

Independent Press Standards Organisation Arbitration Scheme Consultation Paper

A consultation regarding the implementation of an arbitration scheme to aid access to justice and reduce costs relating to the resolution of legal disputes against the press.

June 2015

What is IPSO?

1. The Independent Press Standards Organisation (IPSO) is the independent regulator of the newspaper and magazine industry. We exist to promote and uphold the highest professional standards of journalism in the UK, and to support members of the public in seeking redress where they believe that the Editors' Code of Practice has been breached. We are able to consider concerns about editorial content in newspapers and magazines, and about the conduct of journalists.
2. We administer the Editors' Code of Practice and take active steps to ensure that publications adhere to it. The Editors' Code deals with issues such as accuracy, invasion of privacy, intrusion into grief or shock and harassment.
3. We handle complaints, and conduct our own investigations into editorial standards and compliance. We also undertake monitoring work, including by requiring publications to submit annual compliance reports. IPSO has the power, where necessary, to require the publication of prominent corrections and critical adjudications, and may ultimately fine publications in cases where failings are particularly serious and systemic.
4. IPSO is here to serve the public by holding publications to account for their actions. We will strive to protect individual rights, and by upholding high standards of professional conduct, will help maintain freedom of expression for the press.

What is the IPSO Arbitration Project?

5. The IPSO Arbitration Project is a consultation investigating the potential use of an arbitration scheme for civil-legal claims against the newspaper and magazine industry.
6. The consultation outlines various options and proposals for an IPSO arbitration mechanism and seeks comments and feedback upon the same.
7. For further information on the issues raised in this document, please refer to the initial chapters of IPSO Arbitration Report provided alongside this consultation paper.

What is Arbitration?

8. Arbitration is a private, alternative dispute resolution process for legal disputes, such as defamation and privacy. It is an alternative to litigation and is not run alongside or prior or subsequent to a court case.
9. The IPSO arbitration project aims to provide a cheaper and faster process for resolving civil law disputes against the press, thereby decreasing barriers which currently limit access to justice. It would not affect or replace the current regulatory complaints procedure provided by IPSO in relation to breaches of the Editor's Code.

10. Arbitration requires the parties to sign a contract (the arbitration agreement), agreeing to have their dispute determined by an independent third party (the arbitrator). The arbitrator will have the power to direct procedural and evidential issues in order to deliver a streamlined dispute resolution process, tailored to the specific dispute.
11. Arbitration is also governed by statute.¹
12. Arbitration is binding on the parties. This means that a decision made by the arbitrator is final. The dispute cannot be reassessed on the facts by the court and appeals may only be made on points of law, where the arbitrator exceeds his/her jurisdiction, or where there is a claim of serious irregularity. In certain circumstances the parties may agree to limit the right of appeal even further.
13. Arbitration often attracts lower costs than equivalent cases going to court. The need for legal representation can be kept to a minimum by providing for a streamlined and less formal process. Disputes also tend to be resolved more quickly.
14. The scheme cannot resolve criminal or commercial matters and will not apply to claims under the Data Protection Act.

The Consultation Period:

15. The consultation period will run for 12 weeks from Monday 15th June 2015 and will finish at 5pm on Monday 7th September 2015. Please return your response to the document overleaf by email to alistair.henwood@ipso.co.uk or by post to:

The Arbitration Project
Independent Press Standards Organisation
Gate House
1 Farringdon Street
London
EC4M 7LG

16. Unfortunately we will be unable to process responses received after 7th September 2015.

If you require further assistance please contact Alistair Henwood, the Arbitration Project Researcher, on 0300 123 2220.

¹ The Arbitration Act 1996 in England, Wales and Northern Ireland, and the Arbitration (Scotland) Act 2010 in Scotland. These Acts impose certain mandatory provisions, provide for implied rules and safeguard the impartiality and independence of the process.

What Happens Next?

17. After the consultation period a report will be sent to the IPSO Board recommending a proposal for an arbitration scheme. If this is accepted by the Board, an independent arbitration service provider will be selected to develop detailed rules for the recommended scheme with IPSO, and to then run a pilot scheme. In order to further develop this scheme into a permanent arbitration service the Regulatory Funding Company will need to give its assent.

