

Ethics and Role of Counsel in International Arbitration

International Arbitration Commission

Prague, 2014 – Working Session 08

National Report of Austria

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14 February 2014

Questionnaire

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?

The most important Code in Austria, regulating the conduct for legal profession is the Attorneys Code ('RAO' – *Rechtsanwaltsordnung*), which sets out the rights and obligations of attorneys-at-law in Austria and also contains provisions on who is entitled to act as attorney-at-law in Austria, on the Austrian Bars as well as provisions related to insurances for attorneys-at-law and dispute settlement.

Furthermore, and besides any EU regulations that will of course also apply to Austria, there are regulations containing more detailed provisions as to the rights and obligations of attorneys-at-law (and in some regards trainee lawyers) and how they should act in public and with respect to their clients (e.g. *Richtlinien für die Ausübung des Rechtsanwaltsberufes und für die Überwachung der Pflichten des Rechtsanwaltes und des Rechtsanwaltsanwärters* – RL-BA 1977 – 'Code of Practice') as well as regulations regarding the attorney's fees (e.g. *Rechtsanwaltstarifgesetz*).

Austrian attorneys must act in accordance with these rules when acting in Austria and abroad. However, none of these laws or regulations is limited to an Austrian attorney's conduct while acting as party representative before courts; where applicable, the rules generally apply to an attorney's conduct, even when only related to "private life".

As a preliminary note, it must however be said, that the laws and regulations regulating the conduct for the legal profession do not expressly refer to international arbitration.

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?

The Austrian Bar is the supervisory body for attorneys in Austria and entitled to prosecute attorneys for violations of the Rules of Conduct.

In Austria the so-called Disciplinary Code ('DSt' – *Disziplinarstatut*) applies. Under the Disciplinary Code, attorneys can be held liable for two (very broadly formulated) grounds: (i) violation of professional duties; and (ii) injury of honor and reputation of the legal profession (Section 1 Disciplinary Code).

Any person can report a violation of the Disciplinary Code to the Disciplinary Board (*Disziplinarrat*) or the Austrian Bar. The Disciplinary Board is composed

of elected attorneys admitted to the Austrian Bar. The Disciplinary Board will preliminarily deal with a case reported to it and may refer the case to public prosecution if the attorney is suspected of having committed a criminal act under Austrian Criminal Law.

Remedies for misconduct depend on the gravity of the misconduct as well as the consequences of the misconduct, but also on the financial circumstances of the accused. Remedies are (i) a formal rebuke; (ii) a fine up to EUR 45,000,--; (iii) prohibition to exercise as an attorney-at-law (for a limited period of time up to one year); or (iv) deletion from the list of attorneys (Section 16 Disciplinary Code).

These remedies do, however – contrary to the IBA Guidelines – not explicitly address remedies for misconduct in arbitral proceedings.

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)?

No, neither the Attorneys Code nor other regulations specifically address the conduct of counsel in international arbitration.

It is common understanding in Austria that the Attorneys Code and any other applicable ethics rules are nevertheless also applicable in international arbitration. This can also be derived from Section 8 Attorneys Code which explicitly states that the right of representation for an attorney is not limited to courts and authorities in Austria but includes the right for party representation in all judicial and non-judicial matters, in all public and private matters.

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?

The laws and regulations apply generally to any attorney-at-law admitted to the Austrian Bar. Additionally, some rules (especially rules dealing with the conduct of a lawyer as well as the Disciplinary Code) also apply to trainee lawyers that are not (yet) admitted to the bar.

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?

As far as can be seen, there are no publicly available decisions issued which pertain to the conduct of counsel in international arbitration.

It must be noted in this regard that decisions on disciplinary proceedings are not published as such, but only principles derived from the proceedings are published on the intranet of the Austrian Bar if they are of public interest.

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?

Until now, there has not been any decision issued by Austrian Courts addressing or referring to the 2013 IBA Guidelines on Party Representation.

As far as can be seen, the only decision by the Austrian Supreme Court dealing with any IBA rules so far has been issued on 17.06.2013 (Austrian Supreme Court, 2 Ob 112/12b) and addressed the IBA Guidelines on Conflicts on Interests. The Austrian Supreme Court held in this regard (in line with Austrian literature) that the IBA Guidelines can still be consulted as guidance even if the parties have not explicitly agreed on their applicability.

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?

