What model for cross-border joint practice?

A handbook for bar associations

INTERNATIONAL BAR ASSOCIATION

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Disclaimer

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Glossary of terms

Alliance	A strategic resource-sharing agreement, which takes a legal contractual form.
Bar	The competent regulatory authority for lawyers. In some countries this is not the Bar, or not only the Bar, and in some countries a Bar is called a law society. Bars also vary in their competences regarding lawyer regulation. But the word 'Bar' has been chosen nevertheless because it is a commonly used term in this context, and this handbook is issued by the Bar Issues Commission of the IBA, most of whose members are also regulatory bodies.
Foreign lawyer	A lawyer who is not locally qualified or admitted to the Bar in the local jurisdiction. There is a similar meaning for a 'foreign law firm' (see meaning of 'law firm' below).
Home Bar	The foreign lawyer's bar of original licensure.
Home jurisdiction	The country in which the foreign lawyer was originally authorised to practise, or in which the foreign law firm is established.
Host Bar	The Bar/competent regulatory authority of the local law firm with which the foreign law firm engages in joint practice.
Host jurisdiction	The country in which the foreign lawyer engages in joint practice.
Joint practice	The relationship of cooperation or collaboration between a foreign lawyer and local lawyer.
Joint venture	A new commercial entity created and jointly owned by two separate law firms.
Law firm	A group of lawyers in a single entity.
Local lawyer	The local lawyer, who is a member of the bar in the local jurisdiction, with whom a foreign lawyer might wish to conduct joint practice. There is a similar meaning for 'local law firm'.
Mode of practice	Form in which services are provided (ie, Mode 1 = cross-border supply from one jurisdiction to another; Mode 2 = client crosses border to purchase legal services; Mode 3 = commercial presence of a law firm in another country; Mode 4 = movement of a natural person on temporary or permanent basis.
Professionals	Non-lawyer professionals who qualify under local rules to be part of a multidisciplinary partnership with lawyers, where such partnerships are permitted.

Scope of practice	The range of services a foreign lawyer or law firm is licensed to provide.
Standalone firm	A wholly owned firm that is not part of any other formal grouping.

Introduction

This handbook was prepared to assist IBA member Bars and law societies, or other authorities responsible for lawyer regulation, when dealing with the practical and regulatory issues that arise when local and foreign lawyers form some kind of 'association' or joint practice. This work was prompted by enquiries from a number of IBA member Bars who expressed interest in understanding how other jurisdictions have tackled this issue. The handbook is not intended to recommend any particular form of joint practice or model of regulating such practices over any other. It is also not intended to promote joint practice to jurisdictions that do not permit foreign and local lawyers to share fees on a structured basis, if they have no desire to introduce changes.

Since it was established in the early 1990s, the International Trade in Legal Services Committee (ITILS) has regularly published guidance and drafted resolutions for the IBA Council on the topic of trade in legal services. This handbook is a further contribution to these resources. A full list of ITILS publications is set out in Annex 1. These materials – and the policy resolutions in particular – have had a significant impact on the way that legal services issues are handled or discussed at international level both by national governments and the World Trade Organization (WTO). They have been designed with two objectives in mind: to enable bar associations to participate actively through their governments, or as advisers, in international trade negotiations; and to ensure that any decisions taken on trade issues, including by national governments, pay heed to the special nature of the legal profession and its role in the administration of justice and rule of law.

Globalisation has changed the way that lawyers interact with each other across borders, and the need for them to do so. In the second half of the 20th century, international law firms expanded their operations from – in particular – the United States, the United Kingdom and Australia, as their clients began to develop more international operations. These international law firms set up offices in selected jurisdictions, initially staffed by international lawyers providing international legal services. However, it increasingly made commercial sense for them to offer more integrated services to their clients, and they therefore sought to add local legal capability by merging with local law firms, or by bringing local lawyers into their international partnerships. The approach that Bars, or other regulatory authorities, have taken to such partnerships has varied across jurisdictions and over time, and some of these approaches are explored in more detail in this handbook.

But it is important not to see the issue of joint practice entirely through this historical prism. The world has changed significantly in recent years, and the drivers for collaboration between local and foreign law firms have shifted:

- Governments in many parts of the world are seeking to develop their jurisdictions as international or regional hubs for certain types of turnkey business activities (eg, financial services, business support services or arbitration) in order to attract inward investment. Legal services are often part of this equation, and governments sometimes seek to bring in foreign law firms to accelerate this strategic development process.

- International law firms have for some years been experimenting with the way in which they produce their work, recognising that it may be possible to do it more cost-effectively or efficiently by distributing it to different offices in different time zones or cost locations. Collaboration with lawyers in lower cost jurisdictions may therefore not only be about the conduct of local legal work.

- The demands of compliance requirements (eg, for data sharing, anti-money laundering and 'client on-boarding') and needs within certain practice areas may mean that foreign law firms prefer to have a more integrated supply chain, to avoid the lengthy compliance processes that would be required of an external referral law firm operating as a sub-contractor.

- Local law firms in jurisdictions with smaller legal professions may find that opportunities to work on more complex matters or to develop specialisms are limited if they work in isolation. There is growing evidence of interest and willingness among law firms in such jurisdictions to participate in larger commercial groupings in order to access new opportunities beyond their borders.

- Regional trade and integration have also increased the opportunities for collaboration between law firms and lawyers in countries with smaller legal professions. There are more and more examples of regional 'one-stop' shops, in which law firms in neighbouring countries either merge or jointly ally and market themselves under a common brand to potential clients.

The way in which such collaboration can happen has also altered in recent years with the growth in technology. Firms that are or are thought of as 'foreign' law firms may now prefer to collaborate in a range of other ways that do not actually require any foreign lawyers to be physically present in the 'host' jurisdiction. Some of these methods of collaboration are examined in more detail later in this handbook.

As a result of these overarching trends, there are new questions facing the various stakeholders involved in cross-border legal practice:

- governments need to consider how allowing local and foreign lawyers to work together in their host jurisdiction might serve their economic goals and promote inward investment;

- Bars need to consider how they protect the ethics of the profession and promote access to justice for citizens, while also supporting the development and creation of new opportunities for their local lawyers; and

- law firms and individual lawyers need to consider how, if they wish, they can best participate in cross-border work by associating and collaborating together.

The BIC ITILS has put this handbook together to help stakeholders think through the issue of how lawyers from different jurisdictions can work together on an ongoing, formal basis. It is designed to help them strategically consider how they can address any demands for the trade

or regulatory liberalisation of ownership in law firms, as well as how collaboration between local and foreign lawyers could be structured in such a way as to promote the development of the local legal profession and justice system.

The rest of this handbook sets out to explain the following:

- what is meant by 'joint practice' and what are its advantages and drawbacks?
- what forms can joint practice take?
- how is this treated as an issue by the WTO and in other types of free trade agreements?
- how have different jurisdictions approached joint practice involving their lawyers?
- what issues should Bars think about when considering how to regulate joint practice?

The handbook is supported by an online toolkit, which will be available on the IBA website. This supplements the handbook with the following materials:

- a map of models of lawyer collaboration in existence around the world;
- practical case studies of regulatory approaches to liberalisation;
- extracts from relevant legislation and regulations covering this topic in different jurisdictions;
- a section of frequently asked questions covering common issues or concerns and transitional options, which bars can use in their decision-making process; and
- useful presentations of this material given at IBA conferences and co-sponsored events.

The drivers for joint practice between lawyers

What do we mean by 'joint practice'?

'Joint practice' refers to the collaboration that takes place between local and foreign lawyers and law firms. It can mean any type of structured business relationship involving the sharing of profits, costs and risks, in ways that might normally characterise a partnership or other form of co-ownership. The options for structuring such a joint practice are described in more detail in the next section.

It is important to note that a form of joint practice between local and foreign lawyers need not necessarily imply that the foreign firm has an office in the local jurisdiction, although this is often the case. How this affects the ability to regulate is considered in more detail later in the handbook.

The handbook also touches briefly on employment of local lawyers by foreign lawyers. This is often an issue of concern, since it raises ethical questions relating to independence, supervision and control by a locally authorised lawyer. As the main focus of this handbook is joint practice, the employment of local lawyers by foreign lawyers is only considered in this context.

