FAIR Canada Canada's Investor Rights Advocate | Promoteur des droits des investisseurs

March 6, 2023

General Counsel's Office
New Self-Regulatory Organization of Canada (New SRO)[1]
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Re: Review of the New SRO Arbitration Program

FAIR Canada is pleased to provide comments in response to the above-referenced consultation.

FAIR Canada is a national, independent, non-profit organization dedicated to being a catalyst for the advancement of the rights of investors and financial consumers in Canada. We advance our mission through outreach and education, public policy submissions to governments and regulators, and proactive identification of emerging issues. As part of our commitment to be a trusted, independent voice on issues that affect retail investors, we conduct research to hear directly from investors about their experiences and concerns. FAIR Canada has a reputation for independence, thoughtful public policy commentary, and repeatedly advancing the interests of retail investors and financial consumers.[2]

General Comments

FAIR Canada welcomes the New SRO's review of its arbitration program (the Arbitration Program). The Arbitration Program provides individual investors with an important avenue for seeking redress in the Canadian dispute resolution landscape.

Importantly, the Arbitration Program is but one option available to individual investors. Clients wishing to pursue dispute resolution with a New SRO investment dealer or representative can, among other things, also choose to escalate their complaint to the Ombudsman for Banking Services and Investments (OBSI), or to commence a lawsuit in the

[1] Effective January 1, 2023, the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA) amalgamated their respective organizations into a new legal entity, the New SRO. IIROC issued this consultation prior to the formation of the New SRO. As IIROC no longer exists, this letter refers to the New SRO rather than IIROC.
[2] Visit www.faircanada.ca for more information.

courts.[3] Each option differs in numerous ways, such as the time and costs involved, the procedural rules and tools available, and the degree of formality and confidentiality.

Fundamentally, we believe it is important to preserve investor choice and ensure each option remains available and delivers fair outcomes for investors. The goal should not be for the Arbitration Program to replace these other options or to try to cater to every type of situation. In our view, the objective should be to ensure the Arbitration Program is as efficient and effective as it can be when it is a complainant's preferred option to handle their dispute.

We agree with the Working Group's (WG) statement that "the focus of the Arbitration 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."[4] Consistent with this statement, the New SRO's objective should be to make the Arbitration Program a more attractive alternative to civil litigation – i.e., a quicker and less costly option than court.

We are concerned, however, that some of the WG's recommendations for a pilot program would expand the Arbitration Program beyond just complex cases or cases that involve larger dollar amounts. These include a proposal to develop a tiered approach with additional rules, fee waivers and subsidies.

If implemented as proposed, some of the WG recommendations could lead to confusion and duplication with other dispute resolution mechanisms, particularly for those investors who OBSI could better serve. Further, we believe they would require a significant additional investment of the New SRO's time and resources and, as such, would divert limited resources from other more pressing priorities for questionable gains.

Our concerns, together with other comments on several WG recommendations, are set out below in order of priority. As requested, we specifically comment on the WG's recommendations respecting:

- Increasing the maximum award limit;
- Shortening the time that must have elapsed before commencing arbitration; and
- Publishing arbitration decisions.

Woven into our comments are our views on the role of the Arbitration Program in the investor dispute resolution framework generally and its coexistence with OBSI. While we believe the Arbitration Program should not seek to duplicate OBSI's services, we disagree with having a bright line test that limits when investors can use the Arbitration Program. Although the Arbitration Program may not be well suited for certain types of complaints, it

[3] Residents of Quebec have the option of using the dispute resolution services of the Autorité des marchés financiers, and individuals in certain provinces may be able to make a claim for financial compensation from the provincial securities / financial services regulator. For more information on the complaint handling framework, see FAIR Canada's guide: Getting Your Money Back: An Investor's Guide to Navigating Canada's Complaint System.