In general, the applicable rules in Austria provide for duties of an attorney towards (i) its client; (ii) courts and authorities; (iii) the legal profession and any other attorney; and (iv) the society in general.

The most crucial duties to be respected by the attorney towards its client are the duty to grant confidentiality (Section 9 Attorneys Code), loyalty towards its client (Section 9 Attorneys Code) and the duty to refuse representation and consultation in case of double-representation (*see* question 4.1 below). Moreover, the attorney must defend the client's interests with eagerness. Those duties are considered as being essential, as they guarantee the attorney's independence.

With regards to courts and authorities, an attorney is in brief obliged to not "abusively make use of courts and authorities" (Austrian Supreme Court 20.03.1952, Ds 96/51) and to act in conformity with the instructions given by a court/authority.

As regards other attorneys, under Austrian law, the attorney must not evade another attorney or refuse to negotiate with him (Section 18 Code of Practice). Additionally, an attorney must not be personally attacked.

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?

The rules identified under question 1.1 above do not address this issue, due to the fact that they only deal with attorneys-at-law and (in some parts) trainee lawyers.

Pursuant to Section 594(3) Austrian Code of Civil Procedure ('ACCP'), the parties may be represented or counselled by persons of their own choice in

arbitration. It must however be noted in this regard that this Section only applies to cases where the seat of the arbitral tribunal is in Austria.

The right that the parties may be represented by persons of their own choice cannot be precluded. It follows therefrom that parties may be represented by any person of their choice, irrespective of that person's nationality and professional qualification.

The parties may also be assisted by legal counsel or any person of their choice at oral hearings.

There is moreover no provision in the law that a formal (written) power of attorney is required.

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.

In Austria the principle prevails that an attorney can freely agree on its remuneration with its client (Section 19 Attorneys Code).

In practice, in international arbitration, counsel are remunerated on the basis of an hourly fee rate for their work. It is rather unusual to agree on a lump sum compensation or (contrary to proceedings before Austrian national courts) to apply the Act on Fees for attorneys (*Rechtsanwaltstarifgesetz* – ‘RATG’).

The freedom for counsel to agree with its client on its remuneration is however limited by Austrian Civil law as well as the Rules of Conduct for attorneys. Pursuant to these rules, contingency fees and conditional fee arrangements are absolutely prohibited under Austrian law (Section 879 Austrian Civil Code and Section 16 Attorneys Code) in order to protect the clients that can usually not appraise their chances for success. The attorney and the client may moreover not agree on a commission for the attorney (Section 51 Code of Conduct).

Furthermore, an attorney is not allowed to agree on an unreasonably high remuneration, which must however be assessed on a case-to-case basis. As a guideline, the proportion between remuneration and necessary scope of work must be reasonable.

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

Third party funding is a relatively new concept in Austria and rather unusual in commercial arbitration. Third party funding is more common (but still not used frequently) in proceedings before Austrian national courts. This is also due to the

fact that there are very few third party funders operating in Austria, which may be due to the damages being typically low and the high usage of legal expenses insurance.

The principle of third party funding is however viewed very skeptically and highly debated in Austrian literature under the aspect of the prohibition of contingency fees.

The Austrian Supreme Court has nevertheless not explicitly addressed the issue of third party funding yet, but the Supreme Court did neither strictly oppose against third party funding in aggregate litigation. The Austrian Supreme Court only held that the prohibition of contingency fees (or '*quota litis*') would only apply to attorneys (and other "friends of law" (*Rechtsfreund*)) but not to other professional groups.

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?

Neither the ethics rules in Austria nor other rules or laws address third party funding in international arbitration.

As far as can be seen, also the Austrian Supreme Court did not yet address the issue of third party funding as such, neither with regards to international arbitration, nor in general.

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?

There are no particular rules under Austrian law that establish a duty for counsel to disclose third party funding to the arbitral tribunal.

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.

As there are so far no laws/rules/case-laws dealing with the issue of third party funding, there is also no difference made between the respective categories of funders.

It must however be noted, that the prohibition of contingency fees applies to any "friends of law" (*see* Section 879 Civil Code), including attorneys and (tax) accountants but e.g. not consultants in insurance matters. It is thus arguable that this distinction will also apply to third party funders in order to act in conformity

with the prohibition of contingency fees. On the other hand, it has been argued in literature that third party funders must also be considered as “friends of law” in general and are thus caught by the prohibition of contingency fees in general.

