

Ethics and Role of Counsel in International Arbitration

International Arbitration Commission

Prague, 2014 – Working Session Number 08

National Report of England and Wales

Eleni Polycarpou

Withers LLP
16, Old Bailey
London
EC4M 7EG

eleni.polycarpou@withersworldwide.com

General Reporters:

Simone Stebler, Bär & Karrer AG, Zurich, Switzerland
Katriina Kuusniemi, Roschier, Stockholm, Sweden
Damien Devot, Meyer Fabre Avocats, Paris, France

14 February 2014

Dear National Reporter

First of all, many thanks for having signed up as a National Reporter! We are very much looking forward to working with you.

The working session at the AIJA Annual Congress in Prague 2014 is entitled "Ethics and Role of Counsel in International Arbitration". In the working session we plan to address the respective role of outside counsel (i.e., presenting the case in the best way possible to the arbitral tribunal, preparing written submissions, etc.) and in-house counsel (assisting outside counsel with the fact finding; advising management as to amounts to be put posted as reserves, duties that arise in a pre-arbitration stage, such as selecting suitable external counsel, leading and documenting potential pre-arbitration settlement negotiations, etc.) in international arbitration, and, particularly, the ethics rules applicable to them. Your National Reports will focus on these ethics rules.

You will also find a short description of the working session on the AIJA website. The "teaser text" for the working session that will be published on the website is the following:

"Whether you are an outside or an in-house counsel, your main task in international arbitration proceedings is to present (or to ensure that outside counsel presents) your case to the arbitral tribunal in the best way possible to secure a positive outcome.

However, the end does not always justify the means.

Besides tactical considerations, in his/her interaction with the client, the opposing party and its counsel, the arbitral tribunal as well as potential witnesses and experts, counsel must obey certain ethics rules. What those rules are, their nature and whether they apply to outside counsel and in-house counsel alike will be explored in depth in the National Reports, the General Report and the working session. The working session will also address potential remedies for misconduct and discuss whether an international level playing field is emerging. In that respect a focus will be placed on the relevance of the recently published and much discussed IBA Guidelines on Party Representation in International Arbitration.

The working session will moreover place a particular emphasis on the critical interaction between outside counsel and in-house counsel, as particularly delicate ethical issues may arise in this interaction. The respective roles of outside counsel and in-house counsel thus merit a closer look."

It is important for you to note the main idea behind this questionnaire (and hence your National Report): the questionnaire is designed to explore on a country-by-country basis the various ethics rules counsel must respect when interacting with the arbitral tribunal, the opposing party, the client and witnesses and experts. Your National Reports will thus provide us with an idea as to how level the international playing field is in that regard. The questionnaire moreover focuses on the recently published and much discussed IBA Guidelines on Party Representation in International Arbitration (a copy of those guidelines is attached to the cover e-mail). Your National Reports will thus provide us with insights as to what extent the IBA Guidelines on Party Representation in International Arbitration correspond with various national ethics rules.

The questionnaire is intended to enable you as National Reporter to provide an overview on the key issues which arise in your jurisdiction in relation to ethical rules applicable to counsel in international arbitration proceedings. We have structured the questionnaire, based on broad open questions, in order for you to elaborate on the main topics as freely as possible.

Ideally, the National Reports should be no more than 14 pages and be formatted on a consistent basis. You will find the formatting guidelines at the end of the questionnaire. Please ensure that these guidelines are observed.

The National Reports will be published on the AIJA website. Furthermore, we plan to publish the General Report and the National Reports in some form (if we publish the reports in a condensed and summarized form in an article, we will make sure that your name is mentioned and that you get as much visibility as possible). Such publication could be used as a marketing tool. To make such publication a success, we kindly request you to meet academic standards when preparing the report, such as references to court decisions, applicable law, literature, etc.

Should the National Report be prepared by more than one National Reporter, please ensure that only one single document is provided. In such case, please also note that we will not coordinate the preparation of the Reports between the co-reporters. You may do so on your own.

Looking forward to working together and we remain at your disposal whenever you have any questions or like to discuss.

All the best and looking forward to seeing you in Prague!

Katriina, Damien and Simone

Questionnaire

1. Applicable Ethics Rules

1.1. What are the statutory laws and/or (private) regulations regulating the conduct for the legal profession in your country?

The legal profession in England and Wales consists of solicitors and barristers as outside counsel. Barristers have rights of audience before High Court Judges and above. But both solicitors and barristers may appear as counsel in international arbitration (for further information see 2.2 below).

The Legal Services Act 2007 (the ‘**Act**’) established the current regulatory regime of the legal profession in England and Wales. It came into effect on 1 January 2010. It created the Legal Services Board (‘**LSB**’), which is charged under the Act with the duty to promote the following regulatory objectives:

- Protecting and promoting public interest;
- Supporting the constitutional principles of the rule of law;
- Improving access to justice;
- Protecting and promoting the interests of consumers;
- Promoting competition in the provision of services;
- Encouraging an independent, strong, diverse and effective legal profession;
- Increasing public understanding of the citizen's legal rights and duties;
- Promoting and maintaining adherence to the professional principles.

The LSB oversees the regulatory activities of 8 bodies named in the Act as approved regulators, which exclusively authorise and regulate the provision of legal services. The most important, overseeing the activities of professional lawyers who may appear as counsel in international arbitration, are:

- for solicitors, the Law Society and its independent regulatory arm the Solicitors Regulation Authority (‘**SRA**’);
- for barristers, The Bar Council and its independent regulatory arm the Bar Standards Board (‘**BSB**’).

The regulation of solicitors

The SRA produces the SRA Handbook, which establishes the professional conduct regulations for solicitors in England and Wales (the ‘**SRA Code**’). The current SRA Handbook came into force on 6 October 2011. It is currently in its 8th version, published on 1 October 2013. The SRA Handbook stipulates 10 pervasive Principles, which are binding on all solicitors.¹

The SRA Code of Conduct is made up of Outcomes and Indicative Behaviours (‘**IBs**’). The former are mandatory and the latter are intended to specify the kind of behaviour which may establish compliance with or contravention of the Principles. IBs are not mandatory, but are used to help decide whether an Outcome has been achieved in compliance with the Principles.

