

Ethics and Role of Counsel in International Arbitration

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National Report of Sweden

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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?

The statutory basis for the conduct for the legal profession in Sweden can be found in the Code of Judicial Procedure. Chapter 8, section 4, of the Code of Judicial Procedure provides that in his practice, a member of the Bar must observe the professionals ethics (Sw. God Advokatsed).

The professional ethics are expressed in the rules and regulations of the Swedish Bar Association, more exactly in the Charter of the Swedish Bar Association and in the Code of Professional Conduct for Members of the Swedish Bar Association (the Code of Professional Conduct) (together the Swedish ethics rules). The Code of Professional Conduct is the most essential regulation for the legal profession in Sweden.

Other principles that ought to guide advocates in their work are set out in the charter adopted in 2006 by the European law societies of the Council of Bars and Law Societies of Europe (CCBE), i.e. *'The Charter of Core Principles of the European Legal Profession'*. These rules are always applicable when advocates working cross-border.

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 responsibility to supervise advocates lies with the Bar Association. The Board of the Swedish Bar Association and its Disciplinary Committee are the authorities competent to enforce the above identified rules. According to Chapter 8, Section 6, of the Code of Judicial Procedure, the Board and the Committee must supervise that advocates, in court litigations and in their other activities, satisfy the duties imposed upon them.

The Board of the Bar Association has overall responsibility for matters falling within the Bar association's mandate, whilst the Disciplinary Committee is responsible for disciplinary proceedings against members of the Bar. The Committee consists of eleven members, of whom three are not advocates but public representatives appointed by the Government.

A complaint against an advocate may be brought by the client or any other person involved in the matter to which the complaint relates. The Board of the Bar Association may also initiate disciplinary proceedings against an advocate.

If an advocate does not observe the ethical rules, disciplinary sanctions, or in some cases even criminal sanctions, can be brought against him or her. If the Disciplinary Committee finds that an advocate is in violation of the ethical rules, it has four sanctions at its disposal (in order of severity):

- Disbar the advocate;
- Issue the advocate a warning in combination with a monetary penalty to the Bar Association;
- Issue the advocate a warning; or
- Issue the advocate a reminder.

If the Disciplinary Committee finds that an advocate in his or her practice has intentionally committed a wrongful act or otherwise acted dishonestly, it should, according to Chapter 8, Section 7, of the Code of Judicial Procedure, disbar the advocate. If the committee finds that the advocate has neglected his or her professional responsibilities, it may issue the advocate a warning or a reminder. However, if there are aggravating circumstances, the Disciplinary Committee may disbar the advocate. An advocate who is issued a warning may also, if there is special reason, be ordered by the Disciplinary Committee to pay a monetary penalty to the Bar Association. Instead of issuing an advocate a reminder, the Disciplinary Committee may, if it considers this to be sufficient, express the opinion that the advocate has acted inappropriately.

In addition, if an advocate breaches the duty of confidentiality, criminal sanctions can be brought against him or her.

If an advocate is disbarred by a decision of the Disciplinary Committee or the Board of the Bar Association, he or she can, according to Chapter 8, Section 8, of the Code of Judicial Procedure, appeal the decision to the Supreme Court. Decisions resulting in other sanctions than disbarment can be appealed to the Supreme Court only by the Chancellor of Justice.

There are two major differences between the Swedish ethics rules and the IBA Guidelines on Party Representation in International Arbitration (hereafter the “IBA Guidelines”) with regard to the remedies. First, the remedies in the IBA Guidelines are directed towards the parties while the remedies in the Swedish ethics rules are directed towards the counsel. Second, according to the IBA Guidelines the Tribunal is responsible for supervising that the parties and their counsel abide by the IBA Guidelines whilst according to the Swedish ethics rules the Bar Association is responsible for the supervision of the ethical rules.

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 regulations identified under Section 1.1 above do not specifically address the conduct of counsel in international arbitration.

However, according to Section 6(4) of the Code of Professional Conduct the provisions regarding the relationship to the court apply also to proceedings before authorities other than the courts. In the commentary to the provision it is stated that even though arbitration is not generally covered by the provisions in the Code of Professional Conduct, the rules ought to apply also in relation to arbitration.¹

The Swedish ethics rules are applicable to counsel in all their work, also when working abroad.² Hence the Swedish ethics rules are applicable also to counsel 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 Code of Professional Conduct does only apply to members of the Swedish Bar Association. Only advocates can be members of the Swedish Bar Association and use the title Advocate (*Sw. Advokat*). A lawyer can only be admitted to the Bar Association if he is employed by a law firm set up by advocates (i.e. members of the Bar). Thus, in-house counsel is not permitted to be members of the Swedish Bar Association. If an advocate decides to leave a law firm set up by advocates and start to work at a law firm set up by lawyers who are not members of the Bar Association or as an in-house counsel, he has to apply for resignation from the Bar Association and can no longer use the title advocate.

