

Ethics and Role of Counsel in International Arbitration

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General Report

General Reporters:

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Introduction

This General Report is divided into nine sections.

The first section deals with the applicable ethics rules. The second section addresses the legal status of counsel. The third section is devoted to questions relating to the remuneration of counsel and third party funding. The fourth section deals with conflicts of interest. The fifth section explores ethical concerns relating to the communication with opposing party and the arbitral tribunal. The sixth section deals with contacts between counsel and witnesses or experts. The seventh section addresses the integrity of counsel. The eighth section explores rules governing the liability of counsel. And finally, the ninth section deals with the IBA Guidelines on Party Representation to the extent not already addressed in previous sections.

The contents of sections 1 to 9 are based on the information submitted in the National Reports that we received from the following countries: Austria, Belgium, England, Finland, France, Germany, Latvia, Lithuania, Spain, Sweden and Switzerland.

This General Report is not intended to provide a detailed and complete comparative law study of the issues examined, but rather a brief overview of some of the similarities and differences among the countries reported with regard to such issues.

1. APPLICABLE ETHICS RULES

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

In all of the reported countries, there are both statutory laws and “private” regulations regulating the conduct for the legal profession. As to statutory law, Austria¹, England & Wales², Germany³ and Spain⁴ report of a general statute regarding the legal profession. Austria⁵, Finland⁶, Latvia⁷, Lithuania⁸ and

¹ The Disciplinary Code ('DSt' – Disziplinarstatut)

² Legal Services Act 2007

³ Federal Code for the Legal Profession (Bundesrechtsanwaltsordnung/“BRAO”)

⁴ Title III of the Estatuto General de la Abogacía (General Statute for the Practice of Law) and Código Deontológico de la Abogacía Española (Spanish Code of Conduct for the Practice of Law).

⁵ The Attorneys Code ('RAO' – Rechtsanwaltsordnung)

⁶ The Advocates Act

⁷ Advocacy Law of the Republic of Latvia

Switzerland⁹ report of an explicit statute for attorneys. In addition many countries report that statutes regarding civil, criminal and/or administrative proceedings and/or the local arbitration law include rules on the conduct for the legal profession. Austria and Germany¹⁰ additionally mention explicit statutes regarding compensation for attorneys.

All countries also report of self-regulation of the legal profession either in the form of codes of conduct enacted by the Bar associations or equivalent regulations generally for the legal profession. Several of the reported EU-countries, namely Austria, Belgium, England and Wales, Finland, Germany and Sweden also mention EU-regulations and/or the Code of Conduct for European Lawyers adopted by The Council of Bars and Law Societies of Europe (CCBE).

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

Competent authorities

In all of the reported countries it is either the national Bar Association, a Disciplinary Board, the courts or a combination of the above mentioned that are competent to enforce the identified rules. In Austria, Finland, France, Germany¹¹ and Sweden the competent authority is the Disciplinary Committee of the respective Bar Associations. In Belgium it is the Disciplinary Courts and the Disciplinary Court of Appeal that enforce the regulations on ethics. In Latvia the competent authority is the Latvian Collegium of Sworn Advocates comprising of the Latvian Council of Sworn Advocates as well as the Disciplinary and the Ethics Committees. In Lithuania the special Court of Honour of Advocates, that is a body within the Lithuanian Bar Association, is the competent authority. In Spain the competent authorities are the courts and the Professional Associations.

In Switzerland disciplinary proceedings are regulated by the individual cantons, which also determine the authority competent to order any disciplinary measures.

In England and Wales the competent authorities depend on whether the complaint concerns a solicitor or a barrister. For solicitors it is the Solicitors Regulation Authority (SRA). For barristers the competent authority is the Bar Standards Board (an independent regulatory arm of the Bar Council, BSB) and it's

⁸ The Law on the Bar of the Republic of Lithuania

⁹ Swiss Federal Act on the Freedom of Attorneys-at-law to Provide Services (FAA)

¹⁰ Lawyers' Compensation Act (Rechtsanwaltsvergütungsgesetz, "RVG")

¹¹ The Bar Association and the German Bar Court.

Professional Conduct Committee. Allegations of serious breaches of the applicable professional ethics rules such as to merit disciplinary prosecution may also be heard and adjudicated by a disciplinary tribunal, on referral from the SRA or BSB.

Standing to make a complaint/submission

Austria, Belgium, Finland, Latvia, Lithuania, Spain and Sweden report that in principle any person has standing to make a complaint. Finland further reports that also the Chancellor of Justice or, in special circumstances, a court of law has standing. Sweden adds that the Board of the Swedish Bar Association may also initiate disciplinary proceedings against an attorney. Germany reports that the client and the managing board of the Bar Association have standing.

France reports that: *“An “ethical inquiry” on possible misconducts by a lawyer may be brought by his/her client or any other person involved in the matter to which the complaint relates. Yet, only the Chairman of the Bar or the Represent of the Public Ministry may bring the case before the Ethical Disciplinary Board (Article P.72.3.1. of the SPP).”*

In England and Wales, clients and other legal professionals have standing. There is however, a specified procedure for complaints about solicitors from clients. The clients must first exhaust the complaints procedure within the internal complaints handling of the solicitors and if the client is not satisfied with the outcome, he or she can take the matter to the Legal Ombudsman who refers complaints from clients about solicitors to the Solicitors Regulation Authority (SRA). Others who have standing to make such a complaint are professional lawyers and judges who may report misconduct directly to the SRA, as may the opposing party in litigation and the opposing party's counsel. Complaints originating from a barrister's client are passed to the Bar Standards Board (BSB) from the Legal Ombudsman; any other party (including the opposing party at trial) have standing and may complain to the BSB about misconduct directly within 12 months of the problem arising.

