



RESPONSE TO THE GOVERNMENT'S STAKEHOLDER ENGAGEMENT ON SHORT TERM BUSINESS MOBILITY

17 June 2022

Introduction

1. This note sets out the response of the Bar Council of England and Wales and the Commercial Bar Association ("COMBAR") to Her Majesty's Government's stakeholder engagement around the effectiveness of the UK's current mobility options for facilitating short-term, productive business assignments (i.e. around 90 days or less in length).
2. We have not responded to all 15 questions, although some answers will cover more than one question.
3. The Bar Council represents 16,982 barristers. 13,434 are self-employed, working in chambers or alone as sole practitioners. 3,074 are employed practising barristers.¹ The income of barristers from international work for clients overseas has doubled over the last ten years to c. £329m p.a.² The number of barristers conducting such work has also increased from 999 to 2,198. The earnings figure does not include international work for clients based in the UK which will be much greater, but for which no statistics are

¹ 2019 data, available on the Bar Standards Board website, at <https://www.barstandardsboard.org.uk/news-publications/research-and-statistics/statistics-about-the-bar/practising-barristers.html>

² Figure provided by the Bar Mutual Indemnity Fund.

available. More significant, however, is the huge value this represents in facilitating the work of UK companies and citizens with international dealings.

4. Combar is the specialist association of the English and Welsh Bar for commercial barristers advising the international business community. Combar represents just over 1,600 individual practitioner members of the English Commercial Bar, and 38 leading barristers' chambers, all of whom are self-employed or employed barristers providing specialist advice, advocacy and mediation services in relation to commercial law for businesses, individuals and other organisations.

Current inbound short-term mobility

(1) What are your short-term business travel needs, and who do they apply to (e.g., employees, contractors, service providers etc.)?

5. The current *inbound* short-term mobility need for the legal sector is to facilitate natural persons coming from overseas, to meetings in the UK for transactional or other advice, or to prepare and attend cases before UK courts or in UK-based arbitrations and other forms of alternative dispute resolution. The list of persons needing short term mobility access to the UK for this purpose includes lawyers, clients, lay witnesses, expert witnesses, interpreters, arbitrators and mediators, but, on occasion, there may be other categories of persons required.
6. London is one of the most prominent international hubs for international commercial arbitration, being home to the London Centre for International Arbitration (LCIA), the London Maritime Arbitrators Association (LMAA); the seat of many forms of construction disputes such as under the ICE³ Contractual terms; and other specialist rules covering both metals and commodities trades (such as the Grain and Feed Trade Association (GAFTA)), Lloyd's Open Forum and the Centre for Effective Dispute Resolution (CEDR). It also holds the second largest number of ICC (International

³ The ICE is the Institute of Civil Engineers.

Chamber of Commerce) Arbitrations outside Paris.⁴ The English courts have also been a traditional home to a significant proportion of the world's international commercial disputes. A large number of parties to international commercial contracts still select English law and English Courts, although the jurisdiction is facing increased competition from other centres, especially Singapore. Dubai, Qatar, Abu Dhabi, Paris, Amsterdam and Geneva are other contenders but as yet not that significant in comparison with Singapore.⁵ About 75% of the Commercial Court's work in London is international. About 800 claims are issued each year.⁶

7. The first port of call for dealing with visa and on-entry requirements for clients will typically be solicitors and law firms, rather than counsel and the Bar. However, difficulties for existing or potential clients in accessing the UK legal market in person (GATS Mode 4 access, hereafter referred to as 'Mode 4 access') will have a knock-on effect on the Bar, in terms of the immediate impact on a case and by making the UK legal market less attractive.
8. The other important aspect is reciprocity. Mode 4 access to other countries is crucial to barristers in order to advise clients overseas (on both transactional matters and disputes) and to appear as counsel in arbitrations and in courts overseas. Reciprocity is important when negotiating Mode 4 access in free trade agreements (FTAs)⁷ and is asked for by bar associations abroad with whom we discuss this matter.

(2) What UK immigration route/s are you currently using to bring individuals into the UK to address your short-term business needs?

⁴ The number of known arbitrations across all these institutions was 6,300 in 2020, see UK Legal Services 2021, TheCityUK <https://www.thecityuk.com/media/oi5iqvzy/legal-excellence-internationally-renowned-uk-legal-services-2021.pdf>

⁵ More international dispute resolution centres are being set up at an increasing pace in Asia and Africa.

⁶ As set out at <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/commercial-court/about-us/>

⁷ Some countries' agreements on Mode 4 access expressly require the other country to have made Mode 4 access commitments for their access terms to apply, e.g. Mexico's offer in Annex 12-A ('Temporary entry for business persons') of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

9. The typical route is for the Immigration Rules provision for (short-term) Business Visitor (STBV), including those undertaking Permitted Paid Engagements (PPE). These rules apply both to those who require a visa prior to travel (visa nationals) and to those who need only satisfy the rules on arrival (non-visa nationals). The PPE route is the only one that allows a fee to be taken from a UK-based client.

