IPSO's sham arbitration system

IPSO has announced what it falsely claims to be a new "Leveson-style" arbitration scheme in its latest attempt to mislead the public into believing that it is implementing the recommendations of the Leveson Report and providing access to justice to members of the public.

Its original "pilot" scheme had no takers and was flawed in many ways – including bias against members of the public with claims

The new scheme suffers from many of the same defects. It remains a system designed to pay lip service to the Leveson Report while, in fact, being heavily loaded in favour of IPSO's press paymasters.

In particular:

- **The system is voluntary for IPSO members – most newspapers are not even part of the scheme**
- **Even those newspapers who have joined the scheme can pick and choose which cases go to arbitration, when Leveson said cherry-picking cases was not allowed and defeated the purpose.**
- **The newspapers that run IPSO have stopped IPSO from ever changing this**
- **There is an arbitrary "cap" on damages of £50,000 and a complainant cannot recover exemplary damages however badly the newspaper has behaved. Claimants therefore get a worse deal than they would in court**
- **The scheme is run by a body, IPSO, which is controlled by the newspapers it claims to regulate and which is biased against members of the public**
- **The arbitration scheme has not been independently judged as being fair and independent as Leveson required**

In addition:

- There is a 12 month limit on bringing privacy claims that usually have a 6 year limit
- There can only be an oral hearing if the newspaper agrees – whatever the view of the arbitrator – and oral hearings must be conducted in private, at IPSO's offices.
- The rules exclude appeals to the High Court on a point of law – so that the arbitration system cannot be used to build up a body of Judge approved case law.
- There is a "cap" on the costs which a complainant can recover of £10,000 – this means that newspaper, using in-house legal advisers – can devote huge resources to defending a claim, knowing that, if a complainant matches those resources s/he cannot recover the costs, however badly the newspaper has behaved. A litigant in person is limited to costs of £1,000.

It is not surprising that, in the 16 months since the IPSO arbitration system began operating as a pilot, no one ever has used it. It is a wholly inadequate substitute for the proper access to justice recommended by the Leveson Report.

In IPSO's three years' existence it has done no arbitrations, issued no sanctions against its members, fined no newspapers, and conducted no standards investigations. This is no different from the old Press Complaints Commission whose structure it is based on.

IPSO's arbitration scheme: analysis

The following documents set out the rules.

Those with * are aimed at the public and are misleading.

Pilot scheme

https://www.ipso.co.uk/media/1263/ipso-pilot-arbitration-scheme-summary-july-2016.pdf

https://www.ipso.co.uk/media/1263/ipso-pilot-arbitration-scheme-rules-may-2016.pdf

https://www.ipso.co.uk/media/1321/ipso_arbitration_scheme_v3.jpg

https://www.ipso.co.uk/media/1260/arbitration-agreement_july-2016.pdf

New Scheme

New - https://www.ipso.co.uk/media/1493/ipso-arbitration-scheme-rules-nov-17.pdf

https://www.ipso.co.uk/media/1494/arbitation-structure.pdf*

https://www.ipso.co.uk/media/1492/ipso-arbitration-scheme-summary-nov-2017.pdf*

https://www.ipso.co.uk/media/1502/ipso-arbitration-agreement_nov17.pdf

https://www.ipso.co.uk/media/1495/complaints-v-arbitration-and-court.pdf*

Scheme Summary

https://www.ipso.co.uk/media/1492/ipso-arbitration-scheme-summary-nov-2017.pdf

1. There is a 12-month limit in bringing historic claims, even though in the Courts there is a 6-year limit for privacy claims:

   The scheme can deal with claims which:

   are brought within 12 months of the alleged wrongdoing;

2. Publishers are able to review the "case against them" and then decide whether to proceed with arbitration or not, on a case by case basis. This allows them to arbitrate the winnable cases and scare claimants off with court if they fear losing:

   If a claim does fall within the remit of the scheme, we can refer it to the relevant publisher. During this referral, the parties will be able to discuss the possibility of settling the claim. If this is not possible they may agree to arbitrate, although there is no obligation to do so.

3. A code complaint cannot be pursued simultaneously to an arbitration claim. It is not clear why that is the case.

   The resolution of a dispute cannot be pursued simultaneously as an arbitral claim and a Code complaint.

The Rules

https://www.ipso.co.uk/media/1493/ipso-arbitration-scheme-rules-nov-17.pdf

1. The arbitration scheme does not apply to all cases.

   > *Participating Members are not compelled to use the Scheme in relation to any particular Claim (paragraph 1.2)*

   In other words, newspapers can pick and choose which cases they will allow to be brought. Paragraph 22 of Schedule 3 (Recognition Criteria) of the Royal Charter says:

   > *The Board should provide an arbitral process for civil legal claims against subscribers which:*
   >
   > *a) complies with the Arbitration Act 1996 or the Arbitration (Scotland) Act 2010 (as appropriate);*
   > *b) provides suitable powers for the arbitrator to ensure the process operates fairly and quickly, and on an inquisitorial basis (so far as possible);*
   > *c) contains transparent arrangements for claims to be struck out, for legitimate reasons (including on frivolous or vexatious grounds);*
   > *d) directs appropriate pre-publication matters to the courts;*
   > *e) operates under the principle that arbitration should be free for complainants to use;*
   > *f) ensures that the parties should each bear their own costs or expenses, subject to a successful complainant's costs or expenses being recoverable (having regard to section 60 of the 1996 Act or Rule 63 of the Scottish Arbitration Rules and any applicable caps on recoverable costs or expenses); and*
   > *g) overall, is inexpensive for all parties.*