Switzerland reports: *“In principle, the cantonal supervisory body acts upon a notice/complaint or upon its own detections of circumstances that give rise to reasonable suspicion of a violation of professional obligations by an attorney-at-law. Federal and cantonal courts and government agencies are obliged to notify the competent cantonal supervisory body of any potential violations of professional obligations by an attorney-at-law. Whether clients or other third parties, such as the opposing party or opposing counsel, may be a party to these disciplinary proceedings before the individual cantonal supervisory bodies depends on the cantonal law.”*

Potential remedies

In all of the reported countries, potential remedies include issuing an admonition, reprimand or other type of warning. In Lithuania, it is also possible to issue a public reprimand.

Fines and other monetary penalties are reported as potential remedies in Austria, England & Wales, Finland, Germany, Sweden and Switzerland. The maximum amount of the fines differs from country to country.

All the reporting countries recognize occupational bans as remedies in form of disbarment or another permanent prohibition in practicing the profession. Austria, Belgium, England & Wales, France, Germany, Latvia and Spain report that disbarments or other restrictions in the advocates ability to practice law may also be issued in a more limited form e.g. as a suspension for a certain period of time or with respect to a certain branch of law.

England & Wales further reports that the Solicitors Regulation Authority may issue a remedy for the misconduct of a solicitor to affect the firm instead of the individual. With respect barristers, disciplinary tribunals have wide discretion in issuing sentences for professional misconduct. As of 6 January 2014 these include also for example advice as to future conduct and imposing additional training and professional development requirements.

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

Most of the countries report that the local ethics rules are applicable on counsel also in international arbitration either through an explicit rule or by common understanding/extension.

Austria, Belgium, France, Germany and Sweden report that the laws/regulations do not specifically address the conduct of counsel in international arbitration, but there is a common understanding that local ethics rules apply to counsel also in international arbitration. England and Wales, Finland and Spain refer to Article 4.5 of the CCBE according to which the rules that govern an attorney's relations with the courts also apply to the attorney's relations with arbitrators. In addition, England and Wales specifically mention that there is a common understanding that solicitors and barristers continue to be bound by their local professional ethics rules when appearing in international arbitration, regardless of the seat.

Switzerland reports that local ethics rules, in principle, apply to the conduct of counsel in international arbitration proceedings if the counsel's domestic professional conduct is governed by the ethics rules identified under 1.1. above.

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

Austria, Belgium, Finland, France, Lithuania, Sweden and Switzerland report that the laws/regulations identified under 1.1 do not apply to in-house counsel. This is due to the fact that in-house counsel are not attorneys-at-law admitted to the Bar, which is in general a prerequisite for applying the laws/regulations identified under 1.1 in those jurisdictions.

Germany reports that the rules apply to in-house counsel if they are admitted to the German Bar (this is often the case, but not always).

England and Wales report that the statutes identified under 1.1. apply to all legal professionals in England and Wales. Also Spain reports that the rules apply to all lawyers.

Latvia reports that regulated legal professions are judges, sworn advocates, prosecutors, notaries, and bailiffs (as well as their professional assistants). All other legal professions, including in-house counsel, are considered unregulated. The conduct and ethics of these legal professionals is not subject to any specific statutory regulation and is bound only to law in general, the client's interests, and the specific rules that may apply in certain environments.

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

Most of the countries report that there does not seem to be any recent published decisions pertaining to international arbitration. However, many reports also note that such decisions would not generally be publicly available.

France reports that the Board of the Paris Bar adopted a resolution on 26 February 2008 according to which: *“in the context of international arbitration proceedings, whether conducted in France or abroad, the preparation of a witness before his/her hearing by the arbitral tribunal does not constitute an infringement to the key principles of the profession of counsel and constitutes a commonly agreed practice where the counsel shall fully exercise his/her role as an advocate”*.

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

None of the countries report of decisions that would address or refer to the 2013 IBA Guidelines on Party Representation in International Arbitration.

Austria, Spain and Sweden mention that there are court decisions concerning the IBA Guidelines on Conflict of Interest.

2. LEGAL STATUS OF COUNSEL

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

When it comes to the duties of counsel towards the Arbitral Tribunal, most countries report that the rules applicable to counsel appearing before a state court apply explicitly or by extension to counsel conduct in international arbitration proceedings. Most countries report that counsel must be civil and truthful in the relationship with a court or Tribunal. Counsel may not mislead the Tribunal and counsel must comply with the rules of conduct as set by local law, ethics rules and any orders by the Tribunal.

As to the duties of counsel towards the client, almost all countries report first and foremost acting in the client's best interest. In addition most reports mention confidentiality, loyalty, independence and avoidance of conflict of interest. Finland, Sweden and Switzerland also report the obligation to maintain liability insurance. Germany and Sweden further report the obligation to adequately handle any client assets entrusted to counsel.

With regard to potential conflicts between the duties towards the Tribunal and the duties towards the client, England and Wales report "*Where relevant, solicitors must inform their clients of where their duties to the court outweigh their duties to their client. Notwithstanding their overriding duty to the court, barristers cannot breach their duty to keep the affairs of each client confidential.*"

As to counsel's duties towards the opposing party and the opposing party's counsel, most countries report a counsel must act fairly and respectfully. Several reports also mention that counsel shall co-operate in order to avoid unnecessary litigation. Finland and Sweden further report that if the opposing party retains counsel, all communication from counsel to the opposing party shall be conducted through the opposing party's counsel.

Switzerland reports that "*counsel have a duty towards the opposing parties only in very specific exceptional situations, such as the willful taking advantage of the other party's helplessness in violation of good faith or in the event any other rule of law imposes such a duty on the attorneys-at-law.*"

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

Only England and Wales and Spain report that the representation of parties in international arbitration proceedings is limited to specific professions.