Why might law firms choose joint practice?

Lawyers and law firms have always collaborated across jurisdictional boundaries to serve their clients. Most commonly this takes the form of referrals between members of the profession in different countries. In a referral scenario, law firm A recommends law firm or lawyer B, based in another jurisdiction, to one of their clients who is seeking assistance in that other jurisdiction. A referral of this type will usually simply trade a recommendation to a third party in exchange for goodwill and the hope of reciprocal referrals in future. Many jurisdictions explicitly prohibit the payment of fees in exchange for referrals, as this is generally held to compromise a lawyer's independence in relation to the handling of a case.

The advantage of referral arrangements to law firm A is that they can serve their client in jurisdiction B without needing to have any knowledge of the other jurisdiction's law or a presence there. On the other hand, it requires a high degree of trust, since the referring law firm's reputation with their client will be affected by the quality of advice and service levels of the engaged law firm. Referrals between the same lawyers or law firms may take place on a recurring basis, but this does not, in itself, represent any form of association.

In many cases, referral relationships are perfectly adequate and firms can develop their trust and knowledge of each other through periodic face-to-face meetings, sharing of know-how and other tools such as secondment programmes. However, sometimes in a purely referral-based relationship a sense of inequity can develop between the law firms involved. This can happen where, for example, there are very regular referrals that go only in one direction. In these circumstances, the originating law firm can feel that they are passing a lot of valuable

work to the recipient jurisdiction and receiving little in return, while being exposed to the risk that their referral partner might do a bad job and undermine their reputation with their client. The recipient law firm may equally feel that they are not obtaining a sufficient slice of the work relating to their jurisdiction and only being treated as a very junior service supplier.

An alternative form of collaboration between law firms is sub-contracting. In this scenario, law firm A, which was originally instructed by the client, retains the relationship with the client and project-manages the procurement of advice from a lawyer or law firm in jurisdiction B. The advantage to the instructing law firm is that they retain control of the transaction and can attempt to quality control the service provided. The advantage to the client is that they need deal with only one law firm and receive one bill, and they have the comfort of law firm A's professional indemnity insurance cover. On the other hand, law firm B may then feel distanced from the transaction, wary that they may not be obtaining a full picture of what is needed from law firm A, and may feel resentful of being treated as a supplier rather than an equal partner.

Both referrals and sub-contracting arrangements may persist between jurisdictions on an indefinite basis, but sometimes law firms may find it useful or necessary to build up more formal arrangements with local firms in order to serve existing clients on a cross-border basis, or to find new business. It is at this point that joint practice or association can become a regulatory issue. The next section deals with the potential benefits and drawbacks of joint practice, including those forms that go beyond referrals and sub-contracting.

What are the potential benefits of joint practice?

Joint practice offers a range of potential benefits to law firms and individual lawyers on both sides of the arrangement. These can include:

- *Growth of core competences*: By associating with a firm that undertakes overlapping areas of work but also had additional competences, two law firms can gain access to new work or new geographical markets.

- *Growth of market power*: By combining into a larger entity, lawyers and law firms can develop the economic depth to weather business cycles, and can broaden and deepen the range of the services they offer to clients, and improve the efficiency with which they are able to provide their services. Joint practice also enables law firms to compete more effectively with accountancy providers and other new entrants into the legal market.

- *Transfer of legal skills*: Where two similar law firms – or lawyers with similar backgrounds – cooperate, there may not be much opportunity to add to each other's knowledge of the law or legal practice. But when association involves law firms from other jurisdictions, these differences can add real value. One firm may add to another through the benefit of having experience of very similar transactions that have arisen in comparable circumstances elsewhere in the world (eg, privatisation of state-owned enterprises, designing build-operate-transfer contracts, etc). The assumption is generally that such transfers of experience can only come from the largest international law firms, but this does not need to be the case. Firms of all shapes and sizes are now sharing experience through joint practice.

Some benefits of joint practice are not unique to the legal sector but will arise whenever two businesses work together, for instance:

- *Access to new clients/branding*: Combinations of lawyers or law firms normally attract more notice and more clients than single entities, so not only broaden the client base but also the scope of services offered. Joint practices will usually also have access to wider channels, through which they can market their services and gain access to a wider group of potential clients.

- E*conomies of scale/sharing back office*: There are some inputs that all law firms need, such as access to legal knowledge, IT or a finance department. These overheads can be shared when firms practise jointly.

- *Sharing of management experience*: Other people may do things differently and, sometimes, more efficiently. In joint practice, the best methods of running a law firm can be shared (eg, how to manage business and knowledge within the firm, how to remunerate partners and nurture employees into the partners of the future).

What are the possible drawbacks of joint practice?

Set against these benefits, there are also challenges posed by joint practice:

- *Loss of control*: It is evident that joining forces with another lawyer or law firm dilutes the ability of each partner to exert control over the entity. This is analogous to the issues raised in any partnership. It is therefore very important that all parties consider how the joint practice will be managed in advance and set down an agreement in writing. From the Bar's point of view, there may be additional issues beyond business decision-making that exist as concerns about where control over the business lies. This can influence the structure that the joint practice needs to take (eg, requiring it to be a subsidiary established in the host jurisdiction with its own local controls, management and accounts, rather than simply a branch office).

- *Conflict with domestic regulatory obligations*: Clearly, each of the law firms involved in a joint practice will need to be sure that the steps they are taking to set up a collaboration that conforms with their domestic obligations. There may be explicit rules that cover local-foreign joint practice, or rules that apply to all law practices established in the host jurisdiction, which may need to be navigated by a joint practice. The most common of these hurdles include the corporate vehicle that can be used and the name of the firm. There may also be difficulties that stem from differing regulatory obligations in relation to issues such as data privacy and anti-money laundering.

- *More complex to regulate*: Where Bars or other agencies regulate law firms and not simply individual practitioners, they may wish to ensure that they have the same level of control over a joint practice as they do over a firm that is fully established in its home market. There are different approaches to this question and careful thought needs to be applied to how

joint practice is regulated. The regulatory challenges of joint practice are dealt with in a separate section in this handbook.

- *Economic impact on the local legal services market*: There are understandable fears involved where the largest international law firms, sometimes with turnovers of more than US$1bn, seek to merge with local law firms. The most common concerns in these circumstances are, first, that if the largest law firms in a jurisdiction disappear as independent entities, then this may have a detrimental effect on the local legal system overall. Larger firms, even if only relative to others in the jurisdiction, will often play a crucial part in training the next generation of lawyers or in maintaining and supporting the development of local law. Secondly, there is often a period once foreign law firms are allowed to merge with local law firms when the pay of local associate lawyers increases more rapidly than before, as there is competition to hire the best young lawyers entering the market.

The challenge for governments and bars is how to maximise the potential advantages to the local legal market and local professional interests of permitting foreign-local law firm associations, while minimising the potential drawbacks. The next section of this handbook considers the different forms that law firms are using to cooperate together, since this has an important bearing on the form in which joint practices can be regulated.

Approaches to joint practice – how are law firms collaborating across borders?

This section of the handbook explores the ways in which law firms choose to collaborate or practise jointly with foreign law firms, and what factors might influence their choice of vehicle for such collaboration.

A number of illustrative case studies of the different forms set out below are available in the IBA web toolkit accessible on the IBA website.

There are essentially five generic ways in which law firms can collaborate:

(1) Law firm network

A law firm network is a means of collaboration that most commonly operates as a form of member organisation. Law firms typically pay a fee in order to become members and there may be a selection process involved. In return for their fee, law firm network members receive services, such as marketing support, professional development opportunities, networking events and a fast track to building relationships with foreign law firms. The primary objective for most law firms when joining a network is usually to make or receive referrals to, or from, law firms in other jurisdictions. A network is simply a more structured way of finding new referral partners and does not imply anything other than the sort of contractual relationship involved in being part of any member organisation.

It is nonetheless important to bear in mind that law firm networks can develop ways of working that enable them to operate as one firm and to pitch for multijurisdictional transactions. Sharing resources for research and other support services can also give firms that are members of an international network many of the benefits of operating within a larger, international firm.

