

# ASA Below 40

The straight and narrow –  
legal and ethical rules applicable to counsel, experts and arbitrators



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Second Session: policing misbehaviour by counsel  
and experts – who decides?

Extra-arbitral remedies and sanctions: professional  
disciplinary and civil liability

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## Criminal behaviour by counsel: Available remedies

- *“Any person who commits a felony or misdemeanor in Switzerland is subject to this Code”, Swiss Criminal Code Art. 3 (1).*
- *“Any person who with a view to securing an unlawful gain for himself or another willfully induces an erroneous belief in another person by false pretences or concealment of the truth, or willfully reinforces an erroneous belief, and thus causes that person to act to the prejudice of his or another's financial interests, is liable to a custodial sentence not exceeding five years or to a monetary penalty”, Swiss Criminal Code Art. 146 (1).*
- *“Any person who in his capacity as a member of the clergy, lawyer, defense lawyer, notary, patent attorney, auditor subject to a duty of confidentiality under the Code of Obligations, doctor, dentist, pharmacist, midwife, psychologist or as an auxiliary to any of the foregoing persons discloses confidential information that has been confided to him in his professional capacity or which has come to his knowledge in the practice of his profession is liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty”, Swiss Criminal Code Art. 321 (1).*

# Unethical behaviour by counsel: Available remedies



- Professional disciplinary
  - “a. warning; b. reprimand; c. fine of no more than 20'000 francs; d. temporary interdiction to practice for a maximum of two years; e. permanent interdiction to practice” The Federal Act on the Free Movement of Lawyers Art. 17 (1).
  - See also the Code of Conduct by the Swiss Federation of Lawyers

- Civil liability
  - “The agent is liable to the principal for the diligent and faithful performance of the business entrusted to him”, Swiss Code of Obligations Art. 398 (2)
  - Liability in tort
  - Immunity?



“Judge Wycoff is a strong advocate of swift justice.”

## Criminal behaviour by experts: Available remedies

- Switzerland:
  - *“Any person who appears in judicial proceedings as a witness, expert witness, translator or interpreter and gives false evidence or provides a false report, a false expert opinion or a false translation in relation to the case is liable to a custodial sentence not exceeding five years or to a monetary penalty”*, Swiss Criminal Code Art. 307 (1), see also Art. 309 (a)

## Unethical behaviour by experts: Available remedies

- Professional disciplinary
  - Swiss Accounting Experts (Chambre Fiduciaire): “*a warning; b reprimand; c fine up to 200'000 francs; d exclusion*”, The Rules of the Ethics Commission and the Independent Arbitral Tribunal of the Chambre Fiduciaire (Treuhand-Kammer) Art. 12 (2)
- Civil liability?
- Immunity?

## PROBLEMS:

- Who?
  - The arbitral tribunal, the professional organization or the courts?
  - Should the arbitral institution have a role?
  
- When?
  - During the course of the arbitration?
  - After the award?
  
- On what basis?
  - Regulations / statutes at seat of the arbitration
  - Regulations / statutes at place of qualification
  - The role of the substantive law applicable to the contract
  
- Differences between jurisdictions – potential conflicts

## PROBLEMS cont'd:

- Professional regulations and statutes not adapted to arbitration
  - But see Art. 7 of the Swiss Code of Conduct by the Swiss Federation of Lawyers
- External policing
- Access to information
- Duty to report misconduct v. duty to maintain confidentiality
- Concerns related to procedural efficiency
- Would any of the remedies be effective?