10. There are two problems with the UK Immigration Rules for PPE visitors who are legally qualified lawyers:
 - a. They permit a lawyer coming the UK to take a fee from a UK client only to provide advocacy services,⁸ not advice, whether that advice is related to a non-contentious matter or potential future litigation. NB The provision made in the Immigration Rules, Appendix Visitor: Permitted Activities PA 12.2 'An overseas lawyer may advise a UK based client on specific international litigation and/or an international transaction' is for general entry as a visitor and does not allow for a fee to be taken from a UK-based client.
 - b. They apply for only a month at a time. If the hearing is going to last longer than a month, this route cannot be used.⁹ However, some hearings last longer than a month and may require multiple entries. Though the number of commercial hearings lasting this length of time are small¹⁰, except for arbitrations.¹¹

⁸ The current PPE rules provides: "(d) a qualified lawyer coming to provide advocacy for a court or tribunal hearing, arbitration or other form of dispute resolution for legal proceedings within the UK, where they have been invited by a client".

The Home Office Visit Guidance v.11.0, 6 October 2021 provides: "In addition to advocacy and dispute resolution work, lawyers entering under these provisions are permitted to take an active role in the preparation of a hearing which may need one or more preparatory visit." (at p65 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1019544/Visit.pdf)

⁹ The Home Office Visit Guidance v.11.0 states that "Where it is clear from the invitation or other information the case is likely to last longer than one month, you must find out if the applicant's involvement will be required for the entire duration. If it is, you must refuse the application on the basis that they are not genuinely seeking entry for a period no longer than one month."

¹⁰ See pg. 37 of the 'Commercial Court Report (2020-2021)' https://www.judiciary.uk/wp-content/uploads/2022/02/14.50_Commercial_Court_Annual_Report_2020_21_WEB.pdf

¹¹ See the LCIA's 'Facts and Figures – Costs and Duration: 2013-2016' report <https://www.lcia.org//media/download.aspx?MediaId=596>

11. *Non-expert* witnesses must use a different route to qualified lawyers. They are typically issued with visas (visa nationals) or granted permission to enter on arrival (non-visa nationals) for a single-entry under the Visitor provision of the Immigration Rules. The Immigration Rules make express provision for witnesses *summoned* to appear in court to be able to enter (see PA12.1, Appendix Visitor: Permitted Activities) but are otherwise silent. The Home Office Visit Guidance v.11.0 does not mention appearing as a witness in a commercial case or in an arbitration in the examples for issuing such a visa.¹² As regards expert witnesses only limited provision is made in the Immigration Rules: the rule is silent as to whether a fee can be paid from a UK-based source (see PA12.1, Appendix Visitor: Permitted Activities). There is no guidance on expert witnesses which are a typical feature of a commercial court hearing or arbitration (e.g. on quantum or construction).

(3) Have you ever been in position where you could not deliver the work because of any barriers on in-bound short-term mobility?

12. The perception of a new and unfriendly UK regime tends to push international meetings to Brussels, Paris, or elsewhere rather than London, thereby losing services income to the UK. By way of example, a German lawyer travelling to stay one night in London to receive an honour in England was cross examined at the border about the purpose and length of visit.
13. Singapore is the most significant UK competitor. No advance application for a visa is required for a lawyer entering to work on a short-term basis. The relevant documentation is completed at the airport on entry, which entirely removes what incoming lawyers describe as the visa stress – lawyers from states on the visa national list cannot book a flight until they have a visa (which may take time), but the meeting may only have been arranged a few days ahead. The result can only be that the UK is not a viable place (or the easiest place to choose) to hold the meeting.

¹² See p44.

14. Even if the routes available do not in the end cause difficulties to a case, they can cause political and reputational impacts, e.g. the offence caused to the Attorney General of a Caribbean State who informed us that her lawyers had to apply for visas to attend a hearing involving that State in the Privy Council, which is *their* court of final appeal. Privy Council appeals, the vast majority of which are heard in the UK are a major aspect of UK soft power in addition to being a source of legal fees. However, they depend on the goodwill of Commonwealth States to continue this arrangement, which depends in turn on how their lawyers are treated.

(4) Do you encounter any barriers, gaps or frictions when using these UK immigration routes? If so, what are the implications (e.g. time, opportunity, resourcing costs etc.) for your organisation?

15. See the response to question (3) above.

(5) [For any UK-qualified lawyers based abroad]: How would you define your short-term needs in terms of the typical duration of stay and the frequency of return?

16. Very few barristers are resident abroad on a long-term basis. This is more of an issue for solicitors.

Current outbound short-term mobility (if applicable)

(6) To which overseas destinations do you currently travel to do business?

17. Barristers serve clients worldwide, but countries with considerable international disputes business are visited more frequently such as the US, GCC (the Gulf Cooperation Council countries), Singapore and Hong Kong.

(7) When you travel to overseas destinations for business reasons, what activities do you typically do, or would you like to be able to do (if not currently permitted)?

