

Ethics and Role of Counsel in International Arbitration

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National Report of Germany

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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?

In Germany, there are many statutory laws and regulations regulating the conduct for the legal profession.

The German Federal Constitutional Court evaluates an infringement of the professional freedom of lawyers pursuant to Article 12 (1) German Constitution (*Grundgesetz*, *öGGö*), which is one of the basic German rights in connection with other fundamental rights (e.g. Article 3 (1) and Article 5 (1) GG).

In this context the German Federal Constitutional Court also refers to the principal of free advocacy (*öfreie Advokaturö*), which is stipulated in § 1 Federal Code for the Legal Profession (*Bundesrechtsanwaltsordnung/öBRAOö*) and which provides that a lawyer is an independent organ of the German administration of justice (*öunabhängiges Organ der Rechtspflegeö*). The BRAO, which was established in 1959, is based on the set of rules and general principles of the code of conduct of the legal profession (*Standesrecht*), which was summarized by the German Lawyers Association in 1928 in the so-called *öVademecumö*.¹

Following German constitutional law, the main source of professional regulations for lawyers is the Federal Code for the Legal Profession (BRAO). The BRAO regulates the position of the lawyer in the German legal system (§§ 1 - 3 BRAO), admission to the bar (§§ 4 - 17 BRAO), the rights and obligations of a lawyer (§§ 43 - 59 b BRAO), professional cooperation of lawyers (§§ 59 c - 59 m BRAO), the professional self-administration of the German legal profession (§§ 60 - 91 BRAO) and the jurisdiction for the legal profession (§§ 92 et. seq. BRAO). § 43 BRAO contains the general rule for diligent professionalism and reads as follows:

öBRAO § 43 General professional duties

A Rechtsanwalt must practise his/her profession conscientiously. A Rechtsanwalt must show that he/she is worthy of the respect and the trust that his/her status as Rechtsanwalt demands, both when practicing and when not practising his/her profession.ö

[Translation as available at the Homepage of the German Federal Bar Association, http://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/brao_stand_1.6.2011_englisch.pdf]

¹ Kilian/Ofermann-Burckart/vom Stein/Weber, *Praxishandbuch Anwaltsrecht*, 2nd edition 2010, § 5 marginal no. 1.

Further sources regulating the conduct of the legal profession in Germany are the Lawyers' Compensation Act (*Rechtsanwaltsvergütungsgesetz*, öRVGö), the Legal Services Act (*Rechtsdienstleistungsgesetz*), the Code of Conduct for the Legal Profession (*Berufsordnung der Rechtsanwälte*, öBORAö), and the Code of Conduct for the Specialized Legal Profession (*Fachanwaltsordnung*, öFAOö).

The German criminal code (*Strafgesetzbuch*, öStGBö) contains criminal law rules which are also applicable to lawyers in the business relationship between them and their clients, such as betrayal of secrets pursuant to § 203 para. 1 no. 3 StGB (*Geheimnisverrat*), excessive levying of fees pursuant to § 352 StGB (*Gebührenüberhebung*), and betrayal of a client pursuant to § 356 StGB (*Parteiverrat*). § 261 StGB includes money laundering (*Geldwäsche*) with respect to lawyers' fees.

The code of criminal procedural law (*Strafprozessordnung*, öStPOö) contains in § 138 para. 1 StPO the regulation that only lawyers admitted to the German bar can act as counsel for defense in front of a German judge. Other people (including foreign lawyers) can only act in front of a German judge upon approval of the court (§ 138 para. 2 sentence 1 StPO).

In German statutory law, an important and practically relevant provision is contained in the German Anti-Money Laundering Act (*Geldwäschebekämpfungsgesetz*, öGwGö). § 2 para. 1 GwG requires lawyers who advise their clients on certain transactions to ascertain the identity of the client.

Furthermore, the Law Implementing the Directives of the European Community pertaining to the professional law regulating the legal profession (*Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland*, EuRAG) applies in Germany.

The Charter of Court Principals of the European Legal Profession and Code of Conduct for European Lawyers (*Charta der Grundprinzipien der europäischen Rechtsanwälte*, öCCBE-Rulesö) applies in Germany for every activity directed towards lawyers of European member states in conducting the legal profession as a German *Rechtsanwalt*² (*jede Tätigkeit gegenüber Rechtsanwälten anderer Mitgliedstaaten anlässlich anwaltlicher Berufsausübung*). The CCBE-Rules have been previously implemented into the German statutory law for the legal profession pursuant to § 29 para. 1 BORA and have thereby explicitly replaced the BORA rules in its scope of application as long as no mandatory national law dis exist. In 2013, § 29 BORA has been set aside with effect as of 1 November 2013 by enactment of 15 April 2013 and has been substituted by §§ 29a and 29b BORA; the latter, however, do no longer mention the CCBE-Rules explicitly. As a consequence, the explicit implementation of the CCBE-Rules into the German

² The terms *Rechtsanwalt* and *Rechtsanwälte* (plural form) are used in this work as a gender-neutral description for a lawyer who is admitted to the German bar.

law of the legal profession has been overcome. The Federal Chamber of Lawyers (*Bundesrechtsanwaltskammer*, **öBRAKö**) has, however, declared that this is in no way a renunciation from the applicability of the CCBE-Rules. The explicit implementation is rather not necessary as most of the content is already contained in the more general rules and provision of the German BRAO and BORA.³

Furthermore, it is the declared goal of the CCBE-Rules to be recognized by every reformation of national law in order to achieve the harmonization of the law of the legal profession within the European Union. Therefore, an explicit implementation is no longer necessary in Germany.

The application of the CCBE-Rules requires that the lawyer of the European member state towards which the activity is conducted is a member of the bar association of this European member state (no matter what nationality such lawyer has).⁴

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?