[4] IIROC Arbitration Program Working Group Recommendations, July 2022 at p. 33 [WG Recommendations].

is inappropriate to impose an arbitrary minimum claim amount to restrict when it can be used. Investors should be free to use the Arbitration Program if they so desire, regardless of the amount involved.

Finally, we also comment on whether the Arbitration Program should be extended so that it applies to all members of the New SRO, including those that were members of the MFDA.

Pilot Program

Tiered Approach (WG Recommendation 9)

The WG recommended a 12 – 24 month pilot that would test proposed structural changes to the Arbitration Program, including a tiered approach with additional rules and procedures (the Pilot). The Pilot would create three tiers of claims based on the amounts in dispute, each with its own tailored procedural rules, target timeframes for resolution, and system of fees. Implicit in the proposed changes is that the Arbitration Program should be flexible enough to accommodate every type of complaint that may arise against a dealer, irrespective of the claim amount.

FAIR Canada recommends that the New SRO not proceed with the Pilot. In our view, a tiered model is unnecessary in the Canadian context and would introduce confusion and added complexity into the dispute resolution landscape.

As alluded to, the Arbitration Program should not seek to be everything to everyone. Rather, it should be designed with the understanding that the Arbitration Program is but one dispute resolution option. Different options, such as OBSI and civil litigation, will be more suited to different situations.

In our view, the proposed tiered approach also fails to sufficiently consider the following important factors:

a) Differences Between Canadian and U.S. Contexts

In developing the Pilot proposal, the WG drew inspiration from the U.S. Financial Industry Regulatory Authority (FINRA) model. In particular, the WG found FINRA's tiered approach to procedural matters and fees for matters in arbitration "interesting and compelling."[5] FINRA rules contemplate special procedures for certain types of claims. For example, the parties have the option of simplified procedures for claims under $50,000, such as having the arbitrator decide the case based on the parties' written submissions rather than having a hearing. FINRA also offers expedited procedures for seniors and seriously ill parties. In addition, FINRA has a tiered system of fees, which are calculated based on the amount in dispute. For example, filing fees range from $50 to $2,300 depending on the claim amount.

[5] Ibid. at p. 9.

The tailored nature of FINRA's dispute resolution system may be well-suited for the U.S. context. However, there are important differences between the U.S. and Canadian complaint handling landscapes that call into question whether the New SRO should import FINRA's model into Canada.

In Canada, while dealers must offer arbitration to their clients, the client is free to choose from among several options, including OBSI's free, independent and accessible complaint handling services. By contrast, FINRA is effectively the only available dispute resolution option for investment-related complaints in the U.S. Dealers typically require their clients, by contract, to resolve any disputes by FINRA arbitration. Further, there is no equivalent to OBSI.

Given FINRA's arbitration is, de facto, the only game in town, it makes sense that its rules contemplate different procedures and fees to address the full range of scenarios and complainants that will be required to use it. Implementing this type of tailored approach, however, is unwarranted in the Canadian context.

b) Confusion and Complexity

In our view, the WG's proposed tiered approach would add complexity to the Arbitration Program, which is already difficult for the average investor to understand. It would also introduce needless confusion and complexity into the existing complicated complaint resolution landscape. The tiered model could make it even harder for complainants to navigate the system and may have the undesirable outcome of deterring them from seeking redress.

c) Increased Costs

The tiered approach would also increase the costs of the Arbitration Program. As the WG states in recommendation 9, the responsibility for creating the new procedural tools and processes for each tier would fall to the New SRO. In short, the recommendation envisions the New SRO being far more directly involved in the Arbitration Program, which would necessitate more New SRO resources than are currently required. We anticipate that these additional costs would be passed on to users of the system. Further, the additional complexity would make it more time-consuming and costly for the New SRO to oversee the Arbitration Program and divert resources from other key initiatives as the New SRO gets underway.

d) OBSI is Better Suited for Smaller Claims

The Pilot raises the question of the Arbitration Program's coexistence with other available dispute resolution options such as OBSI. We believe OBSI is the more suitable dispute resolution mechanism for claims under $500,000 (the proposed compensation limit) and see no reason for the Arbitration Program to try to cater to complaints that OBSI could better address.

