IIROC OCRCVM
Investment Industry Regulatory Organization of Canada
Organisme canadien de réglementation du commerce des valeurs mobilières

IIROC NOTICE

Rules Notice
Request for Comments
Dealer Member Rules

Please distribute internally to:
Legal and Compliance
Senior Management
Retail

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REVIEW OF IIROC ARBITRATION PROGRAM

Summary

Investor access to a straightforward, expeditious system to resolve disputes with IIROC Dealer Members fosters confidence in capital markets and the financial services industry. There are currently a number of recourses available to investors to address disputes with Dealer Members, including the IIROC arbitration program (the "Program"). Dealer Member Rule 37.1 has been in place since 1996 and requires Dealer Members to participate in an arbitration program that has been approved by the IIROC Board of Directors. Two independent arbitration firms are designated as administrators of the Program and each firm has responsibility for cases arising in assigned jurisdictions.

Commencing in the fall of 2008, IIROC undertook a comprehensive review and evaluation of the Program. The results are discussed in this Notice.

Since inception, more than 500 cases have been opened under the Program. Utilization of the Program seems to have peaked between 2000 and 2003; in 2002, approximately 96 cases were opened across Canada.

Utilization of the Program has declined significantly in recent years. This year, only eight cases have been initiated under the Program nationally. The decline in utilization may be attributable to several factors, including the Program award limit of $100,000. This award limit has not been increased since 1999. It is likely that the introduction in 2002 of a no cost, non-binding avenue for redress with the expansion of the mandate of the Ombudsman for Banking Services and Investments ("OBSI") to include investment industry complaints is also a factor.

IIROC has made a number of administrative changes to harmonize the operation of the Program and to enhance statistical reporting to IIROC. This Notice discusses improvements to the Program and IIROC's proposal to increase the award limit. IIROC invites comment on these matters.

Dispute Resolution Alternatives

A client wishing to resolve a dispute with an IIROC Dealer Member can choose from any of three avenues beyond the Dealer Member's internal complaint handling process: (i) the Program; (ii) non-binding dispute resolution through OBSI; and (iii) civil litigation in the courts.

For disputes involving Dealer Members registered with the Autorité des marchés financiers ("AMF"), the AMF may in certain circumstances recommend and provide support for voluntary mediation.

(a) Ombudsman for Banking Services and Investments

OBSI is an ombudservice providing a non-binding dispute resolution program for participating financial services providers and their customers. There is no charge to complainants for OBSI's services and OBSI can recommend compensation of up to $350,000.

OBSI complainants do not usually retain legal counsel. The parties do not appear before a third party to present their respective cases. When an investor makes a complaint to OBSI, OBSI staff members apprise themselves of the facts and circumstances by reviewing documents provided by the parties, interviewing the complainant and representatives of the Dealer Member and speaking with relevant third parties. They will also give appropriate consideration to industry practice and the law and complete any necessary research and loss calculations.

If OBSI determines compensation is not warranted, OBSI will communicate that to the parties and advise the client that he or she can reactivate the file if new information arises. If OBSI determines compensation may be warranted, OBSI will propose a settlement to the parties. If

the parties do not settle, and OBSI concludes compensation is warranted, OBSI will proceed to make a recommendation that the Dealer Member compensate the client.

While OBSI's recommendation is non-binding, the names of member firms that refuse to implement the recommendations are disclosed to the public, together with circumstances of the case. To date, no IIROC Dealer Member has refused to implement a recommendation by OBSI.

(b) Arbitration and Litigation

Arbitration is similar to civil litigation in many respects. Arbitration is, however, more flexible than civil litigation proceedings. Conduct of the proceedings can be determined by agreement of the parties. Parties to a dispute in arbitration or litigation present their respective cases to an impartial third party - the arbitrator, panel or judge. Arbitrators impose binding decisions based on the facts and arguments presented.

Arbitration is intended to be more expeditious and cost-effective than litigation. In arbitration, there are fewer opportunities for procedural delays as discovery, motions and appeals are usually more limited in scope.

In addition, parties may favour arbitration because the proceedings and decisions are confidential. Court filings and proceedings are generally publicly accessible. There is less formality in arbitration and some clients may prefer this. Court procedures are formalized and codified.

IIROC Arbitration Program - Background

IIROC Dealer Member Rule 37.1 requires each IIROC Dealer Member to participate in binding arbitration proceedings to resolve a dispute with a client, if the client requests it. IIROC has approved certain arbitration organizations to administer the Program. Failure to comply with the rules of procedure established by the approved arbitration firms can constitute a breach of Dealer Member Rule 37.1. The first version of Rule 37.1 was introduced in 1996.

IIROC began operating the Program in British Columbia in 1993 on a pilot basis. The Program was extended to Quebec in 1996 and to other provinces in 1999. Three independent regional arbitration firms were approved under the Program.

