

Ethics and Role of Counsel in International Arbitration

International Arbitration Commission

Prague, 2014 – Working Session 08

National Report of Switzerland

Barbara Lautenschlager, LL.M. / Simone Hofbauer, LL.M.

Derrer Satmer Hunziker
Attorneys at law
Dufourstrasse 101
CH-8008 Zurich, Switzerland
T +41 44 385 50 30
bl@dsh-law.ch

Barandun Hess von Graffenried
Attorneys at law
Seefeldstrasse 45
CH-8034 Zurich, Switzerland
T +41 44 266 56 56
simone.hofbauer@bhvg.ch

General Reporters:

Simone Stebler, Bär & Karrer AG, Zurich, Switzerland
Katriina Kuusniemi, Roschier, Stockholm, Sweden
Damien Devot, Meyer Fabre Avocats, Paris, France

27 February 2014

Questionnaire

1. Applicable Ethics Rules

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

Switzerland distinguishes between the legal professions of lawyers, attorneys-at-law and in-house counsel. It considers a lawyer to be a person who graduated from law school without having taken the bar exam. An attorney-at-law is a lawyer who passed a bar exam after graduation from law school. Usually, only attorneys-at-law are entitled to represent parties in court (with a few minor exceptions). In-house counsel are lawyers or attorneys-at-law who are employed by a person not registered in a cantonal registry, i.e. the employer is not an attorney-at-law or a law firm. Hence, in-house counsel are not entitled to register in a cantonal register and may thus not represent any parties in court, even if they passed the bar exam.

Local ethics rules regulating the conduct for the legal profession are set forth in various statutory laws and private regulations.¹ Predominantly, these provisions stipulate ethics rules for attorneys-at-law.

1.1.1 Federal Public Law

On 1 January 2002, Switzerland enacted the Swiss Federal Act on the Freedom of Attorneys-at-law to Provide Services (FAA). The FAA is a federal public law regulating the legal profession of attorneys-at-law in Switzerland who are entitled to represent parties in Swiss courts, provided they are registered in a cantonal registry for attorneys-at-law or admitted to the bar in an EU or EFTA member state.² The FAA exclusively regulates the professional obligations of attorneys-at-law which encompass ethics rules,³ such as rules on i) the professional attorney secrecy,⁴ ii) the prohibition of conflicts of interest,⁵ as well as on iii) the independence of attorneys-at-law from third parties.⁶

¹ The ethics rules set forth in these various statutory laws and private regulations may overlap in regard to the counsel's conduct regulated. The proceedings and competent authorities deciding upon whether or not counsel breached the ethics rules, however, differ from one another.

² See Arts 2 and 6 FAA.

³ See Kaspar Schiller, *Schweizerisches Anwaltsrecht*, Schulthess 2009, N. 57; decisions of Swiss Federal Supreme Court 131 I 228; 130 II 275.

⁴ Art. 13 FAA.

⁵ Art. 12(c) FAA.

⁶ Art. 8(1)(d) and Art. 12(b) FAA.

The Swiss Criminal Code also sanctions the disclosure of a client's secret by an attorney-at-law.⁷ Further provisions regulating the legal profession may be found in various statutory laws on procedures, namely in the Swiss Code of Civil Procedures, the Swiss Code on Criminal Procedures, the Swiss Federal Law on Administrative Procedure, and in the Swiss Federal Supreme Court Act.⁸

1.1.2 Private Rules on the Professional Conduct of Attorneys-at-law

Attorneys-at-law - admitted to the bar and registered in one Swiss canton - who are active members of a cantonal bar association are further subject to the rules of professional conduct (“*Standesregeln*”) enacted by the Swiss Bar Association (Code of Conduct).⁹ The Swiss Bar Association is a private legal entity organized in the legal form of an association.¹⁰ In contrast to the professional obligations of attorneys-at-law in the FAA, the rules set forth in the Code of Conduct are private rules applicable to the members of the Swiss Bar Association only.¹¹

1.1.3 Swiss Private Contract Law

The contractual provisions on mandate set forth in the Swiss Code of Obligations (CO) govern the attorney-client relationship.¹² These private contractual provisions also contain ethics rules.¹³ In contrast to the FAA and the Code of Conduct, these provisions apply to lawyers, in-house counsel and attorneys-at-law alike.

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 answer to these questions varies depending on what rule or regulation has been violated out of the rules identified in *1.1. above* and by whom (e.g. a lawyer, an in-house counsel or an attorney-at-law).

⁷ See Art. 321 Swiss Criminal Code (SR 311.0). Art. 321 Swiss Criminal Code applies irrespective of the fact whether an attorney-at-law is registered with a cantonal registry or not (see Philipp Ritz, *Die Geheimhaltung im Schiedsverfahren nach schweizerischem Recht*, Mohr Siebeck, Tübingen 2007, p. 155 *et seq.*).

⁸ See for example 1.2.4 and fn. 23 below.