The regulation of barristers

The BSB issues the BSB Handbook. The most recent edition came out in January 2014, incorporating the 9th edition of the Code of Conduct which regulates the professional conduct of barristers in England and Wales.

S. 176(1) of the Act states that a regulated person, being a person authorised by an approved regulator to provide legal services, ‘has a duty to comply with the regulatory arrangements of the approved regulator’. Arguably, therefore, solicitors and barristers are under a statutory duty to comply with the Handbooks of, respectively, the SRA and the BSB. In any event, the English courts have indicated that the professional rules regulating solicitors in England have the force of statute.²

¹ The Principles specify that every solicitor must always and everywhere:

1. uphold the rule of law and the proper administration of justice;
2. act with integrity;
3. not allow their independence to be compromised;
4. act in the best interests of each client;
5. provide a proper standard of service to their clients;
6. behave in a way that maintains the trust the public places in them and in the provision of legal services;
7. comply with their legal and regulatory obligations and deal with their regulators and ombudsmen in an open, timely and co-operative manner;
8. run their business or carry out their role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
9. run their business or carry out their role in the business in a way that encourages equality of opportunity and respect for diversity; and
10. protect client money and assets.

² Hollins v Russell [2003] EWCA Civ 718; Swain v The Law Society [1983] 1 AC 598.

The Code of Conduct of the Council of Bars and Law Societies of Europe (the ‘**CCBE Code of Conduct**’) has been incorporated into the BSB Code of Conduct³ and it is also binding on solicitors in England and Wales in respect of their cross-border European activities.⁴

1.2. Which authorities are competent to enforce the identified rules and who has standing to make a complaint/submission to the competent authority, e.g., the client, the opposing party, the opposing party's counsel, other? What are the potential remedies for misconduct that are at the disposal of the enforcing authority? What are the differences with regard to the potential remedies set forth by the local ethics rules and Guidelines 26-27 of the IBA Guidelines?

The relevant enforcement authorities are the SRA (for solicitors) and the BSB (for barristers). Allegations of serious breaches of the applicable professional ethics rules such as to merit disciplinary prosecution may also be heard and adjudicated by a disciplinary tribunal, on referral from the SRA or BSB. For solicitors this is a standing statutory tribunal, the Solicitors Disciplinary Tribunal (‘**SDT**’). In the case of barristers, the Council of the Inns of Court (‘**COIC**’), collectively representing all barristers, convenes an ad hoc disciplinary tribunal.

There is a specified procedure for complaints about solicitors from clients. All solicitors are required by the SRA to have an internal complaints handling procedure, which clients must use in the first instance to resolve complaints about the service they have received. Should the client be unsatisfied with the outcome of this process, the office of the Legal Ombudsman, established under the Act and active since October 2010, exists as a next step in the process. The function of the Legal Ombudsman is to administer an independent resolution procedure for complaints brought by clients about the service provided by their legal representatives. In the case of solicitors, the office of the Legal Ombudsman is engaged where the client and solicitor are unable to resolve the matter themselves. Clients with a complaint about their barrister may complain to the Legal Ombudsman directly.

However, the Legal Ombudsman is empowered only to address complaints about quality of service as evaluated from a consumer perspective. Where it finds evidence of potential professional misconduct, it will refer the matter to the SRA or BSB (as appropriate) for further investigation and enforcement.

³ BSB Handbook Part 2 D5.

⁴ http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Status_of_the_CCBE_C1_1386165089.pdf

The SRA and SDT

The SRA has the legal authority to take enforcement action against solicitors for professional misconduct, such as non-compliance with the Principles of the SRA Code. Clients with complaints about their solicitor must first exhaust the complaints procedure described above, rather than complaining directly to the SRA. If it is appropriate, it is the Legal Ombudsman who refers complaints from clients about solicitors to the SRA. Others who have standing to make such a complaint are professional lawyers and judges who may report misconduct directly to the SRA (indeed, the applicable local ethics codes oblige them to do so), as may the opposing party in litigation and the opposing party's counsel.

Whereas Guidelines 26-27 of the IBA Guidelines allow the arbitral tribunal to admonish a party representative for misconduct, to draw adverse inferences, to consider counsel's misconduct in making costs orders or to take any other appropriate measure to preserve the fairness and integrity of the proceedings, the SRA's legal enforcement powers are far more extensive. This reflects the SRA's statutory role to regulate solicitors in the interests of the public and justice and the rule of law at large, as opposed to an arbitral tribunal's more limited duty to preserve the fairness and integrity of the arbitral proceedings in question.

The remedies for misconduct at the SRA's disposal, following a thorough investigation of the complaint, include:

- issuing a warning about future conduct
- imposing a disciplinary sanction, such as a fine of up to £2,000 or a written rebuke against a firm or individual solicitor
- controlling how a firm or individual practices by imposing conditions on a solicitor's practising certificate or a firm's registration
- referring a firm or individual's conduct to the SDT, where the right evidence exists and it is considered in the public interest to prosecute.
- revoking or refusing to renew recognition of a firm, meaning that it can no longer provide legal services
- closing a firm with immediate effect, where dishonesty is suspected and an intervention is deemed necessary to protect the public.

The SDT holds very wide statutory powers of sanction, in the event of finding serious professional misconduct, under s. 47 of the Solicitor's Act 1974. The SDT's powers include:

- issuing a reprimand

- imposing an unlimited fine
- suspending a solicitor from practice, indefinitely or for a specified period
- striking a solicitor's name from the roll⁵ meaning that he or she is no longer authorised to provide legal services.

The SRA and the SDT may also publicise the disciplinary sanctions that they hand down.

The BSB

The BSB investigates complaints about breaches of the BSB Code of Conduct. Complaints originating from a barrister's client are passed to the BSB from the Legal Ombudsman; any other party (including the opposing party at trial) have standing and may complain to the BSB about misconduct directly within 12 months of the problem arising.