England and Wales reports that conducting litigation on behalf of a client may only be undertaken by a person authorized to do so. Solicitors automatically have

full rights of audience in Tribunals, European Courts and the lower courts of England and Wales. Nothing in the applicable rules expressly prevents any solicitor from appearing as an advocate in international arbitration proceedings, but they ought not to appear as advocates for a client in international arbitration proceedings where they are not fully competent to do so (demonstrated by, for instance, having acquired rights of higher audience).

Barristers are not restricted from representing parties as advocates in international arbitration proceedings, but they are traditionally instructed by a solicitor on behalf of a client.

Spain reports: *“Local ethics rules do not make specific reference to the representation of parties in international arbitration proceedings. However, they do state that the representation of a party in any kind of proceedings is the responsibility of counsel and that both the Bar Associations and the Boards of the Autonomous Community Associations will ensure the exclusion of unqualified people. As a consequence, the answer is yes, the representation of parties in international arbitration proceedings in Spain is the exclusive responsibility of lawyers.”*

All other countries report that there is no rule that parties ought to be represented in international arbitration exclusively by a certain profession, such as attorneys-at-law.

For example Austria reports: *“The parties may be represented, assisted or counseled by persons of their own choice in arbitration, as long as the seat of the arbitral tribunal is in Austria.”*

As another example one may take the Finnish report which notes that *“[p]arties do not need to be represented by counsel before the arbitral tribunal; the parties may, however, agree that such representation is obligatory.”*

3. REMUNERATION OF COUNSEL AND THIRD PARTY FUNDING

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

The remuneration for counsel in international arbitration is a matter of agreement between counsel and the client in all the reported countries. Most of the reported countries however note that there are regulations stating that the fees must be reasonable and that factors such as the complexity of the case and the experience or expertise of counsel shall be considered. The basis for the fees is normally an hourly rate but in most reported countries also fixed fee arrangements e.g. for each phase of the arbitration are widely used.

As to the permissibility of contingency and conditional fee -arrangements, there are discrepancies between the reported countries. Reportedly pure contingency fees are prohibited for attorneys in Austria, Belgium, France, Latvia and Sweden. Belgium adds that partial contingency fees are allowed and Sweden adds that reasonable success fees are allowed. Latvia reports that result-oriented bonuses are permissible.

Finland notes that *pactum de quota litis* (i.e. an agreement between an attorney and the client entered into prior to the final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the attorney a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter) is prohibited under the CCBE rules, but the national rules do not include the same prohibition.

Switzerland reports that contingency fees are generally prohibited in proceedings before national or local authorities, whereas the prohibition does not apply to international arbitration.

Germany, Lithuania and Spain on the other hand report that contingency fees are allowed under certain conditions. England and Wales reports that two forms of contingency fee arrangements are allowed, namely Conditional Fee Arrangements (“CFAs”, i.e. where all or some of the legal provider’s fees and expenses will only be paid in certain circumstances, usually where the claim is successful) and Damages-Based Agreements (“DBAs”, i.e. where the client pays an agreed percentage amount of its recovery to its legal counsel).

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

The general observation is that third-party funding is a relatively new concept and still an unusual phenomenon in commercial arbitration in most of the reported countries. Most of the countries report that third-party funding is viewed with a certain amount of skepticism, although the concept is widely discussed and is likely to be permissible under most of the national ethical rules, provided that certain safeguards are met.

In the international arbitration hub of London, third-party funding is however well established and is not an unusual practice. Many specialist funders are also based in London. Also Germany reports that third-party funding is accepted, albeit being a rather new business model.

Belgium and Sweden report that purchasing a right to claim and pursuing it in one’s own interest (e.g. special vehicle companies set up for specific cases) is permissible and case law of such exists. Some countries also report that it is common that insurance providers or affiliated companies fund claims.

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

None of the reported countries' ethical rules, or the CCBE, explicitly address the issue of third party funding. Also, most of the countries report that no other rules/laws or case law on the issue exist in their jurisdictions.

France reports a decision handed down in 1 June 2006, where the Court of Appeal of Versailles stated that: “[...] *third party funding agreements are sui generis and unknown in the European Union member States except those of German legal culture*” (Court of Appeal of Versailles, 1 June 2006, case no.05/01038).

Germany reports that third party funding is entirely unregulated, but that: “*Advising clients on the possibility of third party funding is, however, part of the general obligation of the German Rechtsanwalt to render comprehensive legal advice, at least in cases that have a good chance for success where only the necessary financial means are missing. In these cases, the lawyer also needs to advise the client on services and terms and conditions of such third party funding.*”

In one of the reported countries, namely England and Wales, there are, explicit rules for third-party funders that also cover international arbitration:

A separate Association of Litigation Funders of England and Wales (ALF) was formed in November 2011. It has issued a self-regulated Code of Conduct for Litigation funders (the ‘ALF Code’) in respect of funding the resolution of disputes within England and Wales. The ALF Code states amongst others that the funding agreement must state whether, and if so to what extent, the funder is liable to the claimant to i) provide security for costs, ii) pay any premium (including insurance premium tax) to obtain costs insurance, or iii) meet any liability for adverse costs or any other financial liability. The ALF Code also requires the funding agreement to state whether, and if so how, the funder may terminate the funding agreement where the funder i) is no longer satisfied concerning the legal merits of the case ii) reasonably believes that funding the dispute is no longer commercially viable, or iii) reasonably believes that the claimant is in material breach of the funding agreement.

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

None of the countries report of a rule stating such a duty. However England and Wales report that English counsel would tend to disclose third party funding to the opposing party. Namely England and Wales report that:

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

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

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

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

Only two of the reported countries, namely England and Wales and Germany, report of experience in this regard. The other countries point to the fact that third-party funding of commercial arbitration is either non-existent or very new in their jurisdiction.