Law firm networks may be worldwide and designed for law firms with a particular profile or practice specialisation. They might equally be focused on specific regions of the world in order to allow firms from a group of jurisdictions with smaller legal professions to band together in order to offer the equivalent of a 'one-stop shop' to potential clients. There are also some larger international law firms that have created their own 'best friend' networks in order to establish more structured referral relationships in countries where they do not wish to, or cannot, open offices.

(2) Strategic alliance

A strategic alliance does not create a new legal entity; instead it usually takes the form of two or more law firms coming together to share resources for some specific purpose.

Strategic alliance agreements are often driven by the desire of firms to collaborate on business development, or to test out the potential for expanding into new territories through a full merger. Under such arrangements, the different partner firms will take the lead in different geographic territories, to promote the services of the alliance as a whole. They will also agree in advance the

firm that will take the lead in serving any clients of the alliance, and under what circumstances. Alliance agreements may also be used for other purposes, such as sub-contracting work to law firms in lower cost jurisdictions.

(3) A Swiss verein, company limited by guarantee, or trust company vehicle

In recent years, law firms in different jurisdictions have increasingly used models that allow them to remain legally separate while also sharing fees. The best-known version of this model is the Swiss verein, a formal legal structure recognised under Swiss law that allows separate legal entities to associate together to share branding, strategy, technology and other core functions while remaining independent for regulatory, tax and accounting purposes.

There are a growing number of variants of this model, using trust company structures or incorporating as companies limited by guarantee, often in low tax financial centres, as an alternative mechanism for profit-sharing between separately regulated entities.

Although this model has been used for some time by the large accounting firms and successfully by Baker McKenzie for a number of decades, the majority of law firm vereins have only been formed since 2008. Despite this, an estimated 20,000 lawyers worldwide are now working in firms that use this model.

(4) Joint venture

A joint venture (JV) creates a new jointly owned corporate vehicle as a mechanism for cooperation between two separate legal organisations. Two law firms may, for example, create a third jointly owned vehicle for a specific purpose. In these circumstances, either the partner law firms, or individuals from the partner law firms, will hold equity positions in the JV.

In some jurisdictions, such as Malaysia, JVs are the only permitted vehicle for foreign law firms to share fees with local firms.

(5) Full merger

A full merger occurs when two (or more) law firms come together to form a new entity, or when one law firm acquires another firm. The newly merged entity may be either a fully integrated branch office or a separate subsidiary, which may be required for tax, regulatory or liability reasons.

Law firms may be able to merge and form standalone subsidiary offices, even where there are regulatory limitations on the presence of foreign lawyers in their local jurisdiction. They can do this by separating out the business assets of the firm from the ‘legal practice’, which remains entirely in the hands of local lawyers. They can then put in place contractual agreements that regulate the flow of funds between the local office and its foreign ‘parent’.

Concluding observations

Law firms from a growing number of jurisdictions are using different models for joint cross-border practice. The largest international firms may have a preferred core model but will increasingly run multiple different types of joint practice alongside each other, to meet the requirements of the jurisdictions in which they are operating.

The reasons why a law firm might choose to adopt a particular form of association will be dictated by various factors specific to their history, circumstances and the jurisdictions concerned. These will include: regulation, taxation, ability to limit liability, or a preferred model for doing business. The extent to which any or all of these models are potentially available to law firms in any jurisdiction is a matter of local regulation within that jurisdiction.

The handbook will consider the regulatory models that Bars might choose to use in order to permit joint practice in order to achieve particular objectives. But first it is useful to consider briefly the extent to which trade policy might act as an external constraint on the design of a regulatory regime governing joint practice.

How 'association' is influenced by WTO GATS and other trade agreements

Since the creation of the World Trade Organization (WTO) in 1995, a formal legal framework has existed for 'trade in legal services', which binds all WTO member countries even if they have not made any specific commitments in legal services.[1] This has some bearing on the issue of joint practice.

The best background guide for Bars about the effect that this legal framework can have on the legal profession is the IBA's GATS Handbook.[2] This publication contains more detail on all the concepts discussed briefly below.

The WTO framework and its application to joint practice

There are certain obligations to which all WTO members are bound by virtue of the Marrakesh Agreement, which concluded the Uruguay Round of trade negotiations and established the WTO. This treaty also contains the General Agreement on Trade in Services (GATS), which covers trade in all services, including legal services. Although many WTO members have not made any specific commitments in the area of legal services, there are certain general obligations that still apply to them by virtue of their WTO membership. These obligations are relevant to any rules or regulations that a jurisdiction may wish to make about joint practice between local and foreign lawyers:

- The GATS explains that all measures that are taken by 'non-governmental bodies in the exercise of powers delegated by central, regional or local government or authorities'[3] are covered by its provisions. This means that the rules that control access to the legal market will need to comply with general GATS obligations.

- It explicitly recognises the 'right of Members to regulate and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives',[4] which gives WTO members the flexibility to make rules to suit their particular circumstances. However, this right is circumscribed by some other conditions in the agreement (see below).

- The GATS rules cover various modes of supplying a service and the one that is most relevant to joint practice is known as 'mode III', or the provision of legal services through the commercial presence of a law firm from one country in the territory of another. The GATS defines 'commercial presence' to mean any type of business or professional establishment, including through: the constitution, acquisition or maintenance of a juridical person; or the creation of maintenance of a branch or representative office.

1 See WTO list: www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (which, in effect, includes most countries).
2 www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Committee/Default.aspx.
3 Art 1, General Agreement on Trade in Services: www.wto.org/english/tratop_e/serv_e/1-scdef_e.htm.
4 Preamble to the General Agreement on Trade in Services, Annex 1B of the Marrakesh Agreement.

So, GATS rules cover circumstances in which a law firm might set up a new office in another country or merge with a local law firm. GATS Mode 4 covers the provision of services by a foreign lawyer when physically located in the host jurisdiction. This becomes relevant when a foreign law firm opens an office and staffs it with foreign lawyers or if a foreign lawyer is making 'fly in fly out' visits to the extent permitted by local law.

- The GATS also contains some 'general obligations and principles', including:

  – *The 'most-favoured nation' (MFN) principle*: This requires a member of the WTO to accord, immediately and unconditionally, to all WTO members, any treatment that it grants to service suppliers of other countries. This principle of extending the best treatment offered applies unless the country in question has negotiated an 'MFN exemption' on joining the WTO. WTO members that offer preferential arrangements to other countries in the absence of negotiated and agreed MFN exemptions will need to be prepared to negotiate similar agreements with other jurisdictions or to allow service suppliers from elsewhere to demonstrate how they might meet the same standards. This means that if a Bar wishes to treat foreign lawyers differently in terms of allowing them to practise jointly with its own lawyers, then it can only do so if its government negotiated an MFN exemption, or in the context of a free trade agreement or customs union, or if those rights are granted unilaterally without requiring reciprocal practising rights from a trading partner.

  – *Economic integration*: The GATS allows WTO members to pursue deeper cooperation with some members, notwithstanding the MFN principle. Countries can therefore sign free trade agreements or closer economic partnerships, which treat the parties to these agreements more favourably than other WTO members. This is one mechanism that allows bars to differentiate the treatment of lawyers from different countries.

  – *Transparency*: WTO members and the bodies covered by the agreement are supposed to publish information about any general measures they have taken that would affect the supply of services. As a result, Bars should explain publicly whether, and if so, how foreign lawyers or law firms can practise in their jurisdictions and under what circumstances they can do so jointly.

  – *Domestic regulation*: The GATS requires members, in sectors where they have made specific commitments, to apply any regulatory measures affecting trade in services in a 'reasonable, objective and impartial manner'.

Specific commitments

On becoming a member of the WTO, each country is required to submit a 'schedule of specific commitments', which sets out the terms on which it is prepared to permit trade with other WTO members. Goods schedules set out the tariff rates and quotas relating to the import of goods. But on the services side, which covers legal services, it is more complex.

Countries are not obliged to undertake commitments in every service sector, and many have not done so for legal services (a full list of those that have can be found in Annex 2). But if a member has made commitments in legal services, then there are some strictures that apply to future rulemaking and these can have an impact on the arrangements governing relations with foreign lawyers.