IPSO Arbitration Scheme

Background Information:

18. Publishers agree to IPSO regulation via contracts known as IPSO Scheme Membership Agreements (SMAs). Currently IPSO may provide an arbitration service under the SMAs after due consideration and consultation, having completed a pilot scheme and where the Regulatory Funding Company is in agreement. Under the SMA, publications that are regulated by IPSO (the regulated entities) may voluntarily subscribe to the arbitration scheme. Subscribed regulated entities would then be able to decide on a case-by-case basis whether to use IPSO arbitration for specific disputes.
19. Any option or proposal outlined below, which runs counter to the current contractual provisions as stated above, should be read as proposing - and being subject to - appropriate amendments to the SMAs and IPSO Regulations.
20. The aim is to provide a speedy and cheap means of solving legal disputes, other than through litigation, whilst preventing vexatious and frivolous claims. The need to attempt to settle a dispute before coming to arbitration, combined with the requirement to pay an administrative fee² will prevent such claims from entering the scheme. The notice requirement associated with the strike out mechanism will allow bad claims to be withdrawn at an early stage without costs building up. If a bad claim is still pursued, the arbitrator may make a binding strike out order to remove it.

Mandatory and Voluntary Schemes:

21. Arbitration may only occur via agreement between the parties. Parties may however voluntarily oblige themselves to arbitrate future claims. This means that the press could, via the IPSO SMAs, subscribe to an arbitration scheme in which they could not choose to arbitrate on a case-by-case basis. For the avoidance of doubt, this paper refers to this type of scheme as mandatory. Only Proposals 1 and 2, as identified on page 12, outline a mandatory scheme. Claimants will not be obliged to arbitrate under any of the proposals listed below.
22. References to voluntary arbitration in this paper relate to a scheme in which the press is free to decide on a case-by-case basis whether or not to use arbitration. Both parties would therefore have to agree to arbitrate specific claims at the time of the relevant dispute. Proposal 3, as identified on page 13, outlines such a scheme.

Management of the Scheme:

23. An independent arbitration service provider (the arbitration company) will administer the arbitration scheme. In the case of mandatory arbitration the administrative costs of

² Unless the scheme is a voluntary one.

arbitration would be in the form of a fixed fee payable by the parties in an equal share. In the case of voluntary arbitration the fixed fee would be covered by the defendant.

24. Any annual fees or start-up costs would be funded by the regulated entities retrospectively in proportion to use. Therefore only those using the scheme would pay for its up-keep.
25. The arbitration company will provide guidance regarding the suitability of the arbitration process to the specific claim, as well as information which distinguishes the scheme from the free IPSO complaints procedure. It will also manage the pre-arbitration procedure and select an arbitrator for individual claims.
26. The arbitration company will be able to prevent claims from entering the scheme on procedural matters, such as where the claimant has not contacted the publisher in order to settle the dispute first, or has not complied with any relevant pre-action protocol.
27. The arbitration company would not be able to prevent a claim on its substance or potential merit. It would have the ability to provide guidance on these issues.

Scope and Jurisdiction:

28. The arbitrator will have the power to rule on his/her substantive jurisdiction. This means that where there is a dispute as to the arbitrator's ability to make a determination on a particular issue, the arbitrator will be able to decide on this matter without the parties having to go to court.
29. The IPSO arbitration scheme will be made available for claims relating to defamation, privacy and harassment made in relation to disputes arising from the publication of news-related material.
30. Such claims will include those covered by the Crime and Courts Act 2013 (i.e. Libel, slander, breach of confidence, misuse of private information, malicious falsehood and harassment). The arbitration scheme will not determine data protection disputes.
31. Appropriate pre-publication matters, such as claims for injunctive relief, and otherwise unsuitable claims will be directed to the court. (See more on suitability below).

