IIROC ARBITRATION PROGRAM WORKING GROUP RECOMMENDATIONS

July 2022

IIROC Arbitration Program
Working Group Recommendations

Message from the Working Group

Many things have changed since the last review of the IIROC Arbitration Program (**Program**), which was conducted over 10 years ago. We were asked, as a working group, to review the current state of the Program, identify issues and propose solutions to improve the functionality and utilization of the Program.

We have reviewed and contrasted the Program with litigation through civil courts and other dispute resolution options available to investors. Although these other options significantly differ from the Program, they provided us with helpful insight into what may work and may not work in this context. The key features of this Program include parties' control over procedural aspects of the process, choosing their own decision-maker, timing and location of the hearing, privacy and confidentiality, court-like fact-finding where the demeanor and nature of the arbitration hearing is set by the parties and the arbitrator, less formal and more flexible procedures, finality and enforceability of an award - all with an ultimate goal of a fair, expeditious and cost-effective resolution.

After a comprehensive review, we believe the Program still has the potential of offering a much-needed alternative dispute resolution forum for investor claims in Canada. The Program is, in fact, part of the investor protection landscape, promoting greater access to justice and resources for resolution of investment-related disputes.

We have identified three major areas, which, if improved, will make this Program truly viable: (1) accessibility, (2) costs and (3) procedures.

In brief, we believe that the value of the Program would significantly increase if IIROC increases access to and awareness about the Program through adequate resources and reasonable costs, and provides parties with an enhanced and tailored procedural toolbox. Our recommendations address these issues and provide practical solutions as to how these goals could be achieved.

Working Group Members

IIROC Arbitration Program
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Introduction

THE CURRENT PROGRAM

The IIROC Arbitration Program (**Program**) has a long history. The Investment Dealers Association, the predecessor of the Investment Industry Organization of Canada (**IIROC**) started the Program as a pilot project in British Columbia in 1993 and extended it to Québec in 1996 and other jurisdictions in Canada in 1999. Over the years, there have been a few changes to its substance. IIROC conducted the last comprehensive review of the Program by way of a public consultation more than 10 years ago (2008 – 2011) and implemented two major changes: an increase of the maximum award from $100,000 to $500,000 and empowering claimants to choose whether an arbitrator can award costs against a losing party.

IIROC Dealer Members (**Dealers**) must participate in the Program if clients decide to resolve their disputes through arbitration.[1] The Program is currently administered on behalf of IIROC by two independent service providers, CCAC in Québec and ADR Chambers in the rest of Canada. The service providers are subject to IIROC's administrative oversight. The choice of an arbitrator is left with the parties. The parties consult a specialized arbitration roster provided by the service provider and (within five days of the preliminary conference) must select an arbitrator. The Program has a fairly flexible set of procedural rules[2] to allow the parties to craft the process that is most suitable for their case. Arbitration proceedings are confidential between the parties and the arbitrator. Arbitration decisions are final and enforceable. The parties agree to forgo their right of appeal. These and other key features of the Program are discussed in more details in the Recommendations below.

THE WORKING GROUP REVIEW

In January 2020, a working group of representatives of investor advocates, investment industry and arbitration professionals experienced with the Program was asked to review the Program and provide recommendations on its functionality and utilization (**Working Group**). The Working Group members included:

- Chilwin Cheng, Principal Lawyer, Ascendion Law
- David Nicholson, Vice President and Financial Advisor, Queensbury Securities
- Deb Shorrock, Managing Director, Vice President, Branch Manager, BMO Nesbitt Burns
- Geneviève Gaudet, Lawyer, LCM Attorneys
- Harold Geller, Associate Lawyer, MBC Law PC
- Jocelyn Beckett, Senior Vice President, Branch Manager, Raymond James Ltd.
- Marvin Huberman, Mediator and Arbitrator, ADR Chambers
- Neil Gross, President, Component Strategies Consulting and
- Sébastien C. Caron, Founding Partner, LCM Attorneys.

[1] IIROC Rule 9502 [prior to December 31, 2021, Dealer Member Rule 37.1].
[2] See CCAC Specialized Arbitration Procedure and ADR Chambers Rules of Procedure.

The Working Group was assisted by IIROC's staff, who coordinated and assisted with the meetings and drafting of the recommendations, including:

- Tatsiana Okun, Senior Legal Counsel, General Counsel's Office and
- Sandra Porée, Executive Assistant, General Counsel's Office.

The Working Group met between January 2020 and July 2022. It considered numerous aspects of the Program, its background and context in which it operates, other dispute resolution alternatives, and discussed the changes needed to make the Program viable.

The Working Group considered the Program in light of and in comparison with litigation through civil courts and other dispute resolution fora, in particular:

- Ombudsman for Banking Services and Investments (**OBSI**),
- Autorité des Marchés Financiers (**AMF**) Médiation and Conciliation and
- Financial Industry Regulatory Authority (**FINRA**) Mediation and Arbitration.

Although these programs significantly differ from the Program, by comparing their attributes and context, the Working Group was able to identify and distinguish certain features that could be helpful in improving the Program and ensuring that it provides value to the parties in dispute. These key features are summarized below.

- **OBSI**

OBSI offers free, independent, and informal dispute resolution services between participating firms in Canada and their clients. It has a dual mandate involving dispute resolution of (1) banking complaints and (2) investment complaints. On the investment side, participating firms include investment dealers regulated by IIROC, the Mutual Fund Dealers Association of Canada (**MFDA**) and provincial securities commissions, who are required to make OBSI services available to their clients. IIROC-regulated firms were added to OBSI's mandate in 2002.

Pursuant to sections 13.14 and 13.16(7) of Regulation 31-103, in Québec, the registered investment dealers of Québec are not required to retain the independent dispute resolution service of the OBSI, given the legal obligations to address client complaints and the services offered by the AMF. Therefore, not all investors in Québec have access to OBSI services.

OBSI uses informal processes to review and assess client complaints. Over the past 25 years of its existence, it has developed significant expertise in assessing investment suitability and compensable losses and built significant trust among investors. On average, OBSI annually reviews approximately 200 complaints brought by clients of IIROC-regulated firms.

There have been a lot of discussions, at least since 2016[3], about OBSI's lack of mandate to make binding decisions. As it stands now, OBSI's recommendations are not binding on participating firms,

[3] In February 2016, OBSI underwent an independent evaluation of its operations and process, published as Independent Evaluation of the Canadian Ombudsman for Banking Services and Investments' (OBSI) Investment

which may result in a firm's refusal to pay or a settlement below OBSI's recommendation. In addition, OBSI's current recommendation maximum is capped at $350,000. Both of these aspects were recently considered by Ontario's Capital Markets Modernization Taskforce (**Taskforce**)[4], which recommended granting OBSI the powers to make binding decisions and increasing OBSI's compensation maximum to $500,000 (*submitted to the Ontario Minister of Finance in February 2021 and currently outstanding*).

In its review, the Working Group specifically considered whether the Program is still needed and can provide a viable dispute resolution option in light of the OBSI's growing recognition, and the enhancements recommended by the Taskforce.

The below summary compares the main features of the current investment dispute resolution landscape, which includes traditional litigation through courts, the Program and OBSI. It demonstrates how these options are different and why all three are needed to provide the parties in dispute with practical choices most suitable and responsive in the circumstances of each individual case.

KEY FEATURES	DISPUTE RESOLUTION OPTIONS		
	Court	**Arbitration Program**	**OBSI**
Independence	Independent	Independent (administered by third-party service providers selected by IIROC; independent arbitrators are selected by the parties)	Independent (not-for-profit corporation approved by but independent of regulators)
Regulatory Oversight	N/A	IIROC[5]	JRC[6]
Costs	Parties are responsible for their legal costs and court fees which could be quite significant	Arbitration fees are paid by the parties and typically split 50% - 50% (*see Part 2, #14 for cost details*)	No case specific costs to clients or firms
Funding	N/A	No funding (*see Part 2, #15 - proposed fee waiver and subsidy funded from the fines collected by IIROC)*	Funded by the fees collected from the industry

Mandate. One of the recommendations made in this report was that OBSI be enabled to secure redress for consumers preferably by empowering it to make awards that are binding on the firm and on the customer if they accept the award, accompanied by an internal review process.

[4] Question 47 of the Taskforce Consultation Paper, July 2020 and Recommendation 71 of the Taskforce Final Report, January 2021.

[5] Within IIROC, General Counsel's Office has the oversight function of the Program.

[6] The Joint Regulators Committee (**JRC**) oversees OBSI with respect to its investment mandate. The JRC includes representatives of the CSA's designates, IIROC and the MFDA.