⁹ See Art. 3 of the articles of association of the Swiss Bar Association in connection with Art. 6(1) and (2) FAA.

¹⁰ See Arts 60 *et seqq.* Swiss Civil Code (SR 210); Walter Fellmann, *Anwaltsrecht*, Bern 2010, N. 944.

¹¹ These rules are harmonized within Switzerland and apply to all active members of any cantonal bar association, since all cantonal bar associations adhered to the Swiss Bar Association. See *1.2.2. below*.

¹² Arts 394 *et seqq.* of the Swiss Code of Obligations (SR 220) form part of the Swiss private statutory law.

¹³ In particular, the attorney's duty of care and diligence to preserve and protect the client's interests and refrain from any action that could impair the client's interests is a fundamental principle of Swiss mandate law which encompasses ethics rules.

1.2.1 Breach of Professional Obligation in the FAA

A party's counsel who violates a professional obligation set forth in the FAA may be subject to disciplinary measures, provided that counsel is subject to the FAA.¹⁴ Disciplinary proceedings under the FAA are regulated by the individual cantons, which also determine the authority competent to order any disciplinary measures.¹⁵ In principle, the cantonal supervisory body acts upon a notice/complaint or upon its own detections of circumstances that give rise to reasonable suspicion of a violation of professional obligations by an attorney-at-law. Federal and cantonal courts and government agencies are obliged to notify any potential violations of professional obligations by an attorney-at-law to the competent cantonal supervisory body.¹⁶ Whether clients or other third parties, such as the opposing party or opposing counsel, may be a party to these disciplinary proceedings before the individual cantonal supervisory bodies depends on the cantonal law.¹⁷ However, clients or other third parties have no standing to file a challenge with the Swiss Federal Supreme Court of the final cantonal decision on disciplinary measures against an attorney-at-law.¹⁸

The potential remedies available under the FAA are the following:¹⁹

- Admonishment
- Reprimand
- Fine up to CHF 20'000
- Temporary prohibition to exercise profession of an attorney-at-law in Switzerland up to two years
- Permanent prohibition to exercise profession of an attorney-at-law in Switzerland

1.2.2 Breach of Code of Conduct

Any violations of the Code of Conduct by its members are adjudicated and, if required, sanctioned by internal bodies of the respective association.²⁰ Pursuant to

¹⁴ The professional obligations of attorneys-at-law set forth in Art. 12 FAA are mandatory (see Walter Fellmann, in *Kommentar zum Anwaltsgesetz*, Fellmann/Zindel (eds), Schulthess 2011, 2. Ed., N. 27 to Art. 12 FAA (hereinafter cited as FAA-author, N. to Art.). Further refer to *I.I.I. above* and see Fellmann, *Anwaltsrecht*, N. 609 *et seqq.*

¹⁵ See Art. 34(1) FAA. For violations of the professional obligations of attorneys-at-law in Switzerland refer to Art. 17 FAA in connection with Art. 14 FAA.

¹⁶ See Art. 15 FAA.

¹⁷ Fellmann, *Anwaltsrecht*, N. 618.

¹⁸ Such a final cantonal decision must be rendered by a cantonal judicial body (as opposed to an administrative or governmental body; see decision of the Swiss Federal Supreme Court 133 II 468, 471 *et seq.* cons. 2; 132 II 250, 253 *et seqq.* cons. 4.1-4.4; 129 II 297, 300 *et seqq.* cons. 2.1.-2.3.; 2C_122/2009 of 22 September 2009, cons. 3.

¹⁹ See Art. 17(1) FAA.

Art. 31 Code of Conduct, the cantonal bar associations are competent to sanction any misconduct of a member under these rules. The local bar associations usually vest the power to sanction any misconduct by its members with specific internal commissions or courts of professional conduct. These internal bodies become active upon the notice of the executive board or opposing counsel, upon the complaint by a third party such as the client or opposing party, or *ex officio*.²¹

The remedies available to these internal commissions or courts of professional conduct depend on the code of conduct of each local bar association. Potential remedies for an attorney's breach of the Code of Conduct may be the following:

- Admonishment
- Reprimand
- Fine
- Request to executive board of association to expel attorney-at-law
- Notice to cantonal supervisory body

1.2.3 Breach of Ethics Rules encompassed in the Swiss Private Contract Law

A client is entitled to the common contractual remedies, such as indemnification for damages, in case of a breach of the ethics rules encompassed in the Swiss mandate law by the attorney. Due to the contractual nature of such remedy, only the client has standing to file a claim for damages against the attorney in civil courts, in general. Third parties may have standing to file a contractual claim against the attorney under very limited circumstances only.²²

1.2.4 Differences in remedies set forth by local ethics rules and Guidelines 26-27 of the IBA Guidelines

Guideline 26(c) of the IBA Guidelines expressly provides for the remedy to take the Party Representative's misconduct into consideration when deciding on the apportionment of the costs of the arbitration between the parties to the arbitration proceedings. The rules and regulations identified under *1.1. above* do not provide a similar remedy. However, certain procedural laws provide that "*unnecessary costs shall be borne by the person causing such cost*".²³ Based on such a provision, Swiss courts may under specific and very limited circumstances order a party's legal representative to bear certain or all costs of the proceedings. The demands on such circumstances are very high, though.

