

# Redrafted DBA Regulations: a promising basis for reform

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A [proposed redraft](#) of the much-criticised 2013 regulations governing [damages-based agreements \(DBAs\)](#) has recently been published and has been broadly welcomed by practitioners. The redraft is a joint effort by Professor Rachael Mulheron of QMUL and Nicholas Bacon QC, who were invited by the Ministry of Justice (MoJ) to conduct an independent review of the [2013 Regulations](#). This followed the government's recognition, in its [post-implementation review of Part 2 of LASPO](#), that the current version "would benefit from additional clarity and certainty", a comment which some may say displays the art of understatement.

The redrafted Regulations were presented at a conference on 17 October 2019 and [feedback has been requested by 15 November 2019](#), so time is obviously tight for those who still want to contribute.

## Improved drafting

The redrafted Regulations are certainly an improvement over the 2013 Regulations, having addressed many of the drafting issues which led to a lack of clarity for both lawyers and clients as to what is, or is not, permitted under the current regime.

To give an example, the redrafted Regulations allow flexibility for the lawyer and client to agree terms regarding payment where the DBA is terminated. That point is far from clear in the 2013 DBA Regulations (as explained in my [previous post](#) on this blog), such that the lawyer either has to risk being left high and dry if the client terminates, even if that happens at a point where [settlement](#) is in easy reach, or risk invalidating the DBA by including what seem sensible protections in the event of termination. No doubt most clients would act honourably, but this lack of clarity has nevertheless, in my view, contributed to the profession's reluctance to embrace DBAs. The default position under the redrafted Regulations (subject to alternative terms being agreed in the DBA) is that the lawyer can charge [costs](#), expenses and counsel's fees if the client terminates, or if the

lawyer terminates where the client has behaved unreasonably. That is clearly a welcome change.

Inevitably there are a few drafting niggles, the most significant being that the redrafted Regulations require irrecoverable costs, counsel's fees and VAT (where not recoverable) to be netted off from the DBA payment, when in fact they should simply be included within it. But no doubt those sorts of issues will be sorted out in the drafters' supplementary report, which I understand is being prepared to take account of feedback received.

## Issues of principle

The redrafted Regulations also helpfully address a number of issues of principle that are less than satisfactory in the current regime. These include the proposed move to a success fee model, so that the lawyer gets [recoverable costs](#) on top of the DBA percentage payment (with a reduction in the maximum percentage from 50% to 40%, in commercial cases, as a quid pro quo for this benefit). That would replace the current "Ontario model", in which recoverable costs are set off against the DBA payment, and which (when combined with the indemnity principle) leads to the somewhat puzzling result that the opponent gets a windfall if the DBA payment turns out to be less than the costs that would otherwise be recoverable.

Another significant change is the proposed expansion of the regime beyond money claims. Under the redrafted Regulations, the DBA payment would be a percentage of the client's "financial benefit" resulting from the claim, which is defined to include money or money's worth. This means that DBAs could be used by defendants, where the financial benefit would be the avoidance of (all or part of) some potential liability, as well as claimants who stand to recover some non-cash benefit (whether that is a Renoir, or title to a property, or the protection of an IP right). It will be important to be clear about the financial benefit and how it is to be valued, to avoid disputes arising, quite apart from needing to satisfy the requirement in the redrafted Regulations to specify the financial

benefit to which the agreement relates. But, in principle, this flexibility means opening up DBAs for commercial clients in a broader range of cases, which must be a good thing.

### Lifting the ban on hybrids

Another welcome change is the proposed removal of the ban on “hybrid” DBAs, under which the lawyer can combine a percentage DBA payment with some other form of remuneration, most obviously a reduced hourly rate payment as the matter proceeds which is payable win or lose. The lack of flexibility to agree hybrid DBAs took the profession by surprise when the DBA regime was introduced back in 2013, and has seemed a pointless restriction given that the same result (from the lawyer’s perspective, though not the client’s) can be achieved by complicated arrangements combining DBAs with commercial [litigation funding](#) (as noted in [this blog post](#)).