As the WG stated, "IIROC does not intend for the Arbitration Program to compete with the free dispute resolution services provided by OBSI."[6] In addition to being free, OBSI's services are more informal, but also impartial and efficient, making it the preferred retail investor complaint resolution process. In our view, it would not be in investors' best interests for the Arbitration Program to try to supplant OBSI's important role in the complaint handling landscape.

We would not, however, go as far as recommending that the Arbitration Program be restricted to claims that exceed the OBSI compensation limit (currently $350,000, but we support the proposal to raise it to $500,000). We believe in preserving investor choice: the investor should be able to decide which dispute resolution process makes the most sense for them based on their individual circumstances. While we anticipate that most investors with smaller claims would choose OBSI, an investor with a claim of $300,000, for example, may determine that arbitration is their preferred route. Limiting the Arbitration Program to claims above OBSI's compensation limit would deny investors their choice of dispute resolution forum, which could reduce confidence in the dispute resolution framework.

e) Expedited Arbitration Already Exists

The New SRO has designated two service providers for the Arbitration Program: the Canadian Commercial Arbitration Centre in Quebec and ADR Chambers in the rest of Canada. ADR Chambers offers expedited arbitration "designed for people who want a fast and inexpensive arbitration".[7] Expedited arbitrations have a fixed fee, strict timelines, and restrictions on the number of documents, length of briefs, and time for the hearing. Because an alternative to the more costly, less efficient arbitration process already exists (for those outside Quebec), we are not convinced of the need for a tiered structure.

f) Data Does Not Support the Tiered Structure

We are not persuaded, based on historical data about the average claim size in the Arbitration Program, of the need to introduce more complexity into the Arbitration Program to cater to lower dollar amount claims. As the WG noted, the Arbitration Program statistics show that the average size of claims in the past 12 years was $255,000.[8] Further, in 2020 and 2021, the average claim size was the maximum $500,000 per claim.[9] Moreover, it is clear that OBSI is chiefly addressing lower dollar amount claims: as the WG pointed out, between 2010 and 2019, OBSI's investment compensation recommendations averaged $19,717 with a median amount of $7,336.[10] While it is possible that the tiered structure would make the Arbitration Program more attractive for smaller claims, we believe the added complexity of such a structure could deter potential claimants.

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[6] Ibid. at p. 33.
[7] ADR Chambers Expedited Arbitration.
[8] WG Recommendations, *supra* note 4, a p. 20.
[9] IIROC Arbitration Statistics.
[10] WG Recommendations, *supra* note 4, a p. 7.

In sum, while we believe investors should have the freedom to decide which complaint handling process to use, the Arbitration Program should not introduce complexity or divert claims from OBSI by creating a tiered approach to facilitate smaller claims.

Fee Waiver and Subsidy (WG Recommendation 14)

One recommendation related to the Pilot is to provide funding in qualifying cases to increase access to justice and the viability of the Arbitration Program. In particular, the WG suggested using the New SRO's Restricted Fund to fund qualifying claims in the Arbitration Program.

While we support the goal of enhancing access to justice, we do not believe it is an appropriate use of the New SRO's Restricted Fund to subsidize what is effectively a private claim for compensation, particularly where OBSI's free services are available.[11] Stated differently, we do not support expanding the use of the Restricted Fund beyond its current focus on investor protection issues and initiatives that benefit the public or the capital markets more broadly. Instead, we would encourage the New SRO to highlight resources that may be available to complainants experiencing financial difficulties accessing the Arbitration Program, such as the Osgoode Investor Protection Clinic.