²⁰ See *1.1.2 above*.

²¹ See Fellmann, *Anwaltsrecht*, N. 967 with further references.

²² Fellmann, *Anwaltsrecht*, N. 1400 – 1402.

²³ See Art. 108 of the Swiss Code of Civil Procedure, Art. 417 of the Swiss Code of Criminal Procedure, and Art. 66(3) of the Swiss Federal Supreme Court Act.

The key difference however, lies in the fact that the authorities competent to sanction a breach of the local ethics rules identified in *1.1. above* are different from the authority deciding on the merits of the case.²⁴

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 local ethics rules do not specifically address the conduct of counsel in international arbitration, except for an explicit and implicit reservation for specific rules on arbitration with respect to contacts with witnesses or experts.²⁵ Nevertheless, these local ethics rules, in principle, apply to the conduct of counsel in international arbitration proceedings, if the counsel's domestic professional conduct is governed by the ethics rules identified under *1.1. above*.²⁶

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 local ethics rules do not apply to in-house counsel. The FAA expressly provides that attorneys-at-law who intend to register with a cantonal registry must be able to exercise the legal profession independently; they may only be employed by persons, who are registered in a cantonal registry of attorneys-at-law, or by law firms organized as legal entities.²⁷

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?

Our search did not identify any publicly available decisions in Switzerland relating to the conduct of counsel in international arbitration proceedings.

²⁴ See 9.4 below.

²⁵ See 6.1 and fn. 63 below.

²⁶ According to the Swiss Federal Supreme Court the mandatory professional obligations under the FAA extend to the 'entire' professional activities of the attorneys-at-law who are subject to the FAA, i.e. attorneys-at-law professionally representing clients in court (see decision of the Swiss Federal Supreme Court 131 I 223, cons. 3.4.; decision of the Swiss Federal Supreme Court of 23 October 2008 [2C_407/2008]; also see FAA-Fellmann, N. 6 to Art. 12). The same applies to the professional secrecy obligation under Art. 321 Swiss Criminal Code (see Ritz, pp. 155 and 151, cited in fn. 7 above). The Code of Conduct applies to the entire professional conduct of its members, which includes their conduct in international arbitration proceedings (see fn. 9 above). Moreover, the local contractual ethics rules (identified in *1.1.3. above*) apply to counsel in international arbitration, irrespective of the seat of arbitration or whether or not counsel is admitted to the bar or registered as attorney-at-law in Switzerland, provided that the mandate is governed by Swiss contract law.

²⁷ See Art. 8(1)(d) FAA; decision of the Swiss Federal Supreme Court of 7 September 2012 (2C_237/2011).

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?

As to our knowledge, no such decision has been issued in Switzerland up to date.

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?

According to the local ethics rules, the predominant duty of counsel in Switzerland is to protect the client's fundamental right to be heard in legal proceedings and always represent its client in the client's best interest.²⁸ Thereby, counsel also enables the judge to find the law and helps justice to be done. In this role attorneys-at-law are part of the public administration of justice.

2.1.1 Duties of Counsel towards the Client

It is the fundamental duty of counsel to advise and represent the client in the client's best interest.²⁹ Thereby, counsel has to exercise its profession with due diligence and care. This includes, among others, counsel's duty to inform and notify its clients, e.g. on counsel's principles of invoicing and its fees.³⁰ Counsel is further obligated to render an account of how counsel led the mandate, what measures were taken as well as of the accounting. The duty to safeguard its clients' interests prohibits counsel to untimely terminate the mandate without cause. Counsel also has a duty to keep in custody any assets entrusted by its clients and to return such assets (or documents) to its clients upon demand.³¹

Counsel is obligated to be and remain independent.³² In particular, counsel has to avoid any conflicts of interest.³³ The local ethics rules further prohibit counsel to engage in contingency fee arrangements, to participate in the profits of legal proceedings, and to undertake to waive its fees in the event of a negative outcome of the proceedings prior to the termination of the legal dispute.³⁴ Another

²⁸ See FAA-Fellmann, N. 2b and N. 16 to Art. 12 with further references in fn. 121-123.

²⁹ See Art. 12(a) FAA, Art. 398(2) CO. Also refer to FAA-Fellmann, N. 16 to Art. 12.

³⁰ Art. 12(i) FAA; Arts 18 to 21 Code of Conduct; Art. 398(2) Swiss Code of Obligations.

³¹ Art. 12(h) FAA, Art. 400(1) CO; Art 23 Code of Conduct.

