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Proposal to Modernize the CIRO Arbitration Program
https://https://www.ciro.ca/news-room/publications/proposal-modernize-ciro-arbitration-program

Kenmar Associates welcomes the opportunity to comment on the proposed Arbitration Program. We appreciate the detailed effort made to address all the Comments received on the earlier version.

Kenmar is an Ontario-based privately-funded organization focused on investor education via articles hosted at www.canadianfundwatch.com Kenmar also publishes the Fund OBSERVER on a monthly basis discussing consumer protection issues primarily for retail investors. Kenmar is actively engaged with regulatory affairs. An affiliate, Kenmar Portfolio Analytics, assists, on a no-charge basis, abused consumers and/or their counsel in filing investor complaints and restitution claims.

First and foremost, we believe CIRO should update its Dealer complaint handling rules to reflect current best practices in client complaint handling. We find the latest AMF rules for client complaint handling to be well reasoned and approaching international standards such as ISO 10002. A good benchmark to consider.

The 90 calendar day cycle time for CIRO Member Dealers to respond to a complaint is longer than those in other jurisdictions, the 60 days of the AMF's complaint rule and the 56 days permitted by FCAC for banks.

It is our firm conviction that a modern complaint handling rule will not only result in wiser decisions and fairer outcomes but in improvements to the regulatory system and Dealer business practices. The tone of complaint handling would change from adversarial to an emphasis on client service. Complaints are hidden gems allowing for continuous improvements in service delivery and client satisfaction. Effective implementation would **reduce** the number of complaints and the number of disputes requiring dispute resolution via arbitration or OBSI.

There is a lot to like among the revised Program provisions – a plan to preserve OBSI status, use of virtual meetings, funding some administrative costs of the Program, encourage mediation, fund up to a half-day mediation session, up to 10-20 hours of case management per case, enhanced statistical reporting and publishing anonymized case studies to increase Program transparency (We believe the actual decision should be published albeit with anonymity). This is standard practice at the UK FOS for example. Case studies do not always provide sufficient

information for reviewers, stakeholders and academia to assess and evaluate the arbitration process.

CIRO Oversight of the Program should include contact defined standards, loss calculation methodology approval, statistical reporting including Award amounts , number of cases by category , cycle time , avg. cost per arbitration for current year and 4 prior years etc. to show impact, a periodic independent review, fee management and an Annual Report. Transparency and accountability are key success factors in acquiring retail investor trust in the process.

Response to Questions

We assume the CIRO arbitration definition of complaint is an expression of dissatisfaction (oral or written) about the provision of, or failure to provide, a financial service.

Our response to the questions are as follows:

(a) **Should the Program be extended to clients of mutual fund dealers?**
We advocate that clients of mutual fund Dealers should have access to CIRO arbitration for claims above the OBSI $350K compensation cap. This would add critical mass to the Program and provide consistency to CIRO's dispute resolution system. Any client of a CIRO Member Firm would have to access arbitration. This is one of the benefits of the MFDA-IIROC consolidation.

(b) Should the Program remain available for 1) claims that fall outside OBSI's mandate/eligibility criteria and 2) claims where investors had attempted to resolve their dispute through OBSI and withdrew from or abandoned the process?
It makes a lot of sense to provide a channel for complaints that were deemed out of mandate with OBSI to have an alternative to the long, costly and complex legal process. Similarly, if they withdrew from or abandoned the OBSI process, access should be available to CIRO Arbitration. Complainants could still use civil litigation if they so choose.

(c) Is the proposed range, between $350,000 (and potentially $500,000) to $1,000,000, appropriate for arbitration claims involving investor disputes in Canada?
We believe the $1M figure is reasonable for arbitration in Canada with the limited statistics we have. An examination of enforcement data could provide additional insight. The proposal to double the current award limit raising it to $1,000,000 and allow parties to use the Program on consent for claims above $1,000,000, in which case, their arbitration would not be limited by any set limit is pragmatic.

There should be a mechanism to review the $1M limit annually or tack on an inflation adjustment each year subject to a minimum quantum.

(d) **Should the limitation period be extended and what would be the appropriate limitation period for arbitration claims in the Program?**
Six years would be congruent with OBSI making the investor complaint system harmonious and easier to understand. Extending the limitation period would mitigate the power imbalance of Main Street investors seeking compensation and promote access to justice.

(e) Would the proposed changes, in particular: (1) funding reasonable case management and mediation costs, (2) setting reasonable arbitrators' rates and offering fixed fee arbitration, and (3) referring self-represented litigants to *pro bono* legal assistance, effectively address the issue of costs in the Program and promote greater access to justice for parties in investment-related disputes?
We believe it will increase Program usage but note that Investor Protection Clinics are only located in Ontario. CIRO should use the Restricted Fund to help build Investor Protection Clinics across Canada. Legal Aid may not have the necessary expertise to participate in securities cases.