England and Wales reports that there is a difference, but the difference is principally determined by the funder's role rather than its identity:

“A third party who funds litigation without any interest in the litigation or its outcome is regarded as an altruistic funder and is usually protected from any adverse costs order. A funder who has an interest in the outcome may be liable to pay adverse costs, but such orders are exceptional and in the court's discretion. For professional or commercial litigation funders, that potential liability for adverse costs will, as the law currently stands, be capped at the level of their investment in the case[...] If the professional funder is found to have caused, interfered with or controlled the litigation this protection will be lost.”

Germany reports that there is in principle no difference made between professional third party funders and other third party funders. However, in German business practice:

“...the professional funder has typically set up certain rules¹² for its funding agreements, such as:

¹² Kilian/vom Stein/Ofermann-Burckart, *Praxishandbuch Anwaltsrecht*, 2nd edition 2010, § 11 marginal no. 180, 185.

- *Only a monetary claim of a certain minimum amount in dispute can be subject to third party funding;*
- *Professional funders will take over a case after having evaluated not only the chances of success but also the credit-worthiness of the opponent;*
- *All costs of the proceeding are borne by the professional funder;*
- *The client must assign its claim to the professional funder;*
- *In the event of success, the professional funder and the client have agreed on a certain allocation between themselves of the compensation awarded.”*

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

Most of the countries report that there are no regulations or particular business practice with regard to a potential difference between third party funders and insurance providers. Such reports point again to the novelty of third party funding in those jurisdictions. Switzerland however highlights that insurance providers are subject to the supervision of the Swiss Financial Market Supervisory Body (FINMA). Further, the Swiss report notes that the Swiss Federal Supreme Court has held that third party funders are not *per se* insurance providers, and thus that third party funders that are not insurance providers are not subject to the supervision of the FINMA.

England and Wales as well as Germany report further differences between insurance providers and other third party funders.

England and Wales report a difference in that a legal expense insurer who takes an ordinary passive role in a case will not normally be treated as a funder, and the court will not normally order it to pay adverse costs. Liability insurers and third party funders however are different, as they take conduct of the case and fund it in their own interest.

Germany reports that third party funding and insurance providers are viewed differently as *“the lawyer must ascertain whether the client has insurance coverage for the case. After that, the lawyer must contact the insurer and manage the case in this three-party constellation whereby the lawyer never concludes a contract with the insurance. The lawyer also has the obligation to make sure that the client fulfils all of its obligations under the insurance agreement.”* However, the German report adds that international arbitration disputes are in general not part of the statutory regulated insurance offered in Germany.

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

Not surprisingly, England and Wales report that *[m]aintenance, that is the support of litigation by an unassociated third party 'without just cause or excuse', and champerty, a form of maintenance under which the supporting party shares in the proceeds of the litigation, were traditionally prohibited in England under the common law.* The report explains that they are no longer a crime in English law but remain a tort, that case law has modified the scope of this tort, and that statute has admitted both CFAs (Conditional fee Arrangements) and DBAs (Damages-Based Agreements). The report further points out that third party funders are in practice well aware of the potential risks of maintenance and champerty and they take care to avoid falling foul of the rules.

Probably as a result of “maintenance and champerty” being a common law notion, such notion is either not applicable (has not been discussed) or not recognized in most of the reported civil law jurisdictions. Germany and Sweden explicitly report that “maintenance and champerty” are not recognized in their jurisdictions and are not viewed as an issue with regard to third party funding.

Finland reports that being part of an arrangement including maintenance and/or champerty would probably be considered unethical conduct [for counsel].

The Swiss report highlights that the local ethics rules prohibit counsel in international arbitration proceedings to act as a third party funder participating in the profits of legal proceedings, but this prohibition does not per se extend to third party funders.

France reports that...*“the principle according to which “no one pleads by Prosecutor” (Nul ne plaide par Procureur) might be regarded as an issue when it comes to third party funding to the extent it requires the applicant to be identifiable.”*

4. CONFLICTS OF INTEREST

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

In all the reported countries, the local ethics rules regarding conflicts of interests apply to international arbitration.

Most of the reported countries relate the existence of a conflict to situations where the representation of two different parties could lead a counsel to violate his/her duty of confidentiality or independence, as stated in the Code of Conduct for European Law (see the Lithuanian, Belgian, Swedish, Spanish, Latvian and Finish reports).

France probably has the broadest definition of a conflict of interests, understood as “*the assistance of several parties [that] would lead the attorney to adopt a different defense, notably regarding its development, its legal argumentation and its purpose, than the one he/she would have adopted if he/she was only in charge of the interests of a single party*”.

It should also be noted that Switzerland seems to be the only country which prohibits, *per se*, a lawyer from accepting a mandate against a prior client.

In all the reported countries, it seems that the risk of conflict is prohibited in the same way as an actual conflict, even though the risk must be “significant” under some local ethics rules (see the Finish and Swedish reports). In this respect, the standard set under Swiss law seems particularly tricky to implement as it prohibits potential conflicts of interests, while restricting such prohibition to “specific” conflicts, in contrast to “abstract” conflicts.

Finally, many countries report that when a lawyer is practicing in a law firm, the existence of a conflict must be considered by assessing the entire law firm (see the Austrian, Belgian, Swedish and Finish reports), which can also be found in the Code of Conduct for European Law.

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

None of the reported countries has enacted ethics rules equivalent to Guideline 5 of the IBA Guidelines.

However, the general ethics rules of some countries (especially the ones applicable to conflicts of interests) can cover the situation described at Guideline 5 of the IBA Guidelines (see the French, Finish, Swiss and Swedish reports).

Interestingly, Spain and Belgium point out that, in case a relationship exists between an arbitrator and a lawyer representing a party in arbitration proceedings, which may lead to a conflict of interests, only the arbitrator has a duty to withdraw.