18. The provision of legal services, including:

- a. Advice
- b. Appearing in arbitrations
- c. Acting as arbitrator or mediator
- d. Acting as expert witness
- e. Appearing in court in jurisdictions which allow short term call or where qualified in that jurisdiction.
- f. Conferences, teaching.

(8) Do you encounter any barriers when carrying out these activities? If so, what are the implication for your organisation or for you (self-employed individuals)?

19. Obtaining visas can be cumbersome in certain jurisdictions but we have no hard statistics on this. Further, this is on the proviso that Mode 4 delivery of home state law and public international law or representation in arbitration/ADR is permissible. In India (the largest untapped market) for example the latter is legally uncertain . In addition, some EU jurisdictions have not complied with all their obligations under the TCA, notably Greece and Luxembourg where Mode 4 services in home state law and PIL must be permitted but where they currently fall short in that regard.

(9) Are you aware of countries that provide short-term routes that fully or largely address your business needs? If so, what is about that country's model that you find attractive/unattractive?

20. Singapore, we understand has no visa requirements for lawyers delivering short-term legal services which is highly attractive to parties – it is necessary to fill in a landing card but entry in order to provide services for a fee is open. Equally, France has a very permissive visa regime for those travelling for the purposes of international dispute resolution.

21. To date restrictions have not been faced moving between London and Courts in Luxembourg, Belgium, Paris and Sweden. Traditionally, all countries in Europe allow attorneys from third countries largely USA to fly in and fly out to conduct arbitrations. However, there is concern that requirements could be imposed at any time in the future, e.g. when using the Eurostar to travel for meetings or hearings.

Business needs

(10) What Regulated Qualifications Framework (RQF³) 'skill level' roles do you find you need for short-term work (e.g. degree level, doctorate level)? How does this differ to the other job roles in your business?

22. The UK has minimum requirements of 3 years PQE which discriminates against junior practitioners.

Many other jurisdictions expect our practitioners to have a 6 years PQE requirement for counsel, which creates difficulties for our junior members. This comment is based on the provisions in the FTAs rather than the personal experience of trying to travel for paid work.

(11) If your business relies on short-term migration, why are you unable to, or choose not to, fill roles using domestic labour?

23. The legal sector does not rely on short-term migration in this sense.
24. Clients, witnesses, arbitrators, and counsel may come from around the world to use legal services, including courts and arbitral bodies, in the UK for three reasons: (i) international, commercial, and transnational legal services, which by their very nature involve people and businesses that straddle different jurisdictions; (ii) London's role as an international disputes settlement hub; and (iii) English law being one of the predominant choices of law in commercial contracts.

25. Equally, members of the Bar seek to be able to sell and provide their services in other jurisdictions.
26. Foreign students and practitioners from other jurisdictions, particularly common law jurisdictions, view completing a UK law degree and/or becoming professionally qualified in the UK as desirable because of the global role and importance of English law, courts, and arbitral centres in the international and international commercial legal sector. Foreign law students play a significant role for our educational institutions and the Bar is keen to have an international intake to bolster its international credentials.
27. Above all, foreign law students and trainee lawyers are a vital source of instructions to the English Bar 10, 20, and 30 years or more after the traineeship in London.

(12) How would you define your short-term needs in terms of the typical duration of stay and the frequency of return? In particular, please refer to the practicalities / reality of operating within the legal sector (including any requirements imposed on you, e.g. by courts)

28. This has been covered in previous answers. Legal business requires very often short-notice attendance at hearings or to give confidential advice in person.

(13) Do you see your organisation's demand for, and use of, short-term migration routes changing in the next year (and beyond) as the global economy recovers from any covid-induced drops in business travel? If so, how? Please list any jurisdictions, where in-person client contact remains vital (e.g. India).

29. The Bar expects that the call for in-person delivery of legal services, both in the UK and abroad, will increase in the next year and beyond as the global economy recovers and Covid-related travel restrictions are lifted. Although interlocutory and procedural

hearings that have moved online will probably stay online in future, most heavy litigation and arbitration is still expected to take place face to face.

30. The High Court of England and Wales (which includes the Commercial Court) has moved back to in-person hearings as a matter of policy, though hybrid facilities can be made available to allow attendance by clients and witnesses overseas. However, it is perceived to be a disadvantage to your case to have to attend remotely if the other side is represented in person.

Additional questions

(14) If you are a trade body or association, do you believe there are specific sector(s) and/or job role(s) that are falling through the gaps of the UK's existing short-term mobility offer?

31. Nothing further to what has already been mentioned above.

(15) Are there any other details that you would like to note about short-term business mobility that have not been addressed by the questions above?

32. We have caught issues of concern in our other responses.

(16) How important is short-term mobility to you compared to other forms of mobility?

33. Very important. Barristers with a practice with an international focus depend on short term mobility to provide legal services and generate work (i.e. by attending meetings with existing and potential clients, appearing in court and arbitral hearings, or sitting as a judge or arbitrator and attending and speaking at conferences, etc.). Given the self-employed nature of the profession there are no workarounds.