International Practice Information Pack

This International Practice Information Pack contains three notes which the Bar Council hopes will be of practical use to all members of the Bar who are practising or intending to practise internationally.

There are tremendous opportunities for barristers of all specialisms to develop an international practice. The international earnings of the Bar have continually risen from 90m to 232m over the last ten years, and this includes many members of the traditionally publicly funded Bar.

However sometimes there is a reluctance to take the first step given that there is a need to learn about the regulations that apply to international work as well as the soft skills required in international marketing and the business risks of taking instructions from clients based abroad. This Pack is designed to overcome this reluctance.

In addition this Pack should also be useful for experienced counsel who already have an international practice as they need to keep up-to-date with the rule changes brought in by the Bar Standards Board Handbook in 2014 and can also benefit from the practical advice on marketing and accepting instructions contained in this pack.

We are aiming to update these documents regularly and therefore welcome any feedback on the three papers presented here. Please contact the International Team at the Bar Council (intlevents@barcouncil.org.uk) if you wish to make suggestions or ask us for additional information.

We wish you the best of success in developing your international practice.

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Part One: Marketing the Bar outside England and Wales

This Note has been prepared by the International Committee ("IC") of the Bar Council of England and Wales to assist and inform self-employed barristers who wish to market their services abroad. It should also be of assistance to those who might wish to take part in foreign missions organised by the Bar Council or Specialist Bar Associations (SBAs). Finally it should also be of use to those undertaking their own overseas marketing to a new or unfamiliar place.

There are a number of issues which barristers ought to have in mind when marketing abroad, depending on the particular jurisdiction which is being visited. It pays to undertake some research, or speak to other barristers more familiar with the country in question before travelling. It is also a good idea to prepare what you want to say and sell before you travel.

This note is aimed principally at self employed barristers, but it is hoped that it will also be of interest to the employed bar.

We will update this paper from time to time and welcome feedback. Readers may also find helpful (i) the Note which the IC has produced summarising the changes to the rules on international practice contained within the new BSB Handbook and (ii) booklets produced by the IC on international legal services, international arbitration and crime and regulatory work – these market the Bar to overseas lawyers but the text provides helpful information about how to market the bar.

Lawyers abroad

The lawyers you encounter overseas are likely to be highly educated, and quite often form part of a local elite class. However, it is worth researching the level of sophistication which the local lawyers have in dealing with foreign matters, foreign lawyers and international legal issues. Try to find out in advance how experienced the lawyers you will meet are in such matters.

In many offshore jurisdictions, the local lawyers are expatriates from England or other English-speaking countries, who may have practised in England before moving abroad. In other countries you may find lawyers who are dual-qualified or have considerable

experience studying or working in the UK, the US or another English-speaking or European country. However, in yet other places such lawyers may be relatively rare and you may find yourself dealing with lawyers who have rarely any experience of international disputes or liaising with lawyers from outside their own country. It is worthwhile knowing in advance the sophistication of the lawyers you are likely to meet, and modifying your approach accordingly.

Local lawyers may also have a very different approach or attitude to client care and professional ethics. In many countries, lawyers are held in high regard and they are not used to the level of cut-throat competition that we have become used to in this jurisdiction. They may well not understand, or want to emulate, the 24-hour service culture that UK lawyers now live with.

Law firms abroad

In many countries there is a mix of purely local law firms and branches of large UK and/or US law firms. The larger UK/US firms have moved rapidly into many foreign countries, but they do not all operate in the same way: some follow a strategy of buying up a promising, small local firm (often after establishing a 'best friend' relationship); others build up their own offices by flying out or recruiting ex-pats from London or elsewhere. Many countries outside the EU have restrictions on the type of work which foreign lawyers can carry out, and/or the type of law offices which can be established, if they are not locally qualified or licensed. It is vital to understand such issues before visiting.

Foreign local offices of even the larger UK/US law firms often have considerable local autonomy, so do not assume that they will follow the lead of, or stick to the panel approved by, the head office in London or New York.

It is also useful to understand about the local law firm structures, as they do not all operate as do English solicitors firms. Some have structures more akin to a set of chambers, with each lawyer or partner earning only from their own cases. Others pass profits back only to the partner who introduced the work to the firm, regardless of who did the work or where it was done. Do not assume that the training and career path for a foreign lawyer mirrors that of an English solicitor.

Code of conduct rules

Bear in mind the long-standing rule, now at rC14 in Part 2 of the BSB Handbook, that soliciting work outside England and Wales must not be done in any manner which would be prohibited if done by a member of the local bar. Also local rules on confidentiality/privilege, conflict of interest and other conduct rule may differ, which could become a real issue when accepting instructions from local lawyers. You will therefore have to find out what the local rules are.

It is also worth remembering that a barrister undertaking foreign work (as defined in Part VI of the BSB Handbook) is required as a matter of professional conduct to comply with the applicable rules of the foreign place in question, subject always to the overriding Core Duties of a barrister - see rC13 in Part 2 of the Handbook.

Selling the Bar

The core services provided by the Bar are very attractive to many foreign lawyers and in-house counsel. Some lawyers will be familiar with the way in which the Bar traditionally operates but most lawyers are not. Expect to spend quite a bit of time explaining the split profession and its advantages. Although recent rule changes have blurred the line between the Bar and the solicitor's side of the profession, with a largely ignorant audience it is worth starting any explanation with the traditional roles, before explaining (if needed) what barristers can do with a public access licence, or permission to conduct litigation. This is so even if you have wider rights than a traditional barrister, as you will otherwise be unable to distinguish yourself from a solicitor who might be competing with you for the work and the distinction will be a mystery to the audience. Try to keep the message simple and focus on what you are able to do to work with and assist your audience.

The distinction is important to bring out because the Bar has a well-deserved reputation for excellence in the UK and around the world. It is worth putting the Bar into context for a foreign audience. We are a specialist profession, with a reputation for greater skill and knowledge than solicitors in dispute resolution and advocacy. Why not explain that the vast

majority of lawyers in England are solicitors who consult and defer to counsel when facing a tricky problem? Despite a handful of solicitors now having rights of audience (and a few even having QC after their names), barristers still conduct almost every difficult case in court in England and Wales, especially in the higher courts. We can and should sell ourselves as specialists in areas of law and specialist advocates on whom the general body of lawyers rely for advice and advocacy services. Clients are better served by having a specialist profession; the simplistic notion that two lawyers always cost more than one is just plain wrong, and can be demolished very easily. Emphasise that, however unusual the system seems to your listener, it evidently works, and works to the benefit of the client.