- *Prohibited measures*: The GATS does not limit a country's ability to adopt rules, but it does create a government-to-government remedy that allows a country to impose trade sanctions on another WTO member state that adopted a 'prohibited measure'. Some types of rules are explicitly prohibited (Article XVI of the GATS agreement) to WTO members that have made specific commitments in services sectors, unless the country has limits on its commitments. This means that a country that has taken specific commitments in legal services cannot maintain or adopt any of the following types of measures with impunity, unless these have been notified as exemptions in their services schedules:

  - Limitations on the number of foreign lawyers or law firms that are permitted (ie, quotas). This includes the requirement that a foreign law firm should have to justify its wish to establish in the host country by passing some form of economic needs test.

  - Limitations on the number of foreign lawyers who may be employed.

  - Measures that restrict or require specific types of legal entity or JV through which a service supplier may supply a service.

  - Limitations on the participation of foreign capital in terms of a maximum percentage limit on a foreign law firm shareholding.

- *National treatment*: Members should accord the same treatment to lawyers and law firms from other countries as they do to their own. Even if this is not formally identical, it must have the same effect.

Box 1 sets out some examples of how WTO members have treated the issue of foreign-local lawyer joint practice in their original GATS schedules.

Bars should note from this that:

- if their governments have not made commitments in legal services but might be considering doing so in future, then it will be important for Bars to consider in detail how those commitments are to be framed, so they can retain the ability to regulate relations between local and foreign lawyers, if they wish to do so; and

- there are a range of regulatory options open to Bars that wish to control relationships between foreign and local lawyers, despite restrictions by the WTO on the types of measures that can be imposed.

Box 1: Selected extracts from GATS schedules of specific commitments relating to the treatment of foreign lawyer local lawyer collaboration

Australia

Under 'Additional Commitments', Australia's GATS schedule states that:

'Joint offices involving revenue-sharing between foreign law firms and Australian local law firms are permitted in NSW, Victoria, Queensland and Tasmania subject to the foreign law firms satisfying certain requirements, including in relation to liability, standard of conduct and professional ethics'.

China

Under 'Limitations on market access', China's GATS schedule states that foreign law firms are permitted to enter into 'contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs… Entrustment allows the foreign representative office to directly instruct lawyers in the entrusted Chinese law firm, as agreed between both parties'.

Japan

Under 'Additional commitments', Japan's GATS schedule states that: 'Association with Bengoshi is permitted. Employment of Bengoshi is not permitted.'

Denmark

Under 'Restrictions on market access', the schedule of commitments notes that: 'Only lawyers with a Danish licence to practise and law firms registered in Denmark may own shares in a Danish law firm. Only lawyers with a Danish licence to practise may sit on the board or be part of the management of a Danish law firm.'

United States (all states)

Under 'Limitations on Market Access', the schedule of commitments states that: 'Partnership in law firms is limited to persons licenced as lawyers.'

NB – These are extracts from WTO Country schedules drafted in 1995 on the creation of the WTO. In some cases they have been superseded by legislative developments or changes in applied regimes.

Bilateral and regional cooperation arrangements and free trade agreements

The WTO GATS is not the only external agreement affecting the regulation of relationships between local and foreign lawyers. Some jurisdictions may also be party to other types of agreement that affect joint practice. For example:

- *The Closer Economic Partnership Arrangement (CEPA)*: CEPA is a special relationship between China and Hong Kong, designed to promote economic integration. Legal services are covered under the agreement and various liberalisation measures have been introduced to encourage cross-border business between mainland China and Hong Kong legal sectors.

The agreement allows Hong Kong law firms to form partnerships with mainland law firms in certain geographical areas of China (Guangzhou, Shenzhen and Zhuhai), subject to the control of the local administrative authority. Hong Kong in turn permits foreign law firms to establish as local law firms, provided a majority of the lawyers in the firm are qualified as Hong Kong lawyers. It also offers a mechanism to enable foreign lawyers to requalify as Hong Kong lawyers. Combined, these measures create a route for partnership between mainland Chinese lawyers and lawyers from any jurisdiction who are resident and qualified in Hong Kong.

- *Korean free trade agreements*: The Republic of Korea has signed a number of free trade agreements covering the legal services sector. The first wave of these agreements covered the United States, the European Union and the European Free Trade Area,[5] and these have provided the model for subsequent agreements. The free trade agreements all contain special provisions to permit not only establishment of foreign law firms in Korea, but also joint practice between Korean and foreign lawyers. These liberalisation measures are, however, limited to law firms that are headquartered in the partner states to the free trade agreement. Korea's approach to legal services in free trade agreements permits foreign firms to form alliances with Korean firms, or enter into cooperative agreements to provide advice on Korean law within two years of the agreement entering into force. After five years, foreign firms may establish joint ventures with Korean firms and employ Korean lawyers qualified to practise Korean domestic law. This illustrates how a free trade agreement can deal with the question of joint practice in a staged way.

- *The mutual recognition agreement for advocates of the East African community*: In 2016, the competent authorities for the regulation of legal services in East Africa signed a mutual recognition agreement. Once this agreement has been recognised by the relevant EAC Sectoral Council of Ministers, it will give lawyers from any of the five partner states[6] the right to requalify automatically[7] in each other's jurisdictions. It will also act as a mechanism for cooperation and allows lawyers from the different partner states to form joint practices by gaining automatic recognition in each other's jurisdictions, thereby sidestepping the need to create recognition arrangements for foreign lawyers.

- *The European Union*: The Member States of the EU are party to deep economic integration arrangements, which include a specific regime covering legal practice. These arrangements and, in particular, the Establishment Directive (Directive 98/5/EC), allow lawyers who are nationals of, and qualified in, any of the EU Member States to establish in any of the other 27 Member States of the EU. Joint practice between established EU lawyers is governed by Article 11 of this directive, which states:

  'The host Member State shall take the measures necessary to permit joint practice also between:

  (a) several lawyers from different Member States practising under their home-country professional titles;

5 EFTA (Iceland, Liechtenstein, Norway and Switzerland).
6 Burundi, Kenya, Rwanda, Tanzania and Uganda.
7 Subject to some caveats between civil and common law jurisdictions

(b) one or more lawyers covered by point (a) and one or more lawyers from the host Member State.

The manner in which such lawyers practice jointly in the host Member State shall be governed by the laws, regulations and administrative provisions of that State.'

It is also worth noting that the EU arrangements permit Member States to discriminate, if they wish, between lawyers and law firms from other EU Member States and those from third countries. Fully integrated partnerships between local and foreign lawyers cannot be created in Bulgaria, Denmark, Estonia, France,[8] Ireland, Latvia, Lithuania, Malta and Slovenia, unless the foreign lawyer is an EU national and qualified in an EU Member State. This again illustrates that permitting joint practice does not have to be incompatible with retaining the right to regulate the way in which that joint practice operates.

Concluding observations

While the WTO does not prevent Bars or other regulatory authorities from making national rules to determine the form of collaboration between law firms from different jurisdictions, it does nonetheless impose some external obligations. It is acceptable in international trade terms for a country to maintain limitations on law firm collaboration, but where these exist in a form that discriminates between different nationalities of foreign lawyers/law firms, then they must be notified when any commitments on legal services are made, or be covered by any MFN exemptions made by the WTO member on its accession.

WTO rules also do not prevent special treatment being given to the lawyers of some countries in preference to others, including in relation to joint practice, provided this is done in the form of a FTA or economic integration agreement, or otherwise exempt from MFN requirements.

8 Subject to some historical exemptions.

Models for regulating association

As there are an increasing number of 'push' and 'pull' factors encouraging Bars to look at the question of fee-sharing between their lawyers and foreign lawyers, many jurisdictions have had to consider the question of how they might regulate such partnerships.

This issue can come up in three ways:

- as a pure fee-sharing issue;
- as an issue for outbound lawyers from the home jurisdiction; or
- as an issue of foreign lawyer establishment and practice in a host jurisdiction.

Pure partnership/fee-sharing

The question of joint practice may come up for Bars purely in the context of fee-sharing. Increasingly firms are collaborating in forms that do not necessarily involve the foreign firm opening an office in the host jurisdiction. In these circumstances, a local lawyer may act as a 'valve partner' to link what would otherwise be an entirely standalone local firm into an international partnership of some kind. In other words one of the local partners is also a partner in an overseas firm and acts a channel for the sharing of fees. These arrangements are usually governed by contract, are purely business-related and do not touch on the issue of who is practising law. It is therefore entirely possible (although not always the case) that a wholly owned local law firm with only locally qualified partners to be part of an international collaboration without breaching local rules on the practice of law.

