

# **Ethics and Role of Counsel in International Arbitration**

**International Arbitration Commission**

**Prague, 2014 – Working Session 08**

## **National Report of Belgium**

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Dear National Reporter

First of all, many thanks for having signed up as a National Reporter! We are very much looking forward to working with you.

The working session at the AIJA Annual Congress in Prague 2014 is entitled "Ethics and Role of Counsel in International Arbitration". In the working session we plan to address the respective role of outside counsel (i.e., presenting the case in the best way possible to the arbitral tribunal, preparing written submissions, etc.) and in-house counsel (assisting outside counsel with the fact finding; advising management as to amounts to be put posted as reserves, duties that arise in a pre-arbitration stage, such as selecting suitable external counsel, leading and documenting potential pre-arbitration settlement negotiations, etc.) in international arbitration, and, particularly, the ethics rules applicable to them. Your National Reports will focus on these ethics rules.

You will also find a short description of the working session on the AIJA website. The "teaser text" for the working session that will be published on the website is the following:

*"Whether you are an outside or an in-house counsel, your main task in international arbitration proceedings is to present (or to ensure that outside counsel presents) your case to the arbitral tribunal in the best way possible to secure a positive outcome.*

*However, the end does not always justify the means.*

*Besides tactical considerations, in his/her interaction with the client, the opposing party and its counsel, the arbitral tribunal as well as potential witnesses and experts, counsel must obey certain ethics rules. What those rules are, their nature and whether they apply to outside counsel and in-house counsel alike will be explored in depth in the National Reports, the General Report and the working session. The working session will also address potential remedies for misconduct and discuss whether an international level playing field is emerging. In that respect a focus will be placed on the relevance of the recently published and much discussed IBA Guidelines on Party Representation in International Arbitration.*

*The working session will moreover place a particular emphasis on the critical interaction between outside counsel and in-house counsel, as particularly delicate ethical issues may arise in this interaction. The respective roles of outside counsel and in-house counsel thus merit a closer look."*

It is important for you to note the main idea behind this questionnaire (and hence your National Report): the questionnaire is designed to explore on a country-by-country basis the various ethics rules counsel must respect when interacting with the arbitral tribunal, the opposing party, the client and witnesses and experts. Your National Reports will thus provide us with an idea as to how level the international playing field is in that regard. The questionnaire moreover focuses on the recently published and much discussed IBA Guidelines on Party Representation in International Arbitration (a copy of those guidelines is attached to the cover e-mail). Your National Reports will thus provide us with insights as to what extent the IBA Guidelines on Party Representation in International Arbitration correspond with various national ethics rules.

The questionnaire is intended to enable you as National Reporter to provide an overview on the key issues which arise in your jurisdiction in relation to ethical rules applicable to counsel in international arbitration proceedings. We have structured the questionnaire, based on broad open questions, in order for you to elaborate on the main topics as freely as possible.

Ideally, the National Reports should be no more than 14 pages and be formatted on a consistent basis. You will find the formatting guidelines at the end of the questionnaire. Please ensure that these guidelines are observed.

The National Reports will be published on the AIJA website. Furthermore, we plan to publish the General Report and the National Reports in some form (if we publish the reports in a condensed and summarized form in an article, we will make sure that your name is mentioned and that you get as much visibility as possible). Such publication could be used as a marketing tool. To make such publication a success, we kindly request you to meet academic standards when preparing the report, such as references to court decisions, applicable law, literature, etc.

Should the National Report be prepared by more than one National Reporter, please ensure that only one single document is provided. In such case, please also note that we will not coordinate the preparation of the Reports between the co-reporters. You may do so on your own.

Looking forward to working together and we remain at your disposal whenever you have any questions or like to discuss.

All the best and looking forward to seeing you in Prague!

Katriina, Damien and Simone

## 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 legal profession of attorney is organized by the articles 428 to 508 of the Belgian Code on Civil Proceedings. These articles contain regulations on the functioning of the local bars, the Order of the Flemish Bars and the Order of the French Speaking and German Speaking Bars. They further contain regulations on the requirements of admission to a Bar, and on the organization of the legal aid system and the pro bono work done by attorneys.
- Further, the Order of the Flemish Bars and the Order of the French Speaking and German Speaking Bars, and the local bars, drafted (regional and local) Bar Rules which also regulate the conduct for the legal profession.
- On a European level, also the following rules apply:
  - The Order of the Flemish Bars and the Order of the French Speaking and German Speaking Bars have adopted the Code of Conduct for European Lawyers of the Council of Bars and Law Societies of Europe (“**CCBE**”).
  - The European Council Directive of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (77/249/EEC).
  - The Directive of 16 February 1998 of the European Parliament and of the Council to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (98/5/EC).