Any foreign lawyer can instruct any barrister to advise and to appear in any arbitration or other form of ADR. The only restriction concerns appearance in court in England or Wales once you come to the point of issuing proceedings. So if you are marketing yourself primarily as a specialist advisor or as an advocate for international arbitration, there is no need to introduce or discuss the rule changes permitting barristers to conduct litigation, which may confuse your audience. Similarly an audience of foreign lawyers is unlikely to be much interested in the plans (or your predictions) for alternative business structures or direct access work. Keep the message simple - the Bar, in its traditional, simplest and most common form, is already sufficiently attractive to foreign lawyers as a very high quality, flexible provider of specialist legal services. The analogy with surgeons or other specialist medics or consultants in other fields is apt and readily understood worldwide.

Self-employed barristers also have the huge advantage over law firms that we are generally not interested in forming a long-term relationship with lay clients. You can stress that there is little risk that the local lawyer will lose its clients to us; we are interested in building relationships with the lawyer and her firm, not the lay client. That is very different to the position with many solicitors' firms.

You might also emphasise the inherent flexibility in working arrangements that a self-employed barrister can offer. Unlike solicitors in a large law firm, we are not tied to any particular rate or way of billing. We can offer fixed rates, if we choose, or reduced hourly rates because we are self-employed. We can also be contacted very easily - an email or call to us or our clerks will do.

If you are a junior barrister, you may wish to emphasise how cost effective your services are compared to your contemporary at a law firm. However be wary of competing solely on cost; as a specialist, it will enhance your reputation to be seen as good before cheap. If you are a silk or senior barrister, you may wish to emphasise the unrivalled experience which you will have gained as an English specialist advocate.

If you are from outside London, do not be surprised that foreign lawyers will often equate England and Wales with London. Rightly or wrongly, London is often viewed as the hub for law in our country and it is inevitable that foreigners see London barristers as being at the heart of the system, particularly when considering commercial law or dispute resolution. Conversely, the London bar should not be timid in emphasising that they work in a booming city renowned for its international connections, in law as much as other fields.

Foreign lawyers are often interested in what English barristers can offer their own profession, particular in the way of training. Common areas of interest include advocacy and ethics training. The Advocacy Training Council (ATC) is inundated with requests for training from round the world, and although it tries to accommodate as many requests as possible, please do not offer their services or indicate that they can be provided in response to each and every request. Foreign lawyers, particularly those early in their career, can also show interest in exchanges, or extended visits. The Bar Council runs some exchange or placement programmes (currently with China, Russia, South Korea and soon with Brazil), which you should know about if you are visiting a country benefitting from such a programme. But be wary of suggesting that a new exchange scheme could be set up as they need considerable planning and support. However, your chambers may wish offer an individual mini-pupillage style placement in which case the Bar Council's international team can assist with immigration sponsorship.

You may want to consider explaining very briefly the chambers' system, how the self-employed bar practises and is administered in this system and the role of the senior clerk or practice manager. Be conscious that phrases will not easily translate – "clerk" being a good example of a word which frequently confuses foreign lawyers unfamiliar with the system.

International issues for an international audience

It almost goes without saying that you should try to steer clear of discussing purely domestic issues when marketing abroad. Even if your practice is currently predominantly domestic, consider how you might 'internationalise' it for the foreign audience, even if that means expanding your field of practice. So, for example, if you have a mainly criminal practice, consider what regulatory issues might be relevant to those seeking to export to England, or whether you could expand your practice to deal with bribery or money laundering issues. Most areas of practice have an international potential, although in some areas the international aspect will be more obvious and voluminous.

There is little worse than telling a foreign audience that your practice is purely domestic and they can call you if they have a problem in England when on a visit: you will come across as a lawyer on a holiday rather than on a marketing mission. Plan to explain how you might be of use to the foreign lawyers you are going to encounter.

Read up on issues relevant to the particular region that you are visiting, and this should not be limited to the legal system and the legal market. It will help if you can demonstrate some general knowledge of the culture and of current affairs of that region.

Language

Obviously you may be dealing with potential clients and foreign lawyers whose first language is not English. If you do not speak their language, it is worth bearing in mind that you will have to modify your mode and speed of speech. If you are going to use translators, you should expect things to take at least twice as long to cater for the translation (unless using simultaneous translation, which is expensive). If you are responsible for identifying a translator take references if at all possible from other lawyers. Many translators will not be familiar with legal terms let alone terms relevant to the Bar and its practice (e.g. barrister, QC, chambers, senior clerk). It is best to provide copies of slides or handouts to translators in advance if you can.

As well as avoiding slang and expressions, try to avoid complex language, common lawyers' phrases (*"it seems to me"*, *"notwithstanding"*, *"for the avoidance of doubt"*) and composite or modal verbs (such *"take up"*, *"talk over"*, *"walk off"*, *"made up"*), as few non-English speakers will have learnt them - many will be more used to dealing with written legal English, particularly in contracts, which is invariably more formal than speech. Speak more slowly than usual, even for translators.

Presenting and talking

If you are invited to speak at a seminar, a conference or a meeting with local lawyers, enquire whether you are expected to present slides and know how long you are being given to talk. Depending on how long you are talking and how technical the subject, consider using Microsoft Powerpoint, which is a powerful tool for getting across a message especially to those who might be more comfortable reading than listening, or providing a user friendly handout. Consider whether your Powerpoint should be translated into the local language in advance.

Do not overfill your slides and do not read them out. They should have no more than half a dozen lines on each, and probably no more than about 30 words, ideally in bullet points not blocks of text. Use them as headlines or pointers rather than narrative. If you know how, or can work it out, use some pictures, charts, or tables to break up the monotony of text. But do not use photos which are copyrighted or plagiarise! Also be careful not to descend to stereotyping or cultural insensitivities in your talk.