Privacy:

32. Arbitrations will be conducted in private and allow for 'without prejudice' discussions between the parties. This dialogue is designed to provide speedy and informed resolution at minimal cost to the parties.
33. There will be a general assumption that awards and determinations are to be kept private. Parties may ask the arbitrator for the award to be made public however. Awards may be made public where the arbitrator determines that publication is an integral

element of providing effective resolution in the circumstances of the case, or where they deem it to be in the public interest.

34. In any event, the award or determination will be shared confidentially with the arbitration company and with IPSO. This will allow for effective oversight of the scheme, allow for anonymised information to be published regarding the schemes processes and efficacy, and help to inform the Standards (investigative) arm of IPSO.

Selecting an Arbitrator:

35. Arbitrators must be independent of the parties and the dispute. They must be of high reputation and standing, and be media law experts.
36. The arbitration company will select an arbitrator from a list of approved arbitrators on behalf of the parties. In so doing the company must have regard for minimising costs and delay. This decision will be binding, however the parties will be given the opportunity to object to the company's selection before a final decision is made.
37. Arbitrators must disclose any conflict of interest at the earliest possible time.

Strike-Out Mechanism:

38. The arbitrator must be able to remove vexatious and frivolous claims at an early stage. Defendants will – having given notice to the claimant – be able to apply for the claim to be struck out. This would activate a fast track arbitration procedure, which would likely attract lower fees and costs than full substantive arbitration.
39. Claims will be struck out on the following grounds:
 - The claim is wholly without merit;
 - The claim is trivial with the time and cost of the claim being wholly disproportionate to the potential award;
 - The claim is made in bad faith;
 - The claim represents an abuse of process;
 - The claim is otherwise frivolous or vexatious.
40. The arbitrator shall, in determining whether or not to strike out a claim, consider all the circumstances of the case, including the conduct of the parties and the outcome of the publication's internal complaints process or any complaint lodged with IPSO. In particular the arbitrator shall consider whether or not previous awards or offers under these mechanisms would make it disproportionate to arbitrate the claim.
41. The strike out mechanism will be carried out as part of the arbitration process, after the arbitration agreement is signed. These decisions would therefore be final and binding.
42. The notice given by the regulated entity must be in writing, clearly stating the grounds for believing the claim ought to be struck out. Additionally the notice must clearly state

that, upon the claim being struck out, the arbitrator would be asked to award their costs³ (and any administrative fee paid by the defendant) against the claimant.

43. The arbitrator will not be able to award his/her costs against a claimant pursuing a claim under a conditional fee agreement.

Suitability:

44. The arbitrator must have continuous regard for the suitability of the claim. Upon it becoming clear that the claim is unsuitable to be fairly resolved via the arbitration scheme, the arbitrator must - at the earliest possible time - advise the parties as such and terminate the arbitration. Parties should be given the chance to respond before a final decision is made on the matter.
45. A termination based upon suitability will not affect the claimant's right to pursue the dispute in court.
46. Whilst the arbitrator may proceed in this manner under his/her own initiative, either party may also make an application, having given notice to the other side, to have the arbitration terminated on grounds of suitability.
47. Claims are likely to be dismissed as unsuitable where:
 - In the arbitrator's opinion, they go beyond his/her substantive jurisdiction;
 - In the arbitrator's opinion the claim gives rise to a novel or complex point of law, and it may be in the public interest or in the interest of the parties to have a determination by the Court, and in the event of an appeal, by the Court of Appeal;
 - In the arbitrator's opinion the claim is likely to need a lengthy hearing and/or cannot be conveniently held before the arbitrator;
 - In the arbitrator's opinion disclosure of documents may be required from a non-party in order to make a just determination of the claim.
48. In using his/her discretion in relation to the suitability of claims, the arbitrator must have regard for promoting access to justice.
49. In relation to suitability determinations, it will be within the arbitrator's discretion to make no cost order, or a 'costs in cause' order where appropriate. A 'costs in cause' order would make an award of the costs relating to the arbitration contingent upon the outcome of a subsequent court case.
50. The arbitration company will be able to provide basic guidance as to the suitability of claims before the arbitrator is selected. If parties agree that a claim is unsuitable they may terminate the process at this stage. Where a party ignores such advice, the claim can continue.