#### 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 Disciplinary Courts and the Disciplinary Court of Appeal have to enforce the regulations on ethics.

The disciplinary procedure starts with a complaint filed (by a private person or by another attorney) with the president of the local bar. The president will assign a reporter who hears the attorney and who files a report. Based on this report, the president of the local bar will decide whether he will send the report or not to the Disciplinary Court for further disciplinary proceedings (article 458 of the Belgian Code on Civil Proceedings). The sanctions can be

a “warning”, a “reprimand”, a “suspension” for maximum one year, or the “disbarment”.

Small disciplinary infringements (for instance regarding the tasks and obligations of the trainees) can be sanctioned by the local bar council.

- The main distinction between the local ethical rules and articles 26-27 of the IBA Guidelines on Party Representation in International Arbitration is the following: The IBA Guidelines only give powers to the arbitral tribunal to draw appropriate inferences or to apportion the costs of the arbitration or to take any other appropriate measure within specific arbitration proceedings whereas the local ethical rules can be enforced with sanctions that will be addressed to the attorney, and will not have an influence on the proceedings in which the attorney acted in an unethical way.

**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)?**

- Although there are only some partial regulations specifically addressing the conduct of attorneys in international arbitration (see below), the common understanding in Belgium is nevertheless that the local ethics rules are applicable to attorneys in international arbitration regardless of the seat of arbitration (see G.A. DAL and D. MATRAY, “L’*éthique des conseils*” in *L’*éthique dans l’arbitrage**, Bruylant, Brussels 2012, p.46-52).
- As for international arbitration with attorneys from within the European Union and European Economic Area, article 4.5 of the Code of Conduct for European Lawyers provides: “*The rules governing a lawyer’s relations with the courts apply also to the lawyer’s relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.*”.
- The local Bar Rules of the Dutch Speaking Order at the Brussels Bar contain one specific ethical rule that deals with the conduct of attorneys in international arbitration proceedings in respect of witness contact.

Article 14 of the local Bar Rules of the Dutch Speaking Order at the Brussels Bar states that the attorney cannot have any contact with witnesses.

Article 16 of the aforementioned Rules makes an exception for international arbitration proceedings: “*The above rules do not apply to foreign or transnational judicial or arbitral proceedings where such contacts are permitted under their own rules of procedure.*”

*In his contacts with the witness, the attorney will in all circumstances show prudence, discretion and integrity. He will strictly refrain from influencing the witness or to ask him not to tell the truth.”*

It is useful to mention the motives of the Resolution of the Dutch Speaking Order at the Brussels Bar of 26 June 1989: “*The ethics rules prohibit in general the Belgian attorneys to have contacts with witnesses. Other countries do not have such a rule and allow attorneys even to question the witnesses in depth to prepare them for their witness statement. These countries recognize the cross-examination that provides an important safeguard for the party which did not call the witness. In the absence of such a guarantee, it does not seem appropriate to amend our ethical rules for judicial or arbitration proceedings that are subject to Belgian procedural rules.*

*There is, however, no reason to impose on Belgian attorneys ethical rules that do not apply to their foreign colleagues regarding state court or arbitration proceedings, which are conducted in accordance with the procedural rules of a country that allows contacts between attorneys and witnesses. Such discrimination would harm the good cooperation that should exist between Belgian and foreign attorneys who defend the same interests, and would place the Belgian attorney in a disadvantageous position in comparison to their foreign colleagues. Such discrimination could lead to the decision of parties not to entrust the defense of their interests to Belgian attorneys. The increasing internationalization of the business will lead to an increase of such cases.”*

- The Order of Flemish Bars is drafting uniform ethical rules that will apply to all attorneys that are member of a Flemish Bar. Article III.5.1.2 of these draft ethical rules is identical to article 16 of the ethical rules of the Dutch Speaking Order at the Brussels Bar.
- Article 7.18 of the ethical rules of the Order of French Speaking and German Speaking Bars have a similar provision: “*In the framework of modes of conflict resolution that have a contractual basis, such as arbitration, mediation, conciliation (other than judicial) or compulsory third decision, or in some foreign or international procedures subject to other procedural rules, it may be the mission of the attorney to assess the relevance and reliability of the evidence submitted in support of the claims of his client, adapting the rules of procedure agreed upon by the parties or applicable to such procedures.*

