



Information Note regarding barristers in international arbitration

Introduction

1. The Bar Council of England and Wales is conscious that there has been concern in the recent past expressed in relation to cases in which a barrister appears before a barrister from the same chambers sitting as an arbitrator, in the context of international arbitrations, where clients may not be as used to the structure and culture of the English bar. This note deals only with the position of the self-employed Bar, and does not address other forms of entity.
2. It is of course important that users of the Bar have complete confidence in the barristers who they instruct as advocates, and who they appoint as arbitrators to assist in resolution of their disputes.
3. The purpose of this Note is:-
 - (1) To seek to identify the relevant principles which will, of course, need to be viewed in the context of the particular type of dispute and arbitration tribunal.
 - (2) To set out, by reference to problems which have occurred in practice, the types of considerations which barristers may wish to bear in mind in dealing with the practical problems which may from time to time arise.
 - (3) To seek, therefore, to ensure that any concerns that the client may have as to the arbitrator/counsel situation are met, and to ensure that the valuable protection given to clients by the availability of the independent bar is not compromised.
4. We should emphasise at the outset, however, that:-
 - (1) The principal concern of the Bar Council is with the position of the barrister acting as an advocate (and it is this which the first part of this Note addresses). The position of the barrister acting as arbitrator will be no different from the position of any other individual acting as an arbitrator, and is likely to be governed by the rules (legal and contractual) which govern the type of arbitration in question. Nevertheless, in the hope that it may be of assistance,

Part II of this document addresses the position of barristers who act as arbitrators.¹

- (2) This Note is intended to provide information and assistance, principally to members of the Bar. It is not a regulatory document.
- (3) This Note deals only with the position of the self-employed bar, who are not practising in employment, partnership or other structures.

Part I: Barristers acting as advocates in arbitration

5. We recognise that English and Welsh barristers are now involved in disputes ranging far outside the traditional range of UK law disputes. The parties to such disputes may not always be familiar with the particular way the English and Welsh bar is structured. It is structured in this way for good public interest reasons (discussed below). Barristers should be sensitive to the possible concerns of clients, and should take such steps as are properly open to them to address such concerns.

6. It is also the case that different types of dispute require different approaches, and barristers should remain alive to the varying expectations, backgrounds and cultures of those who utilise arbitration. Many arbitrations involving English and Welsh barristers may have little or no connection with England and Wales or English and Welsh law. By way of example, international investment arbitrations, or public international law disputes, may involve barristers as arbitrators or Counsel but may be located outside England and Wales and may involve consideration of other national legal systems or indeed international or supra-national legal regimes. Such arbitrations may require a different approach from that which would be involved in a purely domestic setting.

The relevant background

7. There are two fundamental principles which must not be lost sight of.

8. The first is the manner in which the Bar has traditionally been structured. Thus, barristers practising from traditional sets of chambers are self-employed and are *not* in partnership, although many of them share expenses to some degree. The English and Welsh Courts have confirmed on a number of occasions that, because of the fact that self-employed barristers are not in partnership and do not share one another's income, there is no objection to barristers appearing against one another in the same case. There is no conflict of interest involved in such a situation arising simply from membership of the same chambers. Indeed, particularly in certain specialist disputes, due to the limited number of experts in the given field, it is common for barristers from the same chambers to appear against one another.

¹ In preparing this document, we have consulted many arbitral institutions worldwide and have taken their comments into account.

9. The second is the client's freedom of choice in selecting its advocate. This principle is supported by the so-called "cab rank" rule. That rule, and its consequences, are currently contained in rC29 in Part 2 of the Bar Standards Board Handbook. In essence this rule requires a barrister to accept a set of instructions on behalf of a client unless the exceptions set out in rC30 apply. The purpose of the rule is to ensure that any client is entitled to obtain the services of the advocate of his, her or its choice. The full text of the aforementioned rules can be found at <http://handbook.barstandardsboard.org.uk/handbook/part-2/>.

10. The combination of these two principles brings with it great benefits for consumers and users of legal services, including in arbitration. Thus:-

- a. The fact that barristers from the same chambers can appear against one another means that clients have access to the greatest possible pool of specialist advocates.
- b. It is not possible for one party to a specialist dispute to "conflict out" all barristers practising from a particular set of chambers by the simple expedient of seeking advice from one member of that set. As barristers who have particular expertise in a specialist field – for example insolvency, or commodities – frequently practise from the same chambers, if it were possible to conflict out whole sets of chambers in this way, consumer choice would be severely restricted.
- c. The fact that the starting point is that, unless exceptions directed towards the interests of justice apply, a barrister *must* accept instructions means that clients should always have access to the advocate of their choice. Thus, barristers are not at liberty to always act for one side in a particular field. There is no such thing as a barrister who will act only for insurance companies and never for assureds. There is no such thing as a barrister who will act only for banks and never for customers.