³ These costs relate to the work done by the arbitrator and not legal costs incurred by the parties in bringing a claim.

51. The conduct of the parties in this regard can be taken into account in relation to the strike out mechanism. Where either party has pursued arbitration on an unsuitable claim in bad faith or in such a way as to affect an abuse of process, the arbitrator may make an award of costs against that party.

POINT OF INTEREST (1): IPSO is particularly interested in hearing responses relating to the scope and strength of the suitability criteria, and the manner in which parties may obtain information and advice regarding the use of the arbitration scheme.

Procedure:

52. The arbitrator will have the power to determine all procedural, costs and evidential issues. This will allow him/her to manage the case and direct its structure and schedule.
53. Each party will submit a single claim document, outlining the dispute. It will then be for the arbitrator to order further disclosure where necessary. This process will be designed to limit the need for extensive legal representation and allow for effective case management. The parties may however agree with the arbitrator to amend this process where it is deemed appropriate and necessary to do so.
54. Claim forms will be designed to highlight the key areas of dispute which are preventing settlement, rather than necessitate parties to submit formal pleadings.
55. The arbitrator must consider the form of procedure that is most appropriate to the resolution of the claim. The arbitrator will have the power to set deadlines, ask further questions of the parties and order further disclosure where appropriate.
56. Where possible, and only where this will reduce costs and maintain fairness for the parties, the arbitrator will allow the parties to settle the dispute after determining the substantive issues of the claim. If the parties cannot do this they will go back to the arbitrator for a consequential ruling on awards and costs.

POINT OF INTEREST (2): In order to further direct arbitrators towards organising a quick process, the arbitration agreement could state that determinations should be given within a standard timeframe. Upon application or agreement by the parties an extension could be granted in individual cases by the arbitrator. IPSO would be particularly interested in suggestions and concerns relating to the application and length of a standard timeframe for resolving claims.

Awards:

57. The arbitrator shall have the same powers to award relief as the court, save that the arbitration process is not suitable to order pre-publication injunctive relief. The arbitrator may, for example:
- award damages to the claimant,
 - direct the respondent to publish a correction and/or summary of the award,
 - direct the respondent to take down material from a website,
 - direct the respondent not to re-publish the information or statement upon which the claim is based.
58. It shall be within the arbitrator's absolute discretion to direct the prominence of a correction and any ordered publication summarising the award given.
59. It will be in the arbitrator's power under section 39 of the Arbitration Act 1996, and under Rule 53 of the Scottish Arbitration Rules where it applies, to award provisional orders.

POINT OF INTEREST (3): IPSO would particularly like to receive responses relating to the availability of damages under the scheme. It has been suggested that a cap should apply in recognition of the streamlined procedure provided. This cap could apply universally across the scheme (for example stating that the maximum award under the scheme should be limited to £25,000). Alternatively individual caps could be tailored to different types of claim.

We would like to receive responses in relation to the value of any caps, and whether or not such a provision should be implemented.

Costs:

60. The arbitrator's costs, associated with making a substantive determination, will be covered by the defendant (subject to those costs being recoverable against the claimant where the claim is struck out).
61. It would be in both parties' interests to utilise the arbitrator's determination on substantive issues to resolve the dispute between themselves. Further rulings on the appropriateness of awards may increase costs unnecessarily.
62. The arbitrator will allocate his/her costs relating to such consequential rulings between the parties, or to one specific party, having regard for the conduct of the parties in attempting to resolve the dispute.
63. Parties utilising conditional fee agreements would agree not to recover success fees or after-the-event insurance premiums from the unsuccessful party.

64. IPSO would prefer the scheme to require little or no legal representation; maintaining it as a cheap, easy and swift process to use. This is in order to help reduce costs, whilst also attempting to rebalance the inequality of arms between parties. However, we are aware that parties which are capable of obtaining legal advice cannot and should not be prevented from doing so. The inquisitorial powers of the arbitrator to direct procedural and evidential matters will help to rebalance the inequality of arms in this regard.