The BSB's Professional Conduct Committee, made up of 35 barristers and 22 lay members, may impose administrative sanctions in the form of a written warning or a fine of up to £1,000. In more serious cases, it also has the authority to refer complaints for disciplinary action where it determines that sufficient grounds exist. Where the BSB determines that disciplinary action is merited, it refers the matter to the COIC to convene a disciplinary tribunal for consideration.

Barristers' disciplinary tribunals may consist of either three or five members, of whom at least one is a lay person (or two, in the case of a five-member tribunal), and they may be chaired by a QC or a judge. The procedures of both types of tribunal are the same, but the five-member tribunal has stronger sanctioning powers.

Barristers' disciplinary tribunals have wide discretion in issuing sentences for professional misconduct. From 6 January 2014, these include:

- Advice as to future conduct
- Issuing a reprimand
- Imposing additional training and professional development requirements
- A fine of up to £50,000

⁵ The solicitor's roll is the official SRA list of all solicitors who currently hold a practising certificate. The list can be found on the Law Society website: <http://www.lawsociety.org.uk/find-a-solicitor/>

- Suspension from practice (a three-member tribunal is limited to the imposition of a suspension of up to 12 months; a five-member tribunal may suspend a barrister without limit)
- Disbarment (only available to a five-member tribunal)

Barristers' disciplinary tribunal hearings are heard in public, and the BSB may publicise their decisions and penalties.

1.3. Do the laws/regulations identified under 1.1 specifically address the conduct of counsel in international arbitration? If the answer is yes, briefly address the relevant provisions. If the answer is no, is the common understanding in your jurisdiction nevertheless that the local ethics rules are applicable to counsel in international arbitration (regardless of the seat of arbitration)?

Article 4.5 of the CCBE Code of Conduct states that, 'The rules governing a lawyer's relations with the courts apply also to the lawyer's relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.'

Chapter 5 of the SRA Code governs solicitors' conduct concerning litigation and advocacy, in respect of proceedings involving a court. A 'court' is defined in the SRA Code as including 'any court, tribunal or enquiry of England or Wales, or a British court martial, or any court of another jurisdiction'.⁶ 'Tribunal' is not defined in the SRA Code, and the context would appear to limit its sense to that of a statutory or other public tribunal. Nevertheless, in practice solicitors apply the same rules that govern their conduct in litigation to their appearances in all arbitrations and before all arbitration tribunals.

The SRA Code and the BSB Handbook do not appear to specifically address the conduct of counsel in international arbitration. However, the common understanding is that English solicitors and barristers continue to be bound by their local professional ethics rules when appearing in international arbitration, regardless of the seat.

The SRA Overseas Rules, which came into effect on 1 October 2013, apply to English solicitors and law firms practising overseas. They require solicitors subject to SRA regulation always to behave in a way which is 'proper and appropriate' for a person authorised by it.⁷ The preamble to those rules says that

⁶ SRA Code Chapter 14.

⁷ SRA Consultation on Handbook Amendments Relating to International Practice, Annex A: Draft Chapter 13 (now effective).

for those engaged in temporary practice overseas the Principles and relevant sections of the SRA Code of Conduct and the SRA Handbook apply.

In an overseas arbitration, if an IB (see 1.1) was not helpful in demonstrating achievement of the mandatory outcome under the SRA Code, it would not necessarily mean that the outcome had not been achieved, but the onus would be very much on the solicitor concerned to demonstrate his having achieved it. It is likely that in an international arbitration this could be done by reference to the IBA rules or local laws or ethics rules of the seat.

1.4. In general, do the laws/regulations identified under 1.1 apply to in-house counsel as well, or do they only apply to outside counsel?

The regulatory regime established by the Act governs all legal professionals in England and Wales.

All solicitors practising in England and Wales must comply with the SRA Code, whether in-house or not. Likewise, the BSB Code of Conduct is binding upon all practising barristers.

1.5. In your jurisdiction, are there any decisions issued by the authorities identified under 1.2 above which pertain to the conduct of counsel in international arbitration proceedings?

There do not appear to have been any recent decisions of the SDT or a barristers disciplinary tribunal specifically pertaining to the conduct of counsel in international arbitration proceedings.

1.6. In your jurisdiction, has a decision been issued already that addresses and/or refers to the 2013 IBA Guidelines on Party Representation in International Arbitration?

To our knowledge there has not yet been a decision in England and Wales that addresses or refers to the 2013 IBA Guidelines.

2. Legal Status of Counsel

2.1. What is the role and legal status of counsel as reflected in the above identified ethics rules/laws, i.e., do the identified rules provide for any duties of counsel towards the Arbitral Tribunal / the client / the opposing party and the opposing party's counsel?

Article 4.5 of the CCBE Code of Conduct states that, 'The rules governing a lawyer's relations with the courts apply also to the lawyer's relations with

arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.’

No rules of the SRA Code or the BSB Code of Conduct specifically address the duties of solicitors or barristers towards the Arbitral Tribunal or towards the client, the opposing party or the opposing party’s counsel in respect of arbitral proceedings. However, the SRA Code and the BSB Code of Conduct govern the behaviour and practice of solicitors and barristers at all times when they are providing legal services (see 1.3 above), so the applicable rules governing legal representative’s conduct in court apply by extension to arbitral proceedings.

Solicitors must not attempt to deceive or knowingly or recklessly mislead the court, nor be complicit in another person’s doing so.⁸ Solicitors must comply with court orders, and not place themselves in contempt of court, and they must comply with their duties to the court.⁹ Where relevant, solicitors must inform their clients of where their duties to the court outweigh their duties to their client – for instance, by refusing to continue to act for a client if the solicitor becomes aware of having unwittingly misled the court and the client does not consent to the solicitor’s informing the court.¹⁰

Similarly, barristers owe an overriding duty to the court to act with independence in the interests of justice. Barristers must:

- not knowingly or recklessly mislead or attempt to mislead the court
- not abuse their role as an advocate
- take reasonable steps to avoid wasting the court’s time
- take all reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions
- ensure that their ability to act independently is not compromised¹¹

Notwithstanding their overriding duty to the court, barristers cannot breach their duty to keep the affairs of each client confidential.¹²

In the event of misconduct of such gravity (such as fraud) as to make arbitral proceedings within English jurisdiction seriously irregular, section 68 of the

⁸ SRA Code O(5.1) and O(5.2).