It must be kept in mind in this regard that the entire concept of third party funding is highly debated and no Supreme Court decision has been issued with regards to this issue yet. It is thus very difficult to predict how the concept of third party funding will develop in the future and whether differences will be made between different categories of funders.

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

Legal expense insurance is predominant among individuals in Austria, but not among businesses. Insurance providers are – contrary to third party funders – not viewed skeptically in Austria.

It has in this regard been argued in literature that contracts with third party funders show elements of a contract of insurance (*see e.g. Wagner, Rechtsprobleme der Fremdfinanzierung von Prozessen*, JBl 2001, 416).

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.

“Maintenance and champerty” as such has not been broadly discussed in Austria with regards to third party funding.

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?

Under Austrian law the prohibition of double-representation applies with regards to conflicts of interest. Pursuant to Section 10 Attorneys Code, an attorney may not act as counsel or even give a legal advice, if he has acted as party representative for the counterparty in this or in any related matter. The attorney may furthermore not give a legal advice to both parties to a dispute.

In such case the attorney is obliged to reveal this fact before even having taken the mandate.

When assessing the issue of double-representation, the entire law office or association of attorneys must be assessed but not only the attorney in question.

This standard also applies to international arbitration where attorneys admitted to the Austrian Bar act as counsel.

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

There is no equivalent rule to Guideline 5 of the IBA Guideline under Austrian law.

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?

Under Austrian law, a client cannot waive conflicts of interest of counsel, neither in international arbitration nor in any other proceedings or consulting. This even holds true when a client waives conflicts of interests in a case where the client's interests are not (potentially) endangered (*see* e.g. decision of the Austrian Supreme Court 14.04.2008, 14 Bkd 16/07).

This is due to the fact that the prohibition of double-representation is perceived as rule of public interest on which parties cannot dispose (Austrian Supreme Court 29.09.2008, 16 Bkd 1/08).

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

Chinese walls are not common in Austria.

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?

Ethics rules under Austrian law do neither expressly nor by analogy address whether counsel in international arbitration proceedings are allowed to engage in direct communications with the opposing party.

In practice, a counsel in international arbitration is not prevented to engage in direct communications with the opposing party (e.g. for settlement negotiations). However, if the opposing party is represented by an attorney, counsel may only communicate with the attorney and must not circumvent the attorney by directly communicating with the opposing party.

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?

There are no rules under the Austrian ethics rules that deal with the issue of ex-parte communication with the Arbitral Tribunal.

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.

There are no rules under Austrian ethics rules or the Austrian lex arbitri that deal with whether counsel are allowed to contact the prospective arbitrator(s).

In practice, an attorney will be able to contact prospective arbitrator(s) in order to check availability or if there might be any conflict of interest.

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?

Austrian law does not prevent counsel from meeting witnesses before or after the commencement of the proceedings. However, pursuant to the Austrian Code of Practice (which is only applicable to attorneys admitted at the Austrian Bar), an attorney must refrain from any behavior which gives the appearance of influencing the witness (Section 8 Code of Practice). Violation of this rule will lead to disciplinary consequences for the attorney in accordance with the Disciplinary Code.

It is however not clear from this rule what exactly will qualify as “influencing a witness”. This is even more complex as not only influencing a witness is prohibited, but already a behavior that gives appearance of influencing a witness is prohibited.

It is undisputed that the attorney is allowed to contact the witness before the proceedings also in order to “prepare” the witness for the hearings or to even discuss the matter of evidence on which the witness will be heard.

The same principles apply regarding experts: Austrian law does not prevent any counsel from meeting the expert(s) before or after the proceedings have commenced. However, if the expert is invited to provide an incorrect expertise, the attorney may even be liable to prosecution for fraud. Additionally, fraud by a party provides a ground to set aside the award under Austrian law.

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?

The Austrian law does not explicitly deal with written witness statements. Thus,

the general rules (see question 6.1) apply.

The attorney must thus refrain from any involvement in the preparation of the written witness statement/expert report that gives the appearance of influencing the witness. This does however not prevent the attorney from entirely getting involved in the preparation of the written witness statement or expert report or even getting involved in the drafting of the written witness statement or expert report, provided that the report correctly and truthfully reflects the witnesses'/expert's own knowledge and own words (*see e.g. Torggler, Schiedsgerichtsbarkeit*, 4. Ed, chapter H, para. 62).

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?