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

There are many differences in the ethic rules of each reported country as to whether a client may waive a conflict of interests of counsel in international arbitration.

Under Austrian and German rules, the parties are forbidden to make any waiver regarding conflicts of interests encountered by a counsel. This stems from the fact that in such countries, the prohibition of conflicts of interests is considered as a public policy rule.

Conversely, in Lithuania, Latvia or Belgium, such waivers are possible without any limitation at all.

In a more flexible way, other countries, while allowing the parties to waive conflicts of interests, require that the counsel refuse such waiver in some cases, for instance, when the waiver would lead the counsel to violate his/her confidentiality obligation of his/her duty of loyalty towards his/her client (see Swedish report), or, more generally if the waiver would be detrimental to the client (see the Finish report).

Finally, the rules of England and Wales distinguish between the counsel's own conflict (conflict between a counsel and a client) which can never be waived by a client, and the client conflict (conflict between two or more client) which can, under very restrictive conditions, be waived by Solicitors, and under less restrictive conditions, by Barristers.

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

Chinese walls are accepted and commonly used in only two of the reported countries: England and Wales and Germany.

In several other reported countries, namely, Belgium, Sweden, Switzerland and Spain, Chinese walls are strictly prohibited, and in the remaining reported countries, they are not commonly used.

In France and Finland, the effectiveness of Chinese walls is not settled yet.

5. COMMUNICATION WITH OPPOSING PARTY/(PROSPECTIVE) ARBITRAL TRIBUNAL

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

Not surprisingly, all the reported local ethics rules allow a lawyer to engage in direct communications with the opposing party provided that this party has not instructed a counsel. In this case however, the lawyer is sometimes expected to advise the opposing party of his/her right to retain a counsel (see the French and Spanish reports).

Conversely, in all but one of the reported countries, a lawyer is not, in principle, allowed to engage in direct communications with the opposing party once this party has instructed a counsel. However, exceptions are made to this rule in most countries¹³, when, for instance, the lawyer of the opposing party authorizes a

¹³ It seems that only France and Austria have not provided for any exception to this rule. As for the situation in Latvia, it is unclear.

direct communication, in case of imminent danger or in exceptional circumstances when it is absolutely necessary. In such cases, many countries have set a safety valve, by requesting that the lawyer who is directly contacting the opposing party keeps the other lawyer informed (see the Swedish, Finnish, German and Belgian reports).

It seems that a lawyer is allowed to engage in direct communications with the opposing party in Lithuania, with, apparently no restriction.

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

None of the reported countries has enacted specific ethics rules addressing ex-parte communications with the arbitral tribunal.

However, in practice, such ex parte communications are forbidden in principle in England, Belgium, Finland and France even though there exists, in some of these countries, some very limited exceptions to this rule (see the English, Finnish and French reports).

Germany is the only country to report that ex-parte communications are generally permitted, but the impact of such general authorization is reduced by the fact that the said communications shall always comply with the general ethics rules applicable to lawyers.

The case of Sweden is interesting as ex-parte communications are common practice in judicial litigation, and seem less tolerated in arbitration proceedings. Sweden therefore points out that lawyers who are not very familiar to arbitration frequently have ex-parte communications with arbitral tribunals. In this case, the arbitral tribunals usually explain that such communications shall be avoided.

Finally, it must be noticed that in many countries, the lack of any express ethics rules on this issue is compensated by the rules applicable to independence and impartiality of the arbitrators (see the German, Swiss and Latvian reports).

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

Neither the ethics rules nor the *lex arbitri* of the reported countries provide for specific rules applicable to communications with a prospective arbitrator.

However, it is common practice in most reported countries to engage into communications with a prospective arbitrator for the same reasons as the ones

stated in the IBA Guidelines, i.e. for instance, in order to discuss his/her availability or to check the existence of a conflict of interests, provided that the merits of the case are not discussed (see the Austrian, Belgian, Swedish, Spanish, Swiss, German and French reports). In Austria for instance, a lawyer can ask a prospective arbitrator what is his/her experience with a certain type of dispute. Finland even speaks of a potential obligation for the lawyer to make sure that a prospective arbitrator has the required expertise and is available.

No country reports that a lawyer would be allowed to discuss the merits of a case with a prospective arbitrator. In this regard, many reports insist on the fact that, depending of their nature, the contacts between a lawyer and a prospective arbitrator may be a cause for challenge of the arbitrator once nominated by a party (see the Swedish, Finish, German, French, Swiss reports).

Finally, England reports that, under the LCIA Rules, such communications shall be disclosed and that it is thus preferable to conduct them through the LCIA Registrar.

6. CONTACT WITH WITNESSES/EXPERTS

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

It is accepted in each reported countries that a lawyer contacts his/her own witness.

In six countries, namely Austria, Sweden, Spain, Latvia, Finland and France, no difference is made in this respect between own witnesses and opposing witnesses.

On the contrary, opposing witnesses cannot be approached under Belgian law.

The rules of most reported countries make it clear that, when contacting a witness, a counsel shall stay objective and not exercise undue influence (see the Austrian, Swedish, Swiss, German, Finish and French reports). Austria even has a more restrictive rule in this respect as it prevents a lawyer from having any behavior which gives the mere appearance of influencing a witness. In Spain, a lawyer has the obligation to inform a witness that he/she must states the truth.

England & Wales makes a clear difference between solicitors, in charge of contacting witnesses, and barristers who rarely do it, except when they are authorized to conduct litigation. Barristers and Solicitors can only contact an opposing witness with the prior knowledge of the other side and, for Barristers, under exceptional circumstances.

Only in England and Wales, Spain and Germany do the above mentioned restrictions also apply to in-house counsels.

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

At least Austrian and Swedish counsels and English solicitors are allowed to participate in the drafting of witness statements or expert reports, provided that they do not exercise undue influence. It is actually common practice to do so for Swedish counsels and English solicitors.

