

**Replacing provisional assessment with arbitration**

**A consultation paper**

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**Introduction**

The purpose of this consultation paper is to set out an alternative to the current system of provisional assessment of Bills of Costs, by means of the provision of a legally binding process of arbitration offered by myself. The principal benefit would be a better service than that offered by the Court Court for provisional assessment, through improved speed, efficiency and quality of decision making.

In turn this should reduce frictional costs in terms of time and money currently being spent by the parties and should cost no more than the current provisional assessment process.

**The problems with provisional assessment**

The problems with provisional assessment are readily apparent to all those who have to use the County Court system currently, to obtain a decision on the reasonableness and proportionality of a claim for costs.

The court labours under a paper based system, with all the potential that involves for delay, provisional assessments are undertaken by District Judges and Deputy District Judges, with varying levels of knowledge and understanding of costs law and practice and decisions are often poorly communicated to the parties.

The courts will not even carry out the basic arithmetic, of totalling the Bill having assessed it.

There is no immediate prospect that this position will improve. There is no money for the court system to improve it and the County Court judiciary are overburdened with work.

Even worse, on the horizon is the prospect of higher court fees, but with no improvement in service.

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However, I can offer an alternative: that is legally binding arbitration, carried out under the Arbitration Act 1996. This is a process which is commonly utilised in construction disputes, international trade disputes and other forms of commercial case.

It has not hitherto been used in costs work, but given the current problems, I consider that its time may well have come.

### **The Arbitration Act 1996**

A copy of the Arbitration Act 1996, is available for download, together with this paper at my website [www.costsbarrister.co.uk](http://www.costsbarrister.co.uk)

Starting with the basics, arbitration is not mediation, nor any of the other forms of alternative dispute resolution (ADR) with which it is often bracketed.

The parties make a written arbitration agreement, conferring jurisdiction on an arbitrator, who they have trust and confidence in, to resolve their dispute fairly and in accordance with law, by way of a binding decision.

The parties can agree in the terms of the arbitration agreement, what the arbitrator's powers are, how his decision is to be made and on what principles. They agree what procedure the arbitrator should use, what remedies he can grant, and how interest should be calculated.

They agree how the arbitrator should structure his award and what level of detailed reasons should be provided.

Once the arbitrator issues his award, it can be registered at court and then enforced using the court's process, in the same way that a judgment can be.

An appeal from the arbitrator's decision will lie on a point of law to the court.

How it might work to replace provisional assessment

I can envisage that a scheme of arbitration might work in the following way.

First the parties will consider and if happy with it, sign an arbitration agreement, conferring jurisdiction on the arbitrator.

The seat of the arbitration will be England and Wales.

The arbitration will be governed by the substantive law of England and Wales.

The arbitrator will apply by analogy the procedure of the Civil Procedure Rules and exercise his discretion in accordance with the principles set out in English law and those rules.

The agreement will provide that the arbitrator has power to make directions, deal with default, and grant remedies. Costs of the arbitration will be limited to sums equivalent to the provisional assessment process, and interest at the Judgment Act rate. Part 36 will apply.

### **Process**

After the agreement has been drawn up and made by the parties, the receiving party will draw up a Bill of Costs and serve it on the paying party. There will be no need for any part 8 proceedings, as the power to assess costs flows from the agreement.

The paying party will then serve Points of Dispute by email.

The receiving party will then serve Replies by email.

The receiving party will then upload securely to the arbitrators website, a copy of the Bill of Costs, the Points of Dispute and Replies, and a scanned copy of the file, organised according to the Costs Practice Direction.

On the basis of a turn around of 10 working days, the arbitrator will then consider and rule on the Points of Dispute.

The arbitrator will then email a draft award to the parties, and invite them to agree the costs of the arbitration or to make brief submissions by email for a ruling within 5 working days.

The arbitral award will then be finalised, with rulings on the costs of the arbitration and interest, signed, scanned and sent out to the parties.

### **Form of arbitration**

It can be anticipated that most cases can be resolved on paper (actually, by electronic submission) with no provision for an oral hearing, but the parties can

agree that the arbitrator shall hold a hearing of 1/2 day or a day, to hear oral submissions and then produce his award.

The hearing will be formally informal and will take place at chambers around a conference table, provided with coffee and biscuits.

### **Afterwards**

The final signed award legally binds the parties. It can be registered at court and then enforced, in the same way a judgment can be.

An appeal can lie from the arbitrator to the court, on a point of law.

### **Costs of the arbitration**

It is envisaged that the costs of the arbitration will be limited to those awarded by the courts on provisional assessment, unless part 36 bites, or the parties agree an oral hearing is necessary.

The arbitrators fee must be paid in advance: at the time of the submission of the documents and will be

"Paper based" determination £750 plus VAT

1/2 day hearing £1250 plus VAT

Day hearing £2500 plus VAT

which includes reading, writing the award, doing the arithmetic and finalising the binding award,

I would be extremely to interested to read comments on this proposal and in particular, whether there is a "market" for arbitration in this field.

In particular I wonder if there is increased scope to streamline the process, by submission for example of a Bill of Costs consisting of a spreadsheet, containing the claim for costs, with columns setting out the items sought, the points of dispute and the replies, and a column for the determined figure. This might aid considerably the process, and speed it up yet more.

All comments, responses, can be sent to me at

[andrewhogan@ropewalk.co.uk](mailto:andrewhogan@ropewalk.co.uk)

I welcome people subscribing to my website at [www.costsbarrister.co.uk](http://www.costsbarrister.co.uk) and seeking to Link with me on Linked In.