The nature of these arrangements may mean that Bars are unaware of them. Local lawyers continue to be the only lawyers practising in the local market, although the name of the foreign firm may be incorporated in the local firm's name, or may even replace it. They may equally not raise any particular concerns since the investment of foreign law firm capital or know-how in this way does not permit foreign lawyers to practise in the jurisdiction.

This underlines the distinction between the commercial presence[9] of foreign law firms (mode 3 in WTO GATS terms) and the practise of law by foreign lawyers (mode 4). In some states of the United States, for example, the commercial presence of foreign law firms is permitted, although individual foreign lawyers are not allowed to practise as there is no foreign legal consultant rule in place.

Some Bars do, however, maintain rules that can make this form of collaboration difficult. These include a prohibition on:

9 That is, the presence of an international law firm office where this is a standalone partnership and all lawyers practising in it are locally qualified.

- lawyers being involved in more than one law firm;

- use of a foreign name or brand that might indicate that it was part of a larger joint practice – this usually means that a local law firm involved in an international joint practice will set up a parallel international website, which cannot be accessed locally; or

- fee-sharing on a one-off basis, or in partnership, with 'non-lawyers', where 'lawyer' is defined as someone who qualified locally, making it impossible to set up a joint practice with a lawyer from another jurisdiction unless special fee-sharing arrangements are set up offshore.

Outbound fee-sharing

There are some jurisdictions in which Bars do not want to expose the local legal market to competition from foreign law firms but do want to promote the development of their local practitioners. These jurisdictions have sometimes drawn on lessons from the export trade-led growth strategy adopted in a number of Southeast Asia economies from the 1960s onwards. This strategy combined high protection in the local market with active promotion of exports.

In the legal sector, there are jurisdictions that have explicitly distinguished between fee-sharing in the local economy (prohibited) and fee-sharing externally (permitted). This approach is designed to enable local practitioners to work abroad and obtain experience of international legal business, without permitting foreign law firms to set up locally. In Japan, for example, Bengoshi (Japanese lawyers) were permitted to enter into partnerships overseas some time before the rules were changed to permit partnerships between foreign and local lawyers in Japan. In India, although foreign law firms and foreign lawyers are not allowed to practise, Indian advocates may obtain permission from their state bar associations to enter into partnerships when they are resident outside India.

However, there are rules that can make it difficult for local lawyers even to gain experience of working in an international partnership overseas, including:

- residency requirements for registration, which mean that lawyers present outside the jurisdiction cannot retain a practising certificate; and

- blanket restrictions on lawyers being involved in other businesses, which might prevent them from taking an ownership interest in a company that acts as a service company for a law firm rather than as a provider of legal services to third parties.

Foreign lawyer practice

For most Bars, the issue of fee-sharing is most likely to come up when foreign lawyers are present in their jurisdiction. There are a number of different models that are used to permit this.

Full mergers

Some jurisdictions permit full mergers between local and foreign lawyers (ie, no limits on shares or number of foreign partners). However, this does not necessarily mean that there is no control that can be exerted by the local Bar.

In England and Wales, for example, there is no restriction on English solicitors and foreign lawyers forming partnerships. However, the Solicitors Regulation Authority (SRA) currently requires any partnership formed between English solicitors and foreign lawyers that is practising in England and Wales to be 'a recognised body'. This means that if a solicitor/foreign lawyer partnership has an office in England and Wales, then it must obtain a law firm licence, which requires it to fulfil exactly the same conditions as a local firm (ie, have a legal director (compliance officer for legal practice) and compliance officer for finance and administration in place, maintain high levels of professional indemnity insurance cover, comply with local codes of conduct, accounts rules, etc).

Solicitor/foreign lawyer partnerships may be established in England and Wales as branches or as standalone offices. In both cases, all the law firm's owners must register with the SRA as registered foreign lawyers and agree to be bound by the SRA code as it applies to them in England and Wales. Where the English office is a branch of a foreign firm, all of the overseas partners in the firm will also need to be registered as registered foreign lawyers with the SRA, in addition to maintaining their home country registration, and will be bound by the SRA 'overseas code of conduct'.

Foreign law firms may also set up in England and Wales without English solicitor partners but in these circumstances have a more limited scope of practice.[10] The SRA is proposing to relax some of these restrictions in future.

In Hong Kong, if foreign lawyers wish to establish a formal collaboration with local Hong Kong law firms, they have two options:

- establish a registered association arrangement with a local firm. This will enable the two firms to share fees, profits, premises, management and employees; but not to share client accounts, supervise or be in charge of the practice of the other firm in the association; or

- a foreign law firm can establish as a local Hong Kong law firm, provided that the number of foreign lawyers associated with the firm does not exceed the number of resident principals and solicitors employed in the firm. Foreign lawyers are permitted to requalify as Hong Kong solicitors and this makes such partnerships easier to form.

There are also some jurisdictions that permit foreign and local lawyers to enter into partnership together but distinguish between the foreign lawyers who can do so, on the basis of nationality and/or qualification. This is the case, for example, in a number of EU Member States, where only lawyers from other European Economic Area states and Switzerland are permitted to form

10 Currently, a foreign law firm that wishes to have an English solicitor partner or to practise through an English solicitor partner in the reserved areas of English law (broadly speaking: litigation, advocacy, conveyancing and probate) must be authorised by the SRA.

partnerships with local lawyers. These countries include: Bulgaria, Denmark, Estonia, France,[11] Ireland, Latvia, Lithuania, Malta and Slovenia.

Some other jurisdictions may sidestep the issue of foreign and local lawyer collaboration entirely, simply by requiring, and making it relatively easy for, at least some foreign lawyers to requalify so that they can be fully regulated as local lawyers. This is the case, for example, in some Gulf Cooperation Council states, which facilitate easy recognition of each other's qualifications. It is also set to be the model in the East African Community, following the conclusion of the mutual recognition agreement for advocates in 2016.

Not all jurisdictions regulate law firms as well as individual lawyers. But even in jurisdictions that do not regulate firms, there may be rules that place limits on the ways in which a full merger may occur.

The lesson that arises from this is that there are many jurisdictions that allow very wide fee-sharing and collaboration between local and foreign lawyers, but far fewer that do so in an entirely uncontrolled way.

Equity limits/foreign lawyer participation

There are some jurisdictions that permit foreign/local lawyer partnerships but have been reluctant to allow full mergers. They attempt to control the percentage of ownership that can be held by foreign lawyers through the imposition of equity limits on either the share ownership, voting rights or percentage of qualified lawyers/owners involved in the joint practice. These conditions may not be under the control of the Bar but might rather governed by general conditions on foreign equity participation, for example, in Pakistan where foreign participation in many types of business, including legal services, is capped at 60 per cent.

Some jurisdictions have specific rules on equity limitations, usually in order to ensure that a law firm is controlled locally. For example, in France, if a law firm chooses to establish as a Société d'Exercice Libérale (SEL) or Société Civile Professionelle (SCP), then at least 75 per cent of the partners holding at least 75 per cent of the shares must be lawyers fully admitted to the Bar in France. However, these are not the only options open to law firms wishing to establish in France; such firms may use a form other than the SEL or SCP.

In Malaysia, reforms introduced in 2014 provided three new routes for foreign and Malaysian lawyers to collaborate: (1) an international partnership; (2) a qualified foreign law firm (QFLF) licence; or (3) employment of a foreign lawyer by a Malaysian law firm. In the case of the international partnership, the Malaysian lawyers must have no less than 60 per cent of the ownership and the foreign lawyers no more than 40 per cent. These limits apply both to the equity and voting rights in the firm and to the total number of lawyers in the international partnership. The QFLF licence (of which only five are available) permits foreign law firms to practise Islamic finance in Malaysia, and requires at least 30 per cent of the total number of lawyers in that firm to be local lawyers. Where Malaysian law firms are hiring local lawyers, their numbers are also capped at no more than 30 per cent of the total number of lawyers in that firm.