³² Art. 12(b) FAA, Arts 2 and 10 Code of Conduct.

³³ Art. 12(c) FAA; Arts 11 to 14 Code of Conduct.

³⁴ Art. 12(e) FAA; Art. 19(2) and (3) Code of Conduct. Cf. however to *clause 3.1. below* in relation to the prohibition of pure contingency fee arrangements in international arbitration.

fundamental duty is counsel's professional secrecy obligation.³⁵ Finally, the local ethics rules require counsel to provide sufficient professional liability insurance.³⁶

2.1.2 Duties of Counsel towards the Arbitral Tribunal

As outlined *in 2.1. above*, the predominant duty of counsel is to represent and safeguard their clients' interest.³⁷ In line with Swiss case law, counsel shall respect and observe justice and the law and must not advocate the client's interest with lies and deception.³⁸ Attorneys may rely exclusively on legally admissible means when advocating their clients' interests. They shall further observe the required level of decency, avoid personal insult or bad-mouthing.³⁹ As stated above, the professional obligations of attorneys set forth in Art. 12 FAA are mandatory and govern the 'entire' professional activities of attorneys.⁴⁰ This includes attorneys' activities in international arbitration. We therefore conclude that the attorneys' duties under the FAA towards government and state courts in principle also apply towards the arbitral tribunal in international arbitration proceedings.

2.1.3 Duties of Counsel towards the Opposing Party and Opposing Party's Counsel

In Switzerland, counsel have a duty towards the opposing parties only in very specific exceptional situations, such as the willful taking advantage of the other party's helplessness against bona fide or in the event any other rule of law imposes such a duty on the attorneys-at-law.⁴¹

In contrast to the FAA, which does not provide any specific rules on the conduct of attorneys among each other, the Code of Conduct issued by the Swiss Bar Association generally obligates counsel to act fairly and treat their colleagues with respect. The Code of Conduct further obligates counsel i) not to submit in proceedings any documents or correspondence among colleagues which were marked as being confidential, ii) subject to the consent of the client, to notify a colleague on the acceptance of a mandate previously handled by said colleague, iii) to avoid direct contact with the opposing party unless opposing party's counsel agrees to or for good cause, iv) to notify their colleagues if they identify any potential breach of law or the Code of Conduct by their colleague, to attempt to

³⁵ Art. 13 FAA; Art. 15 Code of Conduct.

³⁶ See Art. 12(f) FAA.

³⁷ See FAA-Fellmann, N. 16 to Art. 12 with further references in fn. 121-123.

³⁸ Counsel are considered to be part of the administration of justice and shall thus not endanger the trust of the public in the rule of law (see Fellmann, *Anwaltsrecht*, N. 220 *et seq.* with further references, including to the Swiss Federal Supreme Court's decision of 4 Mai 2004 [2A.545/2003; cons. 3]).

³⁹ See Fellmann, *Anwaltsrecht*, N. 237 with references to decision of the Swiss Federal Supreme Court 131 IV 158 and decision by the Federal Supreme Court of 8 June 2007 (2C_97/2007) cons. 2.2-2.3.

⁴⁰ Cf. to fn. 14 and fn. 26 above. Also see decision of the Swiss Federal Supreme Court 130 II 276; decision of the Swiss Federal Supreme Court 131 I 223, cons. 3.4.; decision of Swiss Federal Supreme Court on 23 October 2008 (2C_407/2008 cons. 3.3.); FAA-Fellmann, N. 6 to Art. 12.

⁴¹ See Art. 12(a) FAA; Schiller, *Schweizerisches Anwaltsrecht*, N. 241.

amicably settle any disputes to this end, and to contact the competent bar association prior to initiating any legal or administrative proceedings, and finally v) to aim for an amicable settlement of mandates against colleagues, to notify the competent bar association prior to initiating any proceedings against colleagues, unless an amicable settlement is out of question or for lack of time.

At all times, counsel's duty to act in its clients' best interest prevails over counsel's duty towards its colleagues.⁴²

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 Switzerland, arbitral tribunals are not considered to be state courts, but qualify as private courts. Therefore, the local ethics rules do not limit the representation of parties in international arbitral proceedings to registered attorneys-at-law.⁴³

3. Remuneration of Counsel and Third Party Funding

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

In Switzerland, counsel in international arbitration proceedings are generally remunerated on the basis of an hourly fee agreed upon with the client. Flat fee arrangements may also occur. The local ethics rules do, however, limit the parties' freedom to agree on counsel's remuneration. Article 12(e) FAA expressly prohibits counsel to agree with the clients to participate in the profits of the legal proceedings prior to the end of the proceedings. In particular, counsel must not commit to waive payment in the event of a negative result of the proceedings. Art. 12(e) FAA further prohibits pure contingency fee arrangements with attorneys-at-law subject to the FAA. The arrangement of an incentive payment may though be permissible, provided that the hourly fee covers at least counsel's costs. The prohibition to agree on a pure success fee only applies to proceedings before authorities such as civil or criminal courts, criminal investigation, enforcement or administrative authorities.⁴⁴ Therefore, this prohibition does not apply to the party representation in international arbitration proceedings. However, it does of course apply in case of a request for interim measures in front of a Swiss state court

⁴² See Art. 24 Code of Conduct. See also Schiller, *Schweizerisches Anwaltsrecht*, N. 236.