In Germany, the Bar Association and the German Bar Court are competent to enforce the rules set forth in section 1.1. In such proceedings, the client as well as the managing board of the Bar Association is competent to enforce the said rules.

The Bar Association is competent to enforce its authority by imposing the following remedies:

- suspend the appear procedure if an essential issue, which is subject to another proceeding needs to be decided first (§ 118 b BRAO);
- hand over the case to prosecution (§ 121 BRAO);
- pass a vote of censure (§ 74 para. 2 BRAO).

The Bar Court is entitled to impose the following remedies pursuant to §114 para. 1 BRAO:

- issue a caution (*Warnung*) or an admonishment (*Verweis*) to the counsel;
- impose a fine of up to EUR 25,000.00;
- exclude the counsel from the Bar Association for a certain period of time starting from one year up to five years;

³ Newsletter BRAK . News from Berlin, Edition 08/2013 v. 03.05.2013.

⁴ *Feuerich* in Feuerich/Weyland, Commentary on BRAO, BORA, FAO, PartGG, EuRAG and PAO, 8th edition 2012, § 29 BORA at no. 6.

- exclude the counsel from the advocacy (occupational ban).

The main difference between the potential remedies provided for by German local ethics and the remedies provided for in the Guidelines 26-27 of the IBA Guidelines is, that Section 26 lit. d of the IBA Guidelines authorizes the Arbitral Tribunal to take any appropriate measure in order to preserve the fairness and integrity of the proceedings. In Germany, an Arbitral Tribunal does not have such authority and even the Bar Court, who has authority, does not have such an expansive discretion but rather is bounded by the specific remedies normed in the BRAO.

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)?

The laws and regulations identified under section 1.1 do not specifically address the conduct of counsel in *international* arbitration, but they address the conduct of counsel conducting its legal profession not only in Germany, but also in cross-border legal relations (*see* § 29a and § 29b BORA). In addition, the CCBE-Rules apply for cross-border activities of a German *Rechtsanwalt* within the European Union in addition.

The common understanding is, however, that the laws and regulations apply with respect to ethic rules of German *Rechtsanwälte* acting in the core area of the legal profession, i.e., as an independent organ of the legal system (§ 1 BRAO), self-employed (§ 2 BRAO) rendering legal advice and/or representing a party in a proceeding (§ 3 BRAO).⁵ The German *Rechtsanwalt* is entitled to represent a party and to appear before any kind of court, arbitral tribunal or administrative body; this right is safeguarded by § 3 para. 2 BRAO and can only be restricted by a Federal Act.⁶

Under the German statutory arbitration law, the parties do not have to be represented by counsel before the arbitral tribunal; the parties may, however, agree that such representation is obligatory.⁷ In a German statutory arbitration proceeding, *Rechtsanwälte* may not be excluded from being a representative, § 1042 para. 2 ZPO.⁸

⁵ Vossebürger in Feuerich/Weyland, Commentary on BRAO, BORA, FAO, PartGG, EuRAG and PAO, 8th edition 2012, Introduction to BRAO at no. 10.

⁶ Vossebürger in Feuerich/Weyland, Commentary on BRAO, BORA, FAO, PartGG, EuRAG and PAO, 8th edition 2012, Introduction to BRAO at no. 12.

⁷ Sachs/Lörcher in Böckstiegel/Kröll/Naciminto, *Arbitration in Germany . The Model Law in Practice*, 2007, Chapter V., page 286 at no. 21.

⁸ Schwab/Walter, *Schiedsgerichtsbarkeit (Systematical Commentary on Arbitration)*, 7th edition 2005, chapter 15 at no. 4.

Taking these regulations into account, it is therefore the common understanding that the laws and regulations identified in Section 1.1 also apply to counsel admitted to the German bar and acting in international arbitration.

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 identified under section 1.1 also apply to in-house counsel directly if they are admitted to the German bar (which is often the case, but not always).

The admission to the bar of in-house counsel is broadly discussed in Germany; it is argued that in-house counsel cannot be compared to *Rechtsanwälte*, because they are not independent while they are working for a company that is not a law firm. According to German jurisprudence, in-house counsel can only be treated as a *Rechtsanwalt* if the in-house counsel also works as a *Rechtsanwalt* besides being an in-house counsel, § 46 BRAO.⁹ Although the German Federal Constitutional Court still uphold this judgment, some well-known legal scholars are of the opinion that an in-house counsel who is admitted to the bar (*Syndicus*) should be classified as a *Rechtsanwalt*, including all rights and obligations of the legal professionalism.¹⁰

For in-house counsels who are not admitted to the German Bar, the laws and regulations identified in Section 1.1 do not apply.

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?

In Germany, neither the Bar Association, the German Bar Court nor the managing board of the Bar Association have published any decision pertaining to counsel's conduct in international arbitration proceedings. Published decisions of these bodies are rare, because these proceedings are in general confidential (*see* § 135 para. 1 sentence 2 BRAO, which stipulates explicitly that the hearing of a bar court shall be held *in camera*) and mainly deal with the conduct of a *Rechtsanwalt* in litigation proceedings, but not in arbitration and *a fortiori* in international arbitration proceedings.

⁹ Hartung in Hartung/Römermann, Kommentar zur Berufs- und Fachanwaltsordnung, 4th edition 2008, § 46 BRAO at no. 7-8.

¹⁰ Hartung in Hartung/Römermann, Kommentar zur Berufs- und Fachanwaltsordnung, 4th edition 2008, § 46 BRAO at no. 11; Kleine-Cosack, Kommentar zu BRAO, 6th edition 2009, § 46 at no. 6-7.

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?

There has not yet been a decision issued in Germany that addresses and/or refers to the 2013 IBA Guidelines on Party Representation in International Arbitration in Germany.