KEY FEATURES	DISPUTE RESOLUTION OPTIONS		
	Court	**Arbitration Program**	**OBSI**
Timing	Depends on the particular court but could be significant	Typically, faster than court (*see Part 2, #13 – proposed Set Timeframes between 3 to 12 months)*	Most cases close within 90 days | almost all cases close within 180 days | all cases close within 365 days
Compensation Limit	No limit	Up to $500,000 (*see Part 3, #16 – proposed up to $5,000,000 or above on consent*)	Up to $350,000 (*proposed $500,000*)
Limitation Period	In most provinces, two years from the date on which the claim was discovered or ought to have been discovered[7]	In most provinces, two years from the date on which the claim was discovered or ought to have been discovered[8]	A complaint must be raised with the firm within six years after the issue was discovered or ought to have been discovered and brought to OBSI within 180 days after the receipt of a substantive response from the firm
Confidentiality	As a general principle, open to the public	Confidential between the parties and the arbitrator	Confidential between the parties and OBSI (unless (a) the firm refuses to pay per OBSI's recommendation, in which case, OBSI will "name and shame" the firm but preserve confidentiality of the complainant, and (b) the information is formally requested by a regulator)
Decision-maker	A judge (with or without the Commercial List or specialized background)	Parties select an arbitrator of their choice from a list provided by the service provider; arbitrators are typically specialized and knowledgeable in the area of dispute	An analyst with investment industry background is assigned to review and make a recommendation
Procedures	Traditional adversarial court procedures:	Adversarial court-like yet flexible procedures:	Informal inquisitorial complaint-handling process: ▪ parties submit documents to OBSI

[7] In Canada, the limitation period varies based on the subject matter of the dispute and the applicable provincial limitation statutes.
[8] *Ibid.*

IIROC Arbitration Program
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KEY FEATURES	DISPUTE RESOLUTION OPTIONS		
	Court	**Arbitration Program**	**OBSI**
	▪ pre-hearing discovery (oral or written) ▪ case management where available ▪ motions on disclosure and other preliminary issues ▪ use of experts ▪ fact witnesses ▪ parties present arguments ▪ a judge makes a decision based on the evidence and arguments made at a hearing	▪ pre-hearing discovery (oral or written) ▪ case management as required (*see Part 2, #10 - proposed for all cases*) ▪ motions on disclosure and other preliminary issues ▪ use of experts in appropriate cases ▪ fact witnesses in appropriate cases ▪ parties present arguments ▪ an arbitrator makes a decision based on the evidence and arguments made at a hearing	▪ no oral discovery but OBSI may ask questions or request additional documents ▪ no motions ▪ no external expert evidence ▪ third party witnesses may be interviewed (though rarely) ▪ no hearing requiring arguments ▪ an analyst may assist the parties in settlement discussions and ultimately prepares a report with a recommendation based on the documents received and discussions with the parties
Enforceability	Decisions enforceable through court	Enforceable decisions (Dealers must pay the arbitration award)	Non-binding recommendations which may result in a refusal to pay or a payment below the recommended amount (*proposed making OBSI's recommendations binding*)
Finality/Appeal	Both parties may appeal the decision to a higher level of court	Subject to limited exceptions, decisions are final (parties expressly agree to exclude any right of appeal; claimants also cannot start a new claim elsewhere)	A reconsideration request may be filed with OBSI within 30 days of the recommendation. If a complainant is not satisfied with OBSI's recommendation, they may take their claim to court or arbitration (*proposed making OBSI's recommendations binding*)

As can be seen from the above summary, traditional litigation through courts could be lengthy and costly, but offers procedural tools and resources that may be of significant value to the parties. The Program can provide such tools with greater flexibility, more efficiency and cost savings. OBSI, on the

other hand, is geared for more straightforward claims that can be resolved expeditiously and less formally. The Program can provide tools for more complex cases that require court-like discovery, expert evidence, motions, and other procedural tools that may not be available through OBSI.

Even if/when the Taskforce recommendations are adopted and OBSI is given powers to render binding decisions and the compensation maximum is raised to $500,000, the Program will continue to have significant distinctive features that may be attractive and needed for investors whose claims do not fall into either the litigation or OBSI streams. Such individuals may include, for example, investors:

- ✓ who would like to choose their own decision-maker
- ✓ whose case is more suitable for court-like adversarial fact-finding and adjudication, including pre-hearing discovery, examination of witnesses, expert evidence, legal arguments
- ✓ who have claims above the OBSI recommendation limit (currently $350,000 *or $500,000 if increased*) and the Program maximum is increased
- ✓ who seek enforceability and finality at the first instance.

In addition, OBSI generally deals with complaints that involve amounts too small to warrant the costs of litigation or arbitration. For example, in the 10-year period from 2010 through 2019, OBSI's investment compensation recommendations averaged $19,717 with a median amount of $7,336; and in 2020, those amounts were just $9,250 and $2,425 respectively.[9] The Program, therefore, will not be suitable for the vast majority of cases handled by OBSI. Instead, the Program is designed to be a useful alternative to litigation.

The Working Group is mindful of considerable confusion among investors when it comes to the regulatory and dispute resolution landscape.[10] This confusion is not created by the existence of this Program, OBSI or any other dispute resolution options. The confusion is likely due to the complexities of the current regulatory landscape in general, where multiple regulators are involved in regulation of different investment products and services, and the lack of a single centralized system for investor complaints. This confusion may be addressed through creation of a centralized complaint system where all investor complaints would be triaged and directed to the appropriate regulator and/or dispute resolution channel. It also goes without saying that any material describing investor compensation options should use clear and plain language to prevent and dispel any confusion, as will be discussed further below in this proposal.

The goal of the Program, having regard to the public interest, is to address the needs and objectives of different stakeholders. Given these distinctive features that, alone and in combination, make the Program unique, there is and will continue to be a niche and a need for the Program as a dispute resolution option.

[9] OBSI's Annual Reports 2010 – 2020.

[10] Qualitative Research amongst Complainants, a report to IIROC by Navigator, March 2021 ("Complainants Research"), at 22 - 25 showed the lack of understanding and confusion about the role of different regulators.

- **AMF Conciliation and Mediation**

As part of its consumer protection mandate, the AMF offers conciliation and mediation services for residents of Québec. The AMF approach is unique as it offers a "single window" path for consumers with complaints regarding financial services and is conducted through conciliation and mediation rather than the arbitration process (used in the Program) or the investigation/compensation recommendation process (used by OBSI).

Investment dealers in Québec are required to implement complaint examination and dispute resolution policies setting out free and equitable procedures for dealing with client complaints and providing an oversight for complaint handling. If an investor is not satisfied with the handling or outcome of their complaint, investment dealers are required to transfer the complaint to the AMF at the request of the consumer.

After the AMF examines complaints received through this process, it may ask for additional information or documents and, if deemed appropriate, may offer the parties to participate in the AMF Conciliation and Mediation services. The services are voluntary and require parties' consent to participate. All services are free and confidential. In its assessment of the dispute, the AMF considers particular facts and circumstances related to the complaint as well as the criteria of good financial services and business practice.

The conciliation process is less formal than mediation. It is known to be more direct and personalized. Mediation, on the other hand, is more formal and includes a mediation session with an external mediator chosen by the AMF. Most of the cases are resolved at the conciliation stage. Although the conciliation and mediation recommendations are not binding, they are typically respected and complied with by the parties.

- **FINRA Mediation and Arbitration**

Through its mediation and arbitration programs, FINRA operates the largest securities dispute resolution forum in the United States. FINRA's dispute resolution forum administers claims between and among investors, brokerage firms, and their registered employees through its network of 69 hearing locations. FINRA administers between 3,500 and 8,500 arbitrations and numerous mediations annually with a diverse roster of over 8,000 arbitrators and 270 mediators.

FINRA mediation and arbitration are two distinct ways of resolving securities and business disputes and offer a prompt and inexpensive means of resolving issues.

FINRA mediation is a voluntary, flexible means of resolving disputes that provides parties with a high level of control over the process. In FINRA mediation, the parties determine the selection of the mediator, the timing of the mediation session, and whether and how the dispute will be resolved. FINRA mediation can be initiated at any time before or during arbitration proceedings. FINRA will also waive hearing postponement fees if the parties agree to mediate in the FINRA forum during an ongoing arbitration. The process is voluntary, and all parties must agree to mediate. The parties may stop at any time and proceed to arbitration. FINRA offers free or reduced-cost telephonic or videoconference mediation for claims under $100,000. Mediation is not binding until the parties reach and sign a settlement agreement. More than 80% of FINRA's mediation cases result in settlement.