⁹ SRA Code O(5.3), O(5.4) and O(5.6)

¹⁰ SRA Code O(5.5) and IB(5.5).

¹¹ BSB Handbook rC3.

¹² BSB Handbook rC5.

Arbitration Act 1996 (which governs English arbitration) permits a party to the arbitral proceedings to apply to court to challenge an arbitral award on the grounds of serious irregularity. The court has the power then to remit the award to the arbitral tribunal for reconsideration, to set it aside in whole or in part, or to declare the award to be wholly or partly ineffective.

2.2. According to the local ethics rules identified under 1.1 above, is the representation of parties in international arbitration proceedings limited to specific professions, such as attorneys-at-law?

Barristers have full rights of audience in the English courts, subject to ongoing compliance with requirements of the BSB Handbook. Barristers are not restricted from representing parties as advocates in international arbitration proceedings under the BSB Handbook.

In England and Wales, barristers traditionally are instructed by a solicitor on behalf of a client. Under the new Public Access Scheme, barristers of more than 3 years' standing who have completed an approved training course are now able to receive instructions directly from a client. By extension, this would apply to international arbitration. However, under the Act, 'conducting litigation' on behalf of a client may only be undertaken by a person authorised to do so. 'Conducting litigation' includes the issuing of proceedings or applications, instructing expert witnesses, filing documents at court or serving documents on another party. Until very recently, the BSB would not authorise barristers to conduct litigation, although it is entitled under the Act to do so, as such work was the traditional province of solicitors in England and Wales. As a result, any client directly instructing a barrister had to conduct the litigation itself as a 'litigant in person'.¹³

Since 22 January 2014, however, the BSB is allowing self-employed barristers to apply to be authorised by it to conduct litigation by seeking a litigation extension to their practising certificate, if they can satisfy the BSB that they have:

- appropriate systems in their place of practice to enable them to do so;
- the requisite skills and knowledge of litigation procedure to enable them to provide a competent service; and
- adequate insurance.¹⁴

¹³ 'The Public Access Scheme: Guidance for Barristers', Bar Standards Board Guidance Note (2014).

¹⁴ 'Authorisation to conduct litigation – guidance for applicants', Bar Standards Board Guidance Note (2014).

It remains to be seen what difference these rule changes will make to the conduct of English litigation and arbitration. In practice, however, international arbitration proceedings tend to be sufficiently complex that clients are likely always to instruct solicitors, who would instruct barristers on clients' behalf.

Solicitors automatically have full rights of audience in Tribunals, European Courts and the lower courts of England and Wales. Solicitors may only appear as advocate on behalf of a client in any higher court of England and Wales where they have been granted rights of higher audience. These are only granted to solicitors who have undergone a set of training and education requirements prescribed and administered by the SRA, and ongoing training and assessment requirements apply once these rights have been granted.¹⁵

Nothing in the SRA Handbook expressly prevents any solicitor from appearing as an advocate in international arbitration proceedings. Nevertheless, under the SRA Principles, solicitors must always act in the best interests of their client and provide their clients with a proper standard of service.¹⁶ Applying the local rules, English solicitors ought not to appear as advocates for a client in international arbitration proceedings where they are not fully competent to do so. Such competence might be demonstrated by, for instance, having acquired rights of higher audience.

3. Remuneration of Counsel and Third Party Funding

3.1. How are counsel in international arbitration proceedings normally remunerated in your jurisdiction? Are there any limits/restrictions to be observed according to the local ethics rules identified under 1.1? Please particularly address whether counsel may agree on a contingency fees/conditional fee arrangements with regard to work related to international arbitration proceedings.

Counsel in international arbitration proceedings in England and Wales are normally remunerated as they are for providing any other regular legal service, namely on a time-cost basis, or by way of a fixed fee agreement for example for each phase of the arbitration.

Two forms of contingency fee agreements only are permitted under statute in England and Wales, Conditional Fee Arrangements ('CFAs') and Damages-Based Agreements ('DBAs'). All other forms of contingency fee arrangements in English proceedings are void at common law.

¹⁵ SRA Higher Rights of Audience Regulations 2011, contained in the SRA Handbook 2013.

¹⁶ SRA Handbook, Principles 4 and 5.

Under a CFA, the client and legal provider agree that all or some of the legal provider's fees and expenses will only be paid in certain circumstances, usually where the claim is successful. In the event of success, the legal provider will usually receive an additional 'uplift' on top of the usual fees.

In English civil procedure, the normal policy is that the successful party to litigation is entitled to recover its legal costs from the unsuccessful party. Under the reforms of civil procedure introduced by Lord Justice Jackson in 2013, however, recoverable legal costs no longer include any uplift (the 'success fee') received under a CFA entered into after 1 April 2013, with very limited exceptions.¹⁷ As a result, CFAs have become less attractive to clients as a funding option, as successful clients would have to account for their legal representative's success fee under a CFA.

DBAs, permitted in England only since April 2013 under the same Jackson reforms, are a form of funding arrangement whereby the client pays an agreed percentage amount of its recovery to its legal counsel. These are not yet widely used.

Outcome (1.6) of the SRA Code mandates that solicitors may only enter into fee agreements with clients that are legal. Analogously, Rule C9.7 of the BSB Code of Conduct states that barristers 'must only propose, or accept, fee arrangements which are legal'.

Although nothing in the local ethics rules expressly addresses funding of international arbitral proceedings, in effect, therefore, English solicitors and barristers are restricted to those forms of conditional fee arrangements open to them in litigation, ie CFAs and DBAs.