Consequently, the rules described in this report are applicable only to Advocates and indirectly, to their associates and staff. The rules are not applicable to lawyers in general.

¹ The Bar Association's Commentary to Section 6(4) of the Code of Professional Conduct.

² See the preamble to the Swedish Code of Professional Conduct.

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?

There are no decisions issued by the Board of the Swedish Bar Association or the Disciplinary Committee which pertain to the conduct of counsel in international arbitration proceedings.

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?

In Sweden, no decision that addresses and/or refers to the IBA Guidelines has been issued yet.

It can however be mentioned that the Swedish Supreme Court has referred to the IBA Guidelines on Conflict of Interest in International Arbitration when assessing issues regarding conflict of interest in challenge proceedings (NJA 2007 p. 841). This may indicate that also the IBA Guidelines on Party Representation may be used as a source of inspiration by the Swedish courts.

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 principal responsibility of an advocate is to make every effort to act in the best interest of the client, i.e. to be truthful and loyal to the client. However, an advocate must not act in violation of valid laws or good advocate conduct. Furthermore an advocate should be unbound and independent of the central government so as to act in the best interest of the client in public and civil matters.³

The Swedish ethics rules also provide for duties of counsel towards the client, the opposing party and the court.

Towards the client, the advocate has a number of duties. The most important duties towards the client is the duty of confidentiality⁴, the duty to exercise discretion in respect of client matters, the duty to keep the client informed of what

³ Section 1 of the Code of Professional Conduct.

⁴ See article by Henrik Fieber and Minna Sjöstrand in *Professional Secrecy of Lawyers in Europe*, Compiled by the Bar of Brussels, 2013, Cambridge University Press.

transpires in the accomplishment of the mandate, the duty not to have a conflict of interest and resign would a conflict of interest arise, the duty not to have any economic transactions with a client or own shares in a client's enterprise, the duty to have liability insurance and lastly the duty to charged the client a reasonable fee.⁵

Under the Swedish ethics rules, the advocate also has duties towards the opposing party. One of these duties are that an advocate must not seek to promote the client's cause by taking improper measure in relation to the opposing party. Furthermore, an advocate must not take legal action against an opposing party unless the opposing party is given reasonable time to consider the client's claim and to reach an amicable settlement. Moreover, an advocate may not, as a general rule, in the course of a legal proceeding submit evidence of circumstances which are disparaging to the opposing party or make offensive or disparaging statements about the opposing party. Also, an advocate must not mislead the opposing party by making statements about a factual circumstance or the content of legal rule which the advocate knows are inaccurate. If the opposing party retains an advocate, all negotiations in the matter concerned shall be carried out with and all communications sent to that advocate. At last, an advocate may not, without the consent of the opposing party, disclose an offer of settlement made by the opposing party in legal proceedings.⁶

At last a Swedish advocate also has duties towards the court. These duties are considered applicable also in relation to a tribunal in arbitration.⁷ First, an advocate is obliged to observe the requirements of the Code of Judicial Procedure and what any other procedural statutes require. In arbitration this may be interpreted to mean that the advocate is obliged to observe the applicable arbitration rules. Furthermore, an advocate must be properly acquainted with the matter and pursue the matter with such care as the proper administration of justice requires. Also, an advocate shall ensure that a court order is observed or an inquiry responded without delay. If the advocate's mandate is terminated the advocate is obliged to inform the court thereof without delay. Moreover, an advocate must not make statements to the court which the advocate knows are false nor contest that which the Advocate knows to be true. Lastly, an advocate must not exercise undue influence upon a witness or someone else testifying at Court.⁸

⁵ Section 2(1)-2(8) and Section 3(1)-3(4) of the Code of Professional Conduct.

⁶ Section 5(1)-5(7) of the Code of Professional Conduct.

⁷ The Bar Association's Commentary to Section 6(4) of the Code of Professional Conduct.

⁸ Section 6(1)-6(3) of the Code of Professional Conduct.

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?

There are no such limitations under the Swedish ethics rules.

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.