Although we pride ourselves in talking for a living, the skills required to make an effective presentation at a seminar are different from those you deploy in court. You may benefit from practising any talk in front of a colleague in Chambers, or another barrister on the mission, or your clerk - seek feedback and improve the talk accordingly, or running through your talk in front of a mirror in advance. Time yourself and make sure your talk is going to last only as long as you are given. Long-winded, overrunning, under-prepared talks without slides (or with overfilled, dull slides) will earn you a reputation which is exactly the opposite of how you wish to come across. Generally speaking our experience is that short,

well organised and engaging talks go down well. Bear in mind what is said above about language – in addition jokes rarely translate well.

Always consider who your audience is when preparing your talk e.g. (i) will it include English solicitors, foreign clients or foreign lawyers (ii) will it include lawyers / clients familiar with my topic or not (iii) will it include local press.

Cultural issues and socialising

Business cards are expected and used by almost every lawyer other than the English barrister. If you do not have any, get plenty before you travel. If you are travelling to a country where English is not a language used by the lawyers, consider investing in cards translated into the local language, preferably double-sided. If you are going on a planned mission or to a conference, take more than you imagine you will need: count them in the hundreds. Glossy cards may look smart but prevent your contact writing anything on them.

English humour, whilst admittedly great, does not always export well, even amongst the English speaking world. Try not to rib your fellow barristers openly, as it may be seen as denigration or just rudeness. Self-deprecation might also be mistaken for under-confidence or a candid admission of uselessness. Modesty, by contrast, is wise. An easy way to sell is to talk up your fellow barristers; if a whole team does this (evenly), everyone is made to look good. Express admiration for the more senior members on the trip, however little you may know of their individual qualities.

Try to learn a little about the history of the country you are visiting, and particularly the historic relationship it has had with the UK. You may discover that the locals have an ingrained image of what the English are like, based upon an historic event about which you know very little, sometimes from the last century or the one before when Britain's approach to overseas trade was more one-sided than it is today. Remember that Britain waged some enduringly unpopular wars and foreigners might not see us as plucky, liberal freedom fighters. Some foreigners have preconceptions about us based upon Dickens, BBC costume dramas, James Bond or Mr Bean; be prepared to challenge them, appropriately and in good humour of course.

You might try to learn what the locals are likely to be proud of in their history and take care to praise that; you will win friends for knowing a bit about them in advance. Also find out what locals will not wish to discuss with you. Some things we take for granted are controversial abroad. Tread very carefully in espousing political views if you cannot avoid them altogether.

You will socialise with foreign lawyers when abroad. This may be no more than a coffee after a seminar or it might be an invitation to a boozy meal hosted by a local firm. These are valuable marketing times too and you might try to steer the conversation to work topics rather than reverting to discussing your family or personal life. You may also find that certain cultures do not have the same level of openness (or secrecy) as you encounter at home. In some countries, it is usual to exchange information about salaries, for example. Think of a way of politely skirting such matters if you think you will be embarrassed (for example, you could volunteer average earnings of barristers in your field, or hourly rates). Conversely, some foreigners may not wish to discuss their family or personal circumstances with you. For these reasons, we suggest you keep discussions to work topics until you know the person or place pretty well.

If you have particular dietary requirements or preferences, check before you travel whether they are likely to be easily and politely accommodated. If you are particularly fussy or squeamish, you may find yourself going hungry at banquets in the Far East; your choices may even be interpreted as rudeness if you reject offered items without an appropriate level of politeness. If you do not know what you are being offered to eat, ask what it is with (if necessary, feigned) polite interest, and receive the information with delight, regardless of how disgusting you find the food.

Lawyers in some countries will expect you, particularly if you are male, to drink alcohol, sometimes copiously, to seal a relationship. Lawyers in others frown upon drinking altogether. Try to know what is likely to be expected of you before travelling so that you are prepared and if necessary are able to decline politely. Of course, it is rarely a good idea to get drunk with relative strangers in an unfamiliar place.

Bar Council and third party support

If you are taking part in a mission with the Chair of the Bar and/or Chair of the International Committee, take the time to understand what they do in that role before you meet them. There is a lot of work undertaken by the Bar Council, much by volunteers and overworked staff, with which you may be unfamiliar. There may well be a history of bilateral engagement preceding the trip you are taking.

The officers of the Bar Council may have particular meetings scheduled to which you are invited, and others which will not be open to the delegation as a whole, depending on the trip. Showing respect to the officers when in public view on the trip will enhance the image of the Bar abroad as a well-organised and functioning profession. If attending a mission organised by the Bar Council please check in advance which events you are required to attend and which are optional, and please respect this.

Bar Council missions usually include written and verbal briefings in London and abroad which can enlighten you on some of the issues raised in this Note. Attendance at the pre-mission briefing meeting is expected. This is a good venue to ask any questions you may have about the jurisdiction you are visiting, the Bar Council, the trip or indeed anything else.

On foreign missions organised by the Bar Council, there is often support provided by British embassies, consulates, the UKTI and the Lord Mayor of London. If you are at an event with an English dignitary, again it is polite to show a degree of respect

Part Two: Taking instructions from abroad: A Note about Contractual Terms

This Note has been prepared by the International Committee ("IC") of the Bar Council of England and Wales to assist and inform self-employed barristers who wish to provide their services to overseas clients. Many barristers will use pro forma contracts for their domestic work. Most terms in such contracts will be appropriate for foreign work. But different and additional considerations apply to foreign work and often it is wise to adjust and alter the terms on which you contract if the client is foreign or unfamiliar with the usual practices of the Bar.

This Note focusses on self-employed barristers, but it is hoped that it will also be of interest to the employed bar. It is also mainly concerned with traditional instructions through a professional, foreign lawyer intermediary rather than directly from a lay client; however there is a section touching upon issues which ought to be considered when taking instructions directly for those who are authorised for public access work.

Readers may also find helpful (i) the Note which the IC has produced summarising the changes to the rules on international practice contained within the new BSB Handbook (Code of Conduct) , (ii) the Note produced by the IC on how to market barristers' services abroad and (iii) booklets produced by the IC which have been written for overseas lawyers but the text may provide a helpful example of how to market the bar:

- Barristers in the International Legal Market contains information on the services barristers provide;

- Barristers in International Arbitration 2013/14 includes information for those wishing to instruct a barrister for international arbitration work;

- Services of the International Criminal and Regulatory Bar explains how barristers practising in this field can assist international clients.