FINRA's arbitration program is quite different from this Program. In particular, FINRA's arbitration program administers claims among and between investors and their brokers, as well as disputes between individual brokers and their brokerage firms. FINRA member firms and associated persons are required to submit to FINRA arbitration if requested by a customer or specified by a predispute agreement. Further, a dispute must be arbitrated at FINRA if it arises out of the business activities of a member firm or associated person and is between or among members, members and associated persons or associated persons. A respondent in a FINRA arbitration may be a firm or an individual broker registered with FINRA. Arbitration panels are composed of one or three arbitrators (depending on the amount of the claim) and are selected by the parties through a system of ranking and striking. Although FINRA's arbitration program is coordinated by FINRA's employees, to maintain neutrality of the process, staff administering an arbitration are separate and distinct from FINRA's Examination and Enforcement departments and not involved in rendering arbitration awards. Awards are rendered by independent arbitrators who are selected by the parties. Arbitration decisions are final and binding on the parties. Although arbitration is generally confidential and documents submitted in arbitration are not publicly available, the final award is posted by FINRA in its Arbitration Awards Online Database and can be consulted by the public. FINRA staff and arbitrators are required to maintain confidentiality in arbitration, however, parties may opt to share information about their own proceedings.

Among other investor-friendly features of FINRA's arbitration forum, FINRA assigns hearings in an investor's home state, ensures that an investor has a full opportunity to argue their case by limiting motions to dismiss, gives investors the choice of an all-public (non-industry affiliated) panel of arbitrators, uses an investor-friendly Discovery Guide, and has authority to suspend the licenses of firms and associated persons that fail to pay arbitration awards or settlements.

Aside from launching a claim in court, FINRA's mediation and arbitration programs are generally the only dispute resolution options available to investors with claims against broker-dealers in the United States. There are currently no other dispute resolution services equivalent to OBSI. FINRA's mediation and arbitration programs therefore cover the full range of claims and have no claim/award limits.

Although there are many differences between the programs, the Working Group found some of the features of FINRA's arbitration program interesting and compelling. These features include FINRA's tiered approach to procedural matters and fees, and availability of a fee waiver to assist the parties in financial hardship.

FINRA's arbitration program procedures differ depending on the size of a claim and the method of hearing selected by the filing party. Generally speaking, larger claims are offered more procedural tools, *i.e.*, evidentiary discovery, witness testimonies, in-person hearings decided by a panel of three arbitrators. For claims under $50,000, a customer or associated person claimant chooses whether their claim will be decided on the pleadings (based on the parties written submissions without a hearing), in a special proceeding (an abbreviated telephonic hearing) or in a regular hearing. Cases decided on the pleadings and special proceedings have more limited procedural tools and are decided by one arbitrator.

FINRA also uses a tiered system of fees, which are calculated based on the amount in dispute. For example, to file a claim, an investor must pay an initial filing fee ranging from $50 to $2,300. Other fees may include hearing session fees (calculated based on the amount in dispute as well as the

number of arbitrators at the hearing) as well as adjournment fees, discovery motion fees, contested subpoena fees, explained decision fees and administrative costs. FINRA arbitration fees are borne predominantly by FINRA member firms. Member firms are responsible for 85% of FINRA arbitration fees, and certain fees are assessed exclusively to member firms. This fee structure subsidizes the overall cost of arbitration and keeps the program accessible to individual investors.

Investors experiencing financial difficulties can request an arbitration fee waiver for a portion or all of their arbitration fees. An applicant must demonstrate financial hardship. FINRA has discretion to waive the applicable fee completely or partially, temporarily defer the payment of the fees or deny the request.

IIROC Arbitration Program
Working Group Recommendations

RECOMMENDATIONS' FRAMEWORK & SUMMARY

The Working Group believes that the Program has the potential of offering a much-needed dispute resolution forum for investor claims in Canada. The overall objective of the proposed changes is to enhance an additional viable dispute resolution option. It is attainable only by (1) eliminating and preventing administrative inefficiencies, (2) increasing access through adequate resources and reasonable costs, and (3) providing parties with tailored tools to enable an expeditious, fair and affordable process for resolution of their disputes.

In particular, the Working Group identified the following areas for improvement and recommends approaching them in three parts:

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(1) Redraft and redesign Program materials, avoid legal jargon and use plain language.
(2) Increase public awareness about the Program through social media and professional outreach.
(3) Use an alternative name for the Program to reflect its independence.

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(1) Allow parties to select their own arbitrator outside of the service providers' roster.
(2) Develop specialized rules and practices specifically tailored for the Program.

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Provide alternative means of participation for the parties who may be disadvantaged due to the location of the arbitration hearing.

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Engage in public consultation on publication of arbitration decisions, either as (1) summaries, (2) redacted or (3) unredacted decisions to increase transparency and to provide incentives.

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Increase the award limit to $5 million (and above with parties' consent) to allow for a greater access to the Program.

#17. The 90-day Requirement 35

Consider shortening the 90-day requirement to 30-45 days.

Part 1. Recommendations for Immediate Implementation

The recommendations in this part are proposed for immediate implementation. Subject to IIROC's internal review and approval processes, they could be implemented without delay within 12 months of the recommendations and aligned, as necessary, with the timing of Part 2.

#1. Program Accessibility & Awareness

Recommendation Summary:

(1) Redraft and redesign Program materials, avoid legal jargon and use plain language.
(2) Increase public awareness about the Program through social media and professional outreach.
(3) Use an alternative name for the Program to reflect its independence.

The Working Group explored:

- possible reasons investors are not choosing the Program,
- whether the information available to an average consumer is easily accessible, sufficient, plain and clear, and
- ways to raise access to and awareness about the Program.

The information about the Program currently available to the public is cursory, often technical and does not meet the "plain language" test.[11] Largely, the public information presents the information in such a way that may suggest that the Program requires specialized knowledge and therefore discourages participation. Investors learn about their dispute resolution options, including this Program, when faced with a need to complain/seek compensation. Typically, they receive information about the Program with a response to a complaint from their investment firm/advisor, IIROC's brochure on "How to get your money back" or IIROC's website. Through the complaint handling process, other dispute resolution options, in particular OBSI, are pursued more frequently than the Program.[12] There is also general lack of understanding of what the Program has to offer, including among investors and lawyers representing potential claimants.[13]

The Working Group therefore recommends that IIROC improve both the content and presentation of information available about the Program by:

- redesigning and redrafting materials in plain language to make it more direct and clearer,

[11] The information is available on three websites: IIROC, ARDC and CCAC. There are no other online sources. Some information about the Program is included in the IIROC Brochure, which IIROC Dealers are required to provide to their clients when responding to complaints.
[12] *Supra* note 10, Complainants Research, at 41 - 44.
[13] Feedback received from lawyers practicing in civil and securities litigation, including counsel acting for claimants in the Program.

- avoiding legal jargon,
- using visual communication (graphic design, charts, illustration etc.), and
- including more detailed information about accessing and navigating the Program.

To raise public awareness about the Program, IIROC will need to develop an effective public relations strategy, including, for example, the following:

- social media posts (*e.g.,* IIROC e-publications, LinkedIn, Twitter, Instagram, YouTube etc.),
- professional outreach through
    - professional groups and associations (*e.g.*, provincial law societies, bar associations, the Advocates' Society, Toronto Lawyers' Association etc.),
    - industry trade associations (*e.g.*, IFIC, IIAC, CSTA),
    - advocacy groups (*e.g.*, CARP, FAIR Canada),
    - legal clinics (*e.g.*, Osgoode Investor Protection Clinic and University of Toronto Investor Protection Clinic),
- educational programs (*e.g.*, speaking at professional development programs and conferences, producing educational webcasts and videos etc.).

In addition, while including "IIROC" in the title of the Program may be important to reassure investors about the Program's integrity, this inclusion may also confuse investors as it implies that arbitration services are provided by IIROC itself, when, in fact, the Program is a stand-alone one, handled independently by outside service providers.[14] It is therefore recommended that the title of the Program be clarified to expressly underscore this fact (*e.g.*, "IIROC Independent Arbitration Program").

The strategy will need to progress in stages, with some online content improvement which could be done almost immediately (see Recommendations **#2 and #3**) while others being timed with the substantive structural and procedural changes (as discussed below, particularly in **Part 2**).

#2. Written Resources for Program Participants

Recommendation Summary:

Create written guidance to assist self-represented and all other Program participants with the arbitration process.

The key challenges claimants, especially self-represented individuals, face when considering and using the Program include: (1) Program's costs (discussed in Recommendation **#14**) and (2) accessing legal and other information they need to participate effectively in the Program. Self-represented claimants currently have no dedicated resources at their disposal through the Program. This presents significant challenges for all participants, causing delays and procedural inefficiencies.

[14] *Supra* note 9 at 47.

The Working Group discussed the need to develop specialized plain language Program resources, *e.g.,* guide for self-represented claimants, checklists, FAQs etc. These resources will likely be useful not only for self-represented individuals but also all other participants in the Program.