Increasing the Maximum Award Limit (WG Recommendation 16)

The WG recommended increasing the Arbitration Program's award limit from $500,000 to $5 million (and above with the parties' consent) to allow for greater access to the Arbitration Program.

FAIR Canada supports the WG's recommendation. We agree with the WG's statement that the Arbitration Program is designed to be a useful alternative to litigation. We also believe that, to enhance the use of the Arbitration Program, it must become a more attractive option for investors than civil litigation, particularly for larger claims. The award limit was increased from $100,000 to $500,000 following a public consultation in 2011. Since that time, litigation costs have risen significantly. As a result, there may be claims above $500,000 that are simply not worth litigating because of the legal fees and the costs of going to trial. For complainants to use the Arbitration Program for such claims, the award limit needs to be increased.

Under the current regime, investors who wish to claim over $500,000 in losses are forced to resort to civil litigation due to OBSI's $350,000 limit and the Arbitration Program's $500,000 limit. An increase to a much larger limit of $5 million would provide investors with a viable and attractive alternative to the costly and time-consuming civil litigation route.

[11] FAIR Canada does, however, support using funds designated as disgorgement in the Restricted Fund to make payments to investors who have suffered harm due to misconduct proven in an enforcement proceeding. The New SRO recently issued a consultation on the issue of disgorgement.

Shortening the Timeline to Commence Arbitration (WG Recommendation 17)

The WG recommended that the requirement for a dealer to respond to a client complaint within 90 days of its receipt[12] be shortened to 30 – 45 days.

FAIR Canada agrees there is merit in attempting to resolve disputes directly with the dealer before seeking a resolution through an external body. Some complaints may be quickly and easily resolved using the dealer's internal complaint handling process and without having to involve OBSI or incurring the costs of arbitration or litigation.

In our view, however, the 90-day period is too long, and there is no justifiable reason firms cannot resolve complaints within a shorter period.

We agree with the WG's recommendation for a reduced timeframe. We believe 30 – 45 days would be ideal, as it better aligns with the practices of other jurisdictions and would foster more timely complaint resolution. For example, financial firms regulated by the Australian Securities & Investments Commission generally have 30 days to inform complainants of the outcome of their complaint.[13] Similarly, the Swiss Banking Ombudsman typically gives firms four weeks to resolve complaints before it becomes involved.[14] In Ireland, financial services providers have 40 business days to resolve a complaint, after which the consumer may refer the complaint to the relevant ombudsman.[15]

At a minimum, the 90-day period should be reduced to be consistent with recent changes to the *Bank Act* and proposed changes in Quebec regarding dispute resolution in the financial sector. Under the *Bank Act* and its accompanying regulations, banks must provide a final response to the complainant within 56 days.[16] Previously, banks had 90 days to resolve disputes, but the Department of Finance reduced the period to 56 days to align Canada with best practices internationally for bank complaint handling.[17]

Quebec's Autorité des marchés financiers recently sought comment on a draft regulation on complaint processing and dispute resolution in the financial sector.[18] Under the proposed regulation, dealers in Quebec and other financial institutions would have 60 days to resolve a complaint (subject to an exemption for circumstances that are exceptional or beyond the firm's control).

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[12] New SRO, Corporation Investment Dealer and Partially Consolidated Rules, January 1 2023, Rule 3726, Paragraph 4.
[13] Australian Securities & Investments Commission, Regulatory Guide 271 - Internal Complaint Resolution, Section RG 271.56, September 2021.
[14] Swiss Banking Ombudsman Frequently Asked Questions, question 11.
[15] Central Bank of Ireland, Unofficial Consolidation of the Consumer Protection Code, Section 10.9(d), March 2020.
[16] Financial Consumer Protection Framework Regulations, s. 14.
[17] Fasken Martineau DuMoulin LLP, The Wait Is Over: Federal Government Releases Regulations For Financial Consumer Protection Framework, August 25, 2021.
[18] Autorité des marchés financiers, Consultation on Draft Regulation Respecting Complaint Processing and Dispute Resolution in the Financial Sector and Draft Regulation, December 8, 2022.