This Note makes reference to rules in the Code of Conduct but you should refer to the rules themselves and the published guidance rather than relying upon their description here.

We update our Notes from time to time and welcome feedback.

Standard or bespoke terms?

Until a few years ago, almost every piece of work done by a barrister in England and Wales was performed pursuant to a professional understanding between the barrister and instructing solicitor without any written or even oral contract. The essential terms, such as the rate for the job and scope of the piece of work, were usually the only things discussed in advance.

However, today you are obliged to confirm the terms and/or basis on which you are working in writing, which will often involve a formal written contract . There are a variety of pro forma sets of terms and conditions upon which members of the Bar tend to offer their services. Some of those pro forma terms have been negotiated with English solicitors to take account of their preferences, such as the General Terms agreed between COMBAR and the City of London Law Society. However few of these pro forma sets of terms take account of the additional and different considerations which apply to working with foreign lawyers and foreign clients, whether for domestic or foreign work . They also reflect compromises that may be unnecessary or inappropriate in contexts different from those in which they were agreed.

Whilst that may not cause any difficulty in the case of a solicitor familiar with the modus operandi of the bar (such, for example, an English qualified solicitor who relocates to work offshore), it is wise to consider in advance whether additional or different terms ought to be included when contracting with those who are less familiar with our way of working. There are also likely to be occasions when a foreign party seeks to introduce a term into a contract which is not usual for the English barrister.

This Note sketches out some of the areas which it is well for you to have in mind when contracting for foreign work or with a foreign party. Many of the terms in a pro forma domestic contract can be used in a contract for foreign work, but it is worth considering the appropriateness of each term particularly for larger pieces of work. This Note considers some of the more important terms only.

It is legally open to you to contract in a language other than English, which the client may wish if you and the client both operate in that language. However it is eminently sensible to ensure that the contract is governed by English law and that the English Courts will have exclusive jurisdiction over any disputes arising thereunder, if only because those Courts are more likely to be familiar with the type of services to be provided under the contract – but see also paragraph 49 below. For that reason, it is logical to contract in English. If you have to explain any of the terms to the client, be careful not to add inadvertently additional or contradictory terms when merely seeking to explain or translate.

The points in this Note are likely to be particularly relevant when working for a new foreign client for the first time. After the first, second or third set of instructions, each side will feel more comfortable that they can work with the other and they will likely come to trust each other to deal constructively with any issues arising.

Two regulatory limits must be borne in mind: all work undertaken by you as a barrister must comply with (a) the Code of Conduct (including the obligation to observe applicable parts of any host regulatory regime, see paragraph 30 below) and (b) the requirements of your insurance, including Bar Mutual Indemnity Fund (BMIF). It is always worthwhile checking with the BMIF whether a certain piece of work for a foreign client is covered when in doubt, notably if you are asked to advise on foreign laws.

The new Code of Conduct is very different in structure from the old, and the scope of work which is permitted is different. The Core Duties in particular must be adhered to, whether or not a specific rule or guidance covers a particular issue, which will occasionally mean that more thought will be needed to determine whether a particular contractual term is acceptable or not.

It is worth considering limiting your exposure under a contract to no more than the amount for which you have insurance cover. A barrister is not required to accept instructions under the cab rank rule if the potential liability in respect of the matter could exceed the level of professional indemnity insurance reasonably available in the market . But the other terms on which you contract must also be acceptable to your insurer so be wary of agreeing to unusual terms.

There may be different considerations to take into account if you take instructions to act as an expert, not least considerations laid down by the Court in which your expert evidence will be received. Such instructions are outside the scope of this Note.

Negotiating terms

Foreign lawyers will often be unfamiliar with the system of liaising with clerks on matters relating to fees and availability. They may expect to deal directly with the barrister on all negotiations. It is obviously a matter for you, but if clerks are involved, they must be trained sufficiently to understand the nature of the new Code of Conduct as well as the limits of different charging structures. It is likely that contracts with new clients, or clients from a jurisdiction new to a set of Chambers, may need individual input from you personally.

Conflicts, the cab rank rule and anti-competition clauses

Tensions can arise if a foreign client suggests that you ought to contract so as to restrict your right to appear for or against another person. Obviously there are instances where your right to accept instructions is limited by reason of conflict or duties of confidence , but it is not permissible for you to undertake in a particular contract not take future instructions to act for or against someone (unless, perhaps, it is clear that this could apply only where doing so would inevitably create a conflict which could not be waived by the parties).

For example, a multi-national bank might demand that you must, as a condition of being instructing, agree to forego any future instructions to act against it, or any of its subsidiaries or sister companies anywhere in the world even if such future instructions were wholly unconnected to the instant instructions. Such a demand must be resisted. The cab rank rule would require a self-employed barrister instructed by a professional client to accept such instructions, if otherwise acceptable under the Code of Conduct. You must not agree to terms that could put you in conflict with your professional obligations under the Code of Conduct, including the cab rank rule. It would in any event be thoroughly unwise (if not wholly inappropriate) for you to agree to a term which could put you in the impossible position of having to breach the contract in order to comply with the Code of Conduct.

That argument might be weaker in the case of such a term applying only to "foreign work" (as defined in the BSB Handbook), because the cab rank rule does not apply to such instructions, but it would still hold water if the demand from the potential client was very wide, and it would be likely still to run too much of a risk of falling foul of unforeseen circumstances or changes in the Code.

The fact that most self-employed barristers band together in sets of chambers can lead to misunderstandings on the part of foreign lawyers. The Bar Council has been told of incidents where foreign lawyers seek to introduce clauses restricting the right of anyone else in the barrister's chambers appearing against a certain client. Member of chambers are not each others' agents, so no member of chambers could bind any other member to such a clause under the law of England and Wales; but even if all the other members were prepared to agree to such a restriction, that would, as with the restriction described above, be similarly unacceptable, and arguably more given its even broader scope and effect.