3.2. In your jurisdiction, is third party funding of international arbitration claims wide-spread and accepted or rather unknown and viewed skeptically?

Third-party funding in international arbitration in London is well established and is not an unusual practice. Many specialist funders now exist to fund international arbitration. TheJudge, one of largest English third-party funders, has funded disputes for sums between £25,000 and £20 million.

Typically, third party funders are willing to take on the funding of cases which are estimated to have a greater than 60% chance of success, where there is a clear and transparently-calculated valuation of the claim, an appropriate costs budget and a creditworthy adverse party. Sometimes third party funders also require funded

¹⁷ The exceptions are insolvency proceedings, publication and privacy proceedings and claims for damages arising from mesothelioma.

parties to take out After-the-Event insurance coverage (see 3.5 below) as a condition of the funding agreement.

Overall, there is believed to be in excess of \$1 billion of capital available in the global third-party litigation funding market. Although England, with the USA, Germany and Australia, is one of the principal jurisdictions attracting third-party funding, third-party funding of disputes in England is not confined to entities domiciled in the UK: US funders, in particular, are willing funders of disputes in England.

3.3. Do the ethics rules of your jurisdiction (expressly and/or implicitly) address the issue of third party funding in international arbitration? If yes, please list the applicable rules and elaborate on their meaning. If no, do other rules/laws and/or case law of your jurisdiction address third party funding in international arbitration?

The ethics rules outlined in 1.1 do not expressly address third-party funding in international arbitration.

However, the BSB Code of Conduct and Chapter 3 of the SRA Code prohibit lawyers from acting where there is a conflict of interest. A conflict of interest may easily arise in the context of third party funding, for instance counsel might favour the interests of the funder (who pays counsel) over the best interests of the client.

A separate Association of Litigation Funders of England and Wales (**ALF**) formed in November 2011. It has issued a self-regulated Code of Conduct for Litigation funders (the '**ALF Code**') in respect of funding the resolution of disputes within England and Wales. The current version of the ALF Code is effective from January 2014 and expressly covers the funding of arbitration.¹⁸

Under the ALF Code, the litigation funder must obtain written confirmation that the client to be funded has taken independent advice from its acting solicitor or barrister on the terms of the proposed funding agreement before it is signed. In addition, the litigation funder must neither take any steps likely to cause the funded party's counsel to breach their ethics rules nor seek to influence counsel as to the conduct of the dispute.¹⁹

Clause 10 of the ALF Code states that the funding agreement must state whether, and if so to what extent, the funder is liable to the claimant to:

¹⁸ ALF Code clause 2.4.

¹⁹ ALF Code clause 9.

- provide security for costs
- pay any premium (including insurance premium tax) to obtain costs insurance or
- meet any liability for adverse costs or any other financial liability.

The ALF Code also requires the funding agreement to state whether, and if so how, the funder may terminate the funding agreement where the funder:

- is no longer satisfied concerning the legal merits of the case
- reasonably believes that funding the dispute is no longer commercially viable, or
- reasonably believes that the claimant is in material breach of the funding agreement.²⁰

3.4. Is there a duty under the local ethics rules for counsel to disclose third party funding on his client's side to the opposing party and/or the arbitral tribunal?

Following the Jackson reforms of April 2013, which have abolished the recoverability of success fees and insurance premiums, it is no longer a requirement to disclose the existence of a CFA to the Tribunal or to the opposing party.

In *Hollins v Russell [2003] EWCA Civ 718* the Court of Appeal expressed the hope that parties would disclose the existence of a CFA as a matter of course at the assessment of costs stage of English civil proceedings. As a result, CFAs are usually disclosed between the parties at this stage of litigation.

There does not appear to be a duty on counsel to disclose third party funding on his client's side to the opposing party and/or the arbitral tribunal, although English counsel, in the absence of specific rules, would tend to apply the normal litigation practice to arbitral proceedings.

²⁰ ALF Code clause 11.

3.5. In your jurisdiction, is a difference made as to whether the third party funder is a professional funder or another third party (e.g. an affiliated company to the funded party) or e.g. a specific vehicle set up for the specific case? In answering this question, please consider both law and business practice.

There is a difference, but it is principally determined by the funder's role rather than their identity. A third party who funds litigation without any interest in the litigation or its outcome is regarded as an altruistic funder and is usually protected from any adverse costs order. A funder who has an interest in the outcome may be liable to pay adverse costs, but such orders are exceptional and in the court's discretion. For professional or commercial litigation funders, that potential liability for adverse costs will, as the law currently stands, be capped at the level of their investment in the case. That, however, is judge-made law and may change. If the professional funder is found to have caused, interfered with or controlled the litigation this protection will be lost.

In practice a professional funder is unlikely to make the mistake of interfering with the conduct of the litigation. Related parties, such as shareholders or parent companies do not have the benefit of the cap, and are more likely in practice to interfere, making them more vulnerable to an adverse costs order.

3.6. Are third party funders viewed differently from insurance providers? In answering this question, please consider both law and business practice.

Yes. Legal expenses insurers who take an ordinary passive role in a case will not normally be treated as a funder, and the court will not normally order it to pay adverse costs. Liability insurers and third party funders are different as they take conduct of the case and fund it in their own interests.

3.7. In your jurisdiction is "maintenance and champerty" viewed as an issue with regard to third party funding? In answering this question, please consider both law and business practice.

Maintenance, that is the support of litigation by an unassociated third party 'without just cause or excuse', and champerty, a form of maintenance under which the supporting party shares in the proceeds of the litigation, were traditionally prohibited in England under the common law. Arbitral proceedings are also subject to the rule against maintenance and champerty, at least domestically.²¹

²¹ *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* [1999] Ch. 239. This decision concerned a domestic arbitration, but it has been taken to apply also to international arbitrations with an English seat.