Other comments on the Program

CIRO inform that the Program arbitrators rely on the same test for assessment of damages as judges in civil courts and so do not believe it is necessary to change the methodology used in CIRO arbitration proceedings. The claimant will be made whole but will not receive a windfall (fair and reasonable in the circumstances). **We recommend that this loss calculation methodology be translated into plain language and illustrated by example in material provided to prospective Program users. Fairness principles employed should also be laid out so complainants understand the process.** OBSI is very clear and public on their loss calculation methodology. This is the kind of transparency that will encourage usage of the CIRO arbitration Program.

We encourage CIRO to enable fixed fee options under the Program for less complex/simpler cases , which could include arbitration by written hearing ($3,000 per party), one-day oral hearing ($7,500 per party), two-day oral hearing ($15,000 per party) etc.

Eligible complainants will be able to utilize the program for Off-book cases and class actions if they opted out of the action. This is important as Off book cases often involve significant losses.

Case management could improve key aspects of the Program, such as setting timelines, narrowing issues, choosing the best format and location for arbitration, and resolving procedural matters. These changes would make the Program more flexible, efficient and faster. Cycle time and costs will be key metrics regarding the success of the Program.

We had recommended record retention of 7 years but were informed most arbitrations are currently conducted electronically so electronic records are typically

kept indefinitely by the arbitration service providers**. For greater certainty, we believe that a minimum document retention period (e.g. 7 years) should be specifically defined regardless of the method of data capture.**

We agree with CIROs intent to update their criteria for the independent service providers and conduct regular reviews (annual assessments for at least the first couple of years following the Program review) of all arbitration service providers, including ADR Chambers. We had expressed concern given the issues which occurred with ADRBO on the banking side.

Under the Program, there should be full disclosure of the arbitrators qualifications, education and experience so that both parties to the dispute can make informed decisions in their selection of an arbitrator. Interviews of prospective arbitrators should be permitted. There should be rigorous training in such specialized areas as psychometric risk profiling, best interests suitability determination, fairness based loss calculation, CFR, especially rules on conflicts-of-interest /disclosure and dealing with elderly/vulnerable clients .CIRO propose to implement regular attestations to an arbitrator's Code of Conduct setting out the high standards of conduct, excellence, neutrality and impartiality of arbitrators participating in the Program.

Arbitration service providers should conduct a periodic stakeholder satisfaction survey similar to OBSI's and disclose the results with action plans. **There should also be a mechanism for users to file service complaints as appropriate.**

Notwithstanding the privacy associated with CIRO arbitration, **we expect that identified or suspected criminal activity such as forgery and theft will be reported to CIRO by the investigator.**

We have been informed that arbitration decisions are enforceable as CIRO Rules require Dealers to comply with arbitration requirements and decisions. If a Dealer fails to comply with an arbitration award, they could be subject to an enforcement proceeding by CIRO. See also *NASAA Members Adopt Model Rule Addressing Unpaid Customer Arbitration Awards and Judgments* https://www.nasaa.org/63563/nasaa-members-adopt-model-rule-addressing-unpaid-customer-arbitration-awards-and-judgments/ Failure to pay the award would be a huge blot on the Program.

CSA Staff Notice 31-354 - *Suggested Practices for Engaging with Older and Vulnerable Clients*, requires that Dealers be mindful of the needs of investors, especially those who are older or vulnerable, and conduct the investigations as appropriate to ensure that a valid complaint is not abandoned as a result of a prolonged and unduly complex process. **We recommend added training for arbitrators dealing with cases involving seniors/ vulnerable clients to help promote fairness and understanding.**

Bottom line

CIRO's plan to modernize the Arbitration Program represents a forward-thinking approach to addressing barriers to access to justice and improving investor protection in Canada.

Retail investors' access to a fair, expeditious and streamlined dispute resolution process with CIRO Dealer Members is a key component of investor protection. OBSI's free, time tested, informal service is the preferred solution for complaints that amount to less than $350K. The proposed refreshed CIRO arbitration Program will laser focus on more complex cases involving significant monetary amounts exceeding the compensation limits OBSI can handle. We believe the Proposal will meet expectations.

CIRO's early oversight and transparent reporting will be key to building trust and accountability in the Arbitration Program.

We look forward to reviewing the CIRO IAP position on these matters which we hope will be made public on this critical investor protection issue.

Please contact us if there are any questions regarding our submission.

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