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:
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Summary of Public Comments relating to IIROC Arbitration Program Review and Request for Comments re: Award Limit of $500,000 and Costs Awards

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 organizations, ADR Chambers ("ADRC") and the Canadian Commercial Arbitration Centre ("CCAC"), are approved to conduct arbitrations under the Program and each organization has responsibility for cases arising in assigned jurisdictions.

IIROC has undertaken a comprehensive review and evaluation of the Program. IIROC has made a number of administrative changes to harmonize the operation of the Program and to enhance statistical reporting by ADRC and CCAC to IIROC. IIROC issued Notice 09-0359 on December 16, 2009 providing extensive information about the Program and other dispute resolution recourses and inviting comments regarding:

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.

This Notice discusses certain issues raised via the comment process. A complete summary of comments, together with IIROC's views, is provided as Appendix A to this Notice.

IIROC is proposing to increase the award limit under the Program to $500,000. IIROC is also proposing a change in the rules of procedure under the Program to permit a claimant to opt, at the commencement of an arbitration proceeding, to eliminate the arbitrator's discretion to award costs against a party, unless the arbitrator finds that the party has acted in a manner that may be characterized as unfair, vexatious, improper, in bad faith or has unnecessarily and unreasonably prolonged proceedings. 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. Please refer to Notice 09-0359 for a description of these dispute resolution alternatives.

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.

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 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.

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 currently 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. While IIROC may receive a copy of the decisions, the proceedings are otherwise non-public.

Viability of the Program

Most commenters responding to Notice 09-0359 supported the continuation of the Program and suggested improvements to the Program, including increasing the award limit.

Award Limit

Almost all submissions relating to the award limit favour an increase in the award limit, generally ranging from $350,000 to $1,000,000. The majority cluster at the $500,000 mark. IIROC had originally contemplated an increase to $350,000. Based on comments received and sufficiently broad support for increasing the limit above $350,000, IIROC is proposing an increase in the arbitration award limit to $500,000.

The investor will continue to have choice of recourse: OBSI for up to $350,000, arbitration for up to $500,000 and court action.

For claims between $350,000 and $500,000, there should be clear benefits to arbitration over civil litigation in terms of expedience and cost. If a claimant retains legal counsel and/or experts or if the case is complex, arbitration is more cost effective for claims for these higher amounts.

Some dealers have expressed concern with a higher award limit, as arbitration is binding but may not, in their view, offer the same procedural protections as court. However, arbitration is presided over by a retired judge or experienced lawyer and both parties have an opportunity

to agree on the choice of arbitrator. The Program rules of procedure and governing law ensure administrative fairness of the proceedings. IIROC believes that a $500,000 award limit is appropriate and reflects a balance between providing greater access to recourse that is expeditious and cost-effective, and ensuring adherence to principles of natural justice and legal process.

IIROC is, therefore, proposing to increase the Program's award limit to $500,000 and invites comment on this matter.

Costs Awards

Under the current rules of the Program, the arbitrator may make an award of costs in his/her discretion. Costs might relate to fees of legal counsel or experts. In contrast, arbitration fees (the administrative fees and disbursements of the arbitration organization and the fees of the arbitrators) are, in principle, divided equally between the parties with discretion of the arbitrator to reallocate those amounts. Postponement and cancellation fees are paid by the incurring party (claimant or respondent).

Several investors and investor advocates supported elimination of costs awards. The result would be that each party bears its own costs. Certain commenters recommended instead imposition of a low cap on costs awards, or only permitting awards of costs in limited circumstances.

A significant percentage of complainants retain legal counsel at some point in the arbitration process.

While the risk of an adverse costs award may deter some investors from pursuing arbitration, others may prefer to assume that risk for the opportunity to recover costs if the claim is successful. The investor would have the opportunity to recover costs if civil litigation were pursued instead of arbitration. IIROC is, accordingly, proposing revision of the rules of procedure of ADRC and CCAC to permit the claimant to choose, at the point of filing the claim, between the following options regarding costs awards:

1. the arbitrator shall not award costs against a party unless he/she finds that the party has acted in a manner that may be characterized as unfair, vexatious, improper, in bad faith or has unnecessarily and unreasonably prolonged proceedings, or
2. the arbitrator shall have discretion to award costs against a party.

The respondent would be advised of the election at the outset. **IIROC requests comments on this proposed change in rules of procedure. IIROC also seeks comments as to when it would be appropriate to disclose the claimant's election to the arbitrator**

(e.g., whether the election by the claimant as to costs should be disclosed at the outset of the proceeding or only after the merits are determined).

Several commenters requested application of a new rule eliminating costs awards to cases in progress. If the proposed rule of procedure outlined above is adopted, mandatory application to cases in progress could cause prejudice to a party relying on rules in effect. The parties may, by agreement, modify the application of the rule on cost awards to a case in progress in accordance with the policy considerations outlined above.

IIROC believes the current approach with respect to sharing of arbitration fees is appropriate and does not intend to change it.

Investor Assistance and Education

A number of commenters recommended improved education for investors. Two commenters recommended that IIROC provide or pay for services providing investors with guidance and/or assistance in understanding and preparing claims and determining eligible losses.