Austrian law has a rather interesting approach of this issue. While it provides for a quite restrictive rule stating that a lawyer shall not give the mere appearance of influencing a witness, it also states that a lawyer can get involved in the preparation – including the drafting – of a witness statement/expert report, provided that the statement or report correctly and truthfully reflects the witnesses'/expert's knowledge/opinion.

In the other reported countries (except for Lithuania and Switzerland where the situation is either unknown or uncertain), counsels are allowed to get involved in the preparation of witness statements or expert reports but it is unclear to which extent this is possible, and in particular, if it means that they can draft these documents. Many countries point out that a lawyer shall not exercise undue influence on a witness/expert during the preparation phase (see the Austrian, Swedish, Belgian and Swiss reports), which may be the limit to the involvement of a lawyer in the preparation of a witness/expert. In this respect, the case of Finland is particularly interesting, as Finish lawyers cannot make any statements that he/she knows to be untrue.

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

In most reported countries, counsels are allowed to prepare witnesses and experts before a hearing provided that they do not exercise undue influence on them (see Austrian, Belgian, Swedish and Swiss reports). It is even common practice to do so in Austria and Switzerland.

It should be noted that, France and Belgium, where witness preparation is forbidden in judicial proceedings, found it a crucial issue to authorize such preparation in international arbitration proceedings, in order to develop the attractiveness of their arbitration forum.

On the contrary, witness coaching is strictly forbidden in England and Wales, where lawyers cannot rehearse a witness in relation to his/her evidence. English lawyers may only check that the witness understands procedure, to make sure that he/she will not be disadvantaged by ignorance of the process. Such prohibition is surprising considering the rather liberal approach of England and Wales regarding preparation of witness statements/expert reports.

Finally, it should be noted that the issue of preparation of witnesses is irrelevant in Latvia, where only witness statements are allowed but not witness testimonies.

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

All countries are broadly in line with Guidelines 18-25 of the IBA Guidelines, with no major discrepancy (except for Lithuania where the situation is unknown).

England and Wales points out however that the rules applicable to Barristers are more restrictive than the one stated in the IBA Guidelines.

Interestingly, it is common practice in Austria, that the arbitral tribunal defines and clarifies what kind of contacts a party is allowed to have with a witness in the preparation of a hearing.

7. INTEGRITY

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

In all reported countries (except for Lithuania, where no ethics rules on that point exist) legal counsel in international arbitration proceedings must not knowingly present false or misleading expert or witness evidence to the arbitral tribunal. A breach of this duty may lead to disciplinary sanctions.

It is interesting to note that in some of the reported countries, e.g., Austria and Latvia, untruthful testimony before an arbitral tribunal – unlike before a state court – does not constitute a criminal offence.

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

In all of the reported countries legal counsel in international arbitration proceedings must not knowingly present false facts to the arbitral tribunal. This duty is closely linked to general ethical rules aimed at ensuring the honor and reputation of the legal profession. Therefore, if unbeknownst to counsel forged documents have been presented to the arbitral tribunal, counsel will not be subject to disciplinary sanctions in the reported countries. In all of the reported countries counsel will not be subject to disciplinary sanctions if he or she merely *suspected* that a document was forged. It is interesting to note that in Spain (unlike in the

other reported countries) legal counsel is not even under an ethical duty to inform the arbitral tribunal about the unauthentic nature of a document on file if he or she becomes aware of the forgery after the document has been filed. In such a case, Spain reports that legal counsel at least assumes the duty to inform the client about civil and criminal consequences of the submission of unauthentic documents.

Without exception, however, legal counsel assume no ethical duty to ascertain the completeness of factual submissions. Accordingly, legal counsel is not obligated to reveal facts that may be detrimental to his or her client's case. The absence of such duty seems to go hand in hand with a counsel's general ethical obligation to always act in the best interests of the client.

As regards legal submissions, no country reports an ethical duty to ascertain the completeness and truthfulness of legal submissions. Accordingly, counsel are not under an ethical obligation to inform the arbitral tribunal about potentially detrimental case law. In all of the reported countries, counsel must, nevertheless, ensure that the arbitral tribunal is not misled by his or her submissions.

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

The civil procedure law in most of the reported countries does not provide for production of documents in the sense as it is practiced in international arbitration proceedings. Consequently, in Austria, Belgium, Finland, France, Germany, Latvia, Lithuania, Spain, Sweden and Switzerland, no ethical rules exist that specifically address counsel conduct with regard to the production of documents.

In some of these countries, guidance may be found in more general ethics rules:

Sweden reports: *"There is only one provision in the Swedish ethics rules with regard to production of documents. This provision provides that an advocate may not be complicit in the suppression or distortion of evidence.¹⁴ It follows from this regulation that an advocate may not in any way contribute to the suppression or distortion of evidence. It is however not likely that the provision can be interpreted to oblige the advocate to actively make sure that relevant documents are preserved which is required according to the IBA Guidelines."*

Also Finland reports a duty not to contribute to the suppression or distortion of evidence.

Austria reports that on the basis of the Austrian Criminal Code, which penalizes procedural fraud, learned scholars argue that counsel in international arbitration

¹⁴ Section 6(2)(2) of the Code of Professional Conduct.

must ensure the ordered production of (detrimental) documents, if the non-production would amount to procedural fraud.