The Working Group recommends that IIROC develop and publish materials setting out a step-by-step overview of the arbitration process and various features of the Program as compared with other litigation options to assist potential claimants in evaluating their litigation strategy and better understanding the arbitration process offered through the Program.

The Working Group also notes that individual claimants are often disadvantaged in accessing documents that may be relevant and necessary to prove their case (*e.g.,* investment account statements, firm's internal policies and procedures, trade records, advisor's notes etc.). The standard of disclosure in arbitration should be similar to that in civil litigation, *i.e.,* the parties should disclose and exchange all relevant documents at the outset of the arbitration. The Working Group therefore recommends amending the Rules of Procedure to clarify 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.

In addition, the Working Group believes that the following resources may be useful to assist the parties with documentary discovery:

a) a list of common questions to assist the parties determine what documents may exist and be relevant to the issues in a claim,

b) common categories of documents that may be relevant and expected to be disclosed by the parties through documentary discovery[15], and

c) guidance from a case management arbitrator (if Recommendation **#10** is accepted) regarding relevant and producible documents.

All materials about the Program should be in plain language and easily accessible on IIROC's and service providers' websites (per Recommendation **#1**).

#3. Quality of Arbitration

Recommendation Summary:

Provide more quality control and transparency about the arbitration roster.

The quality of the Program largely depends on the quality of arbitrators. Arbitrators involved in the Program should have a strong understanding of both the investment industry and investor issues. They should also maintain their neutrality and not be an advocate for either side. Arbitrators should possess case management and people management skills to manage the process efficiently and cost-effectively.

[15] A neutral list to provide examples of commonly available types of documents.

The Working Group reviewed the current arbitration roster. It has not identified any particular issues with the current list. However, it makes the following general recommendations to ensure quality and transparency of the Program:

- the Program arbitrators should possess both adjudication experience and subject matter expertise in the financial/securities industry,
- all Program arbitrators should have their qualifications reviewed and approved by IIROC,
- the arbitration roster with focused arbitrators' bios should be made publicly available (including on service providers' and IIROC's websites) and provided to the parties when entering the Program.

#4. Selecting Arbitrators and Setting Rules of Procedure

Recommendation Summary:

(1) Allow parties to select their own arbitrator outside of the service providers' roster.
(2) Develop specialized rules and practices specifically tailored for the Program.

The Working Group questioned the rationale of having service providers "run" the Program.[16] The Working Group recognizes the need for centralizing administrative functions. This is effectively addressed through engaging specialized service providers. ADR Chambers and Canadian Commercial Arbitration Centre (**CCAC**) currently administer the Program on behalf of IIROC.

The Program however does not have to be limited to any exclusive service provider in terms of the parties' choices of an arbitrator. The key feature of any arbitration is the parties' ability to select their own decision-maker. Currently in the Program, the parties' choice is limited to selecting an arbitrator (or where there is no mutual agreement, selecting three arbitrators) out of five names suggested by the service provider. Parties are also limited in selecting an arbitrator outside the arbitration roster maintained by the service providers. The Working Group believes that these limitations place unreasonable restrictions on parties' free choices and undermine the appeal of the Program.

In addition to Recommendation **#3**, the Working Group recommends the following changes to the arbitrator selection process:

- provide parties with the full list of available arbitrators (instead of limiting the list to five arbitrators),
- allow the parties to select an arbitrator of their choice not on the service providers' roster (as long as the arbitrator is qualified, approved by IIROC and accepts the service provider's engagement terms),
- develop a process and encourage the parties to interview potential arbitrators before making their selection.

[16] Currently, the parties are limited to the arbitration rosters available through the designated service providers and their specialized Rules of Procedure.

The Working Group also believes that, although IIROC may use outside service providers for administrative functions, arbitration rules and practices should not be tied up to or limited by any particular service provider's rules of procedure but rather tailored to the needs of this Program as approved by IIROC. The Working Group therefore recommends that IIROC develop specialized rules and procedures specifically tailored for this Program, which either an internal or external administrator could oversee.

Where **Part 2** recommendations are accepted, the arbitration rules and procedures should reflect those recommendations with appropriate modifications.

#5. Place of Arbitration

Recommendation Summary:

Provide alternative means of participation for the parties who may be unable or disadvantaged to participate in-person due to the location of the arbitration hearing.

The location of an arbitration hearing may be an issue, particularly in smaller claims. There may be extra expenses if a claimant or an arbitrator has to travel to the place of arbitration. Large city centres are no longer a preferred location or where most of the parties reside. The Working Group reviewed the current practices, including how flexible the Program is in moving the location of arbitration on request of the parties, who pays extra costs, whether remote hearings present a viable option and how commonly they are used.

The Working Group recommends IIROC amending the Rules of Procedure to expressly provide that, where arbitration is conducted in-person, the place of arbitration should be reasonably close to the actual "location" of the claimant rather than simply the "province in which the Claimant is resident".

The Working Group further recommends that the Rules of Procedure specifically provide that arbitration may proceed electronically on consent of the parties and the arbitrator.

#6. Length of Arbitration and Delays

Recommendation Summary:

Establish and enforce shorter resolution timeframes. Case manage delays: eliminate unwanted delays and allow reasonable delays desired by the parties.

A quick claim resolution is key to success of the Program.

The Working Group reviewed:

- the amount of time an average claim takes to proceed through the Program,
- typical reasons for delays, and
- best ways to address delays, including the use of technology and virtual hearings.

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. The Working Group believes that this average is too long for an arbitration program. To be effective, the Program has to provide *expeditious* resolution within a reasonable time, while allowing the parties sufficient time to prepare and present their case.

The Working Group draws a distinction between desired delays and unwanted delays. Desired delays may involve, for example, the time required by the parties to negotiate settlement or claimant's need to spread the process out to make it more affordable. The Working Group believes that the parties need to accept these realities to a reasonable extent. Unwanted delays, on the other hand, occur when one side is dragging its feet in an attempt to frustrate the process. The Program needs to focus on eliminating unwanted delays without eliminating the opportunity for reasonable delays that may benefit the parties.

The Working Group therefore recommends:

- establishing and enforcing strict resolution timeframes (see also Recommendation **#13**),
- setting out a clear mandate for the Program with a focus on quick resolution of claims to equip the Program administrator and/or case management arbitrator (if Recommendation **#10** is accepted) with tools to ensure adherence to the timeframes,
- providing an arbitrator and/or case management arbitrator (if Recommendation **#10** is accepted) with powers to order costs against a party responsible for unreasonable delays,
- allowing preliminary matters and arbitration hearings to proceed virtually (via Webex, Zoom or other technology) to fast-track the process where appropriate.

#7. Parties' Representation

Recommendation Summary:

Permit claimants to represent themselves and, where permitted by law and authorized by the arbitrator, be represented by an agent other than a lawyer.

The Working Group discussed who is and should be representing parties in the Program. At the present, the Program is flexible regarding parties' choice of representation. The written materials, however, do not reflect this practice.

To make access to the Program more affordable, the Working Group recommends that the Rules of Procedure and/or guidance expressly provide that the parties may be self-represented or, where permitted by law and authorized by the arbitrator, represented by an agent. Such agents may be paralegals, supervised law students participating in a legal clinic and other able representatives who are permitted to provide support to a claimant.

#8. Partnerships with Investor Protection Clinics (IPCs) and *Pro Bono* Legal Counsel

Recommendation Summary:

Develop partnerships with legal clinics and lawyers providing pro bono *legal services to make the Program more accessible.*

The Working Group considered the need for, benefits and challenges associated with establishing partnerships with *pro bono* legal clinics and/or legal counsel to provide free legal assistance to self-represented claimants through the Program.

One of the IPCs in Canada is a student clinic based at the Osgoode Hall Law School, Toronto, Ontario. The Osgoode IPC has been providing free legal assistance to vulnerable investors seeking redress for investment losses since 2016. A short description of and a link to the clinic is available in the Investor section of the IIROC website and under Arbitration FAQs. In 2020, the Osgoode IPC and IIROC partnered to support the clinic in its case work and investor education. The clinic has provided case related legal assistance to qualified claimants in the Program.

In addition, the University of Toronto, Faculty of Law (**U of T**) launched a new IPC in the fall of 2020. The focus of the U of T IPC is on promotion of investor rights and community education. The Working Group had an opportunity to meet with the clinic Director and discuss potential collaboration through the Program. The U of T IPC may assist with developing Program resources and community-oriented outreach.

The Working Group recommends that IIROC continue developing relationships with the legal clinics to:

(1) provide case related legal assistance to unrepresented claimants, and
(2) research, update and develop resources essential to increase access to the Program.

IIROC may also consider engaging with volunteer lawyers willing to provide *pro bono* legal assistance through the Program.