*In this case, the attorney may have preparatory contacts with a prospective witness to assist, if necessary, in the preparation of a written statement or an oral hearing.*

*During such preparatory contacts, the attorney respects the essential principles of his profession and the perception that the witness has of the truth.*

*He abstains, also in this case, from any behavior or any assessment that may influence or could appear to have influenced the witness statement.”*

**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?**

In-house counsel are not considered to be attorneys in Belgium. The organization of the profession of in-house counsel, if any, is not regulated by the Belgian Code on Judicial Proceedings. In-house counsel are not subject to the ethical rules of 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?**

We were not able to find any such decision.

**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?**

We were not able to find any decision.

**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?**

The rules on ethics indeed provide for duties of attorneys towards the Arbitral Tribunal / the client / the opposing party and the opposing party's counsel.

The Code of Conduct for European Lawyers gives a rather complete overview of the issues that are generally tackled by the other laws/regulations identified under 1.1.

The Code of Conduct for European Lawyers includes the following topics:

- a. General principles
  1. Independence
  2. Trust and Personal Integrity
  3. Confidentiality
  4. Respect for the Rules of Other Bars and Law Societies
  5. Incompatible Occupations

6. Personal Publicity
  7. The Client's Interest
  8. Limitation of Lawyer's Liability towards the Client
- b. Relations with Clients
1. Acceptance and Termination of Instructions
  2. Conflict of Interest
  3. Pactum de Quota Litis
  4. Regulation of Fees
  5. Payment on Account
  6. Fee Sharing with Non-Lawyers
  7. Cost of Litigation and Availability of Legal Aid
  8. Client Funds
  9. Professional Indemnity Insurance
- c. Relations with the Courts
1. Rules of Conduct in Court
  2. Fair Conduct of Proceedings
  3. Demeanour in Court
  4. False or Misleading Information
- d. Relations between Lawyers
1. Corporate Spirit of the Profession
  2. Co-operation among Lawyers of Different Member States
  3. Correspondence between Lawyers
  4. Referral Fees
  5. Communication with Opposing Parties
  6. Responsibility for Fees
  7. Continuing Professional Development
  8. Disputes amongst Lawyers in Different Member States

**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?**

Although the specific provision of the old Belgian Arbitration Act has not been retained in the new Belgian Arbitration Act, it is generally accepted that the representation of parties in international arbitration proceedings is not limited to

specific professions (see G.A. DAL and D. MATRAY, “L’*éthique des conseils*” in *L’*éthique dans l’arbitrage**, Bruylant, Brussels 2012, p.38-39; D. DE MEULEMEESTER and H. VERBIST, *Arbitrage in de praktijk*, Bruylant, Brussels 2013, p.135-136.).

### 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.

- Attorneys can either be paid (i) at an hourly rate, (ii) at a fixed budget (for the entire arbitration proceedings) or (iii) a mix of (i) and (ii).
- Article 446 ter of the Belgian Code on Civil Proceedings states that attorneys have to set their rates based on the “modesty” that is expected from their function. This provision that the rates have to be set based on the “modesty” that is expected from their function, is also copied in almost all the local ethical rules of the local bars.

Article 446 ter of the Belgian Code on Civil Proceedings states that an agreement where the rates are exclusively based on the result of the case, is forbidden. This means however that attorneys can base their rates partially on the result of the case. Or that they can take the result of the case into consideration when they set their fees after having won the case.

- The Code of Conduct for European Lawyers contains the following rules in respect of the remuneration of counsel:

#### 3.3 *Pactum de Quota Litis*

- 3.3.1. A lawyer shall not be entitled to make a pactum de quota litis.
- 3.3.2. By “pactum de quota litis” is meant an agreement between a lawyer and the client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer 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.
- 3.3.3. “Pactum de quota litis” does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer.

#### 3.4. *Regulation of Fees*

A fee charged by a lawyer shall be fully disclosed to the client, shall be fair and reasonable, and shall comply with the law and professional rules to which the lawyer is subject.

**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 rather unknown although it is possible to purchase a right to claim and pursue it in one's own right.

However, an old statutory rule (article 1699 Belgian Civil Code) provides that, if a person purchases a disputed right of claim against another person, the latter (the defendant) can liberate itself by paying the price for which the claim was purchased by the former person (as well as the costs reasonably made in connection therewith and the interests calculated as from the day the purchase price was paid). This old statutory rule is meant to prevent speculation involving disputed rights. A right is considered to be disputed from the moment that there are proceedings and the right is disputed in these proceedings (article 1700 Belgian Civil Code).