England – where document production is a known procedural tool –, on the other hand reports the following strict rules applicable to counsel:

"Barristers

*If a barrister becomes aware that his or her client has a document which should be disclosed but has not been disclosed, the barrister cannot continue to act unless the client agrees to the disclosure of the document. In these circumstances the barrister must not reveal the existence or contents of the document to the court.*¹⁵

Solicitors

*Similarly, solicitors must cease to act if their client refuses to comply with their disclosure obligations, as to do otherwise would breach solicitors' duty not to mislead the court and not to be complicit in other persons doing so.*¹⁶ *The person in charge of the disclosure process is charged with ensuring that all the appropriate material is before the court. Solicitors should not take at face value what clients say about documents."*

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

While most reported countries cannot discern any discrepancies between the local ethics rules and Guidelines 9-11 of the IBA Guidelines, several countries report inconsistencies between their respective ethics rules and Guidelines 12-17 of the IBA Guidelines:

Finland, France, Germany, Sweden and Switzerland found that Guidelines 12-17 of the IBA Guidelines do not have any equivalent in their local ethics rule:

Finland reports: *"As stated above, there are no rules in the CCBE Code of Conduct or the National Code of Conduct equivalent to the IBA Guidelines 12-17 concerning document production."*

France reports: *"As for the scope of document productions, there are discrepancies between French ethics rules and Guidelines 12-17 of the IBA Guidelines to the extent there is no obligation to inform the client of the need to preserve documents in the event of arbitral proceedings."*

Germany reports: *"Provisions expressly stating obligations laid down in the Guidelines 12, 14, 15 and 17 do not exist in the local ethic rules. However, similar obligations may follow from the general rule of diligent professionalism"*

¹⁵ BSB Code of Conduct gC13.

¹⁶ SRA Code O(5.1) and O(5.2).

established by § 43 BRAO and general contract law which requires the lawyer to act in the client's best interest."

Sweden reports: *"As regards to Guidelines 12-17 of the IBA Guidelines regarding production of documents, there are however discrepancies. As mentioned above, the Swedish ethics rules only contain one provision stating that an advocate may not be complicit in the suppression or distortion of evidence. Production of documents is not regulated in the same detail in the Swedish ethics rules as in the IBA Guidelines and the counsel's duties are more far-reaching in the IBA Guidelines. Under the Swedish ethics rules, a counsel is not obliged to inform the client of the need to preserve documents which are potentially relevant to the dispute. It is however very likely that an advocate in practice would ask is client to preserve documents which are potentially relevant of tactical reasons."*

Switzerland reports: *"Guidelines 12-17 do not have an equivalent rule as such in the local ethics rules (see for more detail 7.3 above). In our opinion, however, the content of Guidelines 13-17 of the IBA Guidelines goes beyond the local ethics rules addressing integrity."*

England, on the other hand, reports that its local ethics rules with regard to document production are much stricter than Guidelines 12-17 of the IBA Guidelines: *"Under the IBA Guidelines, withdrawing as a party representative is only one of the options open to a party representative where false evidence has been submitted. The other 'remedial measures' are advising the witness to testify truthfully; taking reasonable steps to deter the Witness or Expert from submitting false evidence; urging the Witness or Expert to correct or withdraw the false evidence; and correcting or withdrawing the false evidence. By contrast, under the English rules, if the client refuses to consent to the party representative informing the court/tribunal that it has been misled, then counsel must cease to act.¹⁷*

Regarding the failure to disclose documents, the English rules are stricter, as again, they require counsel to cease to act if the client does not produce the document. Under the IBA Guidelines, the party representative must simply 'advise the Party whom he or she represents of the necessity of producing the Document and the consequences of failing to do so'.¹⁸"

Spain is the only country that reports a discrepancy between its national ethics rules and Guidelines 9-11 of the IBA Guidelines: *"In my opinion, the main discrepancy lies in the obligation on counsel under the Guidelines to file documents and disclose falsehoods with regard to his or her client, as opposed to the duty of professional secrecy established in local ethics rules. Although counsel is clearly not going to encourage his or her client to engage in any falsehood, if*

¹⁷ SRA Code Chapter 5 and BSB Code of Conduct C1

¹⁸ SRA Code of Conduct Chapter 5 and BSB Code of Conduct gC13 compared with IBA Guideline 17.

the client has committed a falsehood and informed counsel, counsel is not obliged to disclose the action or document in question."

8. LIABILITY OF COUNSEL

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

All reported countries observe that Guideline 26 of the IBA Guidelines finds no equivalence in their local ethics rules. The report for Sweden highlights that under the local rules, only counsel may be sanctioned for ethical misconduct, not the party represented by him or her.

Furthermore, in all reported countries, counsel assume civil liability towards the client in case counsel is guilty of a breach of the contract between it and the client and if such breach caused a loss to the client. While most countries observe that the breach of an ethical rule may not per se qualify as a breach of contract, France reports that ethical misconduct is likely to constitute breach of contract. Further, most national reporters opine that Guideline 26 of the IBA Guidelines might enhance liability risks for counsel, as it allows the arbitral tribunal to sanction a party for ethical misconduct of its counsel. The answer submitted by Switzerland may serve as a representative example:

"As outlined in 1.1 above, the contractual relationship between counsel and client is qualified as a mandate agreement in the sense of articles 394 et seq. CO. However, and as for most claims for liability under Swiss law, the cause of action from a client against his counsel requires four elements:

- *a breach of duty;*
- *specific quantifiable damages;*
- *an adequate causal link between the breach of duty and the damages incurred; and*
- *willful intent or negligence.*

A breach of duty is assumed if the counsel acts in violation of a duty stated by the law. The primary source for the duties of counsel is article 398(2) CO. The principal duties of a counsel are the duty of care and the duty of loyalty. As has been outlined in 1.1.3 above, these duties do partly also contain "ethical rules". [...] According to established Swiss case law, a counsel is, in principle, not liable for the success of his actions and the parties have to bear the litigation risk. Nevertheless, counsel has the duty to inform the client with respect to the

difficulties of the case and the associated risks, so that the client is aware of the risks to be borne by him.¹⁹ [...]