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 role and legal status of counsel reflected in the German ethic rules/laws as defined above in Section 1.1 do not specifically provide for any duties of counsel in national or international arbitration. However, there are some core values which describe the position of a *Rechtsanwalt* in Germany and which need to be observed by every lawyer admitted to the German Bar. These core values or basic duties are mentioned in § 43a BRAO, which states as follows:

öBRAO § 43a The basic duties of a Rechtsanwalt

(1) A Rechtsanwalt may not enter into any ties that pose a threat to his/her professional independence.

(2) A Rechtsanwalt has a duty to observe professional secrecy. This duty relates to everything that has become known to the Rechtsanwalt in professional practice. This does not apply to facts that are obvious or which do not need to be kept secret from the point of view of their significance.

(3) A Rechtsanwalt must not behave with lack of objectivity in professional practice. Conduct which lacks objectivity is particularly understood as conduct which involves the conscious dissemination of untruths or making denigrating statements when other parties involved or the course of the proceedings have given no cause for such statements.

(4) A Rechtsanwalt may not represent conflicting interests.

(5) A Rechtsanwalt must exercise the requisite care in handling any assets entrusted to him/her. Monies belonging to third parties must be immediately forwarded to the entitled recipient or paid into a fiduciary account.

(6) A Rechtsanwalt has a duty to engage in continuing professional development.ö

[Translation as available at the Homepage of the German Federal Bar Association, www.brak.de and there to be found under öBerufsrechtö, subsection öBRAOö]

Counsel's duties towards the arbitral tribunal and the opposing party as well as the opposing parties' counsel include the obligation to be objective (*Sachlichkeitsgebot*) within the proceedings, i.e., to refrain from any insults against other people involved in the proceeding, the obligation to refrain from spreading the untruth, and to avoid degrading comments.¹¹ These duties set forth in German professional statutes and rules also reflect criticism of German counsel with respect to the so-called "guerilla tactics" which are often used in international arbitration. These guerilla tactics include serious interference from an obstructive or even criminal behavior of interested "stakeholders" bribery and subornation as well as violent threats of retaliation. Furthermore, it includes threats against witnesses of the other party. As these tactics interfere with the German civil law system and the established ethics and professional code of conduct in national litigation and arbitration proceedings, in Germany these guerilla tactics are widely criticized.

Towards the client, counsel has the duty to remain economically independent especially from the client, and to keep confidential the client relation itself as well as the content of the mandate and related facts. Counsel shall refrain from representation of conflicting interests and must handle any assets entrusted to him/her with due care and monies not belonging to counsel must be immediately returned.

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?

In Germany, the representation of parties in international arbitration proceedings is not limited to specific professions, such as attorneys at law, because there is no distinction between solicitors and attorneys at law. Every lawyer who is admitted to the German Bar is allowed to represent parties whether in national or international arbitration.

Furthermore, with respect to German statutory arbitration proceedings, neither German-admitted nor foreign-admitted counsels might be excluded from German statutory arbitration proceedings, § 1042 para. 2 German civil procedure code (*Zivilprozessordnung*, "ZPO").¹² However, as stated in Section 1.3, under German statutory arbitration law, parties do not need to be represented by counsel before the arbitral tribunal; the parties may, however, agree that such representation is obligatory.¹³

¹¹ See Kilian/Ofermann-Burckart/vom Stein/Weber, *Praxishandbuch Anwaltsrecht*, 2nd edition 2010, § 5 marginal no. 29-36.

¹² Lachmann, *Handbuch für die Schiedsgerichtspraxis*, 3rd edition 2008, p. 341 at no. 1367.

¹³ Sachs/Lörcher in Böckstiegel/Kröll/Nacimint, *Arbitration in Germany . The Model Law in Practice*, 2007, Chapter V., page 286 at no. 21.

3. Remuneration of Counsel and Third Party Funding

3.1 How are counsels 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.

Counsel in international arbitration proceedings are in general remunerated on an hourly fee basis in Germany. The hourly fees invoiced by German *Rechtsanwälte* are restricted by the principle of adequacy which is stipulated in § 3 a para. 2 sentence 1 of the German Lawyer's Compensation Act (*Rechtsanwaltsvergütungsgesetz, öRVGö*). The RVG applies for every legal service rendered by a *Rechtsanwalt* pursuant to § 1 para. 1 RVG¹⁴, i.e., even to legal services rendered in international arbitration by a counsel admitted to the German Bar.

Hourly fees which are lower than the statutory fees stipulated for litigation proceedings in the RVG need to fulfill the following criteria: The fee needs to be *öadequateö* in relation to the effort, the responsibility and potential liability of the lawyer. The same criteria are to be applied in the event that the hourly fees *exceed* the fees as stipulated in the RVG. In this event, further measures are to be considered, such as the complexity of the lawyer's services, the case's importance for the client, the client's assets, the lawyer's qualifications, the time period for services rendered, and the general costs of the lawyer.

Since 2008, German lawyers are allowed by statutory law to agree with their clients on a contingency fee, which is stipulated in § 4 a RVG. Such contingency fee arrangements are also permitted for legal services rendered as a counsel in international arbitration proceedings, § 1 para. 1 RVG. A contingency fee may only be agreed upon for each individual case and may only be concluded if the client would not have retained the counsel without having a contingency fee agreement because of its economic circumstances.¹⁵ Contingency fees are also permitted in litigation proceedings in front of a German state court.

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

In Germany, third party funding is accepted. However, according to our experience, it is not widespread and we have not experienced a case yet where third party funding was used for the initiation of an international arbitration

¹⁴ See *Volpert/N. Schneider* in *Schneider/Wolf*, *Anwaltskommentar zum RVG*, 7th edition 2014, § 3a at no. 57, 69.