POINT OF INTEREST (4): In order to encourage the use of arbitration as a less legalistic process the following proposals have been put forward relating to the recovery of legal costs (those payable to legal representatives/advisers):

1. Legal costs should not be recoverable from the losing side. This suggestion would necessarily prevent claims within the scheme from being pursued under conditional fee agreements.
2. Only claimant legal costs which were judged to be appropriate and proportionate by the arbitrator could be recovered from an unsuccessful defendant. A cap on the hourly rate or a total legal costs cap could apply as standard. The arbitrator must have the discretion to allow for exceptions where appropriate. The arbitrator would have to balance the grant of any such exception against the need to have regard for the suitability of the claim.

Ipso would welcome responses relating to these suggestions.

Pathways to Resolution:

65. Before a claimant applies for arbitration they must attempt to settle their legal dispute with the relevant publisher and go through any relevant pre-action protocol. Disputes resolved satisfactorily in this way will cost less and often be achieved faster than via arbitration.
66. Where claims are not satisfactorily resolved, and the claimant wishes to pursue the claim further, the arbitration scheme will be available for civil-legal disputes (subject to the proposals outlined below).
67. Complaints under the Editor's Code will still go to IPSO. There will be no requirement for a claimant to seek permission from IPSO in order to access the arbitration scheme. Parties may go straight to the arbitration company.
68. The arbitration company will keep IPSO informed of applications made to it under the scheme. The company will also inform claimants of the free complaints handling service provided by IPSO, whilst providing a basic administrative assessment as to the suitability of arbitration in relation to the pursued the claim.

POINT OF INTEREST (5): A voluntary step in the process could be added to allow parties to enter into quick-stream mediation, known as conciliation, in order to try and settle the dispute before going into arbitration. Conciliation would not be for everyone, as it would require a face-to-face meeting and would not produce a binding decision. It may however lead to resolution, guided by an independent party, in a swifter and cheaper manner than arbitration. IPSO would welcome further feedback on this suggestion in particular.

Universal Application of the Scheme:

69. There is no universal civil-costs regime across the UK. Likewise the statutory provisions set up to encourage the use of a recognised arbitration service in England and Wales do not apply elsewhere in the UK. The benefits which might attract members of the press to use an IPSO scheme will therefore vary to some degree across the different legal jurisdictions (England and Wales, Scotland and Northern Ireland).
70. Furthermore, the UK press is far from being a homogenous entity. Different sectors (roughly capable of identification as: the national newspapers, the regional and local newspapers and the magazines) have vastly different resources and attract varying degrees of contention in the stories they run. The need for – and want of - publications to use arbitration will therefore vary significantly across the width of the industry.
71. The scheme must be able to take this into account, either in its application to different sectors and jurisdictions, or via the availability of exemptions to the mandatory nature of any proposed scheme.
72. It may be possible to set up separate schemes for different sectors or jurisdictions. However this runs the risk of making IPSO arbitration overly complex to use. A universal scheme, with appropriate opt-out exemptions, may be an acceptable compromise in this regard.

IPSO would welcome further comments on these issues.

Mandatory Schemes and Subscription:

73. The proposals above set out the basic components of an IPSO arbitration scheme. They should be read as applying universally to the options outlined below.
74. The order of the following proposals does not represent a hierarchy of preference on behalf of IPSO.

PROPOSAL 1: Mandatory arbitration with mandatory subscription

75. Subscription to the arbitration scheme would become a mandatory part of IPSO membership. Therefore by signing into or re-signing into IPSO membership, regulated entities would agree to arbitrate future relevant claims (as defined in the Crime and Courts Act). Under this proposal, regulated entities would not be able to choose to arbitrate these claims on a case-by-case basis.
 - An opt-out clause would be available to regulated entities able to show that the scheme was *financially damaging* (please see the Point of Interest below). The opt-out would enable the regulated entity to switch to a voluntary scheme allowing them to choose to arbitrate on a case-by-case basis (as in Proposal 3 below).

