

Bar Council – Written evidence (TRC0017)

Lords International Relations and Defence Committee Inquiry into the UK's security and trade relationship with China Bar Council written evidence

About us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

The Bar of England and Wales has significant engagement with China through the Bar Council's International Committee. The Committee's remit includes:

- Promoting the standing and the interest of the Bar including the provision of its legal services internationally;
- Supporting the rule of law internationally;
- Influencing international legal developments.

Scope of response

This submission addresses the questions under 'Trade' and 'China's approach' on which the Committee has sought evidence on. It will also address the Bar's engagement with China by reflecting on three aspects relevant to the call of evidence:

- International dispute resolution in the context of China.
- The scope of the Bar's work in relation to China, including who the Bar's clients are.
- The value of the Bar's work in relation to China.

Executive Summary

1. The Bar Council of England and Wales has been engaged with the legal profession of China for over 30 years and hence would like to offer evidence in relation to the importance of legal services and dispute resolution work to the UK's security and trade relationship with China.
2. International Dispute Resolution is an important and growing element of the UK-China relationship, enabling the orderly conduct of commercial and other business between the two countries.

3. The Bar of England and Wales has a pivotal role in conducting such disputes successfully, not just for parties of both sides but many other international private and public actors.
4. Through its long-standing engagement, notably in training many of China's leading legal minds, the Bar has an extensive network of high-profile legal contacts in China and in relation to China which it deploys to both tie China into the rules-based international order and to gradually develop the rule of law (as we understand it in the UK) in China.
5. All of this contributes significantly to the "soft power" of the UK in relation to its security and trade relationship with China, which should be safeguarded and developed.

International dispute resolution in the context of China

6. China as a global economic power engages to an increasing extent with the global trade system. Key features of that global trade system strongly favour the Bar's engagement – for the moment.
7. A significant proportion of contracts concluded by Chinese parties in their international business dealings provide for English law as the governing law and/or for disputes to be resolved in England and Wales.
 - a. 40% of international commercial contracts provide for English law as the governing law.¹
 - b. In international commercial contracts the most popular jurisdiction for dispute resolution is England and Wales, whether in the courts or in arbitration (which is supervised by the English court).²
 - c. London is the preferred centre for international dispute resolution.³
8. A significant proportion of other international commercial contracts concluded by Chinese parties provide for arbitration in other common law centres, such as Hong Kong or Singapore, for which barristers from England and Wales are regularly instructed.
9. This state of affairs derives from, amongst other things,
 - a. the long history of English common law as the preferred law of international commerce, the certainty that is offered by its well-developed case law and the flexibility that precedent and judge-made law provides and

¹ <https://www.thecityuk.com/assets/2020/Reports/1e13ba3d56/Legal-excellence-internationally-renowned-UK-Legal-Services-2020.pdf>

² <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-18.pdf>

³ See Fn 2.

- b. the recognition of the independence, impartiality, and relative swiftness of dispute resolution in England and Wales.
- 10. In addition, English law and English dispute resolution is recognised as offering a supportive environment for the fast-changing needs of international business. By way of example:
 - a. The Business and Property Courts of England and Wales are well-regarded for their ability to provide for new procedures and remedies where required as a result of technological and commercial developments, such as:
 - i. The recent creation of the Financial List to deal with high value and complex financial disputes;
 - ii. The UK Jurisdictional Task Force’s Legal Statement on Cryptoassets and Smart Contracts⁴ which has taken a pioneering approach to Bitcoin and other cryptocurrencies, recognising them as property;⁵ and
 - iii. The development of the remedy of an injunction freezing the assets of “persons unknown”, which is especially necessary where unknown fraudsters can transfer payments instantaneously around the world.⁶ The novel developments seen in the English courts are often closely studied or adopted in courts around the world, including in the People’s Republic of China (PRC).
 - b. The Arbitration Act 1996 is seen as striking a healthy balance between deference to the parties’ choice of private dispute resolution and the need for court supervision of the arbitral process and is one of the reasons for the growth of arbitration in London.
- 11. At present, therefore, the conduct of international commercial dispute resolution strongly reflects traditions of the English common law and of English court and arbitral practice and thus the values of the UK as a whole.
- 12. This includes not just the use of English law and of other common law systems, but also the strong emphasis of the common law on transparency, the impartiality and independence of courts and tribunals, lack of bias, lack of corruption and political interference and the right to a fair trial (including expeditious and cost-effective resolution of disputes). Furthermore, in significant respects

⁴ https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf

⁵ This recognition has been swiftly adopted by the English courts – see, for example: AA v Persons Unknown [2019] EWHC 3556 (Comm) (<https://www.bailii.org/ew/cases/EWHC/Comm/2019/3556.html>).