It is good news, therefore, that the redrafted Regulations permit hybrids, in the sense that, if the client receives no financial benefit, the lawyer can still be paid a reduced fee of up to 30% of irrecoverable costs. And that 30% can, presumably, be paid by the client on an ongoing basis as the matter proceeds (though the Regulations don’t actually spell that out, which would be preferable). This change, if implemented, should go some way to addressing the concerns of practitioners who may see a DBA as simply too risky under the current regime in which their only entitlement, if the case is lost, is to non-counsel disbursements.

So on this basis, if the client receives nothing, the lawyer can receive up to 30% of their fees. And if the client wins the case and recovers its costs, then the lawyer will receive recoverable costs on top of the DBA payment (of up to 40% of the financial benefit). That will almost certainly be more than the 30% of fees they would receive on an outright loss.

### Filling the lacuna

However, consider the position if the client receives only a low financial benefit, and does not recover its costs or recovers only a small proportion of its costs. In those circumstances the current drafting means that the lawyer would likely recover less than the 30% they would be entitled to receive if the client lost the case outright. And if the client has been paying the 30% on account on an ongoing basis, then presumably those payments would have to be refunded to the client, to the extent that they

exceed any recoverable costs plus (in this scenario) what would be a very low DBA payment.

What this means is that there are circumstances in which the lawyer would be better off if the client lost the case outright than if the client won and received some small financial benefit. This seems an obvious lacuna which is both illogical and undesirable, particularly as it heightens the potential for a conflict of interest on the part of the lawyer acting under the DBA.

In my view, the redrafted Regulations should be amended to fill this lacuna. The most obvious solution would be to allow the DBA to provide that, if the DBA payment would be less than 30% of irrecoverable costs (or whatever percentage the DBA provides is payable in the event of a loss; 30% is of course a maximum), then the lawyer can be paid the 30% (or relevant percentage) instead of the DBA payment. That would remove the difficulty that arises on current drafting.

### Is 30% the right figure?

As explained above, the redrafted Regulations provide that, on a loss, the lawyer can recover up to 30% of irrecoverable costs. The 30% figure is put forward as a suggested figure. The drafters recognise that the ultimate figure will be a matter for the MoJ to determine, following consultation, if the redrafted Regulations are taken forward. Nonetheless, it does seem to be a very low starting point, given the apparent aim of allowing the lawyer to recover (at least a contribution to) basic costs if the matter fails.

While solicitors’ profit margins no doubt vary, the Law Society’s [Financial Benchmarking Survey 2018](#) states a median profitability figure of 21.8% for all practices (as a percentage of fee income) or, in other words, a cost base of 78.2%. On that basis, a mere 30% recovery would represent a significant loss.

There is a great difference between a lawyer’s likely willingness to put at risk, on the one hand, the ability to make a profit in a matter and, on the other, the ability to cover overheads. If the redrafted Regulations are to meet the objective of establishing DBAs as a realistic funding mechanism for the benefit of both lawyers and clients, in appropriate cases, it is at least arguable that this figure should better reflect the lawyer’s direct costs in conducting the litigation. No doubt that will be something for debate in due course if the reform project proceeds.

### Next steps

As noted above, feedback on the redrafted Regulations has been requested by 15 November 2019. The drafters will then prepare a supplementary report in light of the feedback received. At that point the ball will be firmly back in the MoJ's court.

In its post-implementation review, the MoJ indicated that it would give careful consideration to the way forward in light of the outcome of the current review of the DBA Regulations. That looks set to happen, given remarks delivered at the 17 October 2019 conference by the MoJ's

Head of Civil Litigation Funding and Costs, Robert Wright. A positive reception, at least for hybrids, should not however be taken for granted, even ignoring the uncertainties resulting from the upcoming election. It seems clear that the MoJ will, quite understandably, want to ensure that any new regime will not lead to abuses. The question is whether it will be satisfied that the redrafted Regulations give sufficient protection, when combined with existing professional conduct obligations. The hope, for practitioners and clients seeking a more flexible DBA regime, is that it will.

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