Every IIROC case is presided over by a sole arbitrator. The investor and the Dealer Member will agree on the choice of arbitrator and, in the absence of such agreement, the arbitration firm appoints an arbitrator. Arbitrators are retired judges or practicing lawyers.

Arbitrators appointed under the Program are empowered to award up to $100,000 plus interest and costs. Arbitration fees are usually divided equally between the parties. The

arbitrator has discretion to deviate from this approach and modify the division of arbitration fees. The arbitrator may also make an award of legal costs.

Quebec law and the agreements concluded by parties participating in the Program in other provinces and territories provide that the decision of the arbitrator is final and binding on the parties with no right of appeal. Absence of a right of appeal means that a party to an arbitration under the Program, with very narrow exceptions, cannot ask a court to reconsider the merits of the arbitral decision and reverse a conclusion of the arbitrator regarding the facts or law applicable to the case. An arbitral decision can be set aside or annulled in limited circumstances.

The arbitrator under the Program renders a decision in writing and states the grounds upon which the decision is made. This is an explicit requirement of the rules of procedure under the Program. Publication of the arbitral decisions is not required because of the likely delay in resolution of cases and increase in costs to the parties. While IIROC may receive a copy of the decisions, the proceedings are otherwise non-public.

Review Findings and Program Improvements

(a) Administrative Practices of the Arbitration Firms

The Program was historically administered by three arbitration firms, each responsible for a region of Canada. The IIROC review revealed that the administrative practices among the firms were inconsistent. As a national organization, IIROC's goal is to ensure consistent administration of the Program, to the extent permitted by law, so that clients, wherever they reside, are treated similarly under the Program.

IIROC has, accordingly, consolidated the administration of the Program with two arbitration firms. Arbitrations in Quebec are conducted by the Canadian Commercial Arbitration Centre and arbitrations in all other provinces and territories are conducted by ADR Chambers Inc. ADR Chambers retains regional arbitrators and will conduct arbitrations remotely via videoconference, where necessary.

Consolidation of the Program infrastructure should assist in containing costs to parties. Reduced fragmentation will also make the Program easier for investors to understand and access and ensure greater consistency in process.

(b) Standardized Reporting to IIROC

While IIROC had historically requested statistical information from the arbitration firms, standardized reporting by those firms was not implemented and IIROC's oversight of the operation of the Program by the arbitration firms was limited.

Each arbitration firm maintained its own methodology of reporting cases following the file management system of the particular arbitration firm. This inconsistent methodology produced statistics that were difficult to compare and aggregate. The information reported to IIROC by the arbitration firms did not sufficiently support extraction of significant national indicators and made it difficult to analyze case data and identify trends.

To address these issues, IIROC has implemented robust tracking and reporting of statistical information as well as standardized reporting guidelines for the arbitration firms. These tracking and reporting procedures apply to all cases commenced on and after January 1, 2009. These new procedures and reporting guidelines will enable IIROC to monitor the Program more actively and broadly oversee its operations. Once a meaningful body of information is collected under the new reporting guidelines, IIROC will determine whether and how to augment its statistical disclosure.

(c) Program Indicators

The following statistical information about the Program has been compiled based on discussions with, and more extensive reporting and record reconstruction by, the arbitration firms.

i. Case Volume

The Program was a progressive innovation at the time of introduction. At that time, investor recourse options were more limited. Since inception, more than 500 cases have been opened under the Program. Utilization of the Program seems to have peaked between 2000 and 2003; in 2002, approximately 96 cases were opened across Canada.

Utilization of the Program has since declined. Eight cases have been opened under the Program nationally in 2009 (as at November 30, 2009). This decline may be attributable to several factors, including the Program's award limit of $100,000 and the expansion of OBSI's mandate in 2002 to include investment industry complaints.

A table indicating the number of cases opened year over year under the Program is included as Appendix A to this Notice.

ii. Average Claim

The average claim in Ontario and the Atlantic provinces under the Program since inception is approximately $75,000. In Quebec, the average claim since inception is $58,600. This information was not tracked in other provinces.

iii. Arbitration Fees

Arbitration fees charged to claimants in Ontario and the Atlantic provinces generally range from $450 (the file opening fee) to just over $3000. This information was not tracked by the arbitration firms in the other regions.

iv. Legal Representation

None of the arbitration firms tracked the percentage of claimants represented by legal counsel. One of the arbitration firms suggested, based on its experience, that close to 50% of claimants retain legal counsel at some point in the arbitration process. Another arbitration firm estimated that 70 to 75% of claimants retain counsel.

v. Case Duration

The average duration of cases ranges from 8.5 months to 2.25 years across the arbitration firms. The speed with which arbitration under the Program is completed is primarily dependent on the parties to the case. Parties are always free to agree to extensions of the expedited timeframes set out in the Program rules. The parties often agree to extensions or seek an extension from the arbitrator.