These opportunities create great potentials of offering significant benefits to all participants in the Program. IIROC has to be mindful, however, of practical challenges they may create especially at the outset and manage that process effectively.

Part 2. Recommendations for a Pilot Program

In this part, the Working Group sets out recommendations that may require interim steps to further research and/or testing before their final implementation. The testing stage (**Pilot**) may vary in duration, taking between 12 to 24 months to develop, implement and test the proposed changes, and may be extended if required. The effectiveness of the changes, however, should be assessed at least annually.

Most of the recommendations in this part are interdependent and should be considered and implemented as parts of one integrated system.

#9. Tiered Approach

Recommendation Summary:

Address different needs of the parties through tailored procedural tools, set timeframes and tiered system of costs.

The biggest challenges affecting the accessibility of the Program identified by the Working Group are (1) excessive costs and (2) lack of procedural tools that adequately and proportionally address the needs of the parties.

To address these issues, the Working Group recommends structural changes to the Program that will allow addressing different needs through different sets of procedural tools. IIROC must develop these tools with the overarching goal of the Program in mind, which is to enable (1) fair, (2) expeditious and (3) low-cost resolution of disputes.

At the outset, to fashion an adequate framework based on the parties' needs, the Working Group recommends grouping various types of claims in three categories based on their complexity and disputed amounts. To determine the appropriate grouping, the Working Group considered the amounts of:

- claims that went through the Program in the past 12 years[17],
- complaints reported by IIROC-regulated firms through the ComSet system in the past eleven years,
- monetary compensation recommended by OBSI in the past eleven years, and
- claim ranges in the current provincial civil court systems.[18]

The Working Group suggests 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.

Each tier should have:

(1) tailored procedural tools available to the parties in case planning, discovery, settlement/mediation and arbitration hearing stages,

[17] The average size of claims in the Program in the past 12 years is $255,000; small claims that went through the Program in the past five years were ranging between $8,000 and $48,500; in 2020, the average claim size was the maximum $500,000 per claim (with only two cases open).

[18] *I.e.*, small claims are currently ranging between $15,000 to $50,000 in different provinces; fast-track claims available in British Columbia are currently under $100,000; simplified procedures were recently extended in Ontario to $200,000.

(2) different target timeframes for claims' resolution, and

(3) a tiered system of fees where simpler and more expedited claims that require fewer resources and less time to resolve would incur lesser costs.

In addition, the Program could offer a fee subsidy to increase access to justice for claimants facing financial hardship or other extraordinary circumstances (as discussed in Recommendation **#14**).

All tiers will be case managed (as discussed in Recommendation **#10**). The arbitrator providing case management will be different from the arbitrator ultimately hearing the claim, unless both parties expressly consent to proceed with the same arbitrator.

The table below summarizes the new framework with the proposed changes discussed in detail further below:

Tiers	**Procedural tools** (*subject to case management)	**Time to resolution**	**Fees** (**may qualify for a fee subsidy)
Tier 1 under $50,000	- Documentary exchange - No oral discovery except with arbitrator's permission* - No written discovery questions - Virtual by default but parties may opt out for an in-person or hybrid hearing with arbitrator's permission* - Preliminary conferences & mandatory mediation* - Motions with arbitrator's permission only* - Written expert reports with arbitrator's permission only* - Hearing up to one full day* - Claimant may opt out of the arbitrator's discretion to award legal costs	3 months	○ Filing fee: waived ○ Mediation fee (up to one hour): waived ○ Other admin fees** ○ Arbitrator's fees** ○ Travel costs** ○ Technology costs**
Tier 2 $50,000 - $250,000	- Documentary exchange - Oral discovery (up to two hours per party)* - Written discovery (alternative to oral discovery) on consent or with arbitrator's permission* - Preliminary conferences & mandatory mediation* - Limited motions (page/time limits set by the arbitrator)*	6 months	○ Filing fee: $200 ○ Mediation fee (up to one hour): waived ○ Other admin fees** ○ Arbitrator's fees** ○ Travel costs** ○ Technology costs**

Tiers	**Procedural tools** (*subject to case management)	**Time to resolution**	**Fees** (**may qualify for a fee subsidy)
	- Written expert reports can be filed but oral evidence with arbitrator's permission only* - Claimant may opt out of the arbitrator's discretion to award legal costs		
Tier 3 above $250,000	- Documentary exchange - Oral discovery (up to four hours per party)* - Written discovery (alternative to oral discovery) on consent or with arbitrator's permission* - Preliminary conferences* - Optional mediation at any stage - Limited motions (page/time limits set by the arbitrator)* - Written and oral expert evidence (including a joint expert report and expert hot-tubbing)* - Arbitrator retains discretion to award legal costs	12 months	○ Filing fee: $450 ○ Optional mediation fee** ○ Other admin fees** ○ Arbitrator's fees** ○ Travel costs** ○ Technology costs**

In addition to these procedural tools, Tier 1 and 2 claims may proceed under Expedited Arbitration, which is currently available through ADR Chambers. Expedited Arbitration is a voluntary option, available at the outset of the arbitration process, when the parties have to consent to proceed under the ADR Chambers Expedited Arbitration Rules. There is no monetary limitation to the amount of a claim, but the parties must agree to a number of restrictions that aim to make the arbitration quicker and less expensive.[19] The fee varies depending on the parties' hearing choices, ranging from $7,500 (plus taxes) per party for a one-day oral hearing to $1,000 (plus taxes) per party for a 'no reasons' arbitration conducted in-writing. IIROC may consider a party's willingness to advance the matter through Expedited Arbitration as a factor on an application for a fee subsidy.

[19] For example, the *Expedited Arbitration Rules* do not permit discovery, expert witnesses or motions, limit documentary evidence to 20 documents and 200 pages per party, written memoranda to 25 pages and authorities to three cases per party, and permit each party to call a maximum of two witnesses only. Arbitrators cannot change these limitations unless the parties and the arbitrator agree to do so and the parties agree to compensate the arbitrator for any extra time spent. Furthermore, the parties must accept that abbreviated and incomplete reasons are acceptable in Expedited Arbitration and do not provide grounds for appeal or judicial review.

#10. Case Management

Recommendation Summary:

Implement case management to make the Program more efficient, fair and tailored to specific parties' needs.

In their review of different areas of the Program, the Working Group noticed that best solutions to several issues identified can be available through case management. Notably, case management is critical at an early documentary exchange stage, particularly where due to power and knowledge imbalances, claimants may require guidance on the types of and extent of disclosure that may be necessary in a particular case. Later in the process, case management may play an important role in helping the parties to zero-in on key issues and determine whether and what kind of expert evidence may be required. Case management undoubtedly plays an important role in keeping the parties to the established timeframes and precluding "unwanted" delays that may unreasonably hold up matters. An active oversight of the process also ensures that the parties disadvantaged by unfamiliarity with the process have access to and utilize the available resources to make the process more efficient and fairer.

The goals of case management are:

- *efficiency*: ensuring that a case is moving efficiently through procedural steps and stays within the set timeframes,
- *fairness*: providing assistance with procedural steps to the parties that may be unfamiliar with the process, particularly self-represented claimants or respondents, as to ensure a fair opportunity to present their case,
- *access to justice*: making the Program available through adequate resources (*i.e.,* costs of participation, travel, video-conferencing, legal representation, mediation fees, fee waiver/subsidy).

These goals are relevant at all stages of arbitration and for all types of cases.

The Working Group recommends amending the Rules of Procedure to provide for the following case management tools:

- case management should be available for all Tiers of cases,
- a case management arbitrator should be different from the arbitrator hearing the case, unless both parties expressly consent to proceed with the same arbitrator,
- all cases should start with a preliminary conference conducted by a case management arbitrator,
- the purpose of the preliminary conference is to assist the parties with:
    - any preliminary matters,
    - provide guidance on prehearing disclosure,
    - attempt to define and narrow down the issues,
    - identify the most appropriate procedure,
    - set dates for procedural steps and arbitration hearing, and
    - explore the possibility of settlement,

- the case management arbitrator should have discretion to assist the parties in selecting the proper representative for prehearing discovery (*e.g*., where appropriate, bringing an individual investment advisor to the table),
- the case management arbitrator may conduct mediation (mandatory for Tier 1 and Tier 2 claims at the time of the preliminary conference or optional for Tier 3 cases and at parties' request at any stage of the proceeding),
- the rules should expressly allow and encourage the parties to consider settlement at any stage of the process,
- the case management arbitrator should have discretion to determine the appropriate format of hearing in cases of parties' disagreement and may convert an in-person hearing into a virtual hearing and *vice versa* where appropriate,
- the case management arbitrator should have discretion to award costs against a party for causing unreasonable delays, including cases where a claimant exercises an election to opt out of arbitrator's discretion to award legal costs (s. 16.4 of the IIROC Arbitration Rules provides that the election is subject to the arbitrator's finding that the party acted "unfairly, vexatiously, improper, in bad faith, or has unnecessarily and unreasonably prolonged the proceedings"; this or similar language should remain to preserve the case management arbitrator's discretion to impose cost consequences in appropriate cases to prevent bath faith tactics and delays).

