. However, the arbitration scheme could be specifically designed to cater for business owners with no, or limited, legal representation.

It is also argued that the ombudsman would be quicker than arbitration. However, a whistleblower from within the organisation recently reported to MPs that 30,000 ombudsman cases were awaiting allocation to an investigator. The average duration of these cases is six months, with a significant number lasting longer than a year. Employment tribunals are a powerful precedent for swift, efficient tribunal processes.

Finally, Mr Glen states that a tribunal would require primary legislation. This is not entirely correct. “Arbitral tribunals” can have legal standing under the Arbitration Act 1996.

To succeed, such a tribunal would need to be operated by a recognised neutral body. One of the UK’s best known arbitral institutions, the Chartered Institute of Arbitrators, is assessing how such a scheme could be implemented. Some consumers will want their “day in court” that only a tribunal can provide. Some claims — for example, for higher-value consequential losses — are inherently unsuitable to the ombudsman. The Chartered Institute of Arbitrators is exploring, too, how the owners of insolvent businesses can be awarded damages under the scheme.

I encourage Mr Glen and HM Treasury to reconsider the advantages of combining the ombudsman with the creation of a fresh arbitration scheme so that business owners can choose which is most likely to deliver them justice.

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