Nathalie Allen of **WilmerHale** assesses the role of barristers in the setting of common standards for the resolving of conflicts of interest in international arbitration, and whether such conflicts may threaten arbitration's good name globally

A recipe for conflict?

There has been considerable debate in international arbitration circles over setting common norms and applicable standards for the disclosure and resolution of conflicts of interest in international arbitrations. Key figures have warned the international arbitration community that a failure to establish standards above and beyond locally accepted rules, could result, as the experienced arbitrator, Johnny Veeder noted in a 2001 lecture, in a possible "gradual deterioration in the standards of legal professional conduct. The international arbitral process would then be brought into disrepute and, once its good reputation was lost, it could take decades to rebuild confidence."[1]

That debate has included significant discussion over whether there are justifiable doubts relating to the independence of barristers in certain situations. Whilst perfectly common in English court proceedings, parties in international arbitration may be uncomfortable with the dynamic of an arbitration comprising a barrister-arbitrator from the same chambers as a barrister representing one of them.

At WilmerHale's international arbitration group, several arbitration lawyers from different jurisdictions around the world — including England, the United States, Germany, Austria, France and Australia — recently gathered to add to that debate. It is evident from that discussion that, despite its merits in the domestic English litigation context, the status quo raises serious questions in the eyes of international users.

That unease is significant. After all, it is "of fundamental importance that justice not only be done, but should manifestly be seen to be done."[2] Thus, the debate reflected in this article seeks to highlight the importance of the appearance of bias as perceived by non-English lawyers and parties. It also puts forward possible solutions open to the Bar in its work in the development of international arbitration.

English rules that don't necessarily work elsewhere

The English legal community is, mostly, at ease with the concept of barrister independence and with the reality of barristers from the same chambers conducting different roles in litigation or arbitration. After all, it is not uncommon in English court proceedings to find barristers from the same chambers representing opposing parties, or appearing before a judge who was formerly a member of the same chambers. These arrangements work as a result of a carefully tuned system that has evolved over time. Solicitors may conduct litigation on the client's behalf by making applications to court, writing letters in litigation, etc. Traditionally, a barrister was prevented from conducting litigation, acting on the solicitor's instructions (although following changes implemented by the Bar Standards Board, barristers can now accept direct instructions in some cases). Barristers generally have less direct contact with the lay client, preferring instead to have a more developed professional relationship with the solicitor, whilst the solicitor has a direct relationship with both client and counsel (although with those recent BSB changes, this distance from the lay client will decrease).

These distinctions are not reflected in many other common law legal systems, nor in most civil law legal systems. As a result, non-English lawyers are less comfortable with the idea of barristers from the same set of chambers taking on different roles in the same arbitration. English lawyers attribute this discomfort to a lack of proper understanding of the workings of the English system. They argue that the sense of unease from non-English qualified lawyers and clients is the result of a failure to understand the nature of the professional (and personal) relationships between barristers working in the same chambers.

In our debate, however, non-English lawyers reacted badly to this suggestion. First, whilst explaining the intricacies of the English system to users may go a long way to alleviating concerns, it may well be insufficient — or inappropriate — to simply say: "You don't understand it, but trust us – it really works." Such an approach is problematic in international arbitration, because it presumes that the non-English party is "foreign" and must accept the supposedly dominant English system in the first place. Yet why should a domestic solution have any relevance? In international arbitration, English clients and lawyers may justifiably be viewed just as "foreign." In a truly international process, seeking to reconcile the procedural expectations for fairness of parties from different legal systems, attributing the role of a "foreigner who does not understand" to any one of them will not be well received.

Modern chambers as a quasi law firm

Traditionally, barristers' chambers have not followed a partnership model. Rather, each barrister is self-employed and contributes to the running costs of chambers. These costs include, *inter alia*, office space costs and staffing costs such as clerks and pupils, and, as times change, increasing marketing costs.

In essence, however, this is not so different from some law firm partnership models to be found in continental Europe, where a partner takes home the revenue he has brought in after having deducted his share of the running costs of the partnership. Such models of "shared infrastructure" — as opposed to shared equity — are prevalent in the mid-market segments of Germany, France, Austria, Switzerland and most of Central and Eastern Europe. Although such "partners" are in many ways as self-employed as barristers, it would raise very serious questions — typically being regarded as unacceptable in those jurisdictions — for one of them

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to appear as counsel before a "partner" in one's own firm (even if there is no profit-sharing between them).

The reality of those chambers most active in international arbitration seems only to make the problem more pointed in the eyes of international users. Whilst barristers have long asserted their independence through being self-employed and financially independent, this is an increasingly difficult argument to run. In an increasingly competitive global environment, chambers market themselves in ways that were impossible historically. By way of example, each set of chambers now has its own website, marketing itself, as a collective. These websites generally have an 'about us' section, highlighting the set's specific expertise as a collective, or detailing previous successes of its members. Barristers also advertise collectively, for example, by inviting clients to a summer garden party in the Temple. These practices do not make chambers a law firm, but they further erode the difference to many European law firms, in which "partners" also work for themselves, share in the infrastructure cost, but market themselves as a collective.

Such marketing initiatives present chambers as a set of successful individuals drawn together in a professional capacity — resembling that of modern law firms. However, if a barrister receives an instruction not (only) as the result of one's individual reputation, but also because of chambers' standing in the market, how sustainable is an argument of the perceived 'total independence' of the Bar?