In addition, based on the Program experience and recent litigation trends, the Working Group expects that arbitrations in the Program may involve multiple parties and/or claims. Such claims may arise where, for example, common issues concern multiple clients of the same firm/advisor or individuals bring similar claims against more than one respondent. Multi-party arbitrations present administrative and procedural challenges. The Program can address these challenges effectively through proactive case management. For example, a case management arbitrator could assess whether claims are sufficiently compatible for consolidation. The case management arbitrator could consider each request for consolidation on their particular circumstances, including the parties' agreement to consolidate, the stage of the proceeding, common evidence and witnesses, time estimates etc. When arbitrations are consolidated, they typically should be consolidated into the arbitration that had commenced first, unless otherwise agreed by all parties. Multi-party claims are another reason why the Program should offer case management.

#11. Mediation

Recommendation Summary:

Implement mandatory mediation at the outset for smaller claims and encourage voluntary mediation for all other claims throughout the process.

Mediation and settlement are currently encouraged (at all stages) but not specifically mandated in the Program. The Working Group considered whether mediation should be optional or required as part of

the Program, as well as benefits and downsides of mandatory mediation. The Working Group also considered at what stages of the process mediation would be most effective.

Although most of the cases will likely benefit from early preliminary conferences where settlement discussions are encouraged, experience shows that mandatory mediation at an early stage of the proceeding may be more effective in less complex cases. In more complex cases, the parties may need more time to review the evidence and narrow down the issues, more often have counsel and can determine the best timing for reasonable and informed settlement discussions.

The Working Group therefore recommends:

(a) mandatory mediation for smaller claims at the outset of the arbitration process

For Tier 1 and Tier 2 claims, the parties should be required to participate in a confidential mediation session, for which the first hour would be free of charge, at a preliminary conference and before incurring significant costs of arbitration. Should the parties decide to proceed with the mediation for longer than one hour, the parties could agree to split the additional costs. If the parties do not settle through mandatory mediation, they can proceed to arbitration.

(b) optional mediation for all other cases at any stage

For Tier 3 claims, mediation could be optional, and the parties could use it at any stage of the proceeding. It would be important to set a timeline for early mediation ensuring that the mediation option does not slow the process down and that the parties consider it before they incur significant costs (after which point mediation may become less attractive). IIROC could limit the mediation option to a half a day or one-day long session (depending on the number of the parties and complexity of the issues involved) unless the parties agree, and the mediator approves an extension.

In all cases, an individual different from the arbitrator ultimately deciding the claim should conduct mediation, unless both parties consent for the mediator (and case management arbitrator, if the same) continuing as their arbitrator should the mediation be unsuccessful. To promote efficiency, the case management arbitrator may act as the mediator and carry on the two functions where possible.

The Working Group also anticipates that co-mediators may be necessary to mediate multi-party and other complex claims.

#12. Tailored Procedural Tools

Recommendation Summary:

Develop tailored procedures responsive to different needs of the parties.

The Working Group considered whether the Program would benefit from tailored rules of procedure on, for example, standard disclosure of documents, agreed statement of facts, use of expert evidence

etc. to make the process more tailored to the parties' needs and therefore more efficient and less costly.

The Working Group notes that the timely access to documents may present a challenge to the parties, especially for unrepresented claimants who may not be familiar with the rules on disclosure and evidentiary discovery.

Another example is the use of expert evidence. An expert report may be an obvious necessity in complex suitability-related cases involving intricate damage calculations while in other, less complex cases, the expertise of the specialized arbitrator may be sufficient to address the issues.

The Working Group believes that the Program can handle these challenges effectively through (1) case management, as discussed above and (2) tailored procedural tools, discussed below in this section.

Effective rules of procedure should provide fair, proportionate and flexible procedural tools. The Working Group therefore recommends tailoring the Rules of Procedure, based on claim Tiers, as follows:

- ***Documentary exchange***

  The initial and primary discovery tool is the exchange of documents between the parties. The documents exchanged must be relevant to the issues in question that were previously or are currently within the party's control and are producible bearing in mind any limitations (*e.g.*, privilege) and the overriding principle of proportionality. Documentary disclosure should be required in all cases and should be adequate and proportionate.

  As discussed in Recommendation **#2** above, in certain cases, parties may require assistance in determining what documents may exist, what is relevant, material and producible. If in doubt, the parties should be able to find guidance through adequate resources and case management available through the Program.

- ***Oral discovery***

  Prehearing discovery is another tool commonly available in litigation. It could provide a very effective discovery mechanism. In some cases, however, it may unnecessarily delay the process and increase costs. The Working Group recommends against authorising oral discoveries for Tier 1 claims except in rare cases with permission of an arbitrator. In larger Tier 2 and Tier 3 claims, oral discoveries should be allowed but limited to two hours of examinations per party in Tier 2 claims and up to four hours per party for Tier 3 claims.[20]

  Under the current Program, arbitration claims may be brought only against Dealers, not individual advisors. The Working Group discussed the benefits of having an individual advisor at the table, particularly at prehearing discovery, as often the real issues in dispute go back to the advisor and

[20] Time limits on oral discoveries are similarly set for the fast-track litigation in British Columbia and civil cases proceeding under the simplified procedures in Ontario.

rarely to the firm. Under provincial arbitration legislation, an arbitrator generally has powers to subpoena a non-party as a witness at an arbitration hearing. The Working Group believes that, for prehearing discovery purposes in Tier 2 and Tier 3 claims, the Program and the parties would benefit from providing the case management arbitrator with discretion to direct the parties in selecting the proper representative of the firm, who may, in appropriate cases, be the individual advisor (if still employed with the Dealer) or another representative who has the best knowledge of the facts. In certain cases, participation of an individual advisor at prehearing discovery would be key to ensure the parties have access to and best knowledge of all relevant facts in order to assess strengths and weaknesses of their case, consider early resolution options and prevent ambush at the hearing.

The Working Group also recommends permitting the parties, on consent, to use digital recordings of their discovery examinations instead of obtaining official transcripts where oral discovery answers will not be used in the hearing unless the transcript is requested by the arbitrator. The recording can be administered by the party conducting the examination and shared with the other side and the arbitrator once completed. The goal is to encourage cost savings and give the parties control over the process.

- ***Written discovery***

Written discovery can also be an effective discovery tool, but parties must use it only as an alternative to oral discovery, to avoid duplications and fishing expeditions. For small claims, proportionality principles advocate against written discovery. For larger claims, written discovery might be available on consent of the parties as an alternative to oral discovery.

In all cases, parties should be able to seek guidance of a case management arbitrator, who can set limits on the issues, number of questions and pages to be used in written discovery.

- ***Preliminary conference & mediation***

In recent years, courts and tribunals have used prehearing conferences as an effective case management tool. In arbitration, preliminary conferences can serve multiple purposes: to explain and remind the parties about the Program's goals, to guide the parties in designing the best suitable framework for resolution of their issues, and to increase efficiency of the process, among other things. When parties consider these issues, preliminary conferences also present an opportunity to consider early resolution options in a less formal forum.

The Working Group therefore recommends mandating preliminary conferences for all types of cases and combining preliminary conferences with mediation sessions for Tier 1 and Tier 2 claims.

For more complex Tier 3 claims, where the parties may have more resources, including access to counsel, although preliminary conferences should also be mandatory at the outset of the proceeding, the parties may decide at what stage of the process, if at all, they want to mediate. For these cases, the Working Group recommends keeping mediation optional, although encouraged through case management, as discussed in Recommendation **#11** above.

- ***Motions***

  Where parties cannot agree on typically preliminary matters (*e.g.,* disclosure, jurisdictional questions etc.), they may bring motions seeking guidance of an arbitrator. Although motions may be required to resolve these matters prior to a hearing, they usually delay the process and increase costs.

  The Working Group believes that the parties can deal effectively with many preliminary matters through case management, thus reducing the need for formal motions. The Working Group recommends setting out limits on motions while granting sufficient discretion to a case management arbitrator to address effectively such preliminary matters where required.

  Specifically, the Working Group recommends that the rules prohibit motions in Tier 1 claims except with the arbitrator's permission. For all other claims, a case management arbitrator should have discretion to set limits on motions, *e.g.,* set a page limit and/or time for arguments or particular issues contested by the parties.

- ***Expert evidence***

  The Working Group observed that although the Program is specialized in investment related issues, the challenge is whether an arbitrator has sufficiently specialized knowledge to decide on complex issues, including for example suitability and calculation of damages.