⁴³ See Art. 2 FAA.

⁴⁴ FAA-Fellmann, N. 125 to Art. 12.

during arbitration proceedings or in the event an arbitral award is challenged before the Swiss Federal Supreme Court.

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 of international arbitration claims is a relatively new concept in Switzerland and thus not (yet) wide-spread.⁴⁵

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 local ethics rules do not address the issue of third party funding in international arbitration. In 2004, the Swiss Federal Supreme Court held third party funding to be admissible concluding that the prohibition of third party funding would unduly restrict the constitutional right to freedom of commerce.⁴⁶ Most importantly the way the funding is secured should only touch the contractual relationship between the financing party and the client and should not touch upon the contractual relationship between counsel and client. Otherwise the counsel's duty towards its client to remain independent and to avoid conflicts of interest may be impaired. While this decision referred to litigation, this case law also applies to arbitration.

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 local ethics rule or regulation imposing any duty on counsel to disclose third party funding to the opposing party and/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.

To our knowledge, this question has not yet been publicly discussed, in Switzerland. In our opinion, it does not make a difference whether the third party funder is a professional funder or another third party (subject to 3.6 below).

⁴⁵ Cf. to the decision of the Swiss Federal Supreme Court of 2004 referenced in clause 3.3. and fn. 46 below. Also see Noradèle Radjai, *Case Note on Third-Party Funding – Switzerland*, in *Global Arbitration Review*, Vol. 3, Issue 1, p. 37 (accessed on 25 February 2014 under http://www.lalive.ch/data/publications/Third_Party_Funding.pdf)

⁴⁶ See decision of the Swiss Federal Supreme Court 131 I 223.

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

In Switzerland, insurance providers are subject to the supervision of the Swiss Financial Market Supervisory Body (FINMA).⁴⁷ In contrast thereto, the Swiss Federal Supreme Court held that third party funders are not *per se* insurance providers. Clients pay a fee/premium to third party funders with regard to a past event (as opposed to clients of legal protection insurances who pay the premium for a future risk). Usually, the premium or consideration for the third party funder is due in the event of success only. Third party funders who are not insurance companies are thus not subject to the supervision of the FINMA.

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 local ethics rules prohibit counsel in international arbitration proceedings to act as third party funder participating in the profits of legal proceedings (provided counsel is an attorneys-at-law subject to the FAA).⁴⁸ This prohibition does not *per se* extend to third parties, though.⁴⁹

4. Conflicts of Interest

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

Under Swiss law, a prohibited conflict of interest exists if counsel accepted the mandate of a client that encompasses the taking of decisions which may potentially conflict to counsel's own interests or to other interests the attorney has to safeguard.

In accordance with the Swiss Federal Supreme Court a conflict of interest of counsel must, however, be *specific*. An *abstract* possibility of conflicting interests between several clients is not sufficient.⁵⁰ Counsel must avoid any specific conflicts of interest in legal proceedings at any time, even if the legal proceedings

⁴⁷ See Art. 2 of the Swiss Insurance Supervision Act of 17 December 2004 (SR 961.1) and Art. 1 of the Swiss Financial Market Supervision Act of 22 June 2007 (SR 956.1).

⁴⁸ See Art. 12(e) FAA and Art. 19(2) and (3) Code of Conduct.

⁴⁹ See decision of the Swiss Federal Supreme Court 131 I 223, 233, cons. 4.5.2 with references to decision of the Swiss Federal Supreme Court 113 Ia 279, 283 *et seq.*, cons. 3 and 4b; 98 Ia 144, 148 *et seq.* cons. 2c. Also see the Report of the Swiss Federal Council on collective legal protection in Switzerland of 3 July 2013, p. 44 (accessed on 25 February 2014 under <http://www.ejpd.admin.ch/content/dam/data/pressemitteilung/2013/2013-07-03/ber-br-d.pdf>)

⁵⁰ Decisions of the Swiss Federal Supreme Court 135 I 261; 134 II 108, 112 cons. 4.2.2.

do not affect the same legal issue.⁵¹ If a specific conflict of interest exists, counsel must not accept or terminate a mandate. To the extent counsel's service is limited to legal advice, the advising of various clients with conflicting interests does not necessarily have to be prohibited, provided that all parties consent.⁵² Finally, the local ethics rules prohibit counsel to accept a mandate against a prior client, in general.⁵³

These standards also apply to counsel in international arbitration cases if counsel is subject to the FAA.⁵⁴

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

The local ethics rules do not provide an express equivalent to Guideline 5 of the IBA Guideline. In our opinion, Art. 12(c) FAA may, however, possibly encompass and regulate a situation set forth in Guideline 5 of the IBA Guidelines.