Barristers appearing as Counsel before barrister arbitrators

11. Turning to the question of barristers appearing before other barristers from their own chambers. Here, the perceived problem in the international arena relates to the possibility that a barrister acting as arbitrator may be biased in favour of the party who is represented by counsel from the same chambers. Such a conflict may be said to arise for financial reasons, or by reason of personal connections.

12. Starting with the English and Welsh legal position, the domestic Courts have confirmed that the question is whether, where an arbitrator comes from the same chambers as the Counsel for one of the parties, this gives rise to justifiable doubts as to the impartiality of that arbitrator. Applying this test, it is clear that as a matter of English and Welsh law,

there is no objection to a barrister acting as an arbitrator in an arbitration simply because one of the parties is represented by a barrister from the same chambers.²

13. Thus, in *Laker Airways v FLS Aerospace et al* [1999] WL 477389, Rix J (as he then was), having considered authorities from England and Wales and from various other jurisdictions, concluded that there was no objection to a barrister appearing in front of an arbitrator who was also a barrister in the same chambers. He emphasised that:-

- a. The barristers were not in partnership. There was no sharing of income and thus neither party had a financial interest in the success of the other.
- b. The fees of counsel were not in any way dependent on success in the arbitration.
- c. There was no conflict of interest and duty, because there was no partnership.
- d. There was no evidence of any breach of confidence.
- e. The suggestion that the arbitrator might favour the advocate he knew was not one which was made out. In this regard, it was impossible to generalise – each case must turn on its own facts.³

14. That decision represents the English and Welsh law on the subject, and has been followed in a number of later cases.

Summary in relation to the question of principle

15. In summary, from the perspective of the barrister acting as advocate, then:-

- a. As a matter of English and Welsh law, there is no prohibition against an advocate appearing before an arbitration tribunal which includes a member of his or her chambers.
- b. Indeed, the system is premised on the client having a range of advocates to choose from. In order to ensure that the users of the bar have the greatest possible choice, and have access to the largest pool of specialist advocates, a barrister is obliged to accept instructions unless one of the exceptions to the “cab rank” rule applies (see para. 9 above).
- c. Those exceptions are designed to ensure that the barrister is obliged to consider whether it is in the client’s best interests that he or she accepts such instructions. If it is in the client’s best interests that the barrister take on the case, then the barrister must do so.

² There may of course be other matters, specific to the individual case, that do lead to the existence of such justifiable doubts. This must be judged on a case by case basis, but this does not affect the general principle that the mere fact that advocate and arbitrator come from the same chambers does not give rise to such justifiable doubts. In addition, we again emphasise that the text deals with English and Welsh law.

³ This reflects the point made in footnote 2.

- d. Nevertheless, good practice would dictate that in circumstances where a barrister comes to understand that he or she has been instructed in an arbitration where one or more of the members of the Tribunal are barristers in the same set of chambers, prompt disclosure ought to be made by those instructing the barrister advocate to the legal representatives of the other side. This will ensure as far as possible that the guidance set out in the IBA Guidelines on Conflicts of Interest in International Arbitration is followed (see further below). A failure to make prompt disclosure, could ultimately, lead to a challenge to the independence of the member(s) of the Tribunal in question.

16. The structure of the self-employed Bar is unusual. This structure is intended to reinforce the independence of the advocate. It also means that conflicts of interest are less likely to arise. This ensures that clients have the greatest possible choice in their selection of a specialist and independent advocate.

17. However, we recognise that the fact that arbitrator and advocate share chambers may give rise to very real concerns and practical problems particularly for international clients who may be unfamiliar with the structure and culture of the English and Welsh bar. It is thus important that these practical problems should be understood and addressed. Below we turn to consider some of the main practical problems, again focusing on the role of the barrister as advocate or advisor, and consider ways in which those practical problems might be addressed. For convenience, we adopt a Question and Answer format, with the questions being posed by a hypothetical advocate.

Practical problems: Q and A

I, and other barristers in my chambers, act as advocates but also accept appointments as arbitrators. What specific considerations should we be thinking about in terms of chambers' administration?