If this is likely to become a problem, it must be addressed early by reference to the cab rank rule, the self-employed status of each member of chambers, the conflict walls which chambers will erect in such cases, and the fact that acting against each other is not unusual. In an appropriate case, a contractual term might be a good idea to spell out what is and what is not permissible.

It is worth noting here that the cab rank does not apply in circumstances where the professional client (such as the foreign instructing lawyer) does not accept liability for the barrister's fees as is the case under Basis B of the COMBAR terms.

Care must be taken if you are asked to divulge whether you have previously worked for or against any party. Confidential information cannot be divulged, and this may include the fact that you have acted for or against a particular party. But even if your acting is a matter of public record and could be confirmed without breaching any other duty to an existing or former client, the scope and nature of your instructions will almost certainly be confidential and often privileged. If accepting the fresh instructions would not of itself be in breach of the Code of Conduct (by reason of any conflict or duties of confidence arising from earlier instructions), it is unlikely to be a good idea to go into any details of previous instructions.

Good clerks are skilled at describing a barrister's experience in certain fields and even particular issues without divulging names and specifics of particular cases, or any other information which may be confidential.

Ethical issues and the limits of permissible instructions

There are jurisdictions in which regulation of the legal profession is looser than in England and where rules, such as exist, are less rigorously enforced than they might be. Lawyers in such places may be used to conducting cases in ways unfamiliar to us, and may expect you to behave in ways which might put you in breach of the Code of Conduct.

As set out above, the specific Core Duties must not be breached. In addition, other rules in the Code of Conduct may require you to pause before agreeing to each request from abroad. Depending on the risks perceived, it may be worth including in a contract some specific reference to the limits of what a barrister may legally do.

For example, if the instructions entail preparing for a trial, it might avoid later disputes if the contract spells out that you cannot coach a witness. It might also be sensible to include a term indicating that you are not permitted and will not engage in issuing application notices (unless you have a litigation extension to your Practising Certificate).

Complying with English and foreign professional rules

The Code sets out Core Duties which must be adhered to in all work. They include duties to act in the best interests of each client, with honesty and integrity, independently and competently but also a duty to keep the client's affairs confidential and duty not to discriminate.

The Code of Conduct also sets out more specific rules, some of which are relaxed in the case of foreign work and/or work for a foreign client; so, for example and importantly, you are not bound by the cab rank rule to accept instructions which entail foreign work or work for

a foreign lawyer outside Europe . But for the most part the rules will apply as much to work with a foreign element as to domestic work.

If undertaking foreign work, the Code of Conduct expressly requires you to comply with any applicable foreign rule of conduct as prescribed by the law or any local or national bar, unless such rule is inconsistent with any of the Core Duties (in which case the Core Duties prevail). You may therefore have to enquire about foreign rules and codes. If you have a foreign professional client, they will be able to provide guidance in cases of doubt. You may also obtain advice from the Bar Council's Ethical Enquiries Service or from local bar associations . It is your obligation to inform yourself of all local rules and laws that may be applicable.

Defining work scope

It is of even greater importance to identify clearly the scope of your instructions when contracting with a party unfamiliar with the traditional role of a barrister. A foreign client may expect you to carry out tasks for which you are unsuited – such as investigating local assets or collating and managing a lot of paperwork. The client should be made aware of the nature of the services which you are offering under the contract, and you should not assume that the foreign client will appreciate the traditional limits on counsel's role.

Unavailability, replacement counsel

In a longer running case, in which there might be instances where you are unavailable for an unavoidable and immovable hearing, it is worth considering a term dealing with replacement counsel. Such terms can be found in pro forma conditional fee agreements and adapted; they are not included in all standard domestic contracts as the situation is rare and easily managed.

Ceasing to work, and returning instructions

Although it should be rarely necessary to rely upon it, you may consider including a term setting out the bases on which you may lawfully return your instructions, either in detail or by reference to the Code of Conduct.

Such a term might include reference to the right to return instructions in the case of a failure to pay fees agreed upon giving reasonable notice and a right to return instructions if your professional conduct (rather than your professional opinion) is being called into question.

Fee matters

It is always possible to agree payment in advance of carrying out work as a barrister. However barristers cannot individually hold money on account of their fees so this method of payment can only be used when the fee for the work in question is one which can be definitively set in advance, such as for a short hearing or one-off piece of advice.

In most cases, and particularly larger jobs where the work may continue for a while, you will to some extent have to extend credit to a client in respect of work done in the traditional manner. This can be mitigated by regular billing arrangements, by contractual terms for prompt payment and the payment of interest, and (where appropriate) by charging fixed minimum amounts in advance, but these possibilities do not avoid at least some credit being extended. More effectively, BARCO is now available as a trust account where money on account of fees may be held by BARCO on behalf of the client, from which fees agreed to be due can be drawn down in accordance with your contract with the client and the BARCO terms of business. This may be a useful tool when working with a new foreign client where trust has not yet been built to a sufficient level for you to be willing to extend credit.

It must be borne in mind that some overseas lawyers charge on very different bases from us. They may be unfamiliar with hourly rates, let alone brief fees and refreshers. One of the great advantages of the self-employed bar is the flexibility which each barrister can bring to fee negotiation: it is open to any barrister to work for a fixed fee for a particular piece of

work if that suits the barrister and the client; rarely will English litigation solicitors have that degree of flexibility.

The legal professional is increasingly expected to provide reliable fee estimates. A foreign client is likely to be keen on estimates particularly if unfamiliar with the level of fees which can be generated by litigation. You should provide accurate fee estimates based upon the material available, but qualified so as to cater for unforeseen changes and the possibility of further material and additional issues arising.

You should make clear in any contract what arrangements will be made to cover your out-of-pocket expenses and in particular any expensive travel or hotel costs. Will you be charging for travelling time? What class of travel and hotel will be acceptable? How much should be allowed for living expenses whilst travelling? Such matters which are taken for granted with English-trained lawyers might be unclear to other lawyers unless agreed in advance.

If you are going to charge a brief fee and refreshers, make sure those concepts are adequately explained and defined in the contract so as to avoid arguments later about, for example, liability to pay when the case settles mid-way through a trial (or mid-way through the preparation for trial). Make clear what happens if a case settles at 10am one day, or finishes at lunchtime – will that day's entire refresher fall due?