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?

If a conflict of interest exists in accordance with Art. 12(c) FAA, counsel must not accept the mandate or – in case the mandate already exists – counsel must immediately resign. Art. 12(c) FAA generally aims at protecting the confidence of the public in attorneys-at-law. A client's waiver of a disclosed conflict of interest does not relieve counsel from its duties according to Art. 12(c) FAA, *i.e.* not to accept or resign the mandate.

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

The local ethics rules do not consider Chinese walls to be sufficient to effectively prevent conflicting interests between clients of domestic or international law firms (including an international association of law firms as opposed to an international network of independent law firms).⁵⁵

⁵¹ FAA-Fellmann, N. 101 to Art. 12.

⁵² FAA-Fellmann, N. 99 to Art. 12.

⁵³ FAA-Fellmann, N. 108 to Art. 12.

⁵⁴ See *1.1.1 above*.

⁵⁵ FAA-Fellmann, N. 88a and 89 to Art. 12.

5. Communication with Opposing Party/(Prospective) Arbitral Tribunal

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

The local ethics rules allow counsel to engage in direct communications with the opposing party only, i) if such party is not legally represented; ii) with the consent of counsel of opposing party; or iii) in exceptional circumstances with good cause.⁵⁶

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?

Swiss ethics rules identified under *1.1. above* address this issue of *ex-parte* communication not from counsel's but from the arbitrators' perspective:

Equal treatment of the parties is a fundamental principle of due process in Swiss statutory law.⁵⁷ *Caucus* or *ex-parte* communications are not in line with Swiss *lex arbitri* and may impair the arbitrators' obligation to be and remain independent.⁵⁸ Arbitrators in international arbitrations seated in Switzerland who engage in *ex-parte* communications may thus risk to be challenged as arbitrators or the final award to be challenged later on. In addition, arbitrators who are admitted to the bar and registered as attorneys in Switzerland are further subject to the attorneys' obligation to be and remain independent set forth in the local ethics rules.⁵⁹

In contrast thereto, the Guidelines 7-8 of the IBA Guidelines address the issue of *ex-parte* communications from the counsel's perspective by describing the circumstances under which *ex parte* communications with arbitrators are not improper for counsel. *Ex-parte* communications by counsel with a prospective Presiding Arbitrator under Guideline 8(c) of the IBA Guidelines may conflict with Swiss *lex arbitri* and local ethics rules and thus, eventually expose the arbitrator to challenges by opposing party.

⁵⁶ See Art. 28(1) Code of Conduct.

⁵⁷ See Art. 182(3) Swiss Private International Law Act (PILA; SR 291).

⁵⁸ See Art. 180(1)(c) PILA.

⁵⁹ See Art. 12(b) FAA; Art. 10 Code of Conduct.

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

The local ethics rules or Swiss *lex arbitri* do not directly regulate whether or not counsel is allowed to contact the prospective arbitrator(s). Counsel who engages in *ex-parte* communications with the prospective arbitrator(s) do, however, risk that opposing party eventually challenges these arbitrators or the final award rendered by these arbitrators for lack of independence and/or lack of impartiality. In practice, communications between counsel and a prospective party-nominated arbitrator prior to the arbitrator's designation are not uncommon in order to inquire the arbitrator's availability, willingness to sit on the panel as well as the existence of potential conflicts of interest. Thereby, counsel is bound by Art. 12(a) FAA and has to refrain from any *ex-parte* communications that may unduly influence the arbitrator(s).⁶⁰

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?

Under the local ethics rules, counsel has to avoid any influence and even the impression of influence of potential witnesses and experts in proceedings before state courts and no difference to this rule is drawn between own and opposing witnesses.⁶¹ Counsel in civil proceedings before state courts may therefore only directly contact a witness under very limited circumstances.⁶² The purpose of these local ethics rules is a result of the fact that finding the truth and as a consequence also the interrogation of witnesses and experts is the exclusive task of the state court and not that of counsel (in contrast to international arbitration proceedings). Both, the FAA (implicitly) and the Code of Conduct (explicitly), however, reserve specific rules on the contact with witnesses applying to arbitration proceedings and before supra-national courts.⁶³ Accordingly, in international arbitration proceedings, such specific rules applicable to a certain arbitration proceeding (as opposed to the local ethics rules) determine whether the interaction of counsel and witnesses and experts is allowed or not. In Switzerland it is widely accepted and considered best practice in international arbitration proceedings that counsel and parties may contact potential witnesses or experts

⁶⁰ See Art. 12(a) FAA and 6.1 below.

⁶¹ See general clause of Art. 12(a) FAA and Art 7 Code of Conduct.

⁶² Decision of the Swiss Federal Supreme Court 136 II 551.