The above rules put a certain limit to the way third party funding can be structured.

**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?**

No, and there are no specific rules/laws and/or case law on this subject.

However, third party funding could raise issues regarding e.g. confidentiality, attorney-client privilege, and arbitration costs.

**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 is no such rule.

**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.**

Third party funding is rather unknown.

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

Third party funding is rather unknown.

**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.**

Our legal system does not know the notions of “*maintenance and champerty*”.

**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?**

- The general test is provided for in the articles I.2.3.1 to I.2.3.5 of the draft ethical rules of the Order of Flemish Bars (draft dated 29 October 2013):

Article I.2.3.1 *“The attorney cannot be in the same case the counsel, the representative or the defender of more than one client, if there is a conflict of interest between those clients or if there is a substantial threat that such a conflict of interest will arise.”*

Article I.2.3.2 *“The attorney must refrain from serving two or all involved clients, if a conflict of interests exists between those clients, the professional secrecy could be violated, or his independence could be threatened.”*

Article I.2.3.3 *“The attorney may not take a matter of a new client, if the confidentiality of the information which he has obtained from a former client is likely to be affected, or if the knowledge he had acquired from the side of the former client, would benefit unjustified to the new client.”*

Article I.2.3.4 *“If attorneys are practicing in a group, then the articles 1.2.3.1 to 1.2.3.3 apply both to the group as a whole and its individual members.”*

Article I.2.3.5 *“The president of the bar may allow exceptions to the above rules. The attorney should consult the president of the bar in case of dispute or doubt about the existence of potential conflicts of interest or the application of this chapter.”*

- The Code of Conduct for European Lawyers contains the following rules in respect of conflict of interest:

*3.2. Conflict of Interest*

3.2.1. A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.

3.2.2. A lawyer must cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired.

3.2.3. A lawyer must also refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.

3.2.4. Where lawyers are practicing in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.

- It is the common understanding in Belgium that these rules also apply to attorneys who represent clients in international arbitration (see above 1.3, 1<sup>st</sup> bullet).

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

The contents of Guideline 5 apply in Belgium to the arbitral tribunal, and not to the attorneys. Therefore, the conflicted members of the tribunal have to disclose this and have to withdraw, as the case may be, but not the attorneys.

Art. 1686, §1 of Belgian Code on Civil Proceedings stipulates in this respect: *“When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall disclose without delay any such circumstances to the parties.”*

#### **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 no specific provisions regarding international arbitration on this matter but it is generally accepted that a client can in principle waive any conflict of interest.

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

The use of Chinese walls in litigation is not allowed (see art.12 of the local Bar Rules of the Dutch Speaking Order at the Brussels Bar; see also J. STEVENS, *Regels en gebruiken van de advocatuur in Antwerpen*, 2<sup>o</sup> edition, Kluwer, Antwerpen 1997, p. 443-444.).

## 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?

- The Code of Conduct for European Lawyers contains the following rules in respect of communication with opposing parties:

#### *5.5. Communication with Opposing Parties*

A lawyer shall not communicate about a particular case or matter directly with any person whom he or she knows to be represented or advised in the case or matter by another lawyer, without the consent of that other lawyer (and shall keep the other lawyer informed of any such communications).

- Art. 118 of Local Bar Rules of the Dutch Speaking Order at the Brussels Bar contains a similar provision as art. 5.5 of Code of Conduct for European Lawyers (see above).

### 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?

- The Code of Conduct for European Lawyers contains the following rules in respect of relations with the courts:

#### *4.2. Fair Conduct of Proceedings*

A lawyer must always have due regard for the fair conduct of proceedings.

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In its comments on this Article 4.2, the CCBE states the following: “*This provision applies the general principle that in adversarial proceedings a lawyer must not attempt to take unfair advantage of his or her opponent. The lawyer must not, for example, make contact with the judge without first informing the lawyer acting for the opposing party or submit exhibits, notes or documents to the judge without communicating them in good time to the lawyer on the other side unless such steps are permitted under the relevant rules of procedure. To the extent not prohibited by law a lawyer must not divulge or submit to the court any proposals for settlement of the case made by the other party or its lawyer without the express consent of the other party’s lawyer.*”

- Art. 1699 of the Belgian Code on Civil Proceedings stipulates: *“Notwithstanding any agreement to the contrary, the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case, pleas in law and arguments in conformity with the principle of adversarial proceedings. The arbitral tribunal shall ensure that this requirement as well as the principle of fairness of the debates are respected.”*

**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.**

The ethics rules and/or the *lex arbitri* do not regulate under what circumstances and to what extent ex parte contact is permitted. However, legal scholars have defined certain rules in respect of contact with contact the prospective arbitrator(s), e.g. it is not allowed to sound out the prospective arbitrators on their position on certain themes (D. DE MEULEMEESTER and H. VERBIST, *Arbitrage in de praktijk*, Bruylant, Brussels 2013, p.99.).