Maintenance and champerty, however, are no longer a crime in English law but remain a tort, and champertous agreements are still unenforceable. In recent years, case law has modified the scope of this tort, and statute has admitted both CFAs and DBAs, which should be unproblematic for English counsel in international arbitrations to the extent that they comply with the forms permitted in domestic litigation (see 3.1).²²

In practice, third party funders are well aware of the potential risks of maintenance and champerty and they take care to avoid falling foul of the rules.

4. Conflicts of Interest

4.1. According to the local ethics rules identified under 1.1 above, what is the general test for conflicts of interest of counsel? In practice, is the identified standard also applied in international arbitration cases where attorneys admitted to the local bar of your jurisdiction act as counsel?

Chapter 3 of the SRA Code addresses conflicts of interests for English solicitors, both own interest conflicts (between solicitor and a current client) and client conflicts (between two or more current clients).

Under the SRA Code, a solicitor may never act where there is an own interest conflict, or a significant risk of one.

In the event of a client conflict, a solicitor may only act where there is a substantially common interest between the clients in relation to the matter; where all the relevant issues and risks have been explained to and understood by the clients; where each client has given written consent on this basis; and where the solicitor is satisfied that it is reasonable to act in these circumstances. Even where these limited exceptions apply, the SRA Code states that ‘In deciding whether to act in these limited circumstances, the overriding consideration will be the best interests of each of the clients concerned and, in particular, whether the benefits to the clients of you acting for all or both of the clients outweigh the risks.’²³

Barristers must not accept instructions from a client where an own interest conflict exists.²⁴ However, barristers may be entitled to accept instructions or to continue

²² S. 58A of the Courts and Legal Services Act specifies that the proceedings in which CFAs are permitted include ‘any sort of proceedings for resolving disputes (and not just proceedings in a court)’. In the case of *DDT Trucks of North America Ltd v DDT Holdings Ltd* [2007] EWHC 1542 (Comm), the judgment indicated that it is unproblematic for solicitors to act in an arbitration under a CFA.

²³ SRA Code Chapter 3, Preamble.

²⁴ BSB Handbook Rule 21.2.

to act on a particular matter in the event of a client conflict, where all affected clients give their informed consent.²⁵

As the above rules on conflicts of interest are contained in the SRA Code and BSB Code of Conduct, they apply to all English solicitors and barristers in all situations, including international arbitrations.

4.2. Does Guideline 5 of the IBA Guidelines have any equivalent in the local ethics rules identified under 1.1 above?

Guideline 5 of the IBA Guidelines does not have an equivalent as such in the SRA Code or the BSB Code of Conduct.

4.3. Do the local ethics rules identified under 1.1 above (either expressly or by analogy) in any way limit a client's ability to waive conflicts of interest of counsel in international arbitration?

Solicitors and barristers cannot under any circumstances act in the event of an own interest conflict (4.1 above), so this cannot be waived by a client in international arbitration.

A solicitor is only permitted to allow clients to waive a client conflict of interest where both clients share a substantially common interest or are competing for the same objective (and in these circumstances it is mandatory that both clients do issue an express waiver in writing – see 4.3). Even where a solicitor may be permitted to act under these limited exceptions, the SRA Code indicates that he is unlikely to be able to do so, even if both clients consent, where the clients cannot be represented even-handedly or will be prejudiced by lack of separate representation, where the clients are not sophisticated users of legal services, or where it is unreasonable to act for both clients because there is unequal bargaining power.²⁶

A client waiver will permit barristers to act in the event of a client conflict, ‘where [the barrister has] fully disclosed to the relevant clients and prospective clients (as appropriate) the extent and nature of the conflict; they have each provided their informed consent to [the barrister’s] acting; and [the barrister is] able to act in the best interests of each client and independently’.²⁷ Unless all of these circumstances apply, a client waiver will not be effective in any situation.

²⁵ BSB Handbook Rule 21.3.

²⁶ SRA Code, IB (3.5), IB(3.6), IB(3.12).

²⁷ BSB Handbook C69.

4.4. Are Chinese walls accepted/commonly used in your jurisdiction, particularly with regard to international arbitration proceedings?

The Chinese wall was accepted as a legitimate means of client protection by the House of Lords in the case of *Prince Jefri Bolkiah v KPMG [1998] UKHL 52*, provided that it is ‘an established part of the organisational structure of the firm, not created ad hoc and dependent on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work’. In relation to professional firms, Mr Justice Laddie, following Prince Jefri, ruled in the case of *Nigel Young v Robson Rhodes [1999] 3 All ER 524* that ad hoc Chinese walls may also be acceptable in the right circumstances.

As a result of these and other cases, Chinese walls have become fairly well established in England and Wales. However, it remains the case that judges in England may bar law firms from acting where they cannot demonstrate that sufficient information barriers have been put in place in the event of possible conflicts.²⁸

5. Communication with Opposing Party/(Prospective) Arbitral Tribunal

5.1. According to the local ethics rules identified under 1.1 above (as expressly stated or by analogy), are counsel in international arbitration proceedings allowed to engage in direct communications with the opposing party? If the answer is no, are there any exceptions?

The SRA Code suggests that solicitors should not communicate directly with an opposing party who has legal representation except to request the name and address of the other party’s lawyer, or where the other party’s lawyer consents, or in exceptional circumstances.²⁹

Similarly, where the opposing party has legal representation, solicitors and barristers are expected at all times to correspond only with the party’s legal representative.³⁰

²⁸ ‘White & Case debarred over conflicts in \$2bn oligarch battle’, *The Lawyer*, 31 January 2014.

²⁹ SRA Code IB(11.4).

³⁰ BSB Code of Conduct gC24.

5.2. Do the identified ethics rules under 1.1 above (expressly or by analogy) provide for any restrictions on ex-parte communication with the Arbitral Tribunal? Under which circumstances are ex-parte communications permitted? In your view, are there any discrepancies between the local ethics rules addressing communications with the Arbitral Tribunal and Guidelines 7-8 of the IBA Guidelines?