⁶³ See general clause of Art. 12(a) FAA and Art. 7 Code of Conduct; FAA-Fellmann, N. 22 to Art. 12.

under their control on whose testimony they intend to rely.⁶⁴ When doing so, however, counsel has to respect the minimum requirement of Art. 12(a) FAA, which demands a careful and conscientious exercise of its profession by lawyers and, therefore, forbids *undue influence of witnesses* by counsel also in international arbitration proceedings.

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?

As has been outlined *in 6.1 above*, local ethics rules reserve any specific rules concerning contact with witnesses applying in international arbitration proceedings. Therefore, local ethics rules do not explicitly deal with the involvement of counsel in written witness statement/expert reports in international arbitration proceedings. As a result, the extent to which counsel is allowed to get involved in the preparation of written witness statements/expert reports depends on the specific rules applicable to the individual arbitration proceeding. Nevertheless and as minimum requirement, which also applies to international arbitration proceedings, Art. 12(a) FAA demands from counsel to refrain from any undue influence of witnesses.

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?

Local ethics rules do not regulate the preparation of a witness/expert with respect to international arbitration proceedings. General restrictions solely derive out of Art. 12(a) FAA, which requests counsel to refrain from any undue influence on witnesses (see *6.1 and 6.2 above*). Again, the specific rules applicable to the individual arbitration proceedings determine whether the preparation of witnesses/experts for their appearance at the evidentiary hearing is permitted.

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

As specific rules with respect to the contact of witnesses/experts in international arbitration proceedings remain reserved under the local ethics rules, the question cannot be answered as such (see also *6.1 to 6.3 above*). However, and as has been outlined above, Art. 12(a) FAA requests from counsel to refrain from any undue influence of witnesses also in international arbitration proceedings. Such is in principle also reflected by Guidelines 18-25.

⁶⁴ See von Segesser, Witness Preparation in International Commercial Arbitration, in ASA Bulletin Vol. 20 (2002), No. 2, pp. 222 *et seqq.*

7. Integrity

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

The general rule of Art. 12(a) FAA demands a correct behavior from counsel in all matters and therewith forbids counsel to unduly influence witnesses. Such prohibition does also apply to international arbitration proceedings.

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?

Under the local ethics rules (see *1.1 above*), counsel does not assume any duties concerning the truthfulness and completeness of factual or legal submission presented to an arbitral tribunal. The Swiss Federal Supreme Court has explicitly acknowledged that the attorney-at-law has the task and obligation to assist and advise the client with the goal to pursue the client's subjective legal interests. Therefore, the attorney-at-law is not qualified as a state body, but is solely obliged to act in his client's interest.⁶⁵ However, the integrity that is required pursuant to the local ethics rules demands from counsel to only use legally admissible means in order to follow the client's interest. As a result, counsels are forbidden to knowingly make untrue statements of facts and to mislead judges and/or authorities with false evidence concerning the relevant facts.

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?

Under the ethics rules identified in *1.1 above*, no such duties of counsel exist with respect to document production. However, Art. 160 Swiss Civil Procedure Code provides for a duty of the parties or of third parties (including counsel) in civil proceedings in front of a state court to cooperate in the evidence taking, in particular to produce documents with the exception of documents that are legally privileged. However, there is no duty of counsel to ensure that the client preserves relevant documents.

⁶⁵ Decision of the Swiss Federal Supreme Court 106 Ia 104 *et seq.*, see also *2.1.2 above*.

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?

In our opinion, there are no such discrepancies between the local ethics rules and Guidelines 9-11 of the IBA Guidelines. Guidelines 12-17 do not have an equivalent rule as such in the local ethics rules (see for more detail 7.3 above). In our opinion, however, the content of Guidelines 13-17 of the IBA Guidelines goes beyond the local ethics rules addressing integrity.

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

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

A breach of duty is assumed if the counsel acts in violation of a duty stated by the law. The primary source for the duties of counsel is article 398(2) CO. The principal duties of a counsel are the duty of care and the duty of loyalty. As has been outlined in 1.1.3 above, these duties do partly also contain “ethical rules”. The standard of care is measured in an objective manner, i.e. a counsel must act in a manner that may reasonably be expected of an “ordinary” person in a comparable situation (objective test). The relevant factors to determine the expected care result from the specific work and the knowledge necessary to comply with the mandate. According to established Swiss case law, a counsel is, in principle, not liable for the success of his actions and the parties have to bear the litigation risk. Nevertheless, counsel has the duty to inform the client with respect to the difficulties of the case and the associated risks, so that the client is aware of the risks to be borne by him.⁶⁶

⁶⁶ Decision of the Swiss Federal Supreme Court 127 III 357; Weber Rolf in: Honsell/Vogt/Wiegand, Obligationenrecht I, 5.e., Basel 2011, Art. 398 n 27.

Damages are defined as the difference between the client's actual current financial situation and the client's financial situation in the absence of any violation of a duty.