As already stated under question 6.1, it is not prohibited under Austrian law for an attorney to meet the witnesses and/or experts. Thus, preparing a witness/expert is permitted under Austrian law, provided that the attorney refrains from any behavior which gives the appearance of influencing the witness/expert. Additionally, the attorney must of course not encourage or invite the witness to giving a false testimony (*see e.g. Torggler, Schiedsgerichtsbarkeit*, 4. Ed, chapter H, para. 62).

In practice, witnesses are often prepared by an attorney for their appearance at the evidentiary hearing in such way that the attorney explains to the witness how the proceedings are conducted and what an arbitral tribunal reasonably expects from a witness. The attorney may also ask some questions for training, in order to prepare the witness for possible questions the tribunal or the counterparty may ask. Such training must of course be conducted in a way that the witness is not influenced by the attorney when answering the questions.

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?

As set out in the questions 6.1 et seq. above, there are no comparably detailed rules under Austrian law. To the contrary, the sole rule under Austrian law explicitly dealing with the contact between an attorney and a witness (namely Section 8 Code of Practice) is very broad, only determining that attorneys must refrain from any behavior which gives the appearance of influencing the witness.

However, I do not see any discrepancies where party representatives would not be able to act in conformity with the IBA Guidelines and in conformity with Austrian ethics rules.

It is moreover considered as good practice in Austria that the arbitral tribunal defines and clarifies what kind of contacts a party is permitted to have with a witness in the preparations for the hearings (in that sense *see also* Section 67 of

the UNCITRAL Notes). This holds especially true when the party representatives must act in conformity with different Codes of Conduct.

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?

Under Austrian law, the attorney must not encourage or invite a witness or expert to give false evidence. To the contrary, the attorney shall encourage the witness/expert to tell the truth.

It must be however noted in this regard that only false testimony in front of a court, but not in front of an arbitral tribunal, is penalized under Austrian Criminal Law.

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?

None of the rules identified under question 1.1 deals with the duties or responsibilities of counsel in international arbitration with regards to the truthfulness and completeness of factual and legal submissions presented to an arbitral tribunal.

However, as explained in question 1.2 above, an attorney can be held liable under the Disciplinary Code for injury of honor and reputation of the legal profession (Section 2 Disciplinary Code). Being aware and being certain or even suspecting that submitted documents are untrue are thus behavior which are likely to be caught under Section 2 Disciplinary Code. There is however no obligation for the attorney to verify the correctness of information or documents he received from its clients in general if the attorney has no reasonable ground to put the correctness of the information/documents under question.

Moreover, an attorney can even be held liable under Austrian Criminal Law for committing fraud or willful deception under certain conditions, when being involved in the falsification of documents or for the falsification of documents as such.

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?

There are no rules under the Austrian ethics rules that provide for any duty or responsibility with regard to the production of documents.

However, in literature it is argued that counsel must ensure that the relevant documents must be produced in cases non-production of documents would amount to fraud in connection with the arbitral proceedings (*see e.g. Torggler, Schiedsgerichtsbarkeit*, 4. Ed, chapter H, para. 76).

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?

As explained under questions 7.1 et seq. above, there are no rules under Austrian ethics rules specifically addressing these issues of integrity. However, I do not see any discrepancies, where an attorney would not be able to act in conformity with both, the IBA Guidelines and the Austrian ethics rules.

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.

There are no comparable rules under Austrian law to Guideline 26 of the IBA Guidelines and no rules that specifically address an attorney's liability with regards to international arbitration.

However, there are multiple rules dealing with the liability of an attorney in general, for violations of information and warning obligations, non-observance of the client's instructions, the violation of the obligation to submit any argument that might be to the advantage of its client or false consulting as such.

Pursuant to Section 17a Code of Profession, an attorney may however agree with its client (within the limits of Civil Law) that the liability be limited to the respective statutory minimum liability sum.

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?

An attorney in Austria is obliged to take out a malpractice insurance (*see* Section 21a Attorneys Code). This is even a precondition in order to be admitted to the Austrian Bar.

The minimum coverage requirement is EUR 400,000 for each contingency. This rule is also applicable to arbitration.

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?

See above (questions 1.2, 4.2, 5.2, 6.4, 7.4 and 8.1).

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?

See above. This question is however very difficult to answer with regards to Austria, as there are no comparably detailed rules as in the IBA Guidelines.

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?

See above. This question is however very difficult to answer with regards to Austria, as there are no comparably detailed rules as in the IBA Guidelines.

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.

See above (question 1.2).