**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?**

See our answer to question 1.3.

We understand that there is fundamental distinction between own witnesses, which can be approached, and opposing witnesses, which cannot be approached.

We understand that outside counsel will have to apply their own ethical rules.

We understand that in-house counsel may be subject to their own ethical rules, but will in any case not be subject to the ethical rules of attorneys.

**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?**

See our answer to question 1.3.

**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?**

See our answer to question 1.3.

**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?**

Our ethical rule is very vague, and the sole purpose of this ethical rule is to allow an exception in an international context to the general rule that attorneys may not approach witnesses.

**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?**

- The Code of Conduct for European Lawyers contains the following rules in respect of false or misleading information:

*4.4. False or Misleading Information*

A lawyer shall never knowingly give false or misleading information to the court.

- There seem to be no other specific rules addressing this issue. However, legal scholars consider this as part of the general duty of dignity, delicacy and integrity (see J. STEVENS, *Regels en gebruiken van de advocatuur in Antwerpen*, 2<sup>o</sup> edition, Kluwer, Antwerpen 1997, p.705; P. LAMBERT, *Règles et usages de la profession d'avocat du Barreau de Bruxelles*, 3<sup>rd</sup> edition, Bruylant, Brussels 1994, p.407-408; G.A. DAL and D. MATRAY, "L'éthique des conseils" in *L'éthique dans l'arbitrage*, Bruylant, Brussels 2012, p.69-70).

**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?**

The same rules as set out under 7.1 apply in international arbitration.

There are no specific duties 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.

However, it is highly recommended that in such case the attorney consults the president of his bar.

**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?**

Document production is not known in Belgium so that there are no specific rules in that respect.

**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?**

There are no real discrepancies. The local ethics rules are less detailed.

**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.**

The general rules on contractual liability apply to the relationship counsel – client. Counsel will in principle be liable for any *culpa levis in abstracto*.

The fact that an arbitral tribunal applies Guideline 26 of the IBA Guidelines could be relevant in the assessment by the state court ruling on the contractual liability of counsel vis-à-vis its client.

We are not aware of any relevant case law on this matter.

**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?**

- The Code of Conduct for European Lawyers contains the following rules in respect of insurance:

*3.9. Professional Indemnity Insurance*

3.9.1. Lawyers shall be insured against civil legal 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.

3.9.2. Should this prove impossible, the lawyer must inform the client of this situation and its consequences.

- Art. 71 Local Bar Rules of the Dutch Speaking Order at the Brussels Bar states that the professional liability of a lawyer (acting solely or within a law firm) must be insured. An overall insurance policy is taken out by the Order (up to an amount of 1,250,000 EUR per claim).

This overall insurance policy covers the work of the members of the Flemish bars, acting as counsel in arbitration proceedings, and acting as arbitrators. However, there may be provisions that exclude the work of Belgian attorneys abroad from the insurance cover.

The above mentioned art. 71 also stipulates that depending on the nature of the affaires handled by the attorneys, they should consider taking out an additional professional liability insurance. This additional insurance policy can be negotiated freely between the law firms and the insurance providers.

## **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?**

- Guidelines 5 and 6 (party representation) – see our comment under 4.2.
- Guideline 8 (ex parte contacts) – see our comment under 5.2 and 5.3.
- Guidelines 10 and 11 (submissions) – see our comment under 7.2.
- Guidelines 12 to 17 (information exchange and disclosure) – see our comment under 7.3 and 7.4.

### **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?**

- Guidelines 12 to 17 (information exchange and disclosure) – see our comment under 7.3 and 7.4.

### **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?**

- Guidelines 18 to 25 (witnesses and experts) – witness contact is more relaxed, see our comment under 1.3.

### **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.**

The local ethics rules do not provide for the arbitral tribunal to impose any sanctions/disciplinary measures. Disciplinary courts will impose disciplinary measures; other sanctions will be imposed by the state courts.