IIROC has undertaken a number of information and education initiatives, including website disclosure, a webcast, creation of industry brochures, and, most recently, implementation of a new, personalized and bilingual telephone information service to provide information about the alternative avenues of investor recourse. IIROC will continue to evaluate and seek opportunities to provide information and guidance for investors.

The websites of the arbitration organizations also provide information, including the rules of procedure relating to the Program and other useful resources.

The Program is operated by third parties independent of IIROC. IIROC believes that it is important to preserve the independence of the Program and the proceedings.

Publication of Decisions, Case Summaries and Statistics

A number of commenters advocated publication of decisions (without names), case summaries and/or statistical information. IIROC is concerned that mandating publication of arbitral decisions could increase costs to the parties and result in the process taking longer. IIROC believes that one of the hallmarks of arbitration, confidentiality, should be preserved.

IIROC does not support creation of quasi-jurisprudence by publication of arbitration decisions (or summaries). Decisions rendered under the Program are not intended to create precedents for subsequent cases. Cases under the Program are decided in accordance with applicable law based on the specific facts of each case.

IIROC has insisted on more robust and standardized tracking and reporting of statistical information by the arbitration firms to IIROC going forward. These new procedures and reporting guidelines will enable IIROC to accurately publish statistical indicators regarding the Program. This statistical information will provide some valuable aggregate information and trend guidance.

Expedience of Arbitration Process

Certain submissions commented on the amount of time it takes to resolve a claim under the Program. IIROC agrees that the cases should be resolved more expeditiously and has taken several steps to encourage this end. One of these steps, as outlined in Notice 09-0359, was to explicitly request that the arbitration organizations enforce the time delays established under the rules of procedure. IIROC has also requested that the arbitration organizations close files where claimants fail to proceed and do not respond to repeated communications. IIROC has also clarified the rules regarding appointment of the arbitrator. If the parties cannot agree on the choice of arbitrator after a period, the arbitrator will be appointed by the arbitration organization so the case can proceed.

The enhanced reporting guidelines will permit the arbitration organizations and IIROC to monitor case durations.

One Dealer Member recommended simplified procedures for smaller claims. Under the current rules, parties may agree to a simplified procedure, including decision based on written pleadings only. IIROC may, in future, consider mandating specific rules regarding simplified proceedings, but is of the view that keeping the rules of procedure simple and straightforward is important at this stage of the Program.

Designation of Additional Arbitration Firms

The National Alternative Dispute Resolution Section of the Canadian Bar Association suggested IIROC conduct a RFP every three to five years. A Dealer Member recommended expanding the list of approved arbitration organizations and standardizing the rules of procedure to address inconsistencies. IIROC recently consolidated the number of approved arbitration organizations and harmonized the rules of procedure for a number of reasons. IIROC places high importance on fairness and consistency in rules, procedures and administrative practices across cases and jurisdictions. This is achieved most effectively and efficiently through some degree of consolidation. IIROC's review revealed that different organizations administer the same rules differently.

The Program should, for a period, operate and be evaluated in the context of the increased award limit and the changes already disclosed. IIROC does not intend to revisit the current

structure or process for approval of arbitration organizations until the next phase of the review of the Program. IIROC would consider a RFP process after this period, as appropriate.

Comments relating to OBSI

IIROC received a number of comments relating to the Ombudsman for Banking Services and Investments ("OBSI"), including the recommendation that OBSI's limit be decreased. It would not be feasible for IIROC, acting alone, to decrease OBSI's claim limit. The current dispute resolution framework was established as a multi-sector solution for the banking and investment industry. The OBSI limit applies to all participants of OBSI, including, but not limited to, IIROC Dealer Members.

National Instrument 31-103

Several commenters sought guidance on the relationship between (i) IIROC Rule 37 requiring Dealer Member participation in an ombudservice and an arbitration program, and (ii) the requirement in section 13.16 of the CSA's National Instrument 31-103 that registrants make available to clients and fund independent dispute resolution or mediation services.

IIROC Rule 37 and the CSA's National Instrument 31-103 are consistent. Compliance by members with Rule 37 (specifically participation in both OBSI and the Program) constitutes Dealer Member compliance with National Instrument 31-103, section 13.16.

Request for Comments

IIROC is proposing an increase in the award limit under the Program to $500,000. IIROC invites comment on this proposal.

IIROC is also proposing a change in the rules of procedure of ADRC and CCAC to permit a claimant to opt, at the commencement of an arbitration proceeding, to eliminate the arbitrator's discretion to award costs against a party, unless the arbitrator finds that the party has acted in a manner that may be characterized as unfair, vexatious, improper, in bad faith or has unnecessarily and unreasonably prolonged proceedings. IIROC seeks comment on this proposed change. IIROC also invites comment as to when it would be appropriate to disclose to the arbitrator the claimant's election as to costs.

On receipt and consideration of any further comments, the IIROC Board of Directors will determine if it is in the public interest to proceed with the proposed increase in the award limit under the Program to $500,000 or some other amount. IIROC will also determine whether to implement with the arbitration organizations changes to the rules of procedure regarding costs awards as outlined in this Notice. IIROC will issue another Notice regarding the outcome of these matters.

Comment letters may be addressed to:

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Comments will be accepted until October 8, 2010. Comments will be posted on the IIROC website as they are received.