18. Clearly, where there is any possibility of barristers from the same chambers becoming involved in an arbitration as advocate and arbitrator respectively, then it is of the utmost importance that arrangements are made to ensure absolute confidentiality is maintained, and that there is no possibility that correspondence to or from one barrister is seen by another.

19. We are sure that the need for such arrangements is well understood by chambers, and anticipate that arrangements should be in hand to protect against any potential breach of confidentiality. Chambers are used to dealing with the position where two barristers are instructed on opposing sides of a case which gives rise to a similar need for the preservation of confidentiality. However, examples of the sorts of arrangements which Chambers should follow where there is any possibility of barristers from the same Chambers being involved as arbitrator and advocate respectively include the following (though we have no doubt that others could be added).

- a. As far as clerking is concerned, separate clerks should be designated to deal with the matter on behalf of the arbitrator member and on behalf of the member retained to act as advocate/adviser.
- b. There should be state of the art arrangements to ensure that communications destined for one member cannot be seen by, or come into the hands of, the other member.
- c. There should be arrangements for the secure storage of papers in cases in which this is necessary, with those arrangements being kept up to date to reflect best practice.

A party to an ongoing arbitration wishes to instruct me, but I am told by the solicitor who wishes to instruct me that another member of chambers is already acting as arbitrator in the reference. What should I do?

20. As we have already noted, the cab rank rule (where it applies) means that a barrister who is instructed in a case which is within his or her competence, must accept such instructions, unless he or she has insufficient availability, or for some other reason it would be contrary to the interests of justice for the barrister to accept such instructions. The full text of the applicable rule, as already stated, may be found at <http://handbook.barstandardsboard.org.uk/handbook/part-2/>.

21. Given the self-employed status of barristers, it follows that the fact that another member of chambers is already acting as arbitrator is not of itself a reason for a barrister to refuse to accept instructions in an arbitration.

22. However, barristers will, of course, wish to ensure that any potential for interference with the arbitral process is minimised, and will also want to ensure that the potential client is made aware of the possibility for a challenge to the arbitrator or to the continued involvement of the barrister who it is sought to instruct. Thus, the barrister should consider the advice that should be given to the solicitor and client, which may (depending on all the circumstances) include the following.

- a. Advising the solicitor and client of the potential for a challenge to the continued involvement of the arbitrator and/or of the barrister him or herself, together with the potential for delay and costs consequences.
- b. Advising the solicitor and client of the steps which might be taken to minimise this potential, and in particular advising the solicitor and client that it would be sensible to ensure that the barrister's involvement is made known to the other party and to the arbitrator as soon as possible, to enable both the other party and the arbitrator to take steps to object or step down immediately or ensure that objections are waived. General Standard 7(b) ("Duty of the Parties and the Arbitrator") of the IBA Guidelines on Conflicts of Interest in International

Arbitration contains a guideline to similar effect. It states: "*A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of the identity of its counsel appearing in the arbitration, as well as of any relevant relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator. The party shall do so on its own initiative at the earliest opportunity, and upon any change in its counsel team.*"

- c. Advising the solicitor and client of any potential risks in relation to the enforceability of the final arbitration award.

I have been involved as an adviser to a party to a dispute for some time, and now my client wants to go to arbitration. It is suggested that another member of my chambers should be instructed as arbitrator. What are the pros and cons?

23. In the final analysis the choice of arbitrator must be a matter for the client. However, in the light of what has already been said about the possibility of challenge to the arbitrator or to the continued involvement of counsel, then you will wish to consider the advice that should be given to the client. This advice may include such advice as that set out in the preceding question and answer.

I have just received the papers for a hearing which is only two weeks away, and it is clear from the papers that the hearing has been conducted by solicitors alone up until this point. On reading the correspondence, I can see that one of the tribunal is a member of my own chambers. Are there any steps that I should take?

24. It is clear both from the reported cases and from the concerns expressed by international institutions that the problem of late notice of the involvement of counsel from the same chambers as one of the arbitrators is a very real one. It is clearly important that counsel acts so as to minimise the possibility of disruption to the arbitral process, insofar as possible.

25. In these circumstances, at the time of instruction, you will wish to consider the advice that you should give to your lay and professional clients. The matters that you will wish to consider are similar to those set out above, and the type of advice that should be considered is as set out above. However, the imminence of the hearing is clearly of relevance in this regard.

- a. The advice needs to be given as soon as possible.
- b. The fact that the involvement of Counsel is being disclosed so close to the hearing will inevitably have a bearing on the perception of the other party to the arbitration of the situation. You will want to consider how this matter should be addressed in dealing with the other party and the arbitrator.