If the case will involve long-haul travel, it might be that you will be unable to return home much or any earlier in the event of a case settling early, in which case consider whether to agree a daily rate at all.

It is common to ask for larger fees to be paid in tranches – and if you do ask for tranches make sure it is clear when they are due and set out the consequences of non-payment. Like most domestic clients, foreign clients will appreciate regular billing on a long-running case, so that periodic payments are kept manageable. This is also likely to be in your own interests by helping to manage your credit risk.

Many foreign lawyers will be uncomfortable about being liable personally for your fees. They may suggest that you enter into a contract directly with the lay client in order to avoid

the fact or impression of personal liability. But, assuming you are content to work without the foreign professional becoming directly liable to you, you might consider a single contract with the professional under which he is liable only to endeavour to collect the fees from the ultimate client rather than any alternative or additional contract with the lay client. Again BARCO may be of assistance in such cases.

You can ask your foreign professional client to take from the lay client money on account of your expected fees (assuming that the foreign professional client's own rules and laws permit this), which the professional client can then hold until you bill for your work.

There will be instances of the lay client refusing to pay. It goes without saying that if you have agreed that the foreign professional will not bear responsibility for your fees then such instances may result in fees being written off. Luckily, in the experience of most barristers undertaking foreign work, this happens only rarely. But many barristers will accept the risk of non-payment in order to take advantage of a new instruction and a new relationship with a foreign firm. The fear of not being paid can fade once the relationship is on a more solid footing. Ultimately it is matter for your own judgment whether to take the risk.

It is commonplace to include a provision for the charging of interest in contracts but it is rare for barristers to enforce such a provision. However it can be an effective deterrent for potential late payers.

Foreign lawyers may wish to set rates in their currency rather than Sterling. The risk of fluctuating currency risk should be borne in mind before agreeing to that, even with established currencies such as the US dollar and the Euro, particularly if there is a risk of delay in payment. But again, if the job is attractive enough and the relationship worth nurturing, it is something to which you might wish to agree.

If payments are made electronically, there may well be significant payment transfer charges made by the remitting or receiving bank and it is worth clarifying whether such charges will be borne by the client or by you.

Disputes

There may be no easy or cheap way to resolve disputes. Nor is there is any way to eliminate the risk of fee disputes, although the ideas in this Note might help in reducing the risk. But in case a dispute does arise, you may wish to include a dispute resolution clause. The COMBAR/CLLS standard terms provide expressly for English law and the jurisdiction of the Courts of England and Wales but you may prefer an arbitration clause before an English lawyer, should the counterpart not agree to the courts here.

If you have a dispute with another lawyer within a CCBE State (i.e. a lawyer whose profession is a member of the Council of Bars and Law Societies of Europe, other than one in the UK) which relates to a professional cross-border activity, the CCBE Code of Conduct requires you to attempt to resolve a fee dispute by mediation of the two bar councils or law societies involved .

Conditional fee and damages based agreements

Particular care must be taken in agreeing conditional fee and damages based agreements. Quite apart from the scope of what is permissible and the additional risks involved in such cases (which are outside the scope of this Note), in a foreign case with no liability to pay arising until the end of a case, there may be greater collection and enforcement problems and an enhanced risk of not being paid at all.

Unless the case is particularly desirable, you may wish to think twice about taking on a case for a new contact on a purely conditional basis.

Confidentiality

Standard general terms include confidentiality provisions (see, for example, clause 10 of the COMBAR/CLLS terms), which may be appropriate and acceptable to both parties. But a foreign client may not agree to disclosure to a pupil, for example.

Furthermore the rules on disclosure under our criminal law and civil procedural codes may be alien to the foreign client who might legitimately expect some explanation of the ambit of a contractual term which permits you to disclose confidential information when such disclosure is required under the English legal, procedural or regulatory rules.

Some foreign clients are nervous about allowing a barrister to see any documents before signing a contract, which makes estimating time and costs of any work difficult. If the clients are not reassured by the existence of our professional obligations, you may have to sign some form of non-disclosure agreement even to see the documents but this should be done only as a last resort. You would also need to take particular care if you do not have enough information to be confident that seeing the documents in this situation would not create a difficulty for you in honouring your obligations to other existing or former clients.

Bear in mind that many jurisdictions have very different rules about privilege: in some there is no right to withhold the content of lawyer-client communications from the Court or an opponent. That means your communications may be disclosed to persons you may not have anticipated seeing them.

Complaints

It is a regulatory requirement that a client know that they can make a complaint, and know how to do so; complaints must be dealt with promptly . As it is a rule to display information about chambers' complaints procedure on websites, it might suffice to refer to the website in the contract, but it is also good practice to follow up any agreement with a letter to each client with details of the complaints procedure. That is as relevant to foreign clients as domestic ones; and rules C99 to C103 apply as much to foreign clients as to domestic ones.

Direct instructions

Different and more acute issues may arise when taking instructions directly from a foreign lay client. It is now a requirement under the new Code that barristers need to be Public

Access qualified to accept such instructions. Of course the usual rules which apply to Public Access work will apply, such as the record-keeping requirement: see section D2.1 of the BSB Handbook. The impact of the Public Access rules may be enhanced in relation to international work, such as the rule to take into account the best interests of the client in its representation. Money laundering and fee issues may well also be of greater concern. As regards the terms of the necessary contract, however, you will find that much of what has be addressed under rC125 overlaps with suggestions and good practice advice set out above in relation to cases involving a professional client, not least because much of rC125 is concerned ensuring that a barrister's role is made clear to those who may not understand it.

More particular advice on taking direct instructions from foreign lawyers can be obtained from the Bar Council by calling the helpline (020 7611 1307) or emailing Ethics@BarCouncil.org.uk.

Money laundering

Barristers must familiarise themselves with the money laundering rules. The risks are low when the only money changing hands is payment for advice and representation in respect of a dispute, particularly if there is a foreign lawyer intermediary. But for advisory work, and a fortiori if instructed directly by a foreign lay client, the money laundering rules must be studied more carefully. The IBA has now issued a useful Guide for practitioners to recognise any dangers in this respect (www.anti-moneylaundering.org/AboutAML.aspx).