  Costs of arbitration increase significantly if expert witnesses are required. Experts are generally unwilling to testify for claimants who are not represented by legal counsel (in such situations, an expert may be particularly wary of appearing as an adversarial 'detective' rather than a detached and unbiased commentator).

  The Working Group considered whether expert evidence should be allowed and how the need for expert evidence could be reduced by, for example, (a) formulating a set of practice standards and permitting arbitrators to take 'judicial notice', (b) allowing the case management arbitrator to pose written discovery questions relating to matters that would otherwise require an expert to testify, and/or (c) through case assessment and management functions.

  The Working Group recommends that IIROC amend the Rules of Procedure to allow the parties to rely on expert evidence with limitations based on complexity and size of the claim:

  (1) for Tier 1 claims
    - subject to the arbitrator's permissions, the parties may exchange written expert reports only,
    - self-represented individuals may apply for the costs of a written expert report to be covered by the subsidy (as discussed below in Recommendation **#14**),

(2) for Tier 2 claims
   - parties may exchange written expert reports but oral evidence should be subject to the arbitrator's permission,

(3) for Tier 3 claims
   - where expert evidence is required, have the parties exchange expert witness reports and statements of qualification in advance of the arbitration hearing and allow the parties to present their expert evidence either
     - orally or in writing,
     - through a joint expert, or
     - resort to expert hot-tubbing[21] in more complex cases where the parties share the costs.

In all cases, the Working Group recommends that parties should seek guidance on the extent of expert evidence they may need in their particular case through case management.

- ***Hearing duration***

To increase efficiency of the process, the Working Group recommends setting limits on the duration of a hearing. In particular, for Tier 1 claims, the Working Group recommends that a hearing should not take longer than one full day.

In other cases, a case management arbitrator should set and modify the hearing duration depending on circumstances of each case.

- ***Cost consequences***

Currently, at the outset of the arbitration claim, a claimant in the Program may choose to opt out of the arbitrator's discretion to award legal costs against a party unless that party acted in a manner that was unfair, vexatious, improper, in bad faith or has unnecessarily and unreasonably prolonged proceedings. In most of the cases that went through the Program since 2011 (when this option was first introduced), claimants choose to exercise this option. The Working Group believes that this feature of the Program continues to be attractive and useful particularly for unrepresented claimants who may otherwise be discouraged from using the Program for the fear of adverse cost awards. The Working Group therefore recommends maintaining this option for Tiers 1 and Tier 2 claims.

In cases involving larger amounts and often sophisticated legal counsel, cost consequences serve an effective tool for eliminating delays and encouraging reasonable and focused conduct of the proceeding. The Working Group therefore recommends that, in these cases, the arbitrator should maintain discretion to award costs. To simplify the process and make it more predictable, the rules could cap adverse cost awards to a percentage of the claim (*e.g.*, 15-20% of the claim amount).

[21] A.k.a. concurrent evidence, a procedure whereby experts of both parties convene with the decision-maker and discuss the case under oath in an attempt to reach an agreement.

This will be particularly relevant if IIROC increases the award limit above $500,000 as discussed in Recommendation **#16** below.

#13. Set Timeframes

Recommendation Summary:

Establish set timeframes for different claim tiers and enforce them through effective administrative and case management tools.

Please see an earlier discussion on this point in Recommendation **#6** above.

As part of the Pilot Program, the Working Group recommends establishing set timeframes, varying in length depending on the disputed amount and complexity of claims. The timeframes would start to run after the exchange of pleadings by the parties and the initial preliminary conference.

The following timeframes would make the Program a truly expeditious dispute resolution option:

- up to 3 months for resolution of Tier 1 claims and Expedited claims,[22]
- up to 6 months for resolution of Tier 2 claims,
- up to 12 months for resolution of all other claims under Tier 3.

To be effective, the parties must respect these timeframes and, where needed, IIROC must enforce them through effective administrative and case management tools. Such measures may include:

- timely reminders to the parties by the Program administrator about upcoming procedural steps and deadlines,
- dismissal by the case management arbitrator for unreasonable delay by a party, and
- administrative dismissal where a matter is dormant for longer than twice the allotted timeframe.

#14. Fee Waiver and Subsidy

Recommendation Summary:

Provide funding in qualifying cases to increase access to justice and viability of the Program.

The Working Group identified the costs of the Program to be the biggest barrier to investor participation in the Program.

Costs of arbitration, although typically lower than costs of court-driven litigation, are still disproportionately high and may be even prohibitive for many claimants. If an investor brings a civil claim in court, they have to pay only court fees if self-represented or legal fees (which typically include

[22] Expedited Arbitration is available through the ADR Chambers: https://adrchambers.com/expedited-arbitration/. See Recommendation **#9**.

lawyer's fees and disbursements, *i.e.,* court fees, court reporter fees and other administrative fees) if represented by a lawyer. Unless an investor chooses to work with a lawyer, there are no costs for filing a complaint with OBSI. If an investor uses the Program, on top of the legal and administrative fees, they have to also pay arbitrator's fees. These fees can easily grow to a significant amount, especially in cases where an arbitrator has to travel, is called to assist on multiple preliminary matters and the claim involves complex issues requiring many hours or even days of hearing. This creates a significant obstacle for claimants. Costs discourage investors from using the Program.[23]

In summary, currently, the costs of the Program include:

(1) arbitrator's fees (currently $350 per hour in Quebec and $400 per hour in other provinces which are typically split equally between the parties),
(2) administrative fees (*e.g.,* a filing fee to commence a claim (currently $450 payable by the claimant except for claims under $3,000 in Quebec for which the fee is $200), administrator's fees, room booking fees, and may include decision/summary publication costs if published, as discussed in Recommendation **#15**)
(3) travel costs (either of the parties or the arbitrator to travel to remote locations or major cities) and technology costs (in virtual or hybrid hearings).

In addition, where parties choose to proceed to mediation, they are responsible for mediator's fees, which are typically split equally between the parties.

The Working Group believes that the Program cannot offer a viable dispute resolution option unless it provides a more affordable fee structure. The Working Group specifically considered if subsidizing some of the costs of the Program could increase access to justice as well as effectiveness and attractiveness of the Program for potential claimants.

The Working Group recommends that a fee waiver and/or fee subsidy be available in certain cases to reduce the burden and increase access to justice through the Program, particularly for the claims where parties are facing financial or other unusual hardship.

Specifically, the Working Group recommends the following:

(1) fee waiver - filing fees

To remove the barrier for accessing the Program, the filing fees could be:
- waived for Tier 1 claims,
- set at $200 for Tier 2 claims, and
- set at $450 for Tier 3 claims.

(2) fee waiver - mediation fees

If Recommendation **#11** is accepted and mediation is mandated (up to one hour) at the outset of the Program for Tier 1 and Tier 2 claims and left optional for Tier 3 claims, the mediation fees could be:

[23] *Supra* note 9 at 46.

- waived for Tier 1 and Tier 2 claims, and
- split equally between the parties for Tier 3 claims.

(3) fee subsidy

To increase access to the Program and consequently access to justice, certain claims may qualify for a fee subsidy where costs of arbitration, *i.e.,* other administrative fees, arbitrator's fees, travel costs and other costs, would create financial or other unusual hardship to the party. A fee subsidy could be available in cases where special circumstances apply (*e.g.*, applicant's liabilities greatly exceed available assets and financial resources, excessive travel costs to the place of arbitration for either the arbitrator or the claimant, high technology costs if numerous witnesses cannot otherwise attend the hearing etc.). The fee subsidy may fully or partially cover the arbitration costs depending on the need demonstrated by the applicant.

Qualifications for the fee subsidy under the Program would include at least the following elements:

- defined eligibility criteria, including the amount and complexity of the claim (assessed at the outset of the arbitration with assistance of the case management arbitrator), individual's assets and liabilities, financial hardship (*e.g.,* impecuniosity, insolvency) and other factors constituting special and unusual circumstances,
- whether the parties are willing to proceed by way of Expedited Arbitration,
- the applicant must disclose any third-party funding or available insurance coverage on a subsidy application and throughout the process.

To increase transparency and effectiveness of the Program, IIROC should provide regular reporting on the number of qualified cases and the total amounts paid in subsidy.

IIROC could make funding for the fee waiver and fee subsidy available out of the IIROC Restricted Fund[24]. Given the low historical case volumes in the Program, particularly in the last decade, and the availability of other avenues for investment dispute resolution in Canada (*i.e*., at the firm level, through courts and OBSI), the Working Group does not anticipate that the Program will generate a high number of cases even if/when these recommendations are implemented. In any event, and as it is practically difficult to estimate the possible uptake, the Working Group recommends establishing a reasonable cap on the funds available for qualified subsidy applications from the IIROC Restricted Fund for the purposes of the Pilot. IIROC may reassess the cap on funding and the use of the waiver and subsidy at least annually and/or when the cap is reached.

