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Investment Industry Regulatory Organization of Canada
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Review of the IIROC Arbitration Program
https://www.iiroc.ca/news-and-publications/notices-and-guidance/review-iiroc-arbitration-program-0

Kenmar Associates appreciates the opportunity to comment on the proposed Arbitration Program. 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 IIROC ("New Self-Regulatory Organization of Canada" or NewSRO for short) should update its Dealer complaint handling rules to reflect current best practices in client complaint handling. Kenmar have been constructively critical for years of IIROC rule 2500B. Earlier this year, an modernized complaint handling approach was proposed by IIROC –it was a step forward but needs more work .OBSI and others provided valuable comments on said proposal. The status of the rule is unknown to us. We found the 2021 AMF proposals for client complaint handling to be well reasoned and approaching international standards such as ISO 10002. That proposal is currently out for another round of consultation .The potential for a reduction in obligation is possible due to the industry utilizing the now potent "regulatory burden" card.

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 application of this rule would reduce the number of disputes and the number of complaints requiring dispute resolution via arbitration or OBSI.

Now on to the proposed Arbitration program. We compliment the Working Group for taking a 360 degree view of the Program. The Proposal effectively addresses the three major barriers to use (1) accessibility, (2) costs and (3) procedures that will increase its attractiveness to retail investors.

A suggested title for the Program is "IIROC Independent Arbitration Program" yet in January 1, 2023, IIROC technically no longer exists. One of the tangible benefits of the MFDA/ IIROC consolidation could be that arbitration would be made available to clients

of former MFDA Member Firms. Kenmar recommend that the Program be made available to all Member Firms of NewSRO as soon as the appropriate rule books have been consolidated and/or harmonized. Looking ahead, we would expect that EMD's if they were consolidated into NewSRO, that their clients could avail themselves of the Program. The greater scope will also make the Program more economically viable.

Based on our experience, we do not believe the Program will see much usage when OBSI is provided a binding decision mandate (the CSA has signalled its clear intention to provide OBSI a binding decision mandate), the systemic issue Protocol is overhauled along the lines recommended in the latest Independent Review Report of OBSI, Board governance is enhanced based on consultation feedback and especially **if** the compensation limit is raised to $500K as recommended by the Ontario Task Force on Securities modernization and in the recently released OBSI Independent Review Report. The Arbitration Program would be a niche alternative unless volumes turn higher than has been historically been the case. However, an increase to a $5M limit could increase Program participation; the pilot program will provide the evidence.

As stated in the Consultation "To raise public awareness about the Program, IIROC will need to develop an effective public relations strategy….". Our concern is that the PR initiative may inadvertently divert retail investor complainants away from OBSI. This is why we believe the Program should not be used for claims expected to be within OBSI's compensation limit or for less complex claims.

We assume that potential users of the Program will have at least 180 calendar days to decide to use the Program (similar to OBSI) and that complainants will also be limited by Statute of limitations Act timelines as applicable.

IIROC/NewSRO will need to ensure that complainants are not confused by this Program. The unique benefits compared to OBSI should be highlighted in marketing materials and Guides. **Kenmar strongly recommend that the Arbitration Program be limited to those cases likely to exceed the prevailing OBSI compensation limit (potentially $500k).**

Recommendations 1(2), 2, 7, 8,9,11 and 14 should be evaluated with our recommendation in mind. OBSI's processes are geared to handling smaller amount cases for unrepresented complainants and their investigation work has been independently rated as world class. Offering low dollar amount options will almost certainly add to retail investor confusion. We have witnessed this in the case of competing bank ECB's. The CSA has selected OBSI as the sole external complaint body for the securities sector for cases up to a prescribed limit (currently $350K). Another negative result could be higher costs for OBSI and its Member Firms if the caseload declines as a result of diversions to arbitration. NewSRO should not undermine CSA's strategic intent -free, informal resolution of retail investor complaints.

An unintended consequence of the these recommendations could negate the case for OBSI to have a binding decision mandate .It would be a catastrophic result for Main Street if cases under $50K or $250K are candidates for arbitration. There is absolutely no evidence to support this option as necessary for retail investors. The only

beneficiaries of such a recommendation would be the legal profession and Firms that believe that OBSI's fairness criteria and principles can be subverted in arbitration.

Of course, some small investors may choose to use Small Claims Court in lieu of OBSI or even after OBSI has released its final decision.