2. Paragraph 1.3 says IPSO can pull the plug on the scheme at any point, and provides no metrics as to how they will assess the scheme:

   > *IPSO reserves the right to immediately terminate the Pilot Scheme at any point upon receiving information which IPSO believes to show that the Pilot Scheme is incapable of fulfilling the objective stated in clause 3.1 or that the Pilot Scheme otherwise hinders the fair application of justice.*

3. IPSO are specifically prohibited from changing the rules in such a way as to compel publishers to participate. This is the only rule-change which is specified to be against the Rules. Fee structure changes will be subject to consultation with Members but not with claimants: (paragraph 1.5)

   > *IPSO reserves the right to amend the Rules at any time save that such amendments shall not apply to arbitrations which have already commenced under the existing Rules and will not compel a Party or the Parties to arbitrate under the Scheme. Any alterations to be made to the Fees structure will only be made after inviting discussion on the matter from Participating Members, the Arbitration Company and the Arbitrator Panel.*

4. Paragraph 2.5 says that all a publisher has to do to avoid arbitration when a claimant requests it is to "provide reasons in writing". There is no mechanism for this to be contested by the claimant, and those reasons are *only* for IPSO's use in evaluating the scheme:

   > *Participating Members agree to provide reasons in writing to IPSO for not agreeing that a Claim should be arbitrated under the Scheme when a Claimant expresses a wish to do so. The reasons given shall be used by IPSO only to assess the Scheme.*

5. Paragraph 3.6 states the Rule that arbitration and code complaints cannot be pursued simultaneously. This is a reversion to the position under the PCC:

   Once agreement to pursue arbitration is reached by the Parties, Claimants will not be entitled to pursue a Code Complaint which relates to the same subject matter, until the Claim is concluded under the Pilot Scheme.

6. Paragraph 4.4 rules out appealing to the courts on a point of law (without prior agreement by both Parties). This prevents a body of case law approved by the Courts being built up:

   Rulings made by the Arbitrator are final and binding on the Parties, subject to the right to appeal to the Court on the mandatory grounds of appeal provided for by the relevant Governing Act. The Parties agree that the right to appeal under the Rules does not include the right to appeal to the Court on a point of law.

   The Arbitration Act (1996) specifies three grounds for appealing the decision of an arbitrator: challenge of substantive jurisdiction (s67), challenge of serious irregularity (s68), and appeal on point of law (s69). S69(1) states that both parties must agree to the challenge (emphasis added):

   Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

7. In Paragraph 5.4 IPSO give themselves an unconditional veto on referring arbitration claims; even if the claimant is prepared to pay the £50 fee. It's not clear on what grounds IPSO have this veto or how they would make such a decision. This is especially problematic if the board is involved as, for example, Trevor Kavanagh could be in a position to veto an arbitration claim against The Sun:

   Upon receiving the completed Arbitration Documents from the Claimant IPSO retains a discretion as to whether to refer the Claim to the relevant Participating Member and is under no obligation to do so.

8. In Paragraph 6.4 the press gets a veto on:
   a. Appeals on point of law
   b. Removal of damages cap

   Within the Agreement the Parties may agree:

   ..

   d) To allow for appeals to the Court against rulings made by the Arbitrator on points of law in accordance with the relevant Governing Act;

   e) To remove the Damages Cap

9. Paragraph 11.1 gives the press a veto to both sides over holding an oral hearing. This shows the scheme is not serious – an oral hearing can be vetoed even if the arbitrator believes one is necessary:

   Should the Arbitrator consider that an Oral Hearing is required they must first obtain agreement from the Parties in order to conduct the hearing.

10. Paragraph 11.4 says that Oral Hearings will take place at IPSO's offices. But Leveson was clear that the arbitration system must be fully independent of the regulator. Given the closeness of IPSO to the industry, this will essentially feel like "home turf" to publishers:

    The IPSO offices shall, when available, host Oral Hearings at no cost to the Parties.

11. Paragraph 13.2, on the "Interim Period" between Preliminary Ruling and Final Ruling, can only be extended beyond 21 days if both parties agree. The problem with many of these sorts of claims is that they involve individuals who have been through traumas and may have legitimate reasons for requesting delay. The arbitrator is not in a position to have discretion over the timing unless the press agrees. That is wrong – the arbitrator should be permitted to consider the circumstances of the claimant and grant a longer period if appropriate:

    The Parties may agree to extend the Interim Period during the standard 21 days, but must inform the Arbitration Company in writing if this is the case. The Arbitration Company shall in turn inform the Arbitrator.

12. Paragraph 19.4 prevents recoverability of CFA success fees and ATE premiums.

    In agreeing to arbitrate under the Pilot Scheme the Parties agree not to recover Conditional Fee Agreement success fees, or associated After-the-Event Insurance premiums, from the other Party in any event.

13. Paragraph 27.6 says the arbitrator cannot award exemplary damages. There is no proper basis for this restriction.

    The Arbitrator does not have the power to award exemplary damages.

14. Paragraphs 28.4 and 28.6 state that oral hearings will be conducted in private and Rulings will carry an assumption of being confidential unless both parties agree – these are contrary to the principles of open justice which the press usually claims are fundamental to the justice process:

    Paragraph 28.4. *If the Arbitrator agrees to conduct an Oral Hearing the hearing shall be conducted in private*

    Paragraph 28.6 *There shall be an assumption that Rulings shall be confidential … unless the Parties agree otherwise in writing*