Publishing Arbitration Decisions (WG Recommendation 15)

The WG recommended engaging in public consultation on publication of arbitration decisions, either as summaries, redacted decisions, or unredacted decisions.

FAIR Canada believes there may be some merit in enhancing the transparency of the Arbitration Program by publishing certain aspects of arbitration cases. Given the WG's concerns regarding the lack of access to and knowledge about the Arbitration Program, it could benefit investors to make arbitration cases more transparent. However, the goal of transparency must be balanced with the need to preserve the parties' confidentiality and to ensure continued use of the Arbitration Program. Unlike court proceedings, where details of cases and decisions are made public, parties choose arbitration because it is essentially a private process. Too much transparency could dissuade complainants from using the Arbitration Program.

We recommend that the New SRO consider publishing, on a no-names basis, case summaries, including the allegations, the relief requested, and the relief awarded. This could improve the visibility of the Arbitration Program, helping investors understand the types of claims brought to arbitration and assess whether arbitration is a suitable avenue for their complaint. In our view, this approach strikes the right balance between enhancing the transparency of the Arbitration Program and maintaining the parties' privacy.

WG Recommendations for Immediate Implementation

The WG's Part 1 recommendations focus on raising awareness of the Arbitration Program, enhancing its quality and efficiency, and making it more accessible.

In general, FAIR Canada agrees with the Part 1 recommendations. It is important to facilitate investor awareness and understanding of the Arbitration Program to promote access to justice and public confidence in the complaint handing process. We support, in particular, the recommendation to develop specialized, plain language Arbitration Program resources, such as a step-by-step overview of the arbitration process. Dispute resolution processes can be confusing and overwhelming for the average lay person, and resources such as these will help investors understand and navigate the Arbitration Program.

There is, however, an aspect of the Part 1 recommendations with which we disagree: the suggestion in recommendation 4 to develop specialized rules and practices specifically tailored for the Arbitration Program. The WG stated that arbitration rules and practices should not be limited by the service provider's rules of procedure but rather tailored to the needs of the Arbitration Program. The WG therefore recommended that the New SRO develop specialized rules and procedures specifically tailored for this Arbitration Program, which either an internal or external administrator could oversee.

We do not believe it is an appropriate use of the New SRO's resources to develop arbitration rules and procedures, nor do we think it is necessary. This would be a costly, time-consuming undertaking that would detract from the New SRO's core responsibilities, such as monitoring compliance with the rules and investigating possible breaches of the rules. We support the current model in which the New SRO designates service providers with expertise in arbitration to administer the Arbitration Program and believe it has served the parties to an arbitration dispute well.

Additional Comment – Expanding the Arbitration Program to Mutual Fund Dealers

The consultation on the Arbitration Program was issued before the creation of the New SRO and pertained exclusively to IIROC dealer members. The recent amalgamation of IIROC and the MFDA into the New SRO raises the question of whether the Arbitration Program should apply to all members of the New SRO.

We recommend that the New SRO consider the merits of expanding the Arbitration Program to all members of the New SRO. This would create a level playing field, ensuring clients of different types of dealers have the same avenue of redress available to them. It could also enhance the visibility and use of the Arbitration Program.

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Thank you for considering our comments on this important issue. We welcome any further opportunities to advance efforts that improve outcomes for investors. We intend to post our submission on the FAIR Canada website and have no concerns with the New SRO publishing it on its website. We would be pleased to discuss our submission with you. Please contact Jean-Paul Bureaud, Executive Director, at jp.bureaud@faircanada.ca or Tasmin Waley, Policy Counsel, at tasmin.waley@faircanada.ca.

Sincerely,

Jean-Paul Bureaud
Executive Director
FAIR Canada | Canadian Foundation for Advancement of Investor Rights