11 Subject to some historic exceptions applying to US lawyers.

While foreign participation limits can, on the face of it, appear a simple way of ensuring that local lawyers remain in control of international partnerships, they may not achieve their desired result. For example, in order to meet the 60 per cent requirement, a single Malaysian practitioner could not collaborate with a single foreign partner. The equity limited model may raise similar issues, since for every additional foreign lawyer, for example, a Malaysian international firm wishes to hire (say, to win a new area of business in which there is no existing local expertise), it must add at least two local lawyers. Alternative approaches to local control that have been adopted in some jurisdictions have included other factors, such as the seat of decision-making and financial independence.

Joint ventures

A few jurisdictions have opted to regulate foreign and local law firm collaborations by means of a JV model. This model keeps the two collaborating firms separate and establishes a third shared business vehicle as a mechanism for collaboration and fee-sharing. The regulatory requirement to collaborate by way of JV has been used most notably by Japan and Singapore, although Japan has since moved to a fully liberalised model.

The Japanese JV or 'joint enterprise' model for foreign and local law firms was introduced in 1994 as a first step in permitting foreign and local lawyer collaboration. It required cooperating foreign and Japanese law firms to create a third entity, which was governed by rules laid down by the Japanese Bar. These rules included restrictions on the supervision and employment of local lawyers and required separate accounts and tax records to govern their cooperation.

The JV model was only adopted by around a quarter of foreign law firms with offices in Japan, the rest preferring the greater flexibility of referral arrangements. In 2005, the model was amended in order to increase the availability of international legal advice in line with the needs of the Japanese economy. This reform permitted full mergers between foreign and local law firms.

Although there are still some 'joint enterprise' arrangements in place, overall it was never a popular model because it denied Japanese lawyers the ability to participate as full partners in larger international firms, it made it difficult for clients to obtain advice from a single source, and it created complex management challenges given the existence of three distinct entities involved: (1) the joint enterprise; (2) the Japanese law firm; and (3) the foreign law firm.

The Singapore JV model (the joint law venture – JLV) is a legal entity formed between a Singapore law firm and a foreign law firm. A JLV may provide Singapore law-related legal services but only in 'permitted areas of legal practice' and only when provided by Singapore qualified lawyers. The model is slightly uneven in that the Singapore side of the JLV retains its own separate local firm, while the foreign firm can only practise in Singapore through the JLV. If the foreign firm attempts to recruit Singapore lawyers to the foreign side of the JLV they will need to surrender their practising certificates. The model is therefore not very popular among foreign law firms, given the other range of vehicles for collaboration that are available, such as the foreign law practice or QFLF licence.

There are 106 foreign law practices[12] registered in Singapore and only eight JLVs. Foreign law firms have argued that the Singapore JLV model does not encourage them to integrate into the local legal market. Moreover, because it requires them to maintain separate firms, with separate profit and loss accounts, the two halves of the JV will sometimes find themselves in competition. For these reasons, the model has not been very successful in encouraging the 'transfer of technology' or expertise between the JLV partners. From the point of view of local lawyers, it is also not a model that delivers great benefits, since local lawyers cannot become partners in an international law firm and participate in the success of the whole business. International law firms have therefore tended to choose to set up as standalone foreign law practices or to integrate Singapore law firms into their operations through verein structures. The choice of model depends very much on the particular circumstances of the form of practice in Singapore.

Quotas

Quota arrangements are generally frowned upon in trade policy and economics more generally, since they do not lead to an efficient allocation of resources. The GATS 'market access' provision (Article XVI) includes quotas as items that should not be used (unless specifically exempted). Article XVI cannot, however, prevent jurisdictions that have not yet made specific commitments in legal services from adopting some kind of quantitative restriction on the number of licences that it issues for joint practice.

Singapore, which has an MFN exemption allowing it not to make a GATS commitment in legal services, awarded an initial quota of five qualifying foreign law practice licences through an open tender process in 2008. These licences were awarded for five years and were designed to supplement the other options for foreign legal practice that already existed in Singapore. Qualifying foreign law practice licences allow foreign law firms to offer Singapore law-related legal services in certain 'permitted areas of legal practice' through Singaporean solicitors. The initial five-year batch of licences was judged to have met the government's objectives and the number of licences offered was expanded to nine in 2014. The Ministry of Law, which has now delegated the task of licensing legal practices to the Legal Services Regulatory Authority, was responsible for the licensing scheme and required bidding international law firms to make proposals that indicated:

- the value of work that the firm's Singapore office would generate;
- the number of lawyers who would be based in the firm's Singapore office;
- the strength of the practice areas that the firm's Singapore office would offer; and
- the extent to which the Singapore office would function as the firm's headquarters for the region.

This illustrates how jurisdictions that have objectives such as growing as a regional centre for legal practice can use a quota schemes to manage greater collaboration between foreign and domestic lawyers. Critics of quota schemes would point out that they can introduce rigidities into the system[13]

12 That is, foreign law firms established to practise only foreign and international law.

13 A five-year licence, even if renewable, will make a foreign law firm less likely to commit itself wholeheartedly to a jurisdiction than a licence that is not time-limited.

and may have done less for local lawyers in Singapore than other forms of joint practice, which are more flexible. Regardless of this, they have perhaps played a role in helping jurisdictions that are cautious about further liberalisation to engage in limited experimentation.

Free trade zones

Free trade zones or special economic zones have also been used by regulators in emerging markets in recent years to experiment with more flexible rules in highly regulated sectors like legal services. The role of free trade zone has usually been to permit foreign law firms to establish in a jurisdiction in order to practise exclusively international law (for example, in the Qatar Finance Centre or the Dubai International Financial Centre) but sometimes regulators have also used this model to provide a limited test bed for experimenting with joint practice between local and foreign lawyers.

Concluding comments

Finally, it should be noted that many jurisdictions that permit foreign and local lawyers to establish joint practices have adapted the models they use to manage this collaboration over time, generally moving towards less restrictive approaches. In some cases, as in Japan, this has been an evolutionary process over a lengthy time period (17 years between foreign law firms being permitted to set up JVs and the removal of restrictions on associations between foreign and local lawyers). In others, like South Korea, the process followed a timetable that was committed to in FTAs (five years from the establishment of foreign law firms to mergers being allowed between foreign and Korean firms). However, even where joint practice was introduced as a 'big bang', as in England and Wales with the introduction of Multi-National Partnerships through the Courts and Legal Services Act 1990, regulatory controls have eased over time as the regulator has become more comfortable with the perceived risks of regulating joint practice.

Joint practice – a checklist of implementation issues for Bars

Regardless of the precise model selected for joint practice, if Bars are thinking about allowing fee-sharing between their lawyers and foreign lawyers, then there are a number of implementation issues to bear in mind. Since most jurisdictions regulate individual lawyers, not law firms, the regulation of fee-sharing arrangements will be effected primarily through rules applying to individual local and foreign lawyers, rather than to the practice as a whole.

Recognition

When a jurisdiction decides to allow a lawyer to enter into fee-sharing arrangements with a 'foreign lawyer', then they may want to establish the criteria for determining who fits this description. Does this mean anyone who is able to provide legal services and call themselves 'a lawyer' in their home jurisdiction, or someone whose qualification process and regulatory model meets certain standards?

There are a variety of different methods of dealing with this question.

- In Germany, the opportunity to associate with a German lawyer is offered to any foreign lawyer who is qualified in a jurisdiction that is a member of the World Trade Organization.
- In England and Wales, the Solicitors Regulation Authority explicitly approves foreign legal professions as 'appropriate for partnership with solicitors' on the basis of a review of the training and regulatory background of the proposed partner legal profession.
- Some Arab jurisdictions operate on the basis of reciprocity and recognise professions where similar recognition is given in return.
- Some other jurisdictions only grant recognition to lawyers who benefit from treaty arrangements that confer national treatment (through more formal intergovernmental cooperation rather than through Bar rules governing mutual recognition). In the EU, for example, there are a number of jurisdictions that permit local lawyers to enter into partnership with lawyers from other EU Member States, but not non-EU lawyers.

Each jurisdiction will want to set its own criteria, doubtless based on adherence to general principles that are important for the proper practise of the law. It is important, too, that the Bar also defines exactly what is meant by a foreign lawyer, and does so in a way that is non-discriminatory in trade terms, unless special conditions apply.