Counsel in international arbitration proceedings are normally remunerated by legal fees paid by the party who has retained the counsel. The legal fees in Sweden are often based on numbers of hours worked.

The advocate has discretion to decide upon a suitable fee. However, the advocate's discretion is limited by the requirement in the Code of Professional Conduct that the fee charged by an Advocate must be reasonable.⁹ The legitimacy of a fee is dependent on a multitude of factors, such as what has been agreed with the client, the extent of the mandate, its nature, complexity and importance as well as the advocate's expertise and the result of the work.¹⁰ Furthermore, an advocate may only receive compensation in the form of customary means of payment, i.e. cash, cheques, bank drafts and similar.¹¹

Contingency fees are generally prohibited in Sweden. According to the ethic rules an advocate may not, except for special cause, enter into a fee agreement with a client which gives right to a quota of the result of the mandate.¹² This relate to the fundamental principle that an advocate should be independent of any interest which may affect the prospect of fulfilling his professional obligations.

However, special reasons for allowing an agreement that entitles an advocate to a quota of the result are for an example when an advocate is representing the interest of a collective action or engaged in a cross-border mandate the handling of which is required outside of Sweden.¹³ A contingency fee was allowed in one Decision by the Disciplinary Committee where a Swedish law firm cooperated

⁹ Section 4(1)(1) of the Code of Professional Conduct.

¹⁰ Section 4(1)(2) of the Code of Professional Conduct.

¹¹ Section 4(1)(3) of the Code of Professional Conduct.

¹² Section 4(2)(1) of the Code of Professional Conduct.

¹³ The Bar Association's Commentary to Section 4(2)(1) of the Code of Professional Conduct.

with a US law firm in a dispute in the US. The US law firm had agreed on a contingency fee and the Disciplinary Committee came to the conclusion that also the Swedish advocates were allowed to use a contingency fee in this case.¹⁴ Another exception is the situation when a client without a quota agreement finds it difficult to get access to justice.¹⁵ The rule conforms with CCBE's Directives on good Advocate Conduct within the EU.

Success fees are however allowed under the Swedish ethics rules as long as the fee is reasonable.¹⁶

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 topical and often discussed among lawyers in Sweden but it is not common in practice. There are so far no known cases in Sweden where a professional third party funder has been involved.

However, it is common that a claim is funded by an insurance provider, an affiliated company or pursued by a special vehicle company set up for the specific case.

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 Code of Professional Conduct does neither expressly nor implicitly address third party funding in international arbitration. Neither do any other laws, rules or case law in Sweden address third party funding.

As mentioned under Section 2.1 above, one of the fundamental principles of an advocate under the Swedish ethics rules, is to make every effort to act in the best interest of the client, i.e. to be loyal to the client. This principle is of great importance for an advocate when a third party funder is involved. In such case the advocate needs to consider carefully who his client actually is and to whom he owes his duty of loyalty and confidentiality for instance.

¹⁴ Claes Peyron, *Advokatetik; en praxisgenomgång*, 2010, p. 63.

¹⁵ The Bar Association's Commentary to Section 4(2)(1) of the Code of Professional Conduct.

¹⁶ Claes Peyron, *Advokatetik; en praxisgenomgång*, 2010, p. 63-64.

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?

As mentioned in Section 3.3. above, the Swedish ethics rules does not address third party funding whatsoever. Consequently, there is no rule imposing a duty for counsel to disclose third party funding on his client's side to the opposing party or the arbitral tribunal.

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

There are no rules in Sweden regarding funding from a third party, nor regarding professional funders or other third party funders such as affiliated companies or a specific vehicle set up for the specific case. However, there are no legal barriers in Sweden to pursue a claim through a special vehicle set up for the specific case. While third party funding is unknown and has so far not been declared to exist publicly in any case in Sweden, funding by a special vehicle is quite common in Sweden.

Such set ups has however been criticized by some Swedish lawyers since it may result in a situation where it is impossible for the respondent to receive compensation for its legal costs if the plaintiff's claim is dismissed. According to case law, the corporate veil may be pierced in relation to specific vehicles set up for a specific case and the board members may be liable to pay the counterparty's legal costs (RH 2011:24, see also the dissenting opinion in Supreme Court case NJA 2006 p. 420).

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

As mentioned above, there are no rules in Sweden regarding funding from a third party. The same applies to insurance providers. Hence, there are no differences in the legal regulation of third party funders or insurance providers in Sweden.