The use of the Restricted Fund is currently limited to the categories enumerated in the IIROC Recognition Order (Appendix A, s. 8). The Canadian Securities Administrators (**CSA**) approved amendments to the IIROC Recognition Order, which may allow the use of the Restricted Fund for additional purposes upon approval by the CSA. The Working Group recommends seeking the CSA

[24] The IIROC Restricted Fund is made up of the fines collected and payments received in settlement through IIROC disciplinary proceedings.

approval to use the Restricted Fund to fund the qualifying claims in the Program as soon as practicable.

The Working Group also notes that IIROC does not intend for the Program to compete with the free dispute resolution services provided by OBSI. The Program has distinctive features that makes it different from OBSI's services, as discussed above in the **Introduction**. With or without a fee subsidy, the goal of the Program is to provide investors with a viable choice tailored to their particular needs. The focus of the Program is and should be on complex cases that typically involve large amounts, are more suitable for adversarial fact-finding and require court-like procedural tools.

Part 3. Recommendations for Further Consultation

The Working Group has considered the issues discussed in this part, some to a great extent. The Working Group saw the need for larger consultation on these issues and therefore recommends that IIROC seek additional comments from other stakeholders, as summarized below.

The public consultation of the questions proposed in this part can proceed immediately and be conducted within six to 12 months of the publication for public comments.

#15. Publication of Arbitration Decisions

Recommendation Summary:

Engage in public consultation on publication of arbitration decisions, either as (1) summaries, (2) redacted or (3) unredacted decisions to increase transparency and provide incentives.

Traditionally, confidentiality is the key feature of arbitration. It plays a significant role when parties consider their litigation strategy (*e.g.,* private arbitration *vs* public court process). Arbitration proceedings are often presumed to be private and confidential between the parties to the arbitration agreement.

This feature is not absolute. For example, FINRA arbitrations, although generally confidential, result in awards that FINRA posts in the Arbitration Awards Online Database, which is open to the public. FINRA's published awards contain names of the parties, names of their counsel of record, names of the arbitrator(s), and the relief sought and awarded in arbitration. Other information about FINRA arbitration proceedings, such as statements of claim, an arbitration record etc., is not available to the public.

Currently, details of the cases going through the Program and arbitration decisions remain confidential. The only information IIROC publishes about the Program are the annual statistics, which include the number and types of cases that went through the Program.

The Working Group considered this limited transparency about the Program. Members of the Working Group felt that the Program would benefit from publishing arbitration decisions in some form, either as (1) summaries, (2) redacted decisions, or (3) full unredacted decisions. The benefits of publishing this information would include providing the parties with a "learning mechanism", *e.g.,* interpretation of "suitability", case analysis and loss calculation methodology adopted by arbitrators on the facts of a particular case. Publication of arbitration decisions in some form may also increase transparency and investor confidence in the Program.

The Working Group was however concerned that removing privacy and confidentiality of the process would effectively remove the key feature of the Program, making it less attractive to both parties. Without an appeal mechanism, published arbitration decisions may also have a significant precedential and reputation impact on the parties: on the respondent, if decided in favour of the claimant (potentially ending or affecting the rest of the advisor's career and reputation of the firm), and on the claimant, if decided in favour of the respondent (who may also rely on the favourable precedent in future cases).

The Working Group therefore recommends that IIROC seek public comments to consult with stakeholders on the benefits and limits of publishing further arbitration details.

The Working Group agreed that IIROC should continue reporting on the cases that went through the Program. The level of detail included in the reports should be sufficient to provide adequate transparency and accountability to justify the Program while preserving the sensitive nature of the arbitration process.

#16. Award Limit

Recommendation Summary:

Increase the award limit to $5 million (and above with parties' consent) to allow for a greater access to the Program.

The current maximum of damages a claimant may seek through the Program is $500,000. IIROC increased the award limit from $100,000 following a public consultation in 2011. Although the award limit does not appear to be a significant issue in the Program, the Working Group considered whether the $500,000 cap continues to be necessary and adequate, particularly in the light of the imminent increase of award limits in other fora, including OBSI, as recommended by the Taskforce[25], as well as Small Claims Court and Simplified Procedure cases in Ontario.

The Working Group discussed whether an increase of the award limit to $5 million or a higher amount would create an additional feature for claimants with larger claims. Increasing the award limit or removing the cap will open up the Program to more potential claimants who would otherwise have to

[25] *Supra* note 4.

take their disputes to court or private arbitration/mediation. If OBSI's recommendation limit increases to $500,000, the focus of the Program should be on the claims above that amount.

There are however certain benefits in keeping the Program open to the claims under $500,000 given its unique features that make it distinctive from OBSI's services, such as parties' choice of an arbitrator, control over the process and court-like fact-finding and other procedural tools (as discussed above in the **Introduction**).

The Working Group discussed a flexible approach that may allow the parties to proceed through the Program on agreement where the claim is above $5 million or leave the choice of opting-in to the Program with a respondent.

The Working Group also discussed that if the award limit is increased, the Program could provide for a series of monetary gradations that add rights of appeal or other procedural safeguards as the claim amounts increase.

In addition, where the stakes are higher, parties may be more inclined to proceed with a panel of three arbitrators (instead of one) as increased costs and additional administrative steps (checking on availability, conflicts and scheduling) may be less concerning and more justifiable.

If the award limit for the Program is raised above $500,000, it may be advisable to retain cost consequences as an effective case management tool for larger claims. To simplify the system and make it more predictable, the maximum cost award could be awarded up to a certain percentage of the claim amount (see Recommendation **#12** *Cost consequences*).[26]

The Working Group therefore recommends the increase of the award limit to $5 million and, where both parties consent, above that amount with no set limit.

A wider consultation on the outcome of the award increase/removal of the cap (*i.e.,* procedure, appeal options, cost consequences) is required to evaluate the best options for the Program.

#17. The 90-day Requirement

Recommendation Summary:

Consider shortening the 90-day requirement to 30-45 days.

One of the conditions for participation in the Program is the requirement for the client to attempt to resolve the dispute directly with their Dealer prior to initiating arbitration.[27] Although indirectly, this

[26] *E.g.,* 15% of the "amount claimed or the property sought to be recovered" is used in the Small Claims Court in Ontario. The court also has discretion to award costs above this amount where it is "necessary in the interest of justice to penalize a party or a party's representative for unreasonable behaviour", *Courts of Justice Act,* R.S.A. 1990 c. C. 43, s. 29.

[27] Rules of Procedure of the ADRC-IIROC Arbitration Program, April 15, 2014, s. 3.3(b).

requirement relates to IIROC Rule 3700, Part E[28], which requires a Dealer to respond to a client complaint within 90 days of its receipt. As a consequence, an investor can bring an arbitration claim only after they first complained to the Dealer and received an unsatisfactory response, which can take up to 90 days (unless the Dealer responds sooner).

The Working Group expressed a view that this requirement may create an unfair and unnecessary hurdle to investors. This requirement does not apply if an investor decides to bring a claim in court or private arbitration. A limitation period[29] applies and is ticking while investors wait for the Dealer's response.[30] It delays the resolution process through the Program. Practically, investors cannot even start their claims until 90 days after they complained to the Dealer. If skipped or shortened, arbitration claims would proceed quicker, offering a more efficient dispute resolution process through the Program.

On the other hand, the Working Group considered the challenges of removing this requirement. The current process essentially allows the firms to review a client complaint and attempt to resolve the dispute at an early stage. This is beneficial to both parties and should be encouraged. The process also aligns with other regulatory requirements and timing for launching a complaint with OBSI.[31]

The Working Group believes that there might be some benefit in starting a complaint directly with the Dealer. However, the waiting period does not have to be 90-days long to achieve the same result. For *expediency* of the process, which is the key feature of the Program, IIROC could reduce this requirement to 30-45 days, subject to any special circumstances that may require more time for the parties' early dispute consideration and resolution.

Additional consultation on this point is recommended to assess the practicality and impact of this proposal on the parties and the existing regulatory requirements and dispute resolution framework.

[28] Former Dealer Member Rule 2500B.
[29] Claims in the Program are subject to the same limitation period as in private litigation, *i.e.*, court, private arbitration, which is typically two-years (and may vary depending on the jurisdiction). OBSI provides for a longer limitation period of 6 years.
[30] Parties may enter into a tolling (or a standstill) agreement to suspend the limitation clock from running. This is not currently required or offered through the Program. A tolling agreement would require parties' consent.
[31] See NI 31-103, s. 13.16(4) and OBSI Terms of Reference, s. 5.1.