Mode and scope of practice

The issue of permitted relationships with foreign lawyers is a different issue to that of practice rights, if any, of a foreign lawyer. Therefore, once a foreign lawyer has been recognised as

eligible to collaborate with local lawyers, the extent of that foreign lawyer's ability to practise in the local jurisdiction should also be addressed, and should be made transparent through regulation (ie, it should be clear to them, and indeed to local lawyers, what areas of law these lawyers can practise either independently or together). For example, Singaporean rules make clear that even where there is a joint practice, it is still only the Singaporean lawyer who is entitled to practise Singaporean law.

Registration

Not all jurisdictions require foreign lawyers to register as a matter of course when they are practising purely foreign, international and third-country law (if permitted). But there are some examples where registration is triggered by joint practice. In Scotland and England and Wales for example, foreign lawyers[14] are only required to register when they enter into multinational partnerships with solicitors from those jurisdictions.

Rights to supervise

In jurisdictions where foreign law firms are permitted to establish, it does not naturally follow that they will be able to employ local lawyers, unless there are local lawyers in the ownership and management of that firm. This stems from an interpretation of rules on lawyer independence, which holds foreign lawyers as equivalent to non-lawyers, because they are not fully bound by the local Bar rules. It is often coupled with concerns that foreign lawyers cannot effectively supervise the work of associates in local law and, moreover lie beyond the scope of regulation of the local Bar. These obstacles to the employment of local associates are overcome in a joint practice, where local partners are able to supervise, as necessary, on local law issues. The reality of international transactions may make it difficult to distinguish clearly at an early stage what is a local law matter and what is an international matter. It would defeat the object of collaboration if local associates were only able to work on matters that were directly supervised by local partners. Provided that local partners are available within the practice to sign off on local legal opinions, provide local representation and ensure that local professional secrecy rules are complied with, it should not be an issue for associates to gain experience of working for a foreign lawyer.

Business structure arrangements

There are a number of relevant considerations for Bars to consider in relation to business structures:

- *Permitted vehicles*: A foreign law firm will obviously have to comply with local legislation on the permitted forms it can take. But Bars can sometimes attempt to restrict these forms further in ways that will influence the extent to which a partnership between foreign and local law lawyers can be integrated with the firm's practise in the rest of the world. These restrictions include:

14 Excluding lawyers from the European Union, EEA and Switzerland, who are dealt with under separate arrangements.

– *Prohibitions on incorporation or of limited liability forms of practice or liability caps* – these restrictions have the effect of limiting the ability of law firms to grow in size, since partners are deterred from merging when their liability is unlimited or in advising on business transactions of a significant size. This may put such firms at a competitive disadvantage since, in some jurisdictions, partners and/or law firms are permitted to cap their liability, although they may need to provide protection to clients through professional indemnity insurance instead. Bars with limitations of this type may want to balance the wish to keep to the principle of lawyer liability with the opposing wish to promote their firms' ability to compete on a level playing field with law firms that are permitted to limit their liability, particularly in those fields of law where large-scale transactions are involved.

– *Alternative business structures or multidisciplinary practices* – in a few jurisdictions (although the number is growing), lawyers are permitted to enter into co-ownership and joint practice arrangements with other professionals or non-lawyers. Many other jurisdictions have a strict prohibition on such forms of fee-sharing. Bars may therefore wish to ensure that they understand fully who else is involved in the overall ownership of a local joint practice law firm, where it is a branch or a subsidiary of an overseas law firm, rather than a standalone local firm. Some Bars (eg, Hong Kong, Singapore and England and Wales)[15] seek evidence and declarations from the owners of the foreign element in any joint practice, that there are no non-lawyers involved in the ownership of the joint practice worldwide, before it can be approved.

– *Names of law firms* – some jurisdictions have rules about what a law firm can be called, for instance that it must carry the name or names of at least one current partner. Others permit their law firms to bear the names of long-dead partners or to have a purely made-up name. This means that some well-known international law firms may not be able to take their name into every jurisdiction or may need to add the name of a local partner in order to operate there. In Hong Kong, for example, if a firm intends to adopt the name of an overseas firm, there must have been a foreign firm established in Hong Kong with the same name practising or advising on the law of a foreign jurisdiction, for a period of three years immediately preceding the establishing of the Hong Kong firm.

Professional standards

Jurisdictions that permit foreign lawyers to establish a presence in-country will generally require them to adhere to the local code of conduct and this will ensure that any foreign lawyers in the joint practice are covered by the same obligations as local lawyers. If the foreign lawyer partner is not established in the local jurisdiction, there are still ways to ensure that all of the owners of a joint practice adhere to the local code of conduct, to the extent that it is applicable. In the UK, for example, both the Law Society of Scotland and the Solicitors Regulation Authority in England and Wales require foreign lawyers who are co-owners of a multinational practice to register as registered foreign lawyers and be bound by the local code of conduct.

15 Although England and Wales permits alternative business structures, there are two different forms of licence available to such firms, depending on whether they are traditional law firms ('recognised bodies') or alternative business structures ('licensed bodies').

Although some Bars have dealt with the question of applicable professional standards by requiring all of the partners/owners of a firm to be resident in the jurisdiction, this may create limitations on the extent to which the local joint practice firm can benefit from being part of a wider international network. An alternative for Bars to consider is the extent to which they can build relationships of trust with the regulators/Bars of any foreign lawyers engaged in joint practice in their jurisdiction. This is where there may be a useful role for information sharing agreements which ensure that Bars keep each other updated on any conduct or disciplinary issues that might have arisen.

Client protection

Client protection is an important aspect of lawyer regulation and includes both professional indemnity insurance to cover against negligence and guarantee funds to cover against default.

- *Indemnity insurance*: Some bars run their own mutual professional indemnity schemes, while others leave it to the market. In the case of mutual schemes, all of the registered lawyers in a jurisdiction provide a collective guarantee against the negligence of their fellow members. There may therefore be some wariness about allowing foreign lawyers into such a scheme, even through a joint practice. While allowing joint practice is easier for Bars that do not maintain mutual insurance schemes, there may be other solutions for those that do, other than simply prohibiting joint practice. Rules could be put in place, for example, which would exclude a joint practice from the mutual scheme but require it to maintain indemnity cover to at least the same level by procuring insurance from the market. As law firms from other jurisdictions who wish to enter into joint practices will generally already have existing insurance in place, and often at a much higher level than required for local practice, this should not be an obstacle to their establishment.

- *Compensation funds*: Some Bars also maintain guarantee or compensation funds in order to compensate clients in case of wrongdoing by a lawyer that causes a loss that cannot be covered by insurance. These schemes usually exist in jurisdictions in which the lawyers themselves hold client money. A concern has occasionally been expressed that if a foreign lawyer is also covered by such compensation schemes, then this exposes the local profession to risks that they may not understand (ie, from the foreign lawyer's practice) and may result in the local profession having to compensate foreign clients for losses that have little connection to the local jurisdiction. These are understandable concerns but are all issues that can be managed. The rules governing a compensation scheme could, for example, exclude overseas clients (or types of clients) or the acts of the foreign lawyers, although the latter is less easy to manage.

Employment of local lawyers

Bars deal with the issue of employment of local lawyers by foreign law firms in different ways. Some may put specific rules in place that govern the employment of lawyers (whether they are employed by lawyers or non-lawyers) – for instance, with provisions in their code of conduct that apply only to lawyers who are employed, or with a rule that says that a non-lawyer

employer has to agree to abide by specific ethical rules when employing a lawyer (which is the case in the Netherlands, for instance).

However, local lawyers and foreign lawyers work together lawfully even in jurisdictions that ban employment; they just do not work together under employment contracts, so as to protect the independence principle as interpreted within that jurisdiction. For instance, one lawyer may work for the other but under a freelance contract without subordination, so protecting the first lawyer's freedom of manoeuvre and judgement.

Practical arrangements

Finally, Bars will also need to think through the approval processes they put in place for approving joint practices. In accordance with WTO Article VI and general best practice, these should not be made too burdensome and any fees charged should be proportionate to the effort required.