However, while third party funding is unknown and has so far not been declared to exist publicly in any case, funding by insurance providers is very common in Sweden.

Because of this, funding by a professional third party funder is generally viewed skeptically in Sweden.

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.

The doctrines of maintenance and champerty are unknown in Sweden and are not viewed as an issue with regard to third party funding.

4. Conflicts of Interest

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

According to the Swedish Code of Conduct an Advocate must not accept a case and must resign from an already accepted case if there exists a conflict of interest or a significant risk of a conflict of interest. A conflict of interest exists if:

1. the Advocate assists or has previously assisted the opposing party in the same matter,
2. the Advocate is assisting another client in the same matter and the clients have conflicting interests,
3. the Advocate is assisting another client in a closely related matter and the clients have conflicting interests,
4. there is a risk that knowledge covered by the Advocate's duty of confidentiality may be of relevance in the matter,
5. the Advocate or a close relative has an interest related to the matter which is contrary to that of the client, or
6. the existence of any other circumstance which prevents the Advocate from acting in the client's best interests in respect of the mandate.¹⁷

In addition, a conflict of interest for someone else in the advocate's firm or in a shared office where an advocate practices, normally constitutes a conflict of interest also for the advocate.¹⁸

As mentioned under Section 1.3 above, the Swedish ethics rules are applicable to advocates in all their work, also when working abroad, hence the rules are considered applicable also to counsel in international arbitration. Consequently, counsel who are advocates (i.e. members of the Swedish Bar Association) adhere to this identified standard also in international arbitration cases.

¹⁷ Section 3(2) of the Code of Professional Conduct.

¹⁸ Section 3(5) of the Code of Professional Conduct.

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

There are rules in the Swedish ethic rules with equivalent implication as Guideline 5 of the IBA Guidelines. As mentioned under section 4.1 above, an advocate must not accept a case and must resign from an already accepted case if there exists a conflict of interest or a significant risk of a conflict of interest. If the counsel has a relationship to the arbitrator in the already ongoing arbitration there would be a conflict of interest and the counsel would not be allowed to accept the case.

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?

Only in exceptional cases can consent from the client affect an advocate's ability to accept a case even though a conflict of interest is assumed to exist. First of all, express consent must be possible to obtain without setting aside the Advocate's duty of confidentiality. Second, the Advocate must make sure that the client's loyalty interest is not impaired.¹⁹

According to the Comments to the Code of Professional Conduct it is, in practice, fairly common for an advocate to for example request the opinion of a corporate client as to whether the advocate may accept a mandate against the company or another group entity. If in such case the client declares not to have any objections thereto, such declaration is a material element in the advocate's analysis as to whether the client's loyalty interest is impaired by the advocate accepting the mandate.²⁰

¹⁹ Section 3(3)(2) of the Code of Professional Conduct.

²⁰ The Bar Association's Commentary to Section 3(3)(2) of the Code of Professional Conduct.

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

Chinese walls are not at all accepted in Sweden. Consequently it is not accepted with regards to international arbitration proceedings either.

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?

If the opposing party retains an advocate, the counsel are not allowed make direct contact with the opposing party. All negotiations in the matter shall be carried out with, and all communications sent to, that advocate.²¹ This rule applies also if the opposing party retains a legally educated external representative that is not an advocate.²²

There are however exceptions. An advocate is allowed to make direct contact with the opposing party (i) where the action must be brought directly against the opposing party or (ii) otherwise, for special reasons, it is necessary.

However, in such case any of these two exceptions are applicable; the advocate representing the opposing party must be notified.

It could also be mentioned that under the Swedish ethic rules, when in contact with an opposing party who does not have a legal representative, the advocate, where appropriate, should inform the opposing party that it is not part of the advocate's mandate to safeguard the opposing party's interest and advise him to retain an advocate.²³ This rule expresses the duty of an advocate to show consideration for the opposing party.

²¹ Section 5(6) of the Code of Professional Conduct.

²² The Bar Association's Commentary to Section 5(6) of the Code of Professional Conduct.

²³ Section 5(5) of the Code of Professional Conduct.

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 Swedish ethics rules do not contain any provisions regulating ex-parte communication.

In Sweden, ex-parte communication is not regarded as an ethical issue but rather an issue for the arbitrators since their impartiality may be questioned in case of ex-parte communication.

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.

According to section 8 subsection 2 item 3 of the Swedish Arbitration Act, where the arbitrator has taken a position in the dispute, as an expert or otherwise, or has assisted a party in the preparation or conduct of his case in the dispute, such circumstance shall always be deemed to diminish confidence in the arbitrator's impartiality and he shall be discharged.

