Privilege across borders in arbitration: multi-jurisdictional nightmare or a storm in a teacup?

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Spotlight on Privilege

The scope of privilege limiting the obligation to disclose certain documents and information has been the subject of considerable scrutiny in recent times. The question is very topical at the moment largely because after decades of relative stability, the ambit of privilege or similar protections is now in a state of flux following significant increases in challenges to assertions of privilege[1]. The drive on the part of competition authorities to route out cartel cases, and the ongoing discussion in the EU about whether legal privilege should be extended to in-house counsel in the context of investigations by the European Commission, have also fuelled the debate.

With various courts around the world reconsidering the principles underlying the law relating to privilege, the pressure of new corporate governance and new whistle-blowing requirements[2], and the implementation of new anti-competition and regulatory rules which seemingly weaken privilege rights[3], lawyers have become increasingly concerned at the erosion of the fundamental tradition of legal privilege and potential statutory intrusions into their professional obligations.

This spotlight on privilege in commentaries and legal writings and in recent case law has also led to increased discussion of the application of evidentiary privileges in international arbitration as a difficult topic of increasing practical importance because of the uncertainties that exist in when, how and in what circumstances privilege protection could or should be available, and the extent of that protection[4]. But is this really such a problem area for arbitration?

In an increasingly global corporate and investment environment, multinational corporations and individuals operating across borders, require and receive legal

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1 The last years have seen a proliferation of cases especially in common law countries. To mention just a few: In England - *Three Rivers District Council v Bank of England (No 5) [2003] EWCA Civ 474*; *Three Rivers District Council v Bank of England (No 10) [2004] EWCA Civ 218*; *United States of America v Philip Morris Inc. & Others and British Tobacco [2004] EWCA Civ 330*. In Australia - *Vance* v *Mc Cormick* [2004] ACTWC 78; *Pratt Holdings Pty Ltd* v *Commissioner of Taxation* [2004] FCAFC 122; *Kennedy* v *Wallace* [2004] FCAFC 337. In the EU: *AM&S Europe Ltd v. Commission [1982] ECR 1575; Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v.* Commission [2003] ECR II – 4771.

2 See e.g. NICOLA LAVER, *Attorney/Client Privilege-the new Dangers*, International Bar News, December 2003, p. 5 ss.

3 As regards legal privilege in the context of investigations conducted by the Swiss Competition Authority ("WEKO"), see FRANZ HOFFET/DOROTHEA SECKLER, *Vom Anwaltsgeheimnis zum "Legal Privilege", Die Revision des Kartellgesetzes erfordert eine neue Sicht auf den Schutz der Anwaltskorrespondenz,* SJZ 101 (2005) Nr. 14, p. 333 ss.

4 See e.g. BERNHARD F. MEYER-HAUSER, *Das Anwaltsgeheimnis und Schiedsgericht*, Schulthess, Zurich, 2004; JAVIER H. RUBINSTEIN/BRITTON G. GUERRINA*: The Attorney-Client Privilege and International Arbitration*, in: Journal of International Arbitration, Vol. 18 N. 6 (2001), p. 587 ss; DAVID W. RIVKIN/ BERNARDO CREMADES, *The Difficult Issue of Privilege,* in: Arbitration and ADR, Newsletter of Committee D of the International Bar Association Section on Business Law, Vol. 5 Nr. 3 (2000), p. 1 ss.; RICHARD M. MOSK/ TOM GINSBURG: *Evidentiary Privileges in International Arbitration,* in: International and Comparative Law Quarterly, Vol. 50, London 2001, p. 345 ss.; NORAH GALLAGHER, *Legal Privilege in International Arbitration*, in: International Arbitration Law Review, Issue 2, (2003), p. 45 ss;

advice in many different jurisdictions. With increased international expansion, corporations are now also exchanging information and documents to an extent undreamt of twenty years ago. As corporations operate in more international locations, often unfamiliar ones, they face greater challenges, complexities and risks. All perfect ingredients for more (and more complex) disputes.

International arbitration inevitably involves parties, lawyers and arbitrators from (often very) diverse legal, commercial and cultural traditions. Tribunals will most often comprise arbitrators from multiple jurisdictions and in particular, from legal traditions different from those of the parties and their counsel (often also from different jurisdictions). Arbitrators and counsel overseeing the claim or defense strategy across different jurisdictions and across legal cultures (in a multi-jurisdictional matter) where advice or evidence is inevitably sought in one jurisdiction involving relationships or communications of another, will have to contend with very different, often ill-defined or sometimes even contradictory notions of legal privilege.

There is no single international code of commonly accepted principles even though all professional privileges have the same rationale - to encourage frank and open communications between professionals and those with whom they have a professional relationship. The number, type and scope of those privileges can vary dramatically not just from one country to another but also among common law or civil law countries[5]. The privilege may be held by the professional, the client, or perhaps even both; it may be subject to certain exceptions and may or may not be waivable. The recent writings and case law show that privilege can be a legal minefield in contentious proceedings at national level and even more so in cross-border litigation. How does this translate into international arbitration proceedings when various different legal regimes and expectations interact?

The growth of international arbitration and its increasing popularity as a dispute resolution mechanism used in most international commercial contracts has increased focus on the predictability and accessibility of the process, creating greater need for clear and accessible rules of the game. Much has been achieved but "privilege" is one of the particularly delicate areas where there are no settled rules, and parties, counsel and tribunals are left to their own devices.

This article highlights the areas of legal privilege that have lead to the greatest debate and discusses some of the concerns that arbitration practitioners and users have identified as the major difficulties or uncertainties they face in attempting to apply legal privilege in international arbitration. We also consider some practical impact of these potential difficulties for clients and practitioners (counsel and arbitrators) in the hope of assessing whether questions of privilege pose real

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5 See e.g. DIANA GOOD, PATRICK BOYLAN, JANE LARNER, STEPHEN LACEY, *"Privilege: a world tour"* and *"Privilege: the in-house view"*, available at www.practicallaw.com; DAVID W. RIVKIN/ BERNARDO CREMADES, op. cit., p. 1 ss.

dilemmas in international arbitration or whether this debate (from an arbitration perspective at least) is rather just a storm in a teacup[6].

Stand and Deliver!

The question which arises in every international arbitration is how the material facts of the case which go to the issues to be determined are to be ascertained by the tribunal. How evidence is produced, its admissibility, relevance and significance determines both the conduct and the result of the arbitration. One of the most frequent areas of cross-cultural dispute in an arbitration is the question of disclosure or production of documents or release of information.

Traditions and rules on document production vary significantly between common law and civil law jurisdictions. Common law lawyers (in the UK, the US and elsewhere) have developed sophisticated, time-consuming and very expensive systems of discovery or disclosure of documents. Such complicated procedures are thought unnecessary in order to do justice in civil law procedures in which parties