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Investment Industry Regulatory Organization of Canada
General Counsel's Office
Suite 2000, 121 King Street West
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GCOcomments@iiroc.ca

Re: Review of the Investment Industry Regulatory Organization of Canada Arbitration Program ("Arbitration Program")

The Osgoode Investor Protection Clinic appreciates the opportunity to provide comments on the review of the Arbitration Program.

By way of background, the Osgoode Investor Protection Clinic, the first clinic of its kind in Canada, is dedicated to providing free legal advice and services to retail investors across the country.

Since launching in 2016, we have worked with a wide range of clients who have suffered investment losses. From seniors whose adviser mismanaged their entire life savings on the cusp of their retirement to low-income investors whose advisers recommended leveraged loans, we have worked with vulnerable retail investors who need assistance in seeking redress but cannot afford a lawyer.

We are pleased to bring their voices to the new SRO's review of the Arbitration Program.

We appreciate your consideration of our comments; in the spirit of brevity, we have focused on those questions and topics where we think we can best offer a value add to the process.

Sincerely,

Brigitte Catellier, Associate Director
Aya Fahmi, Student Caseworker
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The Osgoode Investor Protection Clinic

Introductory Comments

Overall, the Osgoode Investor Protection Clinic ("IPC") commends the Working Group for outlining comprehensive recommendations to improve retail investors' access to a fair, expeditious and cost-effective dispute resolution process with IIROC Dealer Members and thereby foster confidence in capital markets and the financial services industry. We would encourage the new SRO, as a new organization, to seize this opportunity to overhaul the Arbitration Program and adopt transformational changes as opposed to the incremental changes that were adopted by IIROC following the last consultation in 2010.

We believe that retail investors have not taken advantage of the Arbitration Program, as confirmed in the Working Group's analysis of the Program. Following the changes implemented in 2010, the number of arbitration cases as reported under IIROC's Arbitration Statistics, did not increase significantly and actually decreased in the last ten years, standing at a handful of cases on an annual basis. From our perspective of supporting harmed retail investors seeking compensation, this track record is concerning. It further constitutes evidence that in order for the Arbitration Program to constitute a valid dispute resolution forum giving harmed retail investors access to justice, the new SRO should adopt more drastic measures to stress test the Program during the pilot and thereby assess what measures would effectively move the needle on the dial.

Over the last 6 years, the Osgoode IPC has supported retail investors claims against their registered advisers before OBSI and before the Small Claims Courts. We have only supported one client in making a claim under the Arbitration Program (https://www.yorku.ca/osgoode/ipc/wp-content/uploads/sites/594/2023/02/5.-YU_osg-IPC-Newsletter-Winter2022-4.pdf.)

In comparing our experience in these three fora, we offer the following comments:

1. Costs are a key factor in considering avenues for redress. In many cases, the losses suffered by retail investors materially impact their availability of funds to support a claim. Moreover, the uncertainty of compensation, particularly in light of the significant imbalance of information and expertise, is a major hurdle to any further investment in seeking redress. By way of proof point, we have cases where retail investors have reduced the amount of their claim to seek redress before the Small Claims Courts.
2. The OBSI process is distinct from the Arbitration Program. Beyond its pro bono and dollar threshold, investigation is not adjudication. As a pro bono legal clinic offering legal representation, we have witnessed the difference between these two fora as being significant.
    a. In the context of an OBSI claim, legal representation is extremely limited: we draft the complaint and support the investigation behind the scenes, but we are in no way involved in the portion of the investigation involving the defendant adviser. We do not attend the interview with the defendant adviser, and are not privy to any

evidence requested or received. We are in essence at the mercy of the investigation by the decision maker.

b. In the context of an arbitration process, legal counsel drive the process, including all evidentiary matters and arguments put forward. Legal counsel for the plaintiff and defendant communicate directly, with the opportunity to lead settlement discussions.

We believe that an Arbitration Program is a critical component of the access to justice landscape for retail investors who seek compensation further to alleged wrongdoing by their adviser. It is our experience that due to extended timelines and cost factors, the civil courts are not an appropriate forum for addressing retail investor claims that are above the Small Claims thresh hold. A new, enhanced Arbitration Program would in essence represent *the unique avenue for a greater number of retail investors who seek adjudication of their claim*.

We believe that that key enhancements to the existing Arbitration Program, along with a tiered form of arbitration, (discussed further below), will provide a valuable and cost-effective channel of dispute resolution for retail investors.

Our comments will focus on the Working Group's July 2022 recommendations where the Osgoode IPC can add value, including recommendations that we support, in some cases with proposed changes.

Recommendation #2 Written Resources

The Working Group recommends providing self-represented investors a written guide to help them navigate the arbitration process. We support this recommendation and would encourage the development of a Canadian parallel of FINRA's "Investor's Guide to Securities Industry Disputes: *How to Prevent and Resolve Disputes with your Broker*."[1] Notably, this guide was published by the Pace Law School Investor Rights Clinic. We recommend that the new SRO could similarly publish its guide in collaboration with the IPC.