According to a leading Swedish scholar a party is allowed to contact the prospective arbitrator in order to ask if he can undertake the assignment provided that the merits of the case are not discussed. A contact between a party and a prospective arbitrator may diminish confidence in the arbitrator's impartiality since the opposing party may get the justified impression that the party has received for him favorable answers in questions of importance for the dispute. As a consequence, an interview of a prospective arbitrator by a party imposes a risk that the arbitrator can be disqualified.²⁴

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?

An advocate must not exercise undue influence upon witness or someone else testifying at Court.²⁵ However, the advocate is free to contact such person to obtain information about the testimony of that person even where the person is called to testify by another party.²⁶

To actively seeks evidence is regarded to be included in an advocate's duty of care and often involves the advocate hearing witnesses of the opposing party.²⁷ However, the advocate must never put a witness under undue influence. There is no difference between own witnesses and opposing witnesses.²⁸

²⁴ Stefan Lindskog, *Skiljeförfarande*, second edition, Norstedts Juridik AB, section 8-5.3.1.

²⁵ Section 6(3)(1) of the Code of Professional Conduct.

²⁶ The Bar Association's Commentary to Section 6(3)(1) of the Code of Professional Conduct.

²⁷ Claes Peyron, *Advokatetik – en praxisgenomgång*, 2010, p. 149.

²⁸ The Bar Association's Commentary to Section 6(3)(1) of the Code of Professional Conduct.

As described above under Section 1.4, the Swedish ethics rules apply only to advocate's, why there is a difference between outside counsel and in-house counsel also in this regard.

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

The limit as to what extent a counsel is allowed to get involved in the preparation of the written witness statement/expert report is set by the rule stating that the advocate must not exercise undue influence upon a witness or someone else testifying at court.²⁹ However, the Advocate is free to contact such person to obtain information about the testimony of that person even where the person is called to testify by another opposing party. This applies also to preparations of a witness or an expert for their testimony and to the drafting of the witness statements and expert reports.³⁰ What actions should be regarded as “*undue influence*” is debated among lawyers in Sweden. In practice, the limit of what is regarded to be *undue influence* is set rather high and it is common for advocates in Sweden to assist in drafting of the witness statements and also to make comments on expert reports.

In this regard it can also be mentioned that according to the Swedish ethics rules, an advocate must never submit such factual information that he or she knows is inaccurate nor must an advocate contest such information that he or she knows to be true.³¹ This means that an advocate is not allowed to invoke a witness statement or an expert report if he knows they are inaccurate.³²

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 6.2 above.

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?

²⁹ Section 6(3)(1) of the Code of Professional Conduct.

³⁰ The Bar Association's Commentary to Section 6(3)(1) of the Code of Professional Conduct.

³¹ Section 6(2)(1) of the Code of Professional Conduct.

³² The Bar Association's Commentary to Section 6(2)(1) of the Code of Professional Conduct.

Even though the IBA Guidelines are more detailed than the provisions in the Swedish ethics rules the meaning of the IBA Guidelines regarding witness and experts and the Swedish ethics rules are by and large the same.

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 above, an advocate must not make statements to the court which the Advocate knows are false nor contest that which the advocate knows to be true.³³ An advocate must never submit such factual information that he or she knows is inaccurate nor must an advocate dispute such information that he or she knows is accurate. If the client submits inaccurate information or dispute information that is accurate, the advocate must never refer to or address the court on behalf of his or her client based on such information or action.³⁴

Examples of actions that are prohibited in this respect are when an advocate knowingly calls a witness who will commit perjury or acts in bad faith and submits or refers to forged written evidence or refers to inaccurate factual particulars or disputes accurate factual particulars regardless of who entered them into the legal procedure.³⁵

This regulation corresponds to guideline 9-11 of the IBA Guidelines.

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?

As mentioned above, an advocate must not make statements to the court which the advocate knows are false nor contest that which the Advocate knows to be true.³⁶ The regulation means that an advocate must never submit such factual information that he or she knows is inaccurate nor must an advocate dispute such

³³ Section 6.2.1 of the Code of Professional Conduct.

³⁴ The Bar Association's Commentary to Section 6(2)(1) of the Code of Professional Conduct.

³⁵ The Bar Association's Commentary to Section 6(2)(1) of the Code of Professional Conduct.