⁶ See CMO v Persons Unknown [2018] EWHC 2230 (Comm) where the remedy was first applied. This was a case in which large sums of money were fraudulently transferred out of the Bank of China account of a company (which traded Brazilian metals) to fraudsters in Spain, Nigeria, Samoa, Hong Kong and, ultimately, China. The rapid development of this remedy enabled much of the money to be recovered.

international dispute resolution practice follows the common law approach – most clearly in the importance placed on live oral testimony from witnesses and in the testing of that evidence in cross-examination. This means there is a call for the oral advocacy services offered by the Bar even where English or other common law is not in issue.

13. As a result, present practice in international dispute resolution favours the Bar and the UK generally. This is so, both as to the “hard” aspects – i.e. the monetary value to the UK of the work opportunities, directly to the Bar and English law firms and indirectly in associated professional services (finance, insurance, professional services, hotels, retail and so on) – and as to the “soft” aspects – the respect for and familiarity with the English legal system that is engendered by this frequent contact with the English common law and English practitioners, increasing the likelihood of English law and English dispute resolution being used in the future and helping to spread the values of the UK today.
14. However, much depends on what the parties in question request and on what their law firms recommend as to the provisions for governing law and dispute resolution in contracts. It is therefore of real importance that those advising parties at the outset favour the UK and English law. At present Anglo-Saxon law firms are predominant in international trade, but PRC law firms are growing in size, reach and importance. As PRC businesses and PRC law firms increasingly dictate the terms of contracts, their views become increasingly important. Thus, it is critical to influence mindsets at the outset so that English law and dispute resolution, favouring the Bar and the values which the English legal system seeks to uphold, continue to be favoured. Engagement with PRC legal organisations (such as PRC bar associations), PRC law firms and individual PRC lawyers and dissemination of the value, importance and benefits of the English legal system and practice is critical to the continued success of the English legal services market in the international sphere.

The scope of the Bar’s work in relation to China

15. The Bar’s work in relation to China reflects this broad picture. It concerns not just paid work, but broader dialogues and engagement.

Who the Bar engages with

16. The broad extent of the Bar’s work in relation to China means that English and Welsh barristers engage with not just with clients in the PRC, but also with clients and disputes around the world which relate to China. This is primarily the result of China’s increasing engagement with the world, leading to a significant increase in PRC

businesses moving into work overseas and foreign businesses moving into the PRC. Work commonly involves multi-layered structures, with PRC individuals or businesses at the heart of the dispute, but overlaid by Hong Kong, Cyprus or Caribbean entities and with hearings consequently taking place in a number of different jurisdictions in relation to the same matter.

17. The Bar's clients in relation to China come in a number of guises:

- a. PRC law firms with PRC clients.
- b. PRC law firms with clients outside the PRC. Such work is increasingly common for English and Welsh barristers, in particular where there is an offshore entity owned or controlled by a PRC individual or entity.
- c. Law firms outside the PRC with PRC clients. Especially relevant in this context are law firms in Hong Kong (a different legal jurisdiction) and in the UK with mainland PRC clients. Examples of this include PRC clients involved in international trade (such as in the shipping of commodities from South America and Africa to the PRC) and PRC clients which have operations in England and Wales.
- d. Law firms outside the PRC with clients outside the PRC involved with work in or related to China. This includes considerable work in the international trade sector and financial services. A recent example involved English and Welsh barristers acting as advocates in a dispute in relation to offshore entities financed by Hong Kong private equity funds which were controlled by PRC individuals. The dispute involved arbitration proceedings in Hong Kong and court proceedings in the Turks and Caicos and Cayman Islands. In essence, the dispute was between two PRC individuals, but it was global in reach and involved a number of parties in the different proceedings. Every single one of the many parties involved was represented by a barrister of the Bar of England and Wales.

18. In considering the Bar's work in relation to China, it is therefore imperative to consider not just work in China, but also work around the world which concerns China and Chinese parties.

Commercial work

19. Barristers work in a wide range of situations in relation to China, but at its heart that work will consist of one or both of the following:

- a. Advisory work, whether at the outset of commercial relationships, when contracts are being drafted or re-negotiated, or in relation to disputes that have arisen.