There are different ways of approaching these practical requirements, but they usually break down into two steps:

- approval of the individual foreign lawyers as appropriate for co-ownership (which may either stem from a foreign legal consultant registration or from some other process); and

- approval of the vehicle for practice. (For example, who shares in the ownership? What is the legal vehicle? From where will it practise? What is it called? Who does it employ? What indemnity insurance cover does it have?)

The emphasis put on these steps will vary from jurisdiction to jurisdiction. As many Bars do not regulate practices themselves, the focus of any registration requirements will be on the individuals. Some jurisdictions may choose only to require registration of lawyers who seek to establish themselves – that is, actively practise in the jurisdiction. Again this is where cooperation between host Bars and the home Bar of the foreign lawyer involved in the joint practice will be important. The host Bar will often need information from the foreign lawyer's home Bar on the foreign lawyer's qualification as a lawyer, and their disciplinary record. It is perfectly appropriate for Bars to require certified translations of the above in their local language.

Concluding observations

In deciding whether local lawyers should be permitted to associate with foreign lawyers, Bars might also wish to consider whether their own rules are holding back their own lawyers from competing on an equal basis with law firms from other jurisdictions.

Many Bars have a range of rules, some of which may have made sense in the past but today act as obstacles to local firms winning international work, either in their own right or through collaboration. These kinds of rules include, inter alia:

- the maximum number of partners in a law firm;
- tight restrictions on permitted legal entities;
- restrictions on the limitation of liability or incorporation;
- limited permitted forms of association or partnership;
- restrictions on the scope of work that a law practice can undertake;
- restrictions on the ability to respond to tenders; and
- absolute restrictions on 'advertising', coupled with a narrow definition of what that means.

The range of options covered in this handbook gives Bars a wide choice in how to regulate joint practice so as to take account not only of external factors such as trade agreements but also their own core values and requirements.

How can the IBA help?

The Bar Issues Commission of the IBA exists in order to support the interests of the member Bars of the IBA and there are a number of ways in which it can help those Bars that wish to reflect further on the question of joint practice.

Information and benchmarking

The IBA has recently published the second edition of its publication *Benchmarking Bar Associations*,[16] the first edition having proved to be very popular. The guide covers a very wide range of issues facing Bars – in particular those in developing countries – including membership services, regulation, representation, ethics, disciplinary and complaints procedures, rule of law, human rights and access to justice, pro bono work and international work and relations.

There is also a wealth of experience within the IBA and its membership, which can be accessed by other members. There will nearly always be someone somewhere who has faced similar challenges, and so may have useful suggestions for solutions.

Practical workshops

The Bar Issues Commission, with IBA funding and experts provided by its International Trade in Legal Services Committee, has offered conferences recently to Bars in Africa on assisting lawyers to face globalisation. These have always included a session on issues around joint practice. These are valuable opportunities for lawyers locally to meet international experts, and also for the international experts to be exposed to local problems.

These conferences, and others like them (since the IBA offers a wide range of conferences and practical workshops), are on offer through the IBA.

Resolutions

The IBA Council has passed a number of resolutions that are intended to provide guidance for Bars when they are dealing with the issue of cross-border legal services.[17]

Three of these resolutions are relevant to the issue of association.

The core values resolution

This resolution holds that trade agreements that touch on the liberalisation of trade in legal services must respect the need to preserve the core values of the legal profession. These core values are defined as:

16 See: www.ibanet.org/barassociations/Benchmarking-Bar-Associations.aspx.
17 See: www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Committee/Default.aspx.

- the role of lawyers in facilitating the administration of, and access to, justice;
- the duty to the courts;
- the duty to uphold the rule of law;
- the duty to keep client matters confidential;
- the duty to avoid conflicts of interest;
- the duty to uphold specific ethical standards;
- the duty to provide clients with the highest quality of advice and representation; and
- the duty in the public interest of securing professional independence

Many jurisdictions have concluded that there is no reason why maintaining these core values should not be entirely consistent with a decision to allow association between local lawyers and established foreign lawyers. Not only because properly regulated foreign lawyers will be subject to very similar core duties in their home jurisdictions, but also because rules can be made to govern the way in which local and foreign lawyers work together, which protect these values.

The core values listed above can be used as a checklist for Bars to use when making decisions about whether, and on what grounds, to allow association between foreign and local lawyers, whether the decision comes about as a part of a trade agreement or not.

Establishment

The resolution on establishment of foreign lawyers in another jurisdiction deals with lawyers who move to another jurisdiction to continue working as lawyers indefinitely. It acknowledges the increasing mobility of foreign lawyers, and again mentions the importance of establishing common regulatory principles consistent with core values. It stresses the authority of the host Bar to regulate foreign lawyers, as already mentioned above, and states that such regulation should be on the basis that the rules guarantee fairness and uniform treatment, transparency and a public purpose (effective delivery of services, and rules consistent with the need to protect the public).

The resolution proposes two models as to how a foreign lawyer might establish in a local jurisdiction:

- full licensing (where the foreign lawyer becomes a full member of the local Bar); and
- limited licensing (where the foreign lawyer practises in the host country as a foreign legal consultant).

The concept of association is relevant only to the second of these two models, where the foreign lawyer continues to practise under home title, since in the first the foreign lawyer becomes a local lawyer.

Skills transfer

The resolution on skills transfer recognises that a regulatory regime in the host country permitting association of foreign lawyers with local lawyers provides an 'efficient and effective' means of skills transfer (where skills transfer means a transfer of skills from the foreign lawyer to local lawyers). It proposes a model whereby a requirement of training and skills transfer by foreign lawyers as a condition of establishment in the host state could be demanded. This is particularly recommended to developing Bars, whose lawyers need the skills to compete on an international level.

Further support

The Bar Issues Committee and its International Trade in Legal Services Committee (ITILS) welcome views on how we can provide support for Bars that might be considering these issues.

18 The EU schedule was negotiated by the European Commission on behalf of the 15 Member States that were Members at the time the GATS was agreed (1994).

Annex 1: List of IBA BIC ITLS publications and resolutions

IBA Council Resolution on the Regulation of the Legal Profession, 1998

IBA Statement of General Principles for the Establishment and Regulation of Foreign Lawyers, 1998

Standards and Criteria for Recognition of the Professional Qualifications of Lawyers, 2001

Communication to the World Trade Organization on the Suitability of Applying to the Legal Profession the WTO Disciplines for the Accountancy Sector, 2003

IBA Council Resolution in Support of a System of Terminology for Legal Services for the Purposes of International Trade Negotiations, 2003

IBA Council Resolution of the IBA Council on Transfer of Skills and Liberalization of Trade in Legal Services, 2008

GATS Handbook (revised 2013), 2013. (Also available in French and Spanish)

IBA Global Cross Border Legal Services Report, 2014

All available at the IBA website: www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Committee/Default.aspx.

Annex 2: Countries taking specific commitments in legal services in the GATS (2016)

Afghanistan	Kazakhstan
Albania	Kyrgyz Republic
Antigua and Barbuda	Laos
Argentina	Latvia
Armenia	Lesotho
Australia	Liberia
Austria	Liechtenstein
Barbados	Lithuania
Bulgaria	Macedonia (FYROM)
Cambodia	Malaysia
Canada	Moldova
Cape Verde	Montenegro
Chile	Nepal
China	New Zealand
Colombia	Norway
Croatia	Oman
Cuba	Panama
Czech Republic	Papua New Guinea
Dominican Republic	Poland
Ecuador	Romania
El Salvador	Russian Federation
Estonia	Rwanda
European Union (EU 12): Belgium, Denmark, France, Ireland, Italy, Germany, Greece, Luxembourg, the Netherlands, Portugal, Spain, UK[18]	Samoa
	Saudi Arabia
Finland	Seychelles
The Gambia	Slovak Republic
Georgia	Slovenia
Guyana	Solomon Islands
Hungary	South Africa
Iceland	Sweden
Israel	Switzerland
Jamaica	Thailand
Japan	Tonga
Jordan	Trinidad and Tobago

18 The EU schedule was negotiated by the European Commission on behalf of the 15 Member States that were Members at the time the GATS was agreed (1994).

Turkey	Venezuela
Ukraine	Vietnam
USA	Yemen
Vanuatu	

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