A key success factor for the Program will be complainant cost. Recommendation 14 makes sense for complainants of modest means that believe they have unjustly lost over $500,000 and are not eligible to refer their case to OBSI. **We approve the proposal of providing funding in qualifying cases with the proviso that only cases expected to exceed $500 K would be considered qualified.**

Any promotion of the Program via social media, Program documentation, website etc. should not in any way attempt to divert cases eligible for OBSI consideration away from OBSI.

The 30-45 day contraction to allow an expedient access to arbitration is controversial. A 30-45 day processing period could compromise the completeness of the analysis to the potential detriment of investors. It is Kenmar's belief that a Dealer must be given a reasonable opportunity to make things right before the use of an external complaint resolution process is used. A more reasonable timeline for external complaint application might be 56 calendar days, the same time allowed for Federally incorporated banks. This should be benchmarked to other jurisdictions but we are aware that the 90 calendar day provision lags international standards.

A September 2021 proposal by the Autorité des marchés financiers (AMF) to ensure consumers' complaints are fairly processed in Quebec's financial industry compares favourably with international standards and could represent a new benchmark for Canada. The proposed AMF complaint handling rule sets a 60 calendar day clock for firms to process complaints, starting from when a complaint is received. **Kenmar recommend 60 calendar days rather then 30-45 days** (Re the 90-day requirement) **if** time compression is in the best interests of the complainant.

A Fairness standard for Dealer and ADR Chambers (ADRC) complaint handling should be developed; it should not be limited to procedural fairness. See *Fairness by Design* https://ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Brochures/Fairness-by-Design-accessible.pdf , *Complaints resolution - policy framework and best practices:* FSRA https://www.fsrao.ca/complaints-resolution-policy-framework-and-best-practices , *Complaint handling and fair decision making in the financial industry* | QMU Working Paper Series https://www.qmu.ac.uk/research-and-knowledge-exchange/working-paper-series/20201/ and as well, various documents developed by OBSI.

Electronic participation should be permitted at complainant choice and document transmission via DocuSign or other security software should be allowed for those clients who have mobility (e.g. seniors, handicapped) constraints.

We recommend that IIROC / NewSRO adopt the OBSI loss calculation methodology for its client complaint handling rule and for use by the designated arbitration service provider's arbitrators as the standard. This methodology, often referred to as the opportunity-cost methodology, can be illustrated as follows using OBSI material:

- If an investor lost $10,000 as a result of unsuitable investments, but would have lost only $6,000 on suitable investments, the investor's financial harm would be $4,000.
- If an investor lost $10,000 as a result of unsuitable investments, but would have gained $3,000 on suitable investments, the investor's financial harm would be $13,000.
- If an investor gained $10,000 as a result of unsuitable investments, but would have gained $15,000 on suitable investments, the investor's financial harm would be $5,000.
- If an investor lost $10,000 as a result of unsuitable investments, but would have lost $15,000 on suitable investments, the investor did not suffer financial harm.
- If an investor gained $10,000 as a result of unsuitable investments, but would have gained only $2,000 on suitable investments, the investor did not suffer financial harm.

Source OBSI https://www.obsi.ca/en/how-we-work/comprehensive-investment-loss-calculation.aspx This methodology has been recognized as world class by Independent Reviewers. We believe this is the best way to effect the calculations because it is fair to all parties , fully congruent with CFR's regulatory intent and typically used by the courts in cases of this kind. This approach is what retail investors expect to be integral to an advisory relationship. In any event, ADRC should publish its loss calculation methodology to satisfy transparency obligations.

Off- book cases should be eligible for participation under the Program unless it was patently obvious to the complainant that the recommendation was made outside of the Firm's business envelope.

It is our understanding that, with certain provisos, the arbitrator will be able to consolidate cases involving multiple parties and/ or common claims under the case management system. How will costs be split between the parties? If a systemic issue is detected, will the Dealer be informed so that other clients impacted (but who did not complain) can also be fairly compensated?

We have been informed that arbitration decisions are enforceable as IIROC 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 IIROC. If the Dealer is insolvent, NewSRO /IIROC should have a fund available to compensate the victim. This is a scenario that has already played out in a few OBSI cases with the complainant left holding the bag. [Perhaps the Canadian Investor Protection Fund could be used for this purpose as the arbitration compensation amount could be, in effect, considered an asset of the complainant].