¹⁵ *Onderka* in *Schneider/Wolf*, *Anwaltskommentar zum RVG*, 7th edition 2014, § 4a at no. 13-14.

proceeding. Third party funding is a relatively new business model in Germany. The first company offering third party funding of disputes in Germany was established in 1989.¹⁶

Third party funding is not prohibited by German rules or law. Furthermore, third party funding is not subject to regulatory hurdles as it is not seen as an insurance or financial service or part of the legal service. It is therefore entirely unregulated. However, funding agreements must comply as must any other contract with public policy and is limited by usury regulations pursuant to § 138 BGB. Funding agreements may be fully void pursuant to § 139 BGB if a provision out of such agreement infringes § 138 BGB.

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?

The German ethical rules of the legal profession do not address the issue of third party funding in international arbitration expressly. Funding by the counsel itself, however, is forbidden pursuant to § 49 b para. 2 sentence 2 BRAO, which came into force 1 July 2008.¹⁷

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.¹⁸

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 duty for counsel to disclose third party funding on his client's side to the opposing party and/or the arbitral tribunal. On the contrary, third party funding must in most cases be kept confidential by the party receiving such funding, as provided in the contract between the party and the professional funder.¹⁹

¹⁶ Kilian/vom Stein/Ofermann-Burckart, *Praxishandbuch Anwaltsrecht*, 2nd edition 2010, § 11 marginal no. 179.

¹⁷ Weyland in Feuerich/Weyland, *Commentary on BRAO, BORA, FAO, PartGG, EuRAG and PAO*, 8th edition 2012, § 49b BRAO at no. 61.

¹⁸ Kilian/vom Stein/Ofermann-Burckart, *Praxishandbuch Anwaltsrecht*, 2nd edition 2010, § 11 marginal no. 183-184.

¹⁹ Frechen/Kochheim, *sFremdfinanzierung von Prozessen gegen Erfolgsbeteiligung*, NJW 2004, 1213, 1214.

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.

In Germany, there is in principal no difference made between the third party funder being a professional funder or any other third party. However, in business practice the professional funder has typically set up certain rules²⁰ for its funding agreements, such as:

- 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.

Third party funding and insurance providers are viewed differently.

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.²¹ The lawyer also has the obligation to make sure that the client fulfils all of its obligations under the insurance agreement. International arbitration disputes are in general not part of the statutory regulated insurance offered in Germany.²²

²⁰ Kilian/vom Stein/Ofermann-Burckart, *Praxishandbuch Anwaltsrecht*, 2nd edition 2010, § 11 marginal no. 180, 185.

²¹ Kilian/vom Stein/Ofermann-Burckart, *Praxishandbuch Anwaltsrecht*, 2nd edition 2010, § 11 marginal no. 140.

²² Kilian/vom Stein/Ofermann-Burckart, *Praxishandbuch Anwaltsrecht*, 2nd edition 2010, § 11 marginal no. 163.

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.

öMaintenance and champertyö is not viewed as an issue in Germany with regard to third party funding as this common law doctrine or an equivalent does not exist in the German legal system.

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?

§ 3 para. 1 BORA contains the general test for conflicts of interest of counsel and thereby specifies § 43a para. 4 BRAO.

§ 3 para. 1 BORA stipulates that a German *Rechtsanwalt* is not allowed to act in the event that he has already represented or advised another party in the same legal matter on a conflicting interest or if the *Rechtsanwalt* was already involved in the same legal matter in any other way. However, each single case needs to be considered individually.²³

The prohibition from acting as a counsel in the event of a conflict of interest is also extended to other *Rechtsanwälte* within the same law firm or office sharing, *see* § 3 para. 2 sentence 1 BORA. This extended prohibition does not apply if the client was overall informed about the conflict of interest and nonetheless consents to the client agreement, *see* § 3 para. 2 sentence 2 BORA.

This general principle does also apply in international arbitration cases where lawyers admitted to the German 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?

In Germany, there is no equivalent to the Guideline 5 of the IBA Guidelines on Party Representation in International Arbitration in the identified ethic rules. Guideline 5 of the IBA Guidelines deals with the newly-appointed party representative who may have a relationship with an arbitrator of the already constituted arbitral tribunal; thereby the arbitration proceeding could be put at risk. This risk is not yet pictured in German ethic rules.

²³ *Böhnlein* in Feuerich/Weyland, Commentary on BRAO, BORA, FAO, PartGG, EuRAG and PAO, 8th edition 2012, § 3 BORA at no. 5.

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?

§ 43a para. 4 BRAO contains the prohibition to act for a client if the *Rechtsanwalt* has a conflict of interest. This prohibition is not to the disposal of the involved parties; the consent of the client does therefore not cure the existing conflict of interest and thereby the prohibition for the *Rechtsanwalt* to act for the client.²⁴ Therefore, under German ethic rules, the client's ability to waive conflicts of interest is limited.

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

The so called "Chinese walls" are generally accepted in Germany as an organizational arrangement to divide work in law firms in which lawyers of different departments or teams would have a conflict of interest and a spatial separation is needed and thereby realized.²⁵ The organizational question of using "Chinese walls" and the acceptance thereof is not specifically related to international arbitration proceeding, but is in general allowed and used by big law firms to avoid being excluded from representing a client because of a conflict of interest while another team of the law firm is involved in this matter.

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?

German professional law does not *per se* restrict direct communication with the opposing party. However, according to § 12 BORA a *Rechtsanwalt* is prohibited from directly contacting the opposing client if the client is legally represented by another *Rechtsanwalt*. There are two exceptions to this general rule: First, direct contact is permitted in case of consent of the opponent's *Rechtsanwalt*. Second, § 12 para. 2 BORA states that a direct contact is generally allowed in case of imminent danger. In this case the *Rechtsanwalt* shall inform the other *Rechtsanwalt* without delay. The prohibition to directly contact the opposing client shall, in first place, protect him from the exercise of pressure.²⁶

²⁴ *Böhnlein* in Feuerich/Weyland, Commentary on BRAO, BORA, FAO, PartGG, EuRAG and PAO, 8th edition 2012, § 43a BORA at no. 67.

