



A summary note of changes to the rules on international practice

30.01.14

1. In January 2014 the new BSB Handbook (the “**Handbook**”) came into force containing, in Part 2, 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.
2. 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.
3. This Note also does not cover the additional requirements which come into play in relation to European work.
4. The International Committee is preparing a separate note which will address practical issues for barristers to consider when engaged in international work.

The Old Position

5. 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).
6. 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.
7. In addition the old IPRs relaxed and modified the Code in relation to International Work substantially performed outside England and Wales.
8. 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.
9. These distinctions gave rise to anomalies in the past.

The New Definitions

10. 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

11. 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

12. *Foreign work* is defined (in **Part VI** of the Handbook) as legal services of whatsoever nature relating to:
 - a. Court or other legal proceedings taking place or contemplated to take place outside England and Wales; or
 - b. 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.
13. 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**.
14. 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**).
15. 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**).

16. 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

17. *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).
18. 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**.
19. 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

20. 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**).
21. 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**).
22. 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

23. 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.

24. 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.
25. 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.
26. 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.

27. 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 solicitors¹ 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.

28. 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 expressly to the relaxation of former restrictions. For that reason, there are only

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

limited equivalent provisions in the new Code to what was previously IPR Rules 4(a) to (c).

29. 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.
30. 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:
 - a. 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**);
 - b. 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**);
 - c. 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**;

International Committee of the Bar Council

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