NewSRO/ IIROC has good reason to reflect on unpaid arbitration awards .They undercut its legitimacy as a SRO credibly committed to investor protection. Self-regulation works best when the industry bears the costs of industry misconduct. When the industry internalizes the costs of misbehavior, it is incentivized to police its own ranks efficiently. If the industry does not internalize the true cost of misbehavior and instead allows arbitration awards to go unpaid, NewSRO itself may not be incentivized to devote sufficient resources to address this potential issue. 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/

While we appreciate that the goal of arbitration is private dispute resolution, not criminal prosecution, we expect that any criminal acts discovered during the course of the arbitrator's investigation will be reported to NewSRO/ IIROC.

Currently, arbitration is private and confidential between the parties. It would be useful, efficient and logical if information exposed in the resolution of the complaint could be revealed to IIROC and used by IIROC in a subsequent IIROC enforcement investigation and/ or Hearing. Availability of the information would also provide access to any lessons learned during the investigation of the complaint (e.g. need for enhanced advisor training, clarification of a rule or disclosure).

Kenmar recommend that if a systemic issue is uncovered by an arbitrator(s), ADRC should disclose that fact to NewSRO/IIROC.

Kenmar support the publication of arbitration decisions, as anonymized documents (or as a generic Case Study) to increase transparency and increase confidence in the NewSRO/ IIROC arbitration Program.

Program literature should make clear any constraints on disclosure obligations/constraints. NewSO/ IIROC should approve the language used in any NDA form if a complainant is asked to sign one. It should be fair, reasonable and functional.

We take this opportunity to remind NewSRO /IIROC that bank -owned Dealers continue to divert complainants into their complex, multi-step complaint handling process. NewSRO rules should be absolutely clear- diversion to any unregulated entity (such as a bank SCO or " ombudsman") is prohibited and all complaints must be responded to within 90 calendar days , after which the only choices for dispute resolution would be OBSI, IIROC/NewSRO arbitration or civil litigation (with due exception for Quebec) .

ADRBO, a for-profit banking ECB is an affiliate of ADR Chambers, was audited by FCAC in 2020 and more recently by the OBSI Independent Review findings (" Puri" Report https://www.globenewswire.com/news-release/2022/09/01/2508731/0/en/An-independent-evaluation-of-the-ADR-Chambers-Banking-Ombuds-office-ADRBO.html) with less than stellar results. We note that ADR Chambers is NewSRO/IIROC's chosen primary arbitration service provider.

Per ADRBO's website they will not investigate a complaint : " *Class actions—where the loss you are claiming also appears to have been suffered by other customers resulting from the same bank action/inaction and could be subject to a class action*;…". Should we assume that the IIROC Arbitration Program run by ADR Chambers, the parent of ADRBO, will take a similar position in rejecting such a complaint? If they do, we do not believe this would be fair to a complainant that is not a party to the class option (opted out). **Kenmar recommend that such cases be eligible for the Program if the complainant has opted out of the class action.**

We recommend that the retention period for case files be 7 years and that ADR Chambers be responsible for retention. In any event, the retention period should be publicly disclosed.

ADRC arbitrators will need CFR implementation training as this new regulation effectively places higher accountability on Firms/advisors than the suitability standard. The idea of a "balancing of interests" gives way to putting the clients interest first and resolving conflicts-of-interests in the best interests of clients.

ADR Chambers arbitrators will also need to receive training regarding the management of a case filed by an elderly or seriously ill claimant and operated under an accelerated process mechanism. See PIABA comment letter on this issue to FINRA https://www.finra.org/sites/default/files/NoticeComment/PIABA_Michael%20Edmiston_5.16.2022_FINRA%20Regulatory%20Notice%2022-09%20%28May%2016%202022%29.pdf

ADRC should be required to provide a publicly available Annual Report on its activities and must have practices in place to ensure client information privacy and security over case files is maintained. We assume language support will be provided by ADRC for complainants whose first language is not English or French.

Bottom line: **Retail investors' access to a fair, expeditious and streamlined dispute resolution process with IIROC Dealer Members is a key component of investor protection. OBSI's free, time tested, informal service is the ideal solution for complaints that amount to less than $350K. The proposed IIROC arbitration program should laser focus on more complex cases involving significant monetary amounts exceeding the compensation limits OBSI can handle.**

Kenmar Associates agree to public posting of this Comment Letter.

We would be pleased to discuss our comments and recommendations with you in more detail at your convenience.

Respectfully,
Ken Kivenko President
President, Kenmar Associates