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In addition, members of the same chambers often share the same clerks. Clerks play an integral role in both managing work flow and client communications, and increasingly also in marketing. Problems could arise if counsel in an arbitration had the same clerks as an arbitrator with access to confidential information from both sides of the fence. Some chambers try to address this by having a separate clerk for arbitrators, but is this enough? The clerks' room consists of a handful of closely knit individuals who work together in the same room, marketing chambers, paid by chambers' contributions coming from all members. This kind of arrangement can, understandably, unnerve foreign parties and it does not help dispel concerns relating to the appearance of bias.

Some chambers, including those active in international arbitration, seek to explain the nature of chambers in their promotional literature. They explain that chambers are not law firms and members are neither partners nor employees. Their websites also explain that chambers are made up of separate offices for individual, self-employed barristers. Such explanations are necessary, but they may well not be sufficient.

Chambers increasingly present themselves as specialist in particular areas of expertise. In creating themselves as a brand, chambers market themselves as a collective, with each barrister contributing to overall success. Barristers are instructed on the strength of a brand created via the collective success of chambers as a whole. They are therefore not the autonomous, independent individuals they say they are — their business is changing.

Are different standards justified?

One recent pivotal case on the question of apparent barrister bias is the ICSID case, *Hrvatska Elektroprivreda v Republic of Slovenia*.[3] The claimant requested a tribunal to order the removal of the respondent's barrister from the arbitration, which had only been announced a few weeks before an evidentiary hearing despite the fact that the arbitration had been in progress for a considerable period of time. The tribunal considered that it needed to address two central issues: (i) does the tribunal have the power to make such an order; and (ii) if so, should it do so in the circumstances of this case?

In the end, the tribunal ordered the removal of the respondent's barrister. The tribunal said that "for an international system like ICSID, it seems unacceptable for the solution to reside in the individual national bodies which regulate the work professional service provides, because that might lead to inconsistent or indeed arbitrary outcomes depending on the attitudes of such bodies, or the content (or lack of relevant content) of their rules."[4]

Such an international standard, detached

from parochial rules designed for a local court system, seems the most appropriate solution. Much good work in harmonising standards regarding conflicts of interest like this has been undertaken by the International Bar Association, through the IBA Guidelines on Conflicts of Interest in International Arbitration. Although not uncontroversial, these guidelines serve as an important point of reference in most international arbitrations today.

Yet under the IBA Guidelines, arbitrators from partnerships (no matter their actual structure) are subjected to a higher standard of disclosure than barristers. The IBA Guidelines place the following situation on its (waivable) Red List: "[t]he arbitrator is a lawyer in the same firm as the counsel to one of the parties."[5]

However, the Orange List also says: "[t]he arbitrator and another arbitrator or the counsel for one of the parties is a member of the same barristers' chambers."[6] Thus, lawyers are under a greater obligation to disclose than barristers.

Such a disparity in disclosure obligations is increasingly difficult to justify — given that barristers' chambers now closely resemble traditional European-style infrastructure-sharing law partnerships. The European members of our debate strongly suggested that the barrister disclosure requirement should be upgraded to the waivable Red List, as originally intended.

No system is perfect, but allowing for different standards on the basis of increasingly dubious distinctions may be particularly inappropriate in international arbitration — where no single local system has superiority over the systems adopted by other users.

One possible solution is not to focus so much on the terminology of "partnership" as opposed to "chambers" but rather on the true substantive structures that underlie those collectives. Where those structures are similar, the same disclosure obligations should apply.

Therefore, creating a single standard for disclosure for lawyers who share infrastructure and marketing — regardless of organisation as a partnership or as a chambers — may well be the fairer solution (whether that situation should be placed on the Orange or in the waivable Red List, is a different question). Of course, where lawyers share profits, and with a potential financial interest in favouring one party, the conflict becomes even more acute, and (perhaps) non-waivable.

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We also feel barristers might consider introducing an internal conflicts check process for international arbitration work within each set of chambers, which could be relatively simple to implement. This would enable a barrister to reject instructions for an arbitration in which a member of the tribunal was from the same chambers, or at least to advise that the issue be raised as early as possible. Such a system would encourage greater confidence from parties and would help to reduce the appearance of bias.

It is in the interest of all concerned, not least the English Bar, to increase the international acceptance of arbitration and reduce the risk and number of challenges. There is no doubting that barristers have an important and valuable role to play in international arbitration. But to continue doing so, the Bar must address international concerns about lack of independence. They must ensure that non-English parties understand they work independently, just as they must understand that increased collective marketing may undermine the appearance of that independence.

In addition, barristers should consider introducing mechanisms such as early disclosure and internal conflict checks for international arbitration work. Yet nothing would be more powerful testimony to the Bar's commitment to arbitral independence than its acceptance of the same standards of disclosure that applies to other lawyers around the world.

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[1] The 2001 Goff lecture : the lawyer's duty to arbitrate in good faith / V.V. Veeder, Arbitration international: the journal of LCIA worldwide arbitration, ISSN 0957-0411 vol. 18, issue 4, page 431-451

[2] *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256

[3] ICSID Case No. ARB/05/24

[4] Order Concerning the Participation of a Counsel (May 06, 2008)

[5] 2.3.3 IBA Guidelines on Conflicts of Interest in International Arbitration

[6] 3.3.2 IBA Guidelines on Conflicts of Interest in International Arbitration