

Sent Via email

January 21, 2023

Investment Industry Regulatory Organization of Canada
General Counsel's Office
Suite 2000, 121 King Street West
Toronto, ON M5H 3T9
Email: GCOcomments@iiroc.ca

Response to IIROC Arbitration Program Consultation

Thank you for the chance to comment on the recommendations of the Working Group (WG). The Working Group (WG) included a representative from ADR Chambers. OBSI was not a participant of the WG. The no-nonsense, clear exposition of the alternatives, options, background information and related numerics provided by the WG is outstanding.

I note that complainants domiciled in Québec can use the free services of the Autorité des marchés financiers (AMF). If a complainant is not satisfied with a Dealer response, she/he can ask the Dealer to transfer the complaint to the AMF for mediation. I am not aware of any limit on compensation. I note also that complainants in Manitoba, Saskatchewan and NB also have investor compensation options. Securities regulators in these provinces can order a person or company that has broken provincial securities law to pay compensation. These orders are enforced similar to court judgments. Again, I do not know the limits, if any, on compensation.

Although not supported by statistical evidence or empirical research, I believe there could be a niche role for arbitration in the investment industry dispute resolution landscape. Civil litigation in Canada is far too expensive and lengthy for the vast majority of retail investors.

Ombudsman OBSI, while imperfect, competently handles the vast majority of complaints that IIROC dealers were unable to satisfactorily resolve. When the CSA provides OBSI a binding decision mandate, I expect complaint volumes will increase. For 2021, the average compensation recommended by OBSI was just \$8.9K; the median was a modest \$2.5K (The average size of claims in the arbitration Program in the past 12 years is \$255,000). If the compensation limit is increased to \$500,000, as has been recommended, the pressure on the IIROC arbitration Program will be significantly increased.

A 2020 FCAC audit of ADRBO, a related entity owned and controlled by ADR Chambers, found serious deficiencies with it as an External Complaints Body for the banking sector. ADRBO's refusal to post comments received to its independent review consultation raised eyebrows among consumer advocates. OBSI posted all

comment letters on its website for public review. Is IIROC management convinced similar deficiencies do not also exist at the parent Company, ADR Chambers?

While the Working Group identified the costs of the Program to be the biggest barrier to investor participation in the Program, there are other important barriers to participation. Complexity, complainant time consumption, cycle time, time away from employment, the need to obtain representation and the added mental stress involved compared to a financial Ombudsman service.

At its core, despite the proposed Program changes, arbitration remains an adversarial approach which most retail investors are not comfortable with. Many compare a trip to a court like they do a visit to a dentist. The informality of the OBSI process and the balancing of power OBSI provides make it the preferred retail investor complaint resolution process. And of course, dissatisfied complainants still have recourse to the courts after receiving the OBSI recommendation without having incurred any negative impact on statute of limitation time periods.

Increasing the compensation cap to \$5 million could improve the viability of the Program. Opening up the Program to exempt market dealers, mutual fund dealers, Portfolio managers and Scholarship Plan dealers could put the arbitration program on a more solid footing and would be in the Public interest. According to OBSI's 2021 Annual Report, Scholarship trust plans represented 14% of all complaints, up from 9% in 2020.

All of the Part 1 WG recommendations for immediate implementation are reasonable and make sense. Given the relative complexity of the proposed Program, I most certainly agree that written plain language, jargon- free guidance to assist all (especially the self-represented, seniors, recent immigrants) Program participants with the arbitration process will be essential. Videos, charts, graphics should be utilized to optimize communications.

I am not qualified to comment on the Part 2 pilot but do not disagree with the University Investor Clinic partnerships and subsidization in cases where (a) the complaint is ineligible for OBSI engagement and (b) clients need financial assistance in order to pursue the arbitration claim.

Based on the claims in the Program in the past 10 plus years, the average length of proceedings has been between 16 to 18 months. Like the WG, I believe that this average is excessive for an arbitration program. To be effective, the Program has to provide expeditious resolution within a reasonable time .IIROC Dealers are given 90 calendar days to provide a final response letter to complainants. By contrast, in 2021, OBSI took an average of 75 days to complete investment investigations and completed 99% of investment cases in less than 180 calendar days.

The Working Group has suggested creating three tiers of claims based on the amounts in dispute: Tier 1 – under \$50,000; Tier 2 – between \$50,000 - \$250,000 Tier 3 - above \$250,000.

In my opinion, these tiers, especially 1 and 2 will undermine OBSI **without any identifiable benefit to complainants**. Tier 3 could also adversely impact OBSI to the extent claims are lower than the OBSI compensation limit (currently \$350 K). I note that the low- balling by Dealer complainants is usually for higher amounts .There is also a risk that the FCAC, which opposes competing ECB's, would place a cloud over OBSI if competition for OBSI eligible claims for investments is created by adoption of the WG recommendations for small amount, less complicated cases.

The consultation paper states that Multi-party arbitrations present administrative and procedural challenges but assert that the Program can address these challenges effectively through proactive case management. I cannot comment on this but ask a simple question - If the Multi- party cases involving similar claims against a respondent determine that investor compensation is appropriate, would clients who did not file an arbitration claim be informed of their right to compensation by the IIROC Dealer? i.e. a systemic issue

Concrete steps would need to be taken to ensure IIROC Dealers do not try to steer complaints away from OBSI. My perception, and based on public Comment letters, is that many Dealers do not really support a free, robust, empowered financial ombudsman service.

The arbitration Program should be limited to registered investment dealers. Dealers should be held accountable for the actions or negligence of their representatives. This is consistent with OBSI's approach and the G20 HIGH-LEVEL PRINCIPLES ON FINANCIAL CONSUMER PROTECTION Para 6.

One of the best ways to encourage use of arbitration is to ensure its procedures and practices are well articulated in plain language and publicly disclosed. Transparency is essential. I recommend that ADR Chambers ,upon implementation, commence posting all decisions (redacted) on a dedicated website to increase (a) Program transparency , (b) show how ADR Chambers calculates losses and interprets CFR Best interests obligations including KYC / risk profiling and (c) retail investor trust in ,and understanding of ,the Program . They should also periodically post key operational metrics related to the Program on the dedicated website. Simplified Case studies could also be posted as is the practice utilized by OBSI and other responsible dispute resolution bodies.

For-profit ADR Chambers should be subject to regulatory oversight and meet appropriate transparency standards similar to OBSI. Steps need to be taken to ensure that ADR Chambers is independent and has internal controls and mechanisms to counter conflicts-of-interest.

The recommendation to better promote the arbitration program could help attract business but the promotion program must not be such that complaints better handled by OBSI (which is no charge to complainants) are improperly diverted to IIROC arbitration. **That could harm OBSI operations and not benefit complainants**. It could also add to the confusion and frustration investors

encounter when interacting with the investment industry's complex complaint handling system.

In the event a Dealer is unable to pay the arbitration award, IIROC should consider using the NewSRO Investor Protection Fund or other fund to make the complainant whole. Without such a provision, IIROC arbitration would have a built-in design flaw. Indeed, OBSI also needs to establish such a protective fund as well.

I believe that a really good use of IIROC's limited resources would be to bring existing IIROC Dealer complaint handling rules up to international standards and enforce them. This would materially reduce the need for independent dispute resolution services and lead to increased trust in the investment industry. **An ounce of prevention is worth a pound of cure.** Another opportunity for IIROC to improve investor protection in Canada would be to provide funding to Investor Protection Clinics across Canada using its Restricted Fund. Ontario has two but there are none in other provinces.

I grant permission to post this letter on the IIROC/ NewSRO website.

Arthur Ross
Retail Investor