Pursuant to constant Swiss case law, a violation of duty complies with the test of "adequate causal link" if, according to the normal course of events and the general experience of life, the counsel's alleged breach is likely to result in the damages effectively incurred.

Negligence is rarely a difficult element to prove if a breach of duty has objectively been determined. Even slight negligence is sufficient.⁶⁷

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

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

According to article 12(f) FAA, attorneys-at-law registered in Switzerland are obliged to take out a professional malpractice insurance covering the type and extent of risks connected with their activities. The required minimum amount of coverage is CHF 1 million per year. The insurance policies usually cover litigation and arbitration work (including the participation in an arbitral tribunal).

⁶⁷

As opposed to a violation of the ethics rules according to the FAA, where only wrongful behavior can call for disciplinary action (see decision of the Swiss Federal Supreme Court of 7 December 2009 [2C-379/2009]).

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?

In general, the Guidelines are much more specific and detailed when compared to the local ethics rules as identified *in 1.1 above* and refer to specific issues which may arise in arbitration proceedings, namely rules concerning changes of party representatives and potential conflicts of interest arising thereof, rules on communication with arbitrators, rules concerning submissions to the arbitral tribunal, rules on information exchange and disclosure, rules concerning interactions between party representatives and witnesses and experts. In contrast, article 12(a) FAA stipulates in a more generic way that lawyers should exercise their profession in a careful and conscientious manner. Nevertheless, it certainly can be said that some, if not most of the detailed rules of the IBA Guidelines, are covered by article 12(a) FAA.

Most importantly, the Guidelines do not only apply to lawyers, but to “*any person who appears in an arbitration including a Party’s employee, who appears in arbitration on behalf of a Party and makes submissions, ...*”. In contrast, the local ethics rules in Switzerland only apply to attorneys registered in Switzerland (FAA) and/or to members of a Cantonal and/or the Swiss Bar Association (Code of Conduct).

Guideline 5 allows a counsel to represent a party in arbitral proceedings even in the event of a conflict of interest unless none of the parties object after proper disclosure by the counsel. As outlined in *4.3 above*, Art. 12(c) FAA requires from a registered attorney-at-law to not take on the mandate or to immediately resign.

Guideline 18-25 concerning interactions between counsel and witnesses and experts do not have an equivalent in the local ethics rules. It is understood that counsels are allowed to contact witnesses under very limited circumstances only and that they have to refrain from any kind of influence on any potential witnesses or experts in state court proceedings (see Art. 12(a) FAA and Art. 7 Rules of Professional Conduct).⁶⁸

Finally, Guideline 26 on Remedies for Misconduct does not have an equivalent in local ethics rules. In Switzerland, the authority deciding on the merits of the case is in principal not also competent to take disciplinary measures with respect to a party representative.⁶⁹

⁶⁸ See *6.1 above*.

⁶⁹ For exemptions see *1.2.4 and fn.23 above*.

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

Guidelines 12-17 impose certain duties on counsel with respect to preservation, collection and production of documents, which go certainly beyond the duties imposed on counsel by the local ethics rules. That is certainly also because document production requests are not as common in civil proceedings in Switzerland as in common law countries as such requests are only admitted under very limited circumstances. So-called fishing expeditions and/or discovery are inadmissible according to Swiss procedural law.

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?

As mentioned *in 9.1 above*, Guideline 5 is more relaxed as it allows the parties to an arbitral tribunal to waive a potential conflict of interest between counsel and arbitrator in case of proper disclosure.

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 mentioned *in 1.2.4 and 9.1 above*, the authority deciding on the merits of the case is – contrary to the Guidelines - not empowered to take sanctions/disciplinary measures against a lawyer according to the local ethics rules. The power to impose disciplinary measures/sanctions falls entirely within the responsibility of those professional bodies that regulate the exercise of the legal profession. Due to this consolidation of the arbitral tribunal's competence under the IBA Guidelines many Swiss arbitration practitioners suspect additional opportunities for the parties to obstruct and delay the proceedings, *e.g.* by challenging the arbitrators for being biased after the arbitral tribunal ordered any sanctions based on Guidelines 26-27 of the IBA Guidelines. Furthermore and in contrary to the local ethics rules, the remedies according to Guideline 26 can be applied by the arbitral tribunal for any misconduct meaning not only a breach of the Guidelines but also “*any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a Party Representative*”. Therewith, an arbitral tribunal has wide discretion in defining the duties of a party representative whereas disciplinary measures according to the local ethics rules can only be applied in case of a culpable breach of a stipulated duty. Having said this, none of the remedies provided for in Guideline 26 have a full equivalent in the local ethics rules. In particular the remedies in Guideline 26(b), (c) and (d), which, as a result, have an impact on the merits of the case and give the arbitral tribunal even discretion with respect to the proper sanction to be applied, go far beyond any measures which are available pursuant to the local ethics rules.