In the civil litigation sphere, the challenges faced by self-represented parties have garnered substantial attention. Although the civil rules of procedure are more complex than their arbitration counterpart, the core of the challenges of self-represented parties is the same, namely the significant imbalance of power between the parties. Accordingly, the Canadian Judicial Council ("CJC") published a Statement of Principles that offers suggestions on how judges can promote

[1] Jill Gross and Elissa Germaine, "*How to Prevent and Resolve Disputes with your Broker",* (New York: Pace Law School Investor Rights Clinic, 2017)

access to justice to vulnerable, self-represented litigants.[2] Similarly, the new SRO may find it worthwhile to publish a guide for arbitrators – inspired by the CJC Statement of Principles – outlining ways in which they could support those parties as they navigate the arbitration process.

Recommendation #6 Length of Arbitration and Delays

We recommend a shorter resolution process. Currently, the average of IIROC's arbitration process is 16 to 18 months. We recommend (i) that the Arbitration Program be enhanced to offer flexibility and shorter timelines and (ii) that the FINRA rules be leveraged to implement more streamlined processes as follows:

1. First, by allowing parties to forgo preliminary hearings. Such an option enables parties to design their arbitration process according to their needs which is crucial for access to justice and procedural fairness. We would note that FINRA's arbitration rules allow parties to forgo preliminary hearings.

2. Second, by having simplified procedures for certain claims. For example, FINRA gives parties with claims less than $50,000 the option to forgo in-person hearings and conduct the discovery process differently to shorten their arbitration process.

3. Third, by providing guidelines on selecting timeframes or implementing timelines that parties can contract out of. Under FINRA's arbitration rules, parties can modify timelines or opt out of them. The Working Group recommends strict resolution timeframes to reduce unwanted delays. However, if strict timeframes were enforced, then parties would not be able to design an arbitration process that suits their needs.

4. Fourth, providing rules on hearing withdrawals or postponements, which the current IIROC arbitration rules are silent on. By contrast, FINRA provides rules on when a hearing shall and may be postponed, postponement fees, and the dismissal of the arbitration if more than two postponements occur. FINRA rules also specify when a claim may be withdrawn with or without prejudice.

5. Fifth, holding virtual hearings <u>at the request of the retail investor</u>. The defendant should not have to agree. Rules of civil procedure regarding zoom hearings could be leveraged for the purpose of virtual arbitration hearings.

[2] Canadian Judicial Council, "*Statement of Principles on Self-represented Litigants and Accused Persons",* (September 2006)

6. Sixth, the limits on the duration of the hearings should take into account the complexity of a claim and not solely the amount. The procedural flexibility that arbitration offers is a unique and important aspect that sets it apart from court proceedings and needs to be preserved. Hence, instead of setting hard limits, providing guidelines on what constitutes an appropriate hearing duration depending on the claim type is the better solution.

Recommendation #9 Tiered Approach

The IPC supports the tiered approach to the Arbitration Program. However, we propose specific cost and procedural revisions to the existing recommendations.

Costs of arbitration should be proportional and progressively levied based on the size of the claim. While the proposal to waive filing fees and subsidize administrative costs for Tier 1 claims under $50,000 are helpful to investors, we recommend increasing that amount to $100,000 and further extending legal cost relief for such claims and waiving other fees, including arbitration, administrative, and travel fees, rather than dividing these costs evenly between the parties. Additionally, for Tier 1 claims, we recommend capping legal cost awards while also allowing arbitrators to award such costs on a discretionary basis. This encourages smaller claims to brought forward and ensures fairness for parties to recoup legal costs while providing the flexibility to levy legal costs to deter vexatious and bad faith claims on a case-by-case basis.

Additionally, the expedited arbitration rules and procedures recommended under Tier 1 and Tier 2 claims must be clear, easy-to-understand and accessible. Often, lengthier dispute resolution is driven not by procedural delays, but by investor's confusion about procedure, including what is required, how to prepare documents, and where to submit them. To meet the efficiency and accessibility goals of the tiered approach, the ADR expedited Rules should be communicated in ways that can be understood by unsophisticated investors. We suggest reorganizing the Arbitration webpage and providing clear instructions and video explanations in ways similar to that found on the OBSI website.

Finally, while dividing the claims by size is often beneficial in expediting and streamlining the dispute resolution process, we recognize that the complexity of cases is not always directly proportional to the size of the claim. Small claims may in fact, be more complex and require additional procedural tools to a fair resolution. As a result, we recommend allowing claimants the option of utilizing other, larger channels if justified. Further, administrators should have the option to allow or disallow the use of certain tiers, based on principles of fairness and efficiency.