Local ethics rules do not make provision for ex parte communication in these circumstances. Ex parte communications with the Arbitral Tribunal are treated in the same way as in with the Court. They are generally not permitted. There are very limited circumstances (such as an application for a freezing order where there is a risk of dissipation of assets) where ex parte communication will be permitted, and in all circumstances there would need to be a detailed and accurate note taken of what the Tribunal has been told.

5.3. Do the identified ethics rules and/or the lex arbitri of your jurisdiction regulate whether in international arbitration proceedings, counsel is allowed to contact the prospective arbitrator(s)? If yes, please state under what circumstances and to what extent such contact is permitted.

There do not appear to be any circumstances where counsel is permitted to contact the prospective arbitrators before the Tribunal is formed. Under the LCIA Rules, all such communications are conducted through the LCIA Registrar. Once the Tribunal is formed, all communication with members of the tribunal must be open and copied to the other side unless directed otherwise by the Tribunal.

6. Contact with Witnesses/Experts

6.1. Under the local ethics rules identified under 1.1, are counsel in international arbitration proceedings allowed to contact witnesses? Is there a difference to be drawn between own witnesses and opposing witnesses? Is there a difference to be drawn between outside counsel and in-house counsel?

Generally, there used to be rules preventing barristers from seeing witnesses other than the client. There is no longer a rule preventing such contact. That said, a barrister should consider carefully whether and to what extent such contact is appropriate, as it is not the barrister's function to investigate and collect evidence (this is traditionally the role of the solicitor), although this will not apply to barristers authorised to conduct litigation (see 2.2 above).

A barrister should only discuss the substance of the case or evidence with the other side's witnesses in exceptional circumstances, and with the prior knowledge of his opponent.

Contact with witnesses, notably the drafting of witness statements, is a routine part of solicitors' work (see 6.2 below). Witnesses (notably expert witnesses) may also receive compensation for their time from solicitors. However, solicitors may not make payment of witnesses dependent upon their evidence or the outcome of the case.³¹

There is no difference in rules or practice between the ethical obligations of in-house and external counsel in this respect.

6.2. Under the local ethics rules identified under 1.1, to what extent, if at all, is counsel allowed to get involved in the preparation of the written witness statement/expert report?

In civil proceedings, it is not generally appropriate for a barrister who has taken a witness statement (as opposed to 'settling' a witness statement prepared by others) to act as Counsel in that case because it risks undermining the barrister's independence as an advocate.³² However, a barrister authorised to conduct litigation under the new regime (see 2.2 above) will not fall within these strictures.

It is usual for solicitors to prepare at least the first draft of a witness statement. However, tampering with witness evidence or attempting to influence a witness is avoided as behaviour likely to indicate that solicitors have failed to uphold their duty to the court.³³

6.3. Under the local ethics rules identified under 1.1, is preparing a witness/expert for their appearance at the evidentiary hearing permitted and/or are there any particular restrictions?

Witness coaching is forbidden, whether by barristers or solicitors.

Rule C9.1 of the BSB Code of Conduct provides that a barrister must not rehearse, practice or coach a witness in relation to his or her evidence. Barristers may not communicate with any witness while the witness is giving evidence (without permission from the opposing side or the court).

'Witness familiarisation' is permitted to ensure the witness understands procedure, but this must not be a rehearsal of giving evidence about the facts of the case. The Court of Appeal held in *R v Momodou* that: "*Witnesses should not*

³¹ SRA Code O(5.8).

³² See also App 4 to the Chancery Guide, Part H1 of the Commercial Court Guide and CPR Part 32 and 32PD paragraphs 17 to 25.

³³ SRA Code IBs(5.9) – (5.11)

be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible...”

6.4. In your view, are there any discrepancies between the local ethics rules addressing contact with witnesses/experts and Guidelines 18-25 of the IBA Guidelines?

Guidelines 18-25 of the IBA Guidelines, concerning counsel’s contact with witnesses and experts, are broadly in line with the ethical obligations placed on solicitors by the SRA Code, corresponding to IBs(5.8) – (5.11), with similar provisions for remuneration of experts and witnesses (see above, 6.1 and 6.2).

English Barristers’ professional obligations seem to be more restrictive in this respect than those under the IBA guidelines, as English barristers must be careful about taking witness statements. Barristers must also have the *prior* consent of the other side before contacting opposing witnesses, which does not seem to be required by the IBA guidelines. However, in most international arbitrations it is likely that objections would be raised and it would be brought to the Tribunal’s attention if a Party Representative approached an opposing witness to discuss the case.

7. Integrity

7.1. Under the local ethics rules identified under 1.1, what duties/responsibilities does counsel in international arbitration proceedings assume with regard to the truthfulness of witnesses and experts?

Barristers and solicitors have a duty not to mislead the court (see 1.3 above). This duty is taken to include arbitral tribunals.

Barristers are prohibited from calling witnesses to give evidence or put affidavits or witness statements to the court which they know, or are instructed, are untrue or misleading, unless they make clear to the court the true position.³⁴

Solicitors likewise, to comply with their duty not to mislead the court, should not call a witness whose evidence they know is untrue, or attempt to influence a witness when taking a statement with regard to the content of their statement (see 6.2 above).³⁵

³⁴ BSB Code of Conduct rC6.3.

³⁵ SRA Code IBs(5.9) – (5.11).

These obligations also apply to in-house solicitors.

7.2. Under the local ethics rules identified under 1.1, what duties/responsibilities does counsel in international arbitration proceedings assume with regard to the truthfulness and completeness of factual and legal submissions presented to the arbitral tribunal? As to factual submissions, please particularly consider what duties are incumbent on counsel in international arbitration proceedings in case counsel i) becomes aware and is certain that, or ii) suspects that some documents/factual arguments submitted by it to the Arbitral Tribunal are not authentic/untrue?