- b. Dispute resolution work. This is the most visible service offered by the Bar: providing advocacy services in proceedings before courts in England and Wales and arbitral tribunals around the world.
20. In addition, many members of the Bar sit as arbitrators in international arbitrations parties in arbitration proceedings in England and Wales and internationally, including within the PRC.
21. The importance of the Chinese market to the Bar is seen in the fact that a number of UK commercial barristers' chambers have established offices in East Asia at least in part in order to capture PRC-related work, including Essex Court Chambers, Twenty Essex Chambers and 39 Essex Chambers. It can also be seen in the competition between barristers' chambers to be involved in the Bar Council's broader engagement activities in relation to China.

Broader engagement

22. The Bar has a long history of dialogue and broader engagement in relation to the PRC. A summary of that is set out below.
23. ***The Bar Council Training Scheme for Chinese lawyers:*** The Bar Council's work in China began in 1989 with the creation of the Lord Chancellor's Training Scheme ("LCTS") for Chinese Lawyers, which formed the foundation of the Bar Council's relationship with the Chinese legal profession. The Bar Council managed this programme in collaboration with the Law Society, supported by the British Council.
24. The year-long training scheme offered newly qualified Chinese lawyers the chance to learn about common law and to spend time with English solicitors and barristers. Lawyers also spent some time in Hong Kong.
25. Through this programme the Bar Council worked extensively with the Chinese Ministry of Justice and the All-China Lawyers Association (the regulatory body for Chinese lawyers) and the scheme became one of the most prestigious programmes for Chinese lawyers.
26. The programme came to an end in 2011 after the UK Government cut the funding for the programme.
27. Following the end of the LCTS, the Bar Council took the view that over 20 years of engagement was worth building on. It therefore created the Bar Council China Training Scheme ("BCTS") in a bid to build upon the success of the Lord Chancellor's Training Scheme. The BCTS is a more focused version of the LCTS and each year sees around 15 junior lawyers (up to 10 years' qualified) come to London for 7 weeks to take part in a programme of education and training with English and Welsh barristers. This programme includes placements in Chambers, specialised seminars and visits to key legal institutions.

28. Since its inception, the BCTS has continued to grow in popularity in China with application numbers growing year-on-year. Alumni of the scheme now sit in senior positions in PRC law firms and are keen advocates for the scheme and for engagement with and use of the English legal system by PRC law firms and businesses.
29. The scheme has also enjoyed increasing support from barristers' chambers with applications to host a Chinese lawyer outstripping the number of lawyers participating in the programme. This is largely due to the link which chambers are drawing between participation and future instructions.
30. **The Senior Lawyers Training Scheme:** The FCDO's China Business Environment Programme ("CBEP") aims to improve the business environment and thus the rule of law in China over 3 years (2020-22). There are five strands of the programme, one of which is Commercial Dispute Resolution ("CDR"). The Bar Council is one of the subcontractors for the programme under the CDR strand, along with The Law Society.
31. The CDR strand is aimed at positively supporting and driving CDR, rule of law and business environment reform in China, as well as supporting China's integration into the rules-based international system in private international law.
32. As part of the CDR strand, the Bar Council runs the Senior Lawyers Training Scheme. The scheme is an intensive training programme in advanced strategic and technical issues in international dispute resolution for senior Chinese lawyers (over 10 years' qualified). The successful Chinese lawyers undertake a series of technical legal seminars/sessions delivered by barristers/chambers. They also visit key legal institutions. The aims of the programme are:
- a. to strengthen legal cooperation between China, PRC and England and Wales;
 - b. to enhance the capacity, expertise, skills and ethics of participating lawyers in international commercial dispute resolution;
 - c. to build relationships with the participant lawyers and their law firms/ commercial entities employing the participant lawyers.
33. The 2021 programme took place in March with 12 senior lawyers (attending online due to Covid restrictions). The Bar Council intends to continue this programme in 2022, funding from CBEP permitting.
34. **Annual summit and visits:** The Bar Council runs an annual UK-China Arbitration Summit attended by senior level Chinese and UK lawyers and judges. This is a valuable marketing tool for the English and Welsh Bar, as well as an opportunity to develop understanding of key values in international dispute resolution. Topics have included not just more obvious ones such as developing witness-

handling skills, but also more sensitive ones such as ethics in international dispute resolution.