Tax and exchange control

Some law firms want barristers to contract directly with clients because money going out of country above a certain threshold is subject to tax. This is not likely to be an option open to most barristers for most work. In most cases, barristers will have to rely on the foreign lawyer to ensure that they can be paid without restriction under any exchange controls.

If you fear that you may be dealing with a client in a country with restrictive exchange controls, raise it early to see whether it may prove a problem later. Firms with offices in more than one country may be able to arrange for you to be paid out of another office.

Conclusion

Work from abroad is a growth area for all parts of the Bar. The additional complications and risks, above those which exist in domestic work, are worth knowing about and considering. But the opportunities are so big and various that it would be a mistake to allow such risks to prevent the expansion of your practice into foreign work.

Ultimately each barrister will consider each case on its own merits. Some will entail more risk than others. Rarely will a foreign client's concerns or disagreements on contractual terms be so significant as to make a new case not worth taking. Rather you should consider the upside of a new relationship and evaluate the chance of suffering, at worst, a case which goes unpaid.

In foreign work you must take account of not only the English rules and BSB regulation but also any pertinent foreign laws and rules, but again it is rare than such rules are so restrictive as to make the work unattractive overall.

Overall the rewards will ordinarily outweigh the risks. After the first successful piece of work, you will establish a modus operandi and a degree of trust that may lead to years of lucrative instructions from a fresh seam.

Part Three: A summary note of changes to the rules on international practice

In January 2014 the new BSB Handbook (the **"Handbook"**) came into force containing, in Part II, the new "risk-focused" and outcome based Code of Conduct. The Handbook and in particular the new Code of Conduct in Part 2 contains significant changes to the rules relating to international practice. This Note summarises and identifies the main changes.

This Note considers the position of self-employed individual barristers. It is outside the scope of this Memo to consider the changes to the Code by reason of the BSB's decision to regulate entities, but it would appear that many of the provisions have been made applicable to BSB-regulated entities just as they apply to the self-employed bar. However this Memo should not be read as dealing with all the additional or different rules which may apply to entities.

This Note also does not cover the additional requirements which come into play in relation to European work.

The International Committee is preparing a separate note which will address practical issues for barristers to consider when engaged in international work.

<u>The Old Position</u>

Under the old Code of Conduct, there was a set of rules called the International Practice Rules (**"IPRs"**) at Annexe A to the Code. At heart, the IPRs, by reason of their definition of "International Work", disapplied the Cab Rank Rule (i.e. Code §602) for:

a. Some but not all English proceedings (depending on the residence of the lay client and where, geographically, the instructions came from – see IPR1(b)); and

b. Some but not all foreign proceedings (depending on where the work was actually carried out).

The other significant relaxation under the old IPR was the disapplication of Code §401(a) for International Work, thereby permitting the Bar to accept instructions directly from lay clients.

In addition the old IPRs relaxed and modified the Code in relation to International Work substantially performed outside England and Wales.

The old IPRs made distinctions based on:

i. where the barrister *"substantially performed"* his instructions;

ii. the residence of his lay client; and

iii. whence his instructions emanated.

These distinctions gave rise to anomalies in the past.

The New Definitions

The new Handbook –replaces the old concept of 'international work' with fresh definitions of *"foreign work"*, *"foreign client"* and *"foreign lawyer"* (see the definitions in **Part VI** of the Handbook).

Foreign Client

A foreign client is defined in the new Handbook as 'a lay *client* who has his centre of main interests outside England and Wales, or who reasonably appears as having that characteristic.' The foreign client definition is tied to the concept of "*Centre of Main Interests"* which is borrowed from European and UN law and best known domestically in the law of cross-border insolvency. This is an international and objective test, independent of the type of legal entity concerned, which has been considered and refined in the ECJ and the English Courts (see, e.g., *Re Stanford International Bank Ltd* [2010] EWCA Civ 137).

Foreign Work

Foreign work is defined (in **Part VI** of the Handbook) as legal services of whatsoever nature relating to:

b. Court or other legal proceedings taking place or contemplated to take place outside England and Wales; or

c. If no court or other legal proceedings are taking place or contemplated, any matter or contemplated matter not subject to the law of England and Wales.

As before, albeit with potentially different limits, *foreign work* is not subject to the Cab Rank Rule - see the new **Handbook, Part 2, rC30.5**.

As with all other work, a barrister doing foreign work remains under a duty to ensure that the client is well-served by the composition of the legal team, and to advise the client if she comes to the view that it would be better served with different legal representation (see **the new Handbook, Part 2, rC17** and the guidance on that rule, particularly **gC49)**.

Broadly as before (under IPR Rule 2), a barrister undertaking *foreign work* is required, as a matter of professional conduct, to comply with the applicable rules of the foreign place in question, subject always to the overriding Core Duties **(new Handbook, Part 2, rC13)**. Furthermore soliciting work outside England and Wales must not be done in any manner as would be prohibited if done by a member of the local bar **(new Handbook, Part 2, rC14)**.

Unless the barrister has undergone Public Access training, he is not permitted to accept instructions for *foreign work* directly from a lay *foreign client* (i.e. from a non-lawyer) – see further below on this issue. *(Please note that the BSB has announced that barristers who have not completed the training may continue to take instructions from lay clients on foreign work until June 30 if it is in the client's interests to do so. However, if they want to continue to be instructed in this way, they must undertake the public access training before July);*

Foreign Lawyer

Foreign lawyer is defined broadly but not exactly as per the Courts and Legal Service Act 1990 as a person who is a member, and entitled to practice as such, of a legal profession regulated within a jurisdiction outside England and Wales and who is not an authorised person for the purposes of the Legal Services Act 2007 (as amended).

Instructions from a *foreign lawyer* (whether to carry out domestic or *foreign work)* need not be accepted by a barrister under the Cab Rank Rule unless the foreign lawyer is from the UK or Europe - see **new Handbook,** Part 2, **rC30.6**.

As before, any barrister may take instructions directly from a *foreign lawyer* without the need for an English solicitor as the definition of *professional client* in **Part VI**

includes a *foreign lawyer*) – and see Part 3 of the Handbook (Scope of Practice and Authorisation Rules, **rS24.1**). Accordingly, as before, there is no need under the new Handbook for a barrister to have a public access qualification before she can take instructions from a foreign lawyer. However there has been a significant relaxation in that a barrister can now take instructions from a foreign lawyer to provide advocacy services, which used to be prohibited – see further paragraph 23-25 below.