- c. The possibility that there may have to be an adjournment (with costs consequences) needs to be considered, and appropriate advice given.
- d. The enhanced possibility that the arbitrator may step down, or that counsel may be required by the tribunal to step down, in the light of the lateness of the involvement of counsel (and consequent disclosure of that involvement) will need to be considered, and appropriate advice given.

I have been asked by my clerk about my availability for an international arbitration which is ongoing. I know that other members of my chambers regularly sit in arbitrations administered by this arbitral body. Should I take steps to find out whether a member of chambers is involved?

26. The first point to make is that there are, or may be, issues of confidentiality involved in this case. Accordingly, any enquiry that is to be made should be made openly, and via the solicitor involved (assuming that there is a solicitor). If no solicitor is involved, then it may be necessary to seek the consent of the lay client before making such an enquiry.

27. However, in view of the potential need for advice such as that which has been discussed in earlier questions and answers, it would be sensible to make inquiries of the solicitor as to the identity of the tribunal in the arbitration. If, in answer to those inquiries, it turns out that a member of chambers is involved, then it will be necessary to consider whether advice of the nature set out earlier in this note should be given.

Part II: Barristers acting as arbitrators.

28. We turn to the position of barristers who are asked to act as arbitrators.

29. It is a general requirement of most arbitration rules that an arbitrator should be independent, or impartial, or both. Thus, by way of example, the ICC Rules provide, in Article 11(1) that *“Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration”*; the LCIA Rules provide, in Rule 5.3, that *“All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party. No arbitrator shall advise any party on the parties’ dispute or the outcome of the arbitration”*; and the IBA Guidelines on Conflicts of Interest in International Arbitration provide that *“Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceeding has otherwise finally terminated.”* English law is to the same effect, as is reflected in s.24 (1)(a) of the 1996 Arbitration Act, which provides that a Court may remove an arbitrator if it is satisfied *“that circumstances exist that give rise to justifiable doubts as to his impartiality”*.

30. Generally, the law also requires that there should not only be no actual bias, but that there should be no perceived bias. Again, different rules express this concept in different ways, but an example is again to be found in the IBA Guidelines on Conflicts of Interest in International Arbitration, which state that:-

(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.

(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard (4).

(c) Doubt is justifiable if a reasonable and informed third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

(d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List.

31. Those IBA Guidelines set out a series of examples of situations which commonly arise in which there may be an actual or perceived conflict of interest. These situations are divided into three categories – a Red List, an Orange List, and a Green List. The Red List contains examples of situation in which the conflict either cannot be waived or can only be waived expressly. The Orange List contains examples of situations in which the conflict can be waived and will be held to be waived if, following disclosure of the relevant facts to the parties, no objection is taken within a set period of 30 days. Finally, the Green List contains examples of situations in which there is no conflict of interest, actual or perceived.

32. One of the examples in the Orange List is set out at paragraph 3.3.2 of the Guidelines. Disclosure ought to be made of the fact that the arbitrator and another arbitrator, or counsel for one of the parties, are members of the same barristers' chambers. Once such disclosure is made, then an objection may be made to the arbitrator continuing to act. If no objection is made within 30 days, then any assertion of conflict of interest based on the facts disclosed is deemed to be waived. If an objection is made within that time period, then the arbitrator will have to consider whether he or she should continue to act. The decision as to whether or not to continue will depend on the exact facts of each individual case.

33. What is clearly important, however, is that steps are taken to ensure that disclosure is made as early as possible in the arbitration. What should be avoided is a situation in which the relevant facts are disclosed so late that the proceedings are disrupted.

34. In order to avoid such situations, we would suggest that barristers who are asked to act as arbitrators should consider what steps should be taken to ensure early disclosure at the time of appointment, bearing in mind all relevant obligations of confidentiality. Whilst the following list is not intended to be in any way exhaustive, we suggest that the following steps might usefully be considered.

- (1) At the time of appointment, the parties should be asked to identify their legal representatives. Alternatively, such a step might be taken at the first procedural hearing.

- (2) At the stage of the first procedural hearing, an Order might be made that the parties notify the arbitrator, and one another, of their current legal teams, and that each party should notify the arbitrator and the other party of any change in the teams, within a set period.
- (3) In arbitrations in which Terms of Reference are used, consideration might be given to including a requirement of the type set out above.

Important Notice

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. It is not “guidance” for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it. It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please refer to the professional practice and ethics section of the Bar Council’s website [here](#).

The Bar Council
6 July 2015