35. The Bar Council organises regular delegations to visit China, with seminars and training sessions delivered by barristers to Chinese audiences. These visits provide useful soft marketing opportunities as well as permitting further dissemination of UK values such as the in ethics, impartiality of decision making and the requirements of a fair trial.
36. In return, the Bar Council hosts visits from many delegations from China, including from national and city-level organisations. A particular focus in recent years has been on learning about what makes a successful international dispute resolution centre. Any discussion about this cannot help but address the importance of the impartiality and independence of the English courts, the lack of corruption and political interference and the right to a fair trial. Indirectly, at least, therefore, these visits often involve soft advocacy for the values at the heart of the UK legal system and the international legal order.

Value of the Bar's engagement with China

37. Measuring the value of the Bar's work needs to take account of the broad scope of the Bar's engagement with China.
38. First, there is the obvious question of monetary value. As to this, the Office of National Statistics: Trade in Services Data 2018 states that the total value of trade of the entire English legal services sector (not just the Bar) with China was £58 million.⁷ This would appear to be a gross underestimate of the true monetary value. Anecdotal evidence suggests that the Bar alone would be able to make up most of this figure, before even starting on the much larger sector of law firms. It perhaps reflects a narrow approach to capturing data by country which does not reflect the true picture.
39. In order for the true picture to be seen, and for a better understanding of the monetary value of UK legal services engagement with China, it is respectfully suggested that a more sophisticated and extensive approach to data collection is adopted by UK government and/or ONS.
40. A further aspect of the monetary value is that international dispute resolution instructions for the Bar benefit the UK economy more broadly, most obviously by way of work for associated UK services, in finance, insurance, other professional services, and by way of visits to the UK and consequent benefits to hotels, retail and other tourism sectors.

⁷<https://www.ons.gov.uk/businessindustryandtrade/internationaltrade/datasets/internationaltradeinservicesbyserviceproductandcountry>

41. In addition to the monetary value, the wider value of the Bar's engagement with China must be acknowledged, notably in relation to the "soft power" that accrues to the UK in this way. As described above, this extends to at least three key areas:
- a. Marketing, directly or indirectly, through training, seminars and visibility in front of potential clients. This leads on to future monetary value for the Bar and the UK.
 - b. Promotion and protection of the standards and practices of the existing rules-based international legal order and international dispute resolution, to the benefit of the UK both in monetary terms and in terms of the values of the UK.
 - c. Influencing PRC lawyers and thought leaders in law and business as to the standards and practices of the international legal order. Again, this is to the benefit of the UK, monetarily and in terms of values.

Trade

42. In answer to the headline Trade question as to which sectors are most important, it is clear that UK professional services are very important. The Bar is a vital constituent element of that. Together with solicitors, financial services, insurance, accountancy and so on, it provides a package of services, making London, in particular, a one-stop-shop for businesses from the PRC and businesses dealing with the PRC. The Bar has additional significance, however, because of the opportunity its work provides to promote wider, non-monetary values of the UK, as described above, which help to promote the UK generally and to uphold the rules-based international legal order.
43. As to whether the UK should be seeking to increase trade with China, therefore, it is not the Bar Council's role to comment as to UK policy, but it can be said that trade is increasing in any event and that the increasing role of the Bar in that process is a positive for the Bar and for the UK, for the reasons explained.
44. As to how important China is as a current and future trade partner, the answer is that, within the field of international dispute resolution and legal services, it is already important and will only become more so given the growth of its economy and its international investments. The Bar has a key role to play in relation to this trend, in providing opportunities for economic growth for the UK and in promoting UK values and in tying China and its businesses and people into the rules-based international legal order.

China's approach

45. As to the implications of China's pursuit of major international strategic initiatives, the increasing ability of PRC businesses and law firms to influence the terms of commercial transactions is but one example of how China's ability to craft the rules of the game is growing. In that regard, the ability of the Bar to influence minds and practices of PRC lawyers and businesses is vital to the upholding of UK values and the rules-based international legal order. Looking beyond the Bar, the rest of the legal sector and the government ought to act in a similar fashion. This needs to be supported by a commitment to invest in the UK's legal system to demonstrate its ongoing importance for international dispute resolution and hence a place with PRC clients can trust if they want a satisfactory, efficient and fair solution of their commercial disputes.
46. It is relevant in this context to note the significant investments that are being made in dispute resolution by other centres which recognise the value that accrues from being a dispute resolution hub, not just to lawyers involved, but to the wider economy. Singapore, Hong Kong and Dubai, amongst many others, have all heavily promoted themselves as centres of dispute resolution in recent years, with positive and visible results. This trend is likely to continue, and the UK will face increasingly stiff competition for work relating to China and more generally.

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