## Formatting Guidelines

### 1. Heading 1 – paragraph format (style) for level 1 headings

There are three different levels of headings you may use. Their paragraph format (style) has – as have the other styles for text, footnotes<sup>1</sup> etc. – been pre-set for your convenience, and they all offer automatic numbering if you apply the styles for the headings of the different levels consistently (tip: use the format painter; see also section 2). If possible please do not use more than three levels of headings.

Please also use the paragraph formats for text (e.g. "Body Text" for text like the text written in this and the previous paragraph; for more pre-set styles; see section 2), footnotes etc. consistently.

#### 1.1 Heading 2 – paragraph format (styles) for level 2 headings

The above title is formatted in the pre-set style "Heading 2".

##### 1.1.1 Heading 3 – paragraph format (styles) for level 3 headings

It is not mandatory to use three levels of headings but if you do so, note that the above title is formatted in the pre-set style "Heading 3".

### 2. More pre-set styles and their use to structural the text body

#### 2.1 More pre-set styles

We have pre-set additional styles in case you want to use:

- bullet points (as used in this line or indented as used two lines below);
- paragraphs or subtitles listed by:
  - letters for the **first** level of listed paragraphs or subtitles used; and/or
  - numbers for the **second** level of listed paragraphs or subtitles used, and/or
- indented text following a list using bullet points or paragraphs/subtitles sorted by letters or numbers.

The respective styles are named as follows:

- a. bullet points: style "Bullet Text" or "Bullet Text Indented"; see previous paragraph;
- b. first level paragraphs or subtitles sorted by letters: style "Text Lettered"; see this paragraph;

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<sup>1</sup> This is a footnote.

- c. second level paragraphs or subtitles sorted by numbers: style "Text Numbered Indented"; see next paragraph; and
- d. indented text: (style "Text Indented" and "Text Further Indented"; see immediately below):

This is text using the pre-set style "Text Indented" (for use after "Bullet Text" or "Text Alphabetic").

This is text using the pre-set style "Text Further Indented" (for use after "Bullet Text Indented" or "Text Numbered Indented").

The following uses the pre-set style "Text Numbered Indented".

- 1. xxx
- 2. xxx

## 2.2 Structure of the text body below headings

Please follow the following structure as closely as possible:

### **Example 1:** Short Lists

If you only have short lists within sentences or paragraphs, e.g., of:

- arguments; and/or
- explanations,

then consider using the bullet points:

### **Example 2:** Longer text

To structure longer text, use the alphabetical numbering as first level and, if needed, the numeric numbering as second level (you can always use bullet points and/or indented text within the respective levels):

- a. Text/subtitle
  - Text first paragraph below subtitle a
  - Text second paragraph below subtitle a
- b. Text/subtitle
  - Text first paragraph below subtitle b
    - 1. Text/list within first paragraph
      - Here, you could enter "Text Further Indented"
    - 2. Text/list within second paragraph
- c. Text/subtitle
  - Text first paragraph below subtitle c:
    - with bullet point list; and

- another bullet point.

### **3. How to apply and why to use styles**

#### **3.1 How to apply styles**

##### a. General

- To use the pre-set styles, we propose that you save this template and use it as basis for your report (eventually deleting all the explanations but not the styles).
- The text following all of the headings is by default pre-set in the style "Body Text".
- The text following the styles "Bullet Text", "Bullet Text Indented", "Text Alphabetic" and "Text Numbered Indented" has the same style, where applicable, counting on, and starting at a./1. after each heading.

##### b. Application of styles

All other styles you need to apply yourself. To do this, simply **click on the respective style in the quick style gallery. Do not use:**

- the "Format Painter" button on the toolbar to copy the style from one place to another; or
- the copy/paste short-cuts Ctrl+Shift+C/ Ctrl+Shift+V.

#### **3.2 Why to use styles**

Whenever possible, please use the pre-set styles. We are trying to standardize as much as possible the way our material looks to have some consistency ("corporate identity") and to enable and promote a convenient reading experience.

### **4. About the file name when you save your document**

When saving your work, please name the document using the following convention "WS(number) National Report (country).doc" or "WS(number) General Report.doc" (if it relates to a working session) or "Wsh(letter) National Report (country).doc" or "Wsh(letter) General Report (if it relates to a workshop)

**Example:** WS01 National Report (France).doc

#### **Appendix Heading (if applicable)**

Appendix body text

#### **Bibliography (if applicable)**

Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.

Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997.