Timing can also be affected by administration of the process by the arbitration firms. IIROC has requested that each arbitration firm enforce its existing procedural timeframes, subject to mutual agreement by the parties or a deliberate grant of extension by the arbitration firm.

Award Limit

Arbitrators appointed under the Program are empowered to award up to $100,000 plus interest and costs. The parties can agree to a higher limit.

The current Program award limit was established in 1999. In December 2003, the Ontario Securities Commission's Regulatory Burden Task Force recommended increase of the arbitration award limit to at least $350,000.

IIROC is of the view that the $100,000 award limit may reduce the utility of the Program for investors. Many claimants retain legal counsel for some or all aspects of arbitration.

IIROC proposes to increase the award limit under the Program from $100,000 to $350,000. IIROC seeks public comment on this proposal. IIROC will also consider submissions endorsing a higher award limit, such as $500,000, as well as submissions supporting a lower award limit.

FINRA Arbitration

The FINRA arbitration program is quite different from the Program. There is no award limit and there are extensive procedural rules governing the FINRA arbitration process. Fundamental factors influencing utilization and development of the FINRA program are not present in Canada.

FINRA arbitration is mandatory for all disputes between member firms, as well as those between member firms and their representatives. FINRA members must participate if clients choose arbitration to resolve a dispute.

Clients of FINRA firms are required, as a matter of contract law in the United States, to submit to arbitration if they have previously agreed to do so. IIROC understands that many retail account agreements with FINRA members contain predispute arbitration clauses. These clauses require clients to give up rights to sue the broker-dealer in court. These clauses do not apply to class actions. These clauses have been upheld and ruled enforceable by the United States Supreme Court. Recent legislative proposals would authorize the SEC to restrict or prohibit the use of predispute arbitration clauses by FINRA broker-dealers.

There is currently no OBSI equivalent or ombudservice in which FINRA members are required to participate to address customer complaints. FINRA's Office of the Ombudsman addresses concerns and complaints about FINRA's operational activities but does not address client complaints about broker-dealers.

IIROC supports investor choice and does not believe clients of Dealer Members should be required to relinquish alternatives to pursue redress in advance of an issue arising. In addition, proposed amendments to IIROC's complaint handling requirements reflect the principle that the client is in a better position to assess options to seek redress at the time of dealing with an actual dispute, and not at the time of opening the account with the Dealer Member.

Program Evaluation - Roadmap

IIROC has undertaken a comprehensive review and evaluation of the Program. IIROC has made a number of findings regarding the functioning and utilization of the Program. IIROC has made many administrative changes to improve and harmonize the operation of, and reporting regarding, the Program.

IIROC is soliciting views regarding effectiveness of the Program. On receipt and consideration of comments, IIROC will determine if further changes to the rules and procedures of the arbitration firms or improvements in other aspects of the Program are required to maximize stakeholder benefits.

IIROC proposes to increase the award limit under the Program from $100,000 to $350,000. IIROC seeks public comment on this proposal. IIROC will also consider submissions endorsing a higher award limit, such as $500,000, as well as submissions supporting a lower award limit.

On receipt and consideration of comments, the IIROC Board of Directors may determine that it is in the public interest to increase the award limit under the Program to $350,000 or some other amount. IIROC will issue a Notice if it approves an increase in the award limit or if it requests comment in respect of other matters.

IIROC intends to monitor utilization of the improved Program for a period of time to evaluate the effectiveness of the Program within the range of recourses available to investors.

Request for Comments

IIROC invites public comment on the matters raised in this Notice and, particularly, the following:

1. the benefits of arbitration and the viability of the Program;
2. the experience of parties to arbitration cases under the Program and suggestions to improve effectiveness and utilization of the Program; and
3. IIROC's proposal to increase the award limit under the Program to $350,000 or some other amount.

Comment letters may be addressed to:

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Toronto, Ontario M5H 3T9

Comments will be accepted until March 16, 2010. Comments will be posted on the IIROC website.

Appendix A

Cases Opened Annually Under the Program

	Ontario & Atlantic Provinces	Western Provinces	Quebec	Total Cases Opened per Annum
1996		Not available	2	
1997		Not available	8	
1998		Not available	2	
1999	Not available	Not available	14	
2000	Not available	21	22	
2001	Not available	22	21	
2002	50	17	29	96
2003	42	12	35	89
2004	28	5	22	55
2005	9	2	9	20
2006	11	2	5	18
2007	3	1	0	4
2008	5	3	1	9
2009 (to Nov. 30)	1	1	6	8

No claim in respect of the Territories has been made under the Program to date.