²⁵ *Böhnlein* in Feuerich/Weyland, Commentary on BRAO, BORA, FAO, PartGG, EuRAG and PAO, 8th edition 2012, § 3 BORA at no. 23.

²⁶ *Kleine-Cosack, Michael*, Commentary on BRAO, BORA and FAO, Verlag C.H. Beck Munich, 5th edition 2008, appendix I 1, § 12, marginal no. 1

§ 12 BORA applies to the professional activity of a *Rechtsanwalt* in international arbitration proceedings. This follows from § 3 para. 2 and 3 BRAO which suggest that activities before an arbitration tribunal fall within the scope of the professional activity of a *Rechtsanwalt*.

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 is no ethic rule in German law providing for restrictions of ex-parte communication with the Arbitral Tribunal. Therefore, ex-parte communications of the *Rechtsanwalt* with the Arbitral Tribunal are generally permitted, provided that the *Rechtsanwalt* complies with the general professional ethic rules such as confidentiality.

Given that there is no ethic rule for a German *Rechtsanwalt* restricting direct communication with the Arbitral Tribunal there is, indeed, a huge discrepancy to the rules provided by the IBA Guidelines 7-8. This discrepancy, however, may have little practical relevance, since the *lex arbitri* in Germany sanction certain forms of personal relationship between a party counsel and the arbitrator if they pose a threat to the impartiality and independence of an arbitrator (see also below). Such personal relationship may also follow from ex-parte communication between the party counsel and the arbitrator.²⁷

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 is no specific ethic rule or provision of the *lex arbitri* that expressly regulates the conditions under which the prospective arbitrators may be contacted by the counsel. But § 1036 of the German Code of Civil Procedure (*öZPOö*), which forms part of the German *lex arbitri*, indirectly regulates the circumstances under which a party counsel is allowed to contact the prospective arbitrators.²⁸ Under § 1036 para. 2 ZPO an arbitrator may be challenged if circumstances exist, which give rise to justifiable doubts as to his impartiality and independence. Such doubt to the impartiality or independence of a prospective arbitrator may be established if the arbitrator has discussed the factual or legal questions in dispute

²⁷ Musielak, *Hans-Joachim*, Commentary on the Code of Civil Procedure, Verlag C.H. Beck Munich, 10th edition 2013, § 1036 marginal no. 8.

²⁸ § 1036 ZPO is based on art. 12 UNCITRAL Model Law on International Commercial Arbitration.

with a party counsel before his nomination.²⁹ In contrast, a mere contact to obtain general information e.g. for the purpose of selection of the arbitrator is permitted. In conclusion, whether the party counsel is allowed to contact a prospective arbitrator has to be established case by case based on the impartiality test.

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?

Neither professional law nor *lex arbitri* provide for rules on the contact of a *Rechtsanwalt* with witnesses, whether own or opposing. However, § 159 and § 160 the German Criminal Code (*StGB*) establish criminal liability for any person who suborns or attempts to suborn a witness. This provision applies to any person, whether counsel, in-house counsel or whoever. False testimony can be committed before an ordinary court as well as any other authority competent to examine witnesses. Latter does not include Arbitration Tribunals³⁰. However, § 159 and § 160 *StGB* may apply in case the witness is heard before an ordinary court which assists an Arbitration Tribunal in taking evidence as provided by § 1050 ZPO.³¹

Further to this, it is noteworthy that a *Rechtsanwalt* when approaching a witness has to abide by his general professional duties such as objectivity which prohibits the *Rechtsanwalt* from consciously disseminating untruths (§ 43a para. 3 BRAO). This professional duty applies to a *Rechtsanwalt* regardless if he is outside or in-house counsel.³²

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?

There is no specific local ethic rule on whether or to what extent a *Rechtsanwalt* may get involved in the preparation of witness statements or expert reports. Involvement in the preparation of witness statements and expert reports are, consequently, not *per se* prohibited. Only the previously mentioned general professional duties, particularly the obligation to be objective, may give some

²⁹ Munich Commentary on the Code of Civil Procedure, Verlag C.H. Beck Munich, 3rd edition 2008, § 1036 marginal no. 37 with further references.

³⁰ Fischer, Thomas, Commentary on the German Criminal Code and By Laws, Verlag C.H. Beck Munich, 56th edition, § 153, marginal no. 7 and 8

³¹ § 1050 ZPO is based on art. 27 UNCITRAL Model Law on International Commercial Arbitration.

³² see question 1.4 for further explanations as to when professional duties are applied to an in-house counsel.

guidance on the limitations of the involvement of a *Rechtsanwalt* in the preparation of witness statements and expert reports.

Further to this, it has to be noted that lex arbitri expressly provide some provision on the duty of a party to support the expert in the preparation of the expert report. According to § 1049 para.1 ZPO the Arbitral Tribunal may require a party, and thus also a party counsel, to give the elected expert any relevant information or to produce, or to provide access to, any relevant documents or property for his inspection. Of course, this provision is only applicable to (neutral) experts appointed by the Arbitral Tribunal. It follows from § 1049 para.1 ZPO that the involvement of a party counsel in the preparation of an expert report is generally permitted and cannot be considered as a violation of ethic rules unless the involvement constitutes a breach of the previously mentioned general professional duties.

A further limit to the involvement of a party counsel in the preparation of expert reports follows from the provisions on challenge in § 1049 para.3 in conjunction with § 1036 ZPO. An expert, like an arbitrator, can be challenged if the extent of the involvement of a party or a party counsel in the preparation of the expert report can raise justifiable doubts to his impartiality and independence.

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?