Barristers

Barristers are under a duty not to mislead the court, whether knowingly or recklessly.³⁶ Knowingly misleading the court includes inadvertently misleading the court, if it later comes to the barrister's attention and he or she fails to correct the position. Recklessness means being indifferent to the truth, or not caring whether something is true or false. The duty not to mislead the court continues to apply for the duration of the case.³⁷

Solicitors

Solicitors equally have a duty not to deceive or knowingly or recklessly mislead the court.³⁸ Additionally, solicitors must not be complicit in another person deceiving or misleading the court.³⁹ Solicitors are expected to obtain their client's consent to inform the court immediately if they become aware during the course of proceedings that they have inadvertently misled the court, and to have the client disclose the truth to the court if they become aware that the client attempted to mislead the court in any material matter. In either case, if the client does not consent to inform the court, the solicitor must immediately cease to act for that client.⁴⁰

³⁶ BSB Code of Conduct rC3.1.

³⁷ BSB Code of Conduct gC4.

³⁸ SRA Code O(5.1).

³⁹ SRA Code O(5.2).

⁴⁰ SRA Code IBs(5.4) and (5.5)

7.3. Do the ethics rules identified under 1.1 provide for any duties/responsibilities with regard to the production of documents? Particularly, is there a duty for counsel in international arbitration proceedings to make sure that relevant documents are preserved?

Barristers

If a barrister becomes aware that his or her client has a document which should be disclosed but has not been disclosed, the barrister cannot continue to act unless the client agrees to the disclosure of the document. In these circumstances the barrister must not reveal the existence or contents of the document to the court.⁴¹

Solicitors

Similarly, solicitors must cease to act if their client refuses to comply with their disclosure obligations, as to do otherwise would breach solicitors' duty not to mislead the court and not to be complicit in other persons doing so.⁴² The person in charge of the disclosure process is charged with ensuring that all the appropriate material is before the court. Solicitors should not take at face value what clients say about documents.

7.4. In your view, are there any discrepancies between the local ethics rules addressing integrity and Guidelines 9-11 and 12-17 of the IBA Guidelines?

Under the IBA Guidelines, withdrawing as a party representative is only one of the options open to a party representative where false evidence has been submitted. The other 'remedial measures' are advising the witness to testify truthfully; taking reasonable steps to deter the Witness or Expert from submitting false evidence; urging the Witness or Expert to correct or withdraw the false evidence; and correcting or withdrawing the false evidence. By contrast, under the English rules, if the client refuses to consent to the party representative informing the court/tribunal that it has been misled, then counsel must cease to act.⁴³

Regarding the failure to disclose documents, the English rules are stricter, as again, they require counsel to cease to act if the client does not produce the document. Under the IBA Guidelines, the party representative must simply

⁴¹ BSB Code of Conduct gC13.

⁴² SRA Code O(5.1) and O(5.2).

⁴³ SRA Code Chapter 5 and BSB Code of Conduct C1

‘advise the Party whom he or she represents of the necessity of producing the Document and the consequences of failing to do so’.⁴⁴

8. Liability of Counsel

8.1. In your jurisdiction, under what circumstances may counsel in international arbitration proceedings become liable towards its client? Please specifically discuss whether counsel might in any way become liable towards its client for ethical misconduct and the potential relevance of Guideline 26 of the IBA Guidelines in that regard. In answering this question, please particularly consider relevant case law.

See 1.2 above. Counsel might become liable towards its client in international arbitration proceedings in the same way as it might in the normal provision of legal services, and the same remedies are available to a client. If a client suffers loss as a result of its counsel’s ethical misconduct in a arbitration, it can also consider filing a civil claim for professional negligence in the English courts.

8.2. In your jurisdiction, are counsel obliged to take out a malpractice insurance? If yes, is there a minimum coverage requirement and do these insurance policies normally cover arbitration work?

The professional indemnity requirements for solicitors are contained in the SRA Indemnity Insurance Rules, which form part of the SRA Handbook. Since 1 October 2013, firms of solicitors are required by the SRA to take out and maintain professional indemnity insurance in accordance with the SRA Indemnity Insurance Rules with one or more participating insurers. This insurance covers the activities of all solicitors practising within that firm in respect of their performance of legal services, including acting in arbitrations. The SRA requires participating insurers to satisfy minimum terms and conditions which it issues. The minimum coverage is £3,000,000 for most regulated firms.

A dedicated professional indemnity insurance for barristers, Bar Mutual, was set up in 1988. The Bar Standards Board requires that all self-employed barristers (comprising the vast majority of the profession, some 13,000 barristers) take out professional indemnity insurance with Bar Mutual. Its minimum coverage is £500,000, and it covers all of the normal activities of barristers in respect of the supply of legal services, including for arbitration work (both as counsel to an arbitration and as arbitrator).

⁴⁴ SRA Code of Conduct Chapter 5 and BSB Code of Conduct gC13 compared with IBA Guideline 17.

9. Comparison between the Local Ethics Rules and the IBA Guidelines on Party Representation in International Arbitration

9.1. To the extent not already addressed above, what rules, if any, of the IBA Guidelines do not have an equivalent in the local ethics rules?

These are discussed above: see 4.2, 5.2 and 5.3.

9.2. To the extent not already addressed above, what rules, if any, of the IBA Guidelines stipulate duties which are not imposed on counsel by the local ethics rules?

The IBA Guidelines do not stipulate duties which are not imposed on counsel by the local ethics rules, save as discussed above at 4.2, 5.2 and 5.3.

9.3. To the extent not already addressed above, what rules, if any, of the IBA Guidelines which do have an equivalent in the local ethics rules, are i) more relaxed/ii) more severe than their local counterpart?

i) Guideline 24 permits the coaching of witnesses by counsel, which is prohibited for English barristers and solicitors: see 6.3 above. Guideline 24 concerns the taking of witness statements, which is permitted for solicitors but about which English barristers must be more careful if they are not authorised to conduct litigation: see above at 6.1 and 2.2.

See also 7.4 above.

ii) In no cases are IBA Guidelines with a local equivalent more severe.

9.4. To the extent not already addressed above, please compare the sanctions/disciplinary measures provided for in the IBA Guidelines with the sanctions/disciplinary measure stipulated in the local ethics rules.

This is addressed above at 1.2.