PROPOSAL 2: Mandatory on those subscribed to the arbitration scheme

76. Subscription to the arbitration scheme would remain a voluntary part of IPSO membership. By subscribing to the scheme, regulated entities would agree to arbitrate relevant claims and could not therefore choose to arbitrate on a case-by-case basis. Unsubscribed regulated entities would be unable to use IPSO arbitration.
 - Under this proposal the opt-out clause would allow regulated entities to either unsubscribe from the scheme completely, or switch to a voluntary scheme allowing them to choose to arbitrate on a case-by-case basis.

A small administrative fee would be charged to claimants in order to make a claim under Proposals 1 and 2. The value of the fee would be kept to a minimum but amount to half of the administrative costs associated with setting up the arbitration. (i.e. If the arbitration company charges £500 to administer the process the claimant will be charged £250.)

The administrative charge would be recoverable against the defendant upon the claim being successful. The defendant would cover the other half of the administrative costs.

POINT OF INTEREST (6): IPSO would be particularly interested in suggestions made as to the wording of the threshold allowing a member to opt out of the arbitration scheme.

PROPOSAL 3: Voluntary arbitration with mandatory subscription

77. Subscription to the arbitration scheme would become a mandatory part of IPSO membership. Regulated entities could choose to arbitrate on a case-by-case basis under the scheme. i.e. both parties would have to agree to use the IPSO arbitration process at the time of dispute in each individual case. No opt-out clause would be necessary under this proposal.
78. Entry into the process would be free for claimants (subject to an award of costs under the strike out mechanism). The defendant would therefore cover, initially at least, the administrative costs of arbitration, as well as the arbitrator's costs relating to substantive determinations.
79. The regulated entities would be required to provide written reasons for choosing not to arbitrate individual claims. This must be provided to both the claimant and IPSO, and must include a brief summary of the dispute. IPSO would not be able to compel the regulated entity to arbitrate if the regulator disagreed with those reasons. The information would however help IPSO to determine the on-going efficacy of the scheme, and may be used in relation to its Standards Arm.

POINT OF INTEREST (7): IPSO would be interested in hearing responses as to the perceived efficacy and potential uptake of the scheme under this proposal.

It has been suggested that the proposals outlined above (1-3) would be strengthened by a Judicial Practice Direction, stating that litigation costs ought not to be recoverable by a party which unreasonably declined an offer to arbitrate a relevant claim. It is beyond the scope of this consultation and IPSO's remit to develop this suggestion further without engagement and dialogue with the appropriate authority however.

PROPOSAL 4: No Arbitration Scheme

80. Whilst the use of an arbitration scheme has been put forward as a key element of future press regulation, it is not a straight forward process, (not least because is it one which is not necessarily suited to provision via a regulator).
81. The provision of a press arbitration scheme must balance rights regarding access to court, privacy and freedom of expression. It must also find a way of balancing financial and legal inequality in relation to the relative wealth and experience of those involved in individual disputes.
82. Furthermore, the scheme would have to encompass a wide range of claims, which may require very different processes and awards. A great deal of reliance would have to be placed on individual arbitrators to effectively direct the proceedings and maintain a fair and consistent process.

83. It is arguable therefore that an arbitration scheme may not be able to provide an effective service, which is fair and acceptable to both claimants and defendants and proportionate in balancing the rights of all those concerned. This is particularly true where the sticks and carrots envisaged by Leveson, and implemented in the Crime and Courts Act 2013, do not apply universally across the UK.

POINT OF INTEREST (8): IPSO would be interested in hearing responses to Proposal 4, in relation to the acceptability and perceived efficacy of the former proposals, and would be particularly interested in suggestions regarding alternative processes which might be better utilised to aid in the resolution of civil-legal complaints.

Checklist

IPSO would welcome responses on any of the sections within this paper. Particular areas of interest include:

- The strength and scope of suitability criteria,
- The method and extent of providing pre-arbitration information and advice,
- Suitable timescales for arbitrated claims,
- Whether there should be a cap on the level of awards available,
- Whether and how legal costs should be recovered,
- Whether conciliation should be part of the process,
- The extent to which the above proposals may be capable of application to different industry sectors and/or legal jurisdictions,
- Whether the scheme should be mandatory on the press and if so in what form.

We look forward to hearing from you.