The above mentioned principles apply accordingly to the involvement of a party counsel in the preparation of a witness or expert for their appearance at the evidentiary hearing. Particularly, the counsel has the duty to not consciously disseminate untruths (principle of objectivity), § 43a para. 3 BRAO. In case of the preparation of a (neutral) expert for his appearance in the hearing, however, it must be noted that any involvement going beyond the support of the expert under § 1049 para. 2 ZPO, that is the provision of required information or documents, might give way to challenge procedures.

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?

No explicit local ethic rules comparable to the IBA Guidelines 18-25 exist in Germany. Particularly, there is no ethic rule at all which may have similar effect to the IBA Guidelines 18-19. IBA Guideline 20 reflects the unexpressed principle that a *Rechtsanwalt* may assist witnesses and experts in the preparation of witness statements and expert reports. As regards the IBA Guidelines 21-25 the general professional duties of a *Rechtsanwalt* may be interpreted in way that comes quite near to the principles laid down in the IBA Guidelines 21-25.

Moreover, some of the acts apparently prohibited by the IBA Guidelines 21-25 are threatened with criminal sanctions such as suborning witnesses and experts.³³

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?

As mentioned in Section 2.1, § 43a BRAO provides for some core values or "basic duties" which must be observed by every lawyer admitted to the German Bar. These "basic duties" also apply to professional activities of a *Rechtsanwalt* in international arbitration.³⁴ The "basic duties" of a *Rechtsanwalt* include the obligation to refrain from any impertinent or unobjective behavior in the course of professional practice. According to § 43a para. 3 sentence 2 BRAO such impertinent or unobjective behavior particularly includes unnecessarily disparaging or injurious statements against involved parties³⁵ and the conscious dissemination of untruths³⁶. Although, to a common understanding, a *Rechtsanwalt* cannot be held responsible for the truthfulness of witnesses or experts, it flows from the duty of objectivity that he must refrain from any conscious behavior which may induce the witness or expert to disseminate the untruth. Therefore, a *Rechtsanwalt* is not allowed to knowingly propose witnesses who have the intention not to tell the truth. Since the wording "dissemination" postulates positive action, a *Rechtsanwalt*, arguably, complies with § 43a para. 3 BRAO in case an expert or witness conceals the truth or even lies spontaneously and the *Rechtsanwalt* merely tries to take advantage for his client out of this misconduct without actively promoting the untruth.³⁷

³³ see § 159 and § 160 StGB.

³⁴ see Section 1.3.

³⁵ e.g. calling the opposing attorney a liar and fraudster+ (Oberlandesgericht Rostock, decision of 30.11.2012 - AGH 1/12 (I/1).

³⁶ The statement of a lawyer that he is not any more representing his client for the avoidance of a conflict of interest, while he was in fact continuing to represent his client, was considered as a conscious dissemination of untruths in the sense of § 43a para 3 BRAO (Anwaltsgerichtshof Mecklenburg-Vorpommern, decision of 28.9.2009 . I AG 4/09).

³⁷ *Gaier/Wolf/ Göcken*, Commentary on lawyers' professional law, Carl-Heymanns Verlag Cologne, 2010, § 43a, marginal no. 72, p.501.

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?

- Firstly, the duties of a Rechtsanwalt with respect to the truthfulness and completeness of factual and legal submissions can be derived from the general professional rules of conduct stipulated in § 43 and § 43a BRAO. As previously mentioned, the duty of objectivity in § 43a para. 3 BRAO obliges the Rechtsanwalt to refrain from the conscious dissemination of the untruths. This obligation most notably applies to factual submissions. Further, the general rule of diligent professionalism stipulated in § 43 BRAO, stating that a Rechtsanwalt must practice his profession conscientiously and show that he is worthy of the respect and the trust that his status as Rechtsanwalt demands, assumes some more abstract duties of a counsel with regard to truthfulness of factual submissions. As a common understanding, however, these duties do not encompass a duty to truthful legal submissions since truthfulness is a concept generally linked to the facts of the case and not the legal arguments. Thus, even the conscious representation of wrongful legal arguments does not constitute a violation of professional rules³⁸.
- Secondly, some further duties may be derived from criminal provisions. Although these provisions do not constitute ethic rules they formulate duties of a Rechtsanwalt with regard to the truthfulness of submissions.

It is the common understanding that obtaining a court judgment by means of fraudulent misrepresentation constitutes a fraud under § 263 StGB.³⁹ A representation is considered as fraudulent if it is committed by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts (§ 263 StGB).⁴⁰ As a general rule § 263 StGB is also applicable on fraud in obtaining an arbitral award.⁴¹ Of course collusion of a Rechtsanwalt in the causing or maintaining of an error of the Arbitral Tribunal through consciously false or misleading factual submissions

³⁸ *Gaier/Wolf/ Göcken*, Commentary on lawyers professional law, Carl-Heymanns Verlag Cologne, 2010, §43a, marginal no. 83, p.503.

³⁹ *ibid.* marginal no. 7.

⁴⁰ Translation of § 263 as available on the website of the Federal Ministry of Justice: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p2127.

⁴¹ see Oberlandesgericht Munich, 6.3.2012 . 34 Sch 3/10, which generally considers fraud in obtaining an award as a violation of ordre public.

constitutes a complicity in fraud and is as such punishable by criminal law. Further sanctions may be imposed by the bar as fraudulent behavior also constitutes a serious breach of the basic duties of a *Rechtsanwalt* under § 43a BRAO.⁴²

- Whether the *Rechtsanwalt* is obliged to refrain from submitting information or documents to the Arbitral Tribunal which he suspects are false or not authentic, is not entirely clear. Such obligation would require a duty of the *Rechtsanwalt* to check the truthfulness or authenticity of information and documents.⁴³ Since § 43a BRAO solely prohibits the conscious dissemination of untruths it can be assumed that such a duty does not exist. So it is quite unlikely, that bar authorities would issue sanctions against a *Rechtsanwalt* if it is established that he had good reasons to suspect the falseness of facts or documents submitted to a Tribunal.