In practice, damages as well as the causal link between the breach of duty and damages are often difficult to prove in liability claims between client and its counsel concerning the counsel's party representation in litigation and/or arbitral proceedings. In that respect, Guideline 26(c) may potentially be of relevance as it allows the arbitral tribunal to consider the counsel's misconduct by "apportioning the costs of the arbitration, indicating if appropriate, how and in what amount the party representative's misconduct leads the tribunal to a different apportionment of costs". Accordingly and if such measure is taken by the arbitral tribunal, i.e. stipulating the amount additionally imposed on a party as a result of its counsel's misconduct, the cost decision of the arbitral tribunal could have an impact on a subsequent liability claim between client and counsel as it could possibly furnish proof for the damages as well as for the causal link requirement. Therefore, such a remedy applied by the arbitral tribunal in accordance with Guideline 26(c) could potentially facilitate a subsequent liability claim of a client against his party representative in arbitration proceedings before state courts."

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

Under the Code of conduct for European Lawyers (Article 3.9 "Professional Indemnity Insurance") lawyers shall be insured against civil liability arising out of their legal practice to an extent which is reasonable having regard to the nature and extent of the risks incurred by their professional activities. If such insurance proves impossible, the lawyer must inform the client of this situation and its consequences. The reported countries which adopted this code, except for Latvia, report that their national ethics and local bar rules contain requirements that go beyond Article 3.9 of the Code of conduct for European Lawyers. In Austria, Belgium, England, Finland, Sweden, Spain, France, Germany and Lithuania, counsel are obliged to take out a malpractice insurance. The same applies to Switzerland, which is, however, not bound by the Code of conduct for European Lawyers.

A minimum coverage requirement is reported by most reported countries, the minimum coverage, however, ranging from EUR 29'000 to EUR 4'000'000:

- Austria: minimum coverage of EUR 400'000 per claim;

¹⁹ Decision of the Swiss Federal Supreme Court 127 III 357; Weber Rolf in: Honsell/Vogt/Wiegand, Obligationenrecht I, 5.e., Basel 2011, Art. 398 n 27.

- Belgium: minimum coverage of EUR 1'250'000 per claim;
- England: minimum coverage of EUR 3'000'000 for solicitors and EUR 500'000 for barristers;
- Finland: minimum coverage of EUR 170'000
- France: minimum coverage of EUR 4'000'000
- Germany: minimum coverage of EUR 250'000
- Lithuania: minimum coverage of EUR 29'000
- Spain: minimum coverage of EUR 30'000 – 400'000 or more depending on the local bar rules
- Switzerland: minimum coverage of EUR 820'000

Sweden has no fix amount minimum coverage requirement. According to the National Report, the coverage must be well suited to the attorney's normal business.

Without exception, the reported countries note that the insurance coverage exists for the type and extent of risks connected with a lawyer's activity. Accordingly, arbitration work is covered as well. It is interesting to note that Belgium, Germany and Spain report that work carried out abroad or under foreign law may be excluded from coverage. The following excerpt from the National Report for Germany is particularly interesting: *"Generally, the insurance covers the whole professional practice of a lawyer and therefore includes arbitration work. However, claims arising out of services involving legal advice in non-European law and claims arising from the appearance of the Rechtsanwalt before courts outside of Europe are generally excluded in the usual insurance policy.²⁰ It can be assumed that the exclusion applies correspondently to the appearance before Arbitral Tribunals outside of Europe. Even in international arbitration proceedings taking place inside Europe, it may happen that non-European law or even transnational law or lex mercatoria are applied. In this case, too, the activity of the party counsel may fall outside the coverage of malpractice insurance."*

²⁰ see Allgemeine Bedingungen der Berufshaftpflichtversicherung der Rechtsanwälte (AVB-RSW 2008).

9. COMPARISON BETWEEN THE LOCAL ETHICS RULES AND THE IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION

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

When it comes to a comparison between the IBA Guidelines and local ethics rules, generally speaking, most reports note that the Guidelines are much more specific and detailed than the local ethics rules. This is particularly due to the fact that most local ethics rules do not specifically deal with arbitration proceedings.

In addition to what has already been outlined above, two of the reported countries discerned the following rules contained in the IBA Guidelines which do not have any equivalent in the local ethics rules and which have not been addressed above:

Sweden reports that besides the general rule not to exercise undue influence upon a witness, the local ethics rules do not contain any specific provisions regarding what the counsel may offer to pay a witness or expert. The country report for Sweden further stresses the differences between the IBA Guidelines and the local ethics rules concerning ex-parte communication, production of documents and highlights that Guidelines 26-27 find no equivalent rule in the local ethics rules.

The report for *Switzerland* emphasizes that unlike the local ethics rules, which only apply to attorney registered in Switzerland, the Guidelines apply not only to lawyers but to "any person who appears in an arbitration including a Party's employee, who appears in arbitration on behalf of a Party and makes submissions". Switzerland further stresses that Guidelines 5, 18-26 do not have an equivalent in local ethics rules.

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

None of the countries reports duties stipulated by the IBA Guidelines that are not imposed on counsel by local ethics rules in addition to what has been laid out above.

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

None of the countries reports rules set for in the IBA Guidelines that are more relaxed/severe in addition to what has been laid out above. The report for Finland, however, observes that under the Finnish ethics rules an attorney may face disciplinary sanctions if he acts in a way that is considered disgraceful to the Bar Association or likely to decrease public confidence therein. In this respect, the Finnish local rules are more severe, as they impose extensive duties on attorneys

whereas the IBA Guidelines only apply with regard to specific arbitration proceedings.

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

Most reported countries stress that the IBA Guidelines 26 b-d may be considered more severe than the disciplinary measures provided by local ethics rules. The report for Sweden, however, relativizes this impression by submitting that the Guidelines may be considered more severe when considering a specific case. Seen from an attorney's perspective the permanent disbarment by the local authority may be considered the most severe form of disciplinary sanction.
