# Taking instructions from abroad: A note about contractual terms

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| **Purpose:** | To assist and inform self-employed barristers who wish to provide their services to overseas clients |
| **Scope of application:** | All practising barristers |
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| **Status and effect:** | **Please see the notice at end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.** |

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.