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?

Given that document production is very rare in Germany neither statutory law nor case-law provides for duties or responsibilities of a *Rechtsanwalt* in respect of document production or preservation. Failing specific provision such responsibilities can only be based on general professional duties or contractual obligations. Again, reference can be made to the general rule for diligent professionalism established by § 43 BRAO. Further obligations, albeit of no ethical character, follow from the contract of legal services concluded between the lawyer and the client. A lawyer is liable for any damage culpably caused in the course of performance of the legal services contract. This may include responsibility for any damages incurred in failure to comply with any provisions or orders, if any, on document production or preservation.

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?

Similar to Guideline 9 of the IBA Guidelines § 43a para. 3 BRAO prohibits the conscious dissemination of untruths by a *Rechtsanwalt*. Beyond that, no express provisions corresponding to the Guidelines 10-11 of the IBA exist in the local ethic rules. However, knowingly false statements by a *Rechtsanwalt* as formulated in the Guidelines 10-11 may constitute complicity to a criminal act. Guidelines 13

⁴² *Kleine-Cosack*, Michael, Commentary on BRAO, BORA and FAO, Verlag C.H. Beck Munich, 5th edition 2008, § 43a marginal no. 66.

⁴³ Such duty has been assumed, albeit in another context, by the Oberlandesgericht Celle in the judgment of 9.8.1990 - 2 Ss 186/90, NJW 1991, 1189. However, it is doubtful whether the assumption of this court will prevail.

and 16 of the IBA Guidelines form part of the *Rechtsanwalt*'s general duties according to § 43 and § 43a para. 3 BRAO. 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 established by § 43 BRAO and general contract law which requires the lawyer to act in the client's best interest.

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.

According to § 280 para. 1 BGB a lawyer can be held liable for any damages incurred by the client because of the breach of duties arising out of the legal services contract. Such liability may also arise from pre-contractual obligations according to § 311 para. 2 or 3 BGB (*culpa in contrahendo*), for example if the lawyer fails to inform the client on the mode of calculation of prospective fees.⁴⁴ According to the jurisdiction of the Federal Court of Justice (*Bundesgerichtshof*) a lawyer is even liable for a false decision of a court if he fails to advise the court on existing case law favorable to his client.⁴⁵ This excessive interpretation of lawyer's responsibility has been heavily criticized by lawyers and scholars.⁴⁶

Liability of a *Rechtsanwalt* has been assumed in following cases (to name a few)⁴⁷:

- A lawyer has to ensure that the client's claims do not prescribe (BGH NJW ZIP 08, 1402, BGH NJW 93, 1779).
- A lawyer is liable for legal errors (BGH VersR 59, 641).
- A lawyer has to stay informed by reading professional journals (BGH NJW 01, 675; 09, 987); he has to respect decisions of the highest German courts (BGH NJW 93, 3324, 09 987).
- A lawyer has to choose the safest way when taking action for the client (BGH NJW 81, 2741; **88**, 487, 566).

⁴⁴ Hartmann, Peter, NJW 2004, 2484.

⁴⁵ Bundesgerichtshof, decision of 18.12.2008 - IX ZR 179/07, NJW 2009, 987.

⁴⁶ see e.g. Slobodenjuk, Dimitri, NJW 2006, 113.

⁴⁷ Palandt, Commentary on the German Civil Code, Verlag C.H. Beck Munich, 73rd edition 2014, § 280, marginal no. 66- 71

- In case it is sure or at least highly probable that the client will lose the case, the lawyer has to advise on that issue (BGH 97, 937, NJW **84**, 791, **97**, 2168).
- A lawyer has to request evidence if necessary as well as preserve needed evidence (BGH NJW 93, 2676). He must make use of necessary defense tactics in time (Hamm VersR 88, 192; Düss NJW-RR 89,1197; BGH NJW-RR 1242).

All cases mentioned above explicitly refer to the liability of a *Rechtsanwalt* for his behavior in ordinary court proceedings. However, as long as German substantive law applies on the lawyer-client relationship⁴⁸ similar standards will apply on a lawyer's negligence in the course of an arbitration process.

It has to be noted, however, that the existing case law on liability of a lawyer is limited to the breach of contractual duties rather than ethic rules. The violation of ethic rules, with some exceptions, does not per se give rise to liability towards the client. An exception to this principle may be seen in the violation of § 54a para. 5 BRAO. According to this provision a *Rechtsanwalt* has to advise his client on the fact that, under the Lawyers Remuneration Act (RVG), his fees may be calculated on basis of the amount in dispute.⁴⁹ It is common understanding that a violation of this professional rule can give rise to liability of a *Rechtsanwalt* for any damages incurred by the client caused by this misconduct.

However, generally, professional misconduct is rather sanctioned by professional and disciplinary remedies under BRAO as displayed in Section 1.2 than giving rise to civil liability towards the client.

With respect to Guideline 26 of the IBA Guidelines it can therefore be noted, that it is of rather limited practical relevance. With the exception of the right of the bar to issue an admonishment (see Section 1.2), which finds an equivalent rule in Guideline 26 (a) of the IBA Guidelines, neither similar provisions of law nor existing case law referring to Guideline 26 could be asserted. The potential relevance of Guideline 26 is, hence, limited to cases, where the Arbitral Tribunal, on the express will of the parties or on its own motion, applies the IBA Guidelines on Party Representation.

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?