³⁶ Section 6(2)(1) of the Code of Professional Conduct.

information that he or she knows is accurate. If the client submits inaccurate information or dispute information that is accurate, the advocate must never refer to or address the court on behalf of his or her client based on such information or action.³⁷

With respect to legal submission to the Tribunal on the other hand, an advocate may argue any construction of a law, case law or any other authority that he or she believes is reasonable.

Under the Code of Professional Conduct, the advocate is only obliged not to make statements to the Court which the advocate *knows* are false. Actual knowledge of the false nature is required. Merely a suspicion that it might be false is therefore not sufficient to oblige the advocate not to make the statement.³⁸

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

There is only one provision in the Swedish ethics rules with regard to production of documents. This provision provides that an advocate may not be complicit in the suppression or distortion of evidence.³⁹ It follows from this regulation that an advocate may not in any way contribute to the suppression or distortion of evidence. It is however not likely that the provision can be interpreted to oblige the advocate to actively make sure that relevant documents are preserved which is required according to the IBA Guidelines.

It should also be noted that according to the same provision, an advocate is not obliged to produce or invoke evidence or adduce facts detrimental to the client unless required to do so at law. An advocate is considered to be required to do so at law if the court orders production of documents.⁴⁰

³⁷ The Bar Association's Commentary to Section 6(2)(1) of the Code of Professional Conduct.

³⁸ The Bar Association's Commentary to Section 6(2)(1) of the Code of Professional Conduct.

³⁹ Section 6(2)(2) of the Code of Professional Conduct.

⁴⁰ The Bar Association's Commentary to Section 6(2)(2) of the Code of Professional Conduct.

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?

The Swedish ethics rules do not make a distinction between submissions of facts and submissions of evidence like in Guidelines 9-11 of the IBA Guidelines. The meaning of the Swedish ethics rules and the Guidelines 9-11 of the IBA Guidelines are however the same. There are according to my opinion no actual discrepancies between the Swedish ethics rule and Guidelines 9-11.

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

Production of documents is not very common in Sweden and is clearly not used to the same extent as in for an example the US and the UK. It is however becoming more and more common.

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.

As mentioned under section 1.2 above, unlike the IBA Guidelines, the remedies in the Swedish ethics rules are designed as disciplinary sanctions directed towards the counsel. Any ethical misconduct by a counsel will therefore affect the counsel and not the party in the proceedings.

Nevertheless, there may of course be situations where a counsel's ethical misconduct may cause the party damage, like for an example if the advocate has to resign from the mandate. Such claim must however be brought by a party in the courts as a civil claim for damages. The Bar Association has no authority to award damages. The legal basis for claims for damages is decided in accordance with general principles on contractual liability for damages.

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

Under the Swedish ethics rules, an advocate is obliged to purchase liability insurance and the advocate is also obliged to maintain such insurance cover by complying with the applicable policy terms and conditions.⁴¹

The provision also contains a minimum coverage requirement, the insurance *must be appropriate to the advocates practice*. This requirement means that the insurance cover held by an advocate must be well suited to his or her legal operation, i.e. an advocate practicing business law normally need a larger coverage.⁴²

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 mentioned above, the rules forbidding ex-parte communication does not have an equivalent in the Swedish ethics rules.

Furthermore, the Swedish ethics rules does not contain any provisions regarding what the counsel may offer to pay a witness or expert. However, the obligation under the Swedish ethics rules not to exercise undue influence upon a witness or someone else testifying at Court in practice means that the counsel only may pay the witness reasonable expenses and the expert reasonable expenses and fees.

Moreover, the guidelines regarding production of documents in the IBA Guidelines impose more far-reaching duties on counsel than the Swedish ethics rules.

Lastly, as mentioned above, Guidelines 26-27 of the IBA Guidelines do not have a direct equivalent in the Swedish ethics rules. According to the Swedish ethics rules the remedies are directed toward the counsel and not the party. According to the Swedish ethics rules, the court or tribunal may not draw any negative inference in assessing the evidence or consider the counsel's misconduct in apportioning the costs. Furthermore, according to the Swedish ethics rules, the Bar Association is responsible for supervising that the parties and the counsel abide by the ethical rules and not the court or the tribunal as in the IBA Guidelines.

⁴¹ Section 2(6) of the Code of Professional Conduct.

⁴² The Bar Association's Commentary to Section 2(6) of the Code of Professional Conduct.

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

See Section 9.1 above.

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

See section 9.1 above.

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

See section 1.2 and 9.1 above.