Recommendation #7 &8 Parties' Representation, Partnerships with IPCs and Pro Bono Legal Counsel

The benefits of educating investors, particularly self-represented investors, are well recognized. However, this education is not sufficient to mitigate the imbalance of power between them and the institutions that they typically face in seeking compensation. Those institutions often far exceed investors in wealth, resources, and tolerance to withstand the long dispute resolution processes. That is where recommendations 7 and 8 are especially important. The key to mitigate this imbalance of power is legal representation. As such, the expansion of representation and partnership with legal clinics is necessary to achieve this goal.

Access to justice, education, and community outreach are at the core of Osgoode Investor Protection Clinic's vision and mission. The Clinic addresses the complaints of harmed investors and assists them through a wide scope of services, including drafting complaints and demand letters, negotiating settlements and representing them in seeking compensation. The Osgoode Investor Protection Clinic obtains the support of IIROC and MFDA in its casework and investor education initiatives. This continued support and funding of the Clinic is critical for a true fulfillment of recommendations 7 and 8, particularly through a partnership model where the IPC can add value to the Arbitration Program. Additionally, as the Osgoode Investor Protection Clinic expands the scope of its reach and works with investor protection clinics in other law schools, this partnership model will become essential to improving access to justice and mitigating the imbalance of power between retail investors and their adviser.

Recommendation #12 Tailored Procedural Tools

Documentary Exchange

Discovery is an important step during arbitration for exchanging documents. It enables parties to disclose and produce documents to corroborate their claims during the hearing and reach a just conclusion. Consequently, it is crucial for parties to know their rights during discovery, such as the list of documents that need to be disclosed, the timeframe for disclosing them, ways to request additional documents and available sanctions that can be imposed against a non-compliant party. Unlike FINRA, the current IIROC arbitration rules are completely silent on discovery.

IIROC gives parties the freedom to choose their documentary exchange procedure during the preliminary hearing and tailor it to their needs. However, this freedom without further guidelines could put parties, especially the ones with less bargaining power or self-representing ones, at a disadvantage. Under the enhanced Arbitration Program, the new SRO should consider providing rules or guidelines on the discovery process. Otherwise, access to justice would be greatly impaired

due to a lack of framework for monitoring the document production of parties and ensuring that necessary disclosures are made.

Oral Discovery

The Working Group recommends that oral discoveries not be permitted for Tier 1 claims to avoid unnecessary delays. However, we recommend oral advocacy be permitted in all tiers of claims for two reasons. First, to enable parties to tailor the arbitration process to their needs, particularly in the case of more complex Tier 1 claims. Second, to allow parties who are unfamiliar with the discovery process or are self-represented to gather evidence orally, which may be less challenging than through written discoveries.

Motions

FINRA arbitration rules provide extensive rules on how to initiate a motion, respond to it, and the authority to decide the motion. FINRA also provides rules regarding when a motion can be dismissed and provides guidelines to discern legitimate motions from ones that may be vexatious or unacceptable. The current IIROC arbitration rules are silent on these matters. For self-represented or unsophisticated parties who may not know when and how to oppose a motion, such rules would be quite helpful as an enhancement to the Arbitration Program.

Lastly, the Working Group recommends placing limits on motions and prohibiting motions entirely for Tier 1 claims. We disagree with this recommendation as motions are remedial opportunities for parties to deal with issues that arise during the arbitration process. This remedial opportunity should be available to all tiers of claims. That said, as an enhancement to the Arbitration Program, the new SRO should not only make motions available to all parties, but, similar to FINRA, it should also provide concrete guidelines on how motions can be brought.

Cost Consequences

We recommend that the Arbitration Program be enhanced to provide for the waiver of arbitration costs for retail investors who have suffered investment loss based on certain factors. These factors could include their affordability such as their income and remaining wealth after the financial loss. Other factors could include their level of loss compared to overall investment, number of dependents, and their stage of life. Cost waivers allow for greater access to justice by preventing the claimants from having to pay the cost of resolving a financial issue that they did not cause.

Publication of arbitration decisions

We strongly recommend the publication of summary information on arbitration decisions. Precedents are crucial resources for ensuring access to justice. Furthermore, the development of a library of precedents would constitute valuable investor education. As an enhancement to the Arbitration Program, we would recommend that the new SRO publish summary information on the last ten years of arbitration cases and continue to do so on an ongoing basis.

Additional Recommendation – Limitation Period

We recommend extending the limitation period for arbitration cases to six years, in line with the limitation period for OBSI claims and FINRA arbitration rules. In our experience, vulnerable retail investors often struggle to comply with this constraint due to lack of knowledge, structural vulnerabilities, and difficulties identifying the harm that had occurred. We would highlight that very few retail investors meet with their adviser on an annual basis and along with market factors, the two-year limitation period in Ontario is a major hurdle to access to justice. We have been unable to assist clients in over twenty cases as a result of the limitation period expiring, with the majority of these cases involving claims against large institutions. Extending the limitation period would promote the interests of justice and mitigate the power imbalance of retail investors in seeking compensation.