

INVESTOR ADVISORY PANEL

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New Self-Regulatory Organization of Canada
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Re. Review of the Arbitration Program

On behalf of the Ontario Securities Commission's Investor Advisory Panel (the Panel), I wish to thank you for this opportunity to comment on the recommendations of the Arbitration Program Working Group. The Panel is an initiative of the Ontario Securities Commission to ensure investor concerns and voices are represented in the OSC's policy development and rulemaking process. Our mandate is to solicit and articulate the views of investors on regulatory initiatives that have investor protection implications.

The Panel has, for years, pressed for reform of the investment sector's external complaint handling system to improve outcomes for investors by making the system more accessible, functional and transparent. We are, therefore, pleased to see many of our concerns addressed in the three strategic planks of the Working Group's recommendations: accessibility, costs, and procedures. Directionally, the Panel supports the recommendations presented. However, given the track record of the current program, we do not believe they go far enough to truly transform the arbitration process in order to achieve greater accessibility for retail investors.

At the outset we would note that the 2010 consultation led to only two changes to the arbitration program - an increase of the maximum award from \$100,000 to \$500,000 and the empowering of claimants to choose whether an arbitrator can award costs against a losing party. This has clearly not made the system more accessible according to IIROC statistics: for the last decade, there have been five or fewer cases each year.

Hence, our specific comments below on the Working Group's findings reflect our main concern of improving accessibility of the arbitration program – accessibility is the central pillar of any solution to meaningfully improve the experience of investors. At the same time, any efficient dispute resolution process must ensure that costs and procedures do not hinder accessibility.

Additionally, the Panel wishes to take this opportunity to reiterate its support for the Ombudsman for Banking Services and Investments (OBSI) and to laud the New SRO for confirming its intent that the arbitration program not draw away from OBSI. We are in favour of the New SRO making the program available only for claims that fall outside of

the OBSI compensation limit in order to avoid potential overlap and confusion with the services offered by OBSI.

We have the following comments on the Working Group’s recommendations:

Part 1: Working Group Recommendations for Immediate Implementation

#1. Program Accessibility & Awareness

Redrafted materials must include a clear explanation of how arbitration differs from the OBSI process, in particular the binding outcome of arbitration. This would hopefully help to reduce investor confusion between the two options.

#2. Written Resources for Program Participants

While this recommendation seeks to improve written guidance to help the self-represented, court-like procedures make it impractical and outright impossible for self-representation. We support the recommendation that the Rules of Procedure be amended to clearly require that the parties must disclose all documents “relevant” to the matters in issue that are (or used to be) in the party’s possession and control. This recommendation should aim to address the imbalance of information between retail investors and their advisors and to give access to investors to all personal information that they have a right to under the PIPEDA. However, the deadline for advisors to provide the information should be shorter than the 30 day PIPEDA timeline and in any event no more than 10 days.

#5. Place of Arbitration

Requiring in-person meetings and proceedings increases costs and reduces accessibility for Investors. In light of platforms that facilitate virtual meetings, we support the recommendation that the Rules of Procedure be amended to allow for electronic attendance at the request of the investors. The arbitrator should not be able to veto.

#7. Parties’ Representation and #8. Partnerships with IPCs and Pro Bono Legal Counsel

Unlike the OBSI process, legal representation is a critical component of access to justice in an adjudication proceeding. Pro bono representation should be an integral part of the arbitration program. We would encourage partnerships with law school IPCs and law societies in order to build a pool of pro bono legal counsel for retail investors who cannot afford a lawyer. We also support the recommendation to allow for representation by an agent, which would improve accessibility and reduce costs for claimants.

Part 2: Recommendations for a Pilot Program

#9. Tiered Approach

We note that the statistics for the arbitration program reflect that it has not been widely pursued, particularly in the last 10 years where there have been 5 or fewer cases each

year, and in one year, none. Given the poor performance of the program over the last 10 years (as noted above) we recommend that the pilot be seen as an opportunity to stress test the program to see whether it will increase the number of cases. We would suggest the following measures to improve accessibility: eliminating costs up to a higher threshold, providing pro bono legal and expert advisors, pro bono translation services, reducing the timeline of the process and increasing the limitation period to six years.

In addition, the Panel recommends that:

1. The first tier should be for any claims up to \$100,000 (an increased limit for the first tier). This amount is often used as a rule of thumb for the purpose of taking action before the civil courts. In that first tier, there should be no costs for the retail investor.
2. The second tier should be for any claims up to \$500,000.
3. Given the imbalance of power and information between retail investors and advisors, retail investors should have access to pro bono legal counsel and pro bono experts for claims in the first and second tiers.
4. The default should be for virtual hearings as these are the least costly and most accessible.
5. Advisors should be required to inform their clients of the existence of the arbitration program and give them the plain language guide that will be developed.
6. Arbitration decisions should be published on a no names basis, including the development of a database of the decisions rendered in the last 10 years.

#10. Case Management and #11. Mediation

Both of these recommendations should be piloted, as they could be effective in reducing the time and costs of the parties. Mediation may be a simpler and more effective way to resolve disputes for smaller claims and/or self-represented complainants.

#12. Tailored Procedural Tools

We believe the need for expert evidence may present a challenge for complainants, especially in circumstances where they are self-represented and for those with relatively smaller claims. The burdens of costs and sourcing of experts should not fall on the investor.

#14. Fee Waiver and Subsidy

We strongly support the proposed fee waiver and subsidy funded from the fines collected by the New SRO. This is crucial to improving accessibility and access to justice.

Part 3: Working Group Recommendations for Further Consultation

#15. Publication of Arbitration Decisions

In addition to the suggestions in this recommendation, we support improving transparency of the arbitration process. While the arbitration program is a private process, anonymised data about the cases (such as amounts claimed, award amounts, costs of each party, costs awards, time for completion etc.) should be collected and made publicly available. Parties should also have the option to share information about their proceedings, including the publication of the judgment on an anonymised basis.

#16. Award Limit

The Panel would like to see this item included for immediate implementation rather than further consideration in order to improve access to the arbitration process. We support the increase of the compensation limit to \$5,000,000 and believe this would substantially increase access to the program by expanding the pool of claims that have arbitration as an option rather than be limited to civil litigation as a means of pursuing an enforceable judgement and award. When civil litigation is the only option, costs of litigation (in particular, the requirement of retaining legal representation) can hinder the pursuit of legitimate claims above the current \$500,000 limit.

Apart from these specific recommendations, the Panel believes that the best way to shape these reforms is by iterating them as opposed to reviewing the status quo via an expert panel once every 10 years. This is even more important when reviewing the (limited) case data we have available.

We wish to thank you again for the opportunity to comment on this important initiative. We will, of course, be happy to provide any clarification or elaboration on our comments should the need arise.

Sincerely,



Ilana Singer
Chair, OSC Investor Advisory Panel