According to § 51 BRAO a *Rechtsanwalt* is obliged to take out a malpractice insurance. Pursuant to § 51 para. 4 BRAO the minimum coverage for a single *Rechtsanwalt* shall be 250,000.00 Euro for each case of loss. Moreover, § 52

⁴⁸ According to art. 4 (1) (b) of the Regulation (EC) 593/2008 (Rome I) legal services contracts are governed by the law of the place of the habitual residence of the lawyer.

⁴⁹ Hartmann, Peter *ibid.*

BRAO lays down the conditions under which claims for compensation can be limited by agreement. 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.⁵⁰ 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.

Section 51 BRAO reads as follows:

ōBRAO § 51 Professional indemnity insurance

(1) A Rechtsanwalt must take out professional indemnity insurance in order to cover his/her potential liability for financial loss resulting from his/her professional practice. The Rechtsanwalt must maintain the insurance for the duration of his/her admission. The insurance must be taken out with an insurance company that is authorised to conduct business operations in Germany under the General Terms and Conditions of Insurance set out in the Insurance Supervisory Act (Versicherungsaufsichtsgesetz). The insurance must also cover financial loss for which the Rechtsanwalt is liable under § 278 or § 831 of the German Civil Code.

(2) The contract of insurance must afford coverage for each and every breach of duty which could result in legal liability claims being brought against the Rechtsanwalt under private law; it may be agreed that all breaches of duty in connection with one uniform mandate shall be regarded as a single case of loss, whether this is due to the conduct of the Rechtsanwalt or of a vicarious agent assisting the Rechtsanwalt.

(3) The contract of insurance may exclude liability for:

- 1. claims against the insurer on grounds of a deliberate breach of duty,*
- 2. claims against the insurer on grounds of services rendered through law practices or offices established or run in other countries,*
- 3. claims against the insurer on grounds of services involving legal advice in non-European law and concerning oneself with such law,*
- 4. claims against the insurer arising from the Rechtsanwalt appearing before courts outside Europe,*

⁵⁰ see Allgemeine Bedingungen der Berufshaftpflichtversicherung der Rechtsanwälte (AVB-RSW 2008).

5. *claims for damages due to embezzlement by staff, relatives and partners of the Rechtsanwalt.*

(4) The minimum coverage shall be 250,000 euro for each case of loss. The benefits paid out by the insurer for all losses caused within an insurance year may be limited to four times the minimum coverage.

(5) It shall be permissible to agree on an excess of up to 1 per cent of the minimum coverage.

(6) In the contract of insurance the insurer must undertake to immediately notify the responsible Bar, and also the Federal Ministry of Justice where Rechtsanwälte at the Federal

Supreme Court are concerned, of the commencement and the end or termination of the contract of insurance and of any amendment to the contract of insurance that negatively affects the prescribed coverage. Upon application, the Bar shall provide information regarding the name and address of the Rechtsanwalt's professional indemnity insurance as well as regarding the insurance number to third parties wishing to assert damage claims, insofar as the Rechtsanwalt has no overriding legitimate interest in the non-disclosure of this information; this also applies when admission to the Bar has expired.

(7) The competent authority as defined by § 158c para. 2 of the Insurance Contract Act (Gesetz über den Versicherungsvertrag) is the Bar.

(8) The Federal Ministry of Justice shall have powers to set a different minimum coverage by way of statutory order with the approval of the Upper House of Parliament (Bundesrat) after seeking the opinion of The German Federal Bar, should this be necessary in order to ensure adequate protection for the injured parties in changed financial circumstances.ö

[Translation as available at the Homepage of the German Federal Bar Association, http://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/brao_stand_1.6.2011_englisch.pdf]

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?

As already mentioned in Section 4.2, German ethic rules do not provide for a professional duty equivalent to the obligation stipulated in Guideline 5 of the IBA Guidelines on Party Representation. Consequently, there is no provision for a sanction in case of breach of such duty corresponding to Guideline 6 of the IBA Guidelines.

Moreover, Guideline 27 of the IBA Guidelines finds no equivalent provision in German ethic rules. This is due to the fact that Guideline 27 refers to the remedies

provided by Guideline 26 which themselves find no equivalent in German ethic rules.⁵¹

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?

Please see 9.1 .

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?

According to Guideline 11 of the IBA Guidelines a party counsel is obliged to actively prevent witnesses or experts from the dissemination of untruths and even to take positive measures if he later discovers that witness or expert statements are false. However, § 43a para. 3 BRAO only prohibits the conscious dissemination of untruths by the *Rechtsanwalt* himself. German ethic rules do not formulate a duty to stop other persons (eg. witnesses or experts) to disseminate the untruths or to correct there false declarations.⁵² Hence, Guideline 11 of the IBA Guidelines is more severe than the comparable ethic rules provided in German law.

In contrast, the sanctions for professional misconduct foreseen by Guideline 26 of the IBA Guidelines are much softer than the sanctions provided by their local counterpart, the German BRAO. The latter provide for heavy sanctions such as a caution (*Warnung*), admonishment (*Verweis*), fines of up to EUR 25,000.00, exclusion of the counsel from the bar association for a certain period of time (1-5 years) and exclusion of the counsel from the advocacy (occupational ban).⁵³ This is, of course, due to the fact that a bar association has the authority to impose disciplinary sanctions on their members whereas an Arbitral Tribunal lacks such competence.

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.

As indicated above in Section 9.3, the sanctions provided by the German ethic rules are much more severe than the remedies for misconduct foreseen in Guideline 26 of the IBA Guidelines. In this respect, it has to be highlighted that the remedies for misconduct foreseen in Guideline 26 (b) and (c) are rather aimed to discipline the party than the party counsel. German local ethic rules do not provide for comparable disciplinary measure directed to the client.

⁵¹ see Section 8.1.

⁵² *Gaier/Wolf/ Göcken*, Commentary on lawyers professional law, Carl-Heymanns Verlag Cologne, 2010, § 43a, marginal no. 72, p.501.

⁵³ see Section 1.2.