Direct instructions from lay clients

The new Rules change the old position in this respect: under the old Code of Conduct, no intermediary was needed for International Work – that was effected by disapplying para 401(a) of the Code in relation to International Work (Rule 3 of IPRs at Annexe A). But, in relation to *foreign work*, a barrister cannot now take instructions directly from a lay client because the equivalent provision in the Scope of Practice Rules section in the new Handbook (**Part 3, rS24**) does not have any carve out for *foreign work* (see also the guidance at **gS3**).

For example, in 2013 a barrister might have chosen to (but was not obliged to) accept instructions directly from a foreign client to advise on an English law matter or appear in an English arbitration: that would have been International Work then and there was no requirement under the old Code to have an English solicitor involved in such matters because they did not entail advocacy services in an English Court. A common example of this used to be a London construction arbitration in which the barrister was instructed by an in-house surveyor at the client. Under the new Code, such work could not be accepted by a barrister who had not completed public access training (**Part 3, rS24.3.a.iii**).

The same is true of direct instructions from a lay client to advise or work on a foreign law matter, or appear in a foreign arbitration or an overseas Court. Under the old Code, with limited exceptions, such instructions could have been accepted by any barrister as the work was likely to have been International Work. However under the new Code, only barristers licensed to do public access work could accept them under the same rule **rS24.3.a** in Part 3 of the Handbook.

Other differences in form and practice

The new draft Handbook has been produced with an aim of removing Annexes. Much of the substance of Annexe A has been folded into the body of the Handbook. Subject to the points set out above, there are few radical changes to the limits and rules of international practice per se.

One other significant change to the old rules is that a barrister can now accept instructions directly from a foreign lawyer to provide advocacy services preparatory to appearing in Court in England or Wales without an English solicitor intermediary. The barrister cannot (unless he has the requisite conduct of litigation extension) step foot in Court without a solicitor (or other authorised litigator) but, if there were some urgent need to prepare for, say, an injunction, she could start work on the skeleton argument and oral arguments in parallel with the search for a suitable solicitor, subject to the client or foreign lawyer bringing in a solicitor by the time of appearing in Court.

This change is a result of the fact that under the old Code of Conduct a barrister could take instructions from a *"professional client"*, defined (in Part X, Rule 1001) so as to include a foreign lawyer *"in a matter which does not involve the barrister supplying advocacy services"*. Advocacy services are defined in the Courts and Legal Services Act 1990 (s.119) as *"any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings, to provide"*, and so would include writing a skeleton argument or preparing for Court. The net effect of those definitions was that a barrister could not take instructions to work preparing arguments to deploy in an English Court on the instructions of a foreign lawyer.

However in the Handbook, there is no such restriction in the definition of *"professional client"*, so the barrister can provide advocacy services on the instructions of a foreign lawyer, albeit neither of them (unless the barrister had the requisite conduct of litigation extension) can conduct the ensuing litigation. Of course, in practice it is quite possible that the barrister will be best placed to identify and recommend a suitable solicitor; for this reason, this rule change could be advantageous to the profession. As before, the barrister could do drafting

work, such as settling an affidavit or drafting an application notice, as that does not amount to the conduct of litigation as presently interpreted by the Courts.

Other changes have the effect of permitting a barrister to turn away instructions in various rare situations which the old rules treated, somewhat anomalously, as governed by the Cab Rank Rule, i.e.:

a. A foreign matter in which the barrister is instructed by a lawyer (foreign or English) on behalf of an English lay client, and where the work is then carried out in England. An example would be where an expatriate Englishman returns home from the Turks & Caicos Islands; he is sued in the T&CI Courts, and retains solicitors[1] who in turn instruct a barrister to advise upon and settle a defence to the claim, which he does in London with the solicitor attending by phone for a con. Under the old rules, anomalously, that would not have been International Work; but it is under the new Code within the definition of "*foreign work*". The effect is that it would no longer be governed by the Cab Rank Rule;

b. A foreign matter in which the barrister is instructed by an English solicitor on behalf of a foreign client where the work is carried out in England. This would surely be rare but it is conceivable: e.g. a Russian company retaining a City law firm which instructs a barrister in London, to advise on a highly specialised point of law in a contract governed by the law of Hong Kong, whose law on the point is similar to English law. Under the old IPR this would not have been International Work, but it is *foreign work* as defined under the new Code. The effect is that it would no longer be governed by the Cab Rank Rule.

The old IPR relaxed the rules on overseas associations between barristers and other lawyers, restrictions on the type of work which barristers could do abroad, their insurance requirements and the way in such barristers charged for their services. Many of the restrictions have been dismantled by the BSB as part of its wider plan to free up the profession from historic barriers to work. Accordingly the new Code does not need to refer

[1] It does not matter whether they are in England or T&CI

expressly to the relaxation of former restrictions. For that reason, there are only limited equivalent provisions in the new Code to what was previously IPR Rules 4(a) to (c).

However there is in the Scope of Practice Rules section of the new Handbook at **Part 3, rS26** a relaxation on the prohibition on the management, administration and general conduct of a client's affairs where the work is foreign work carried out at an office outside England and Wales which a barrister established or joined primarily for the purpose of carrying out that particular foreign work or foreign work in general.

The old IPR contained rules on dual-qualified barristers and other miscellaneous rules on barristers working outside England and Wales. The new Code makes no significant changes to this position, for example:

d. Much as under the old IPR Rule 4(d), a barrister employed by a foreign lawyer may provide foreign work services to a client of his employer (**Part 3, rS39.10**);

e. Under the old IPR Rule 4(e), an unregistered barrister practising as a foreign lawyer who neither advised on English law nor supplied legal services in respect of English proceedings was not treated as a practising barrister. The position is preserved under **Part 3, rS13**);

f. The former IPR Rule 5 set out who would be qualified to supervise a barrister of less than 3 years' standing who works from an office in the EU outside England and Wales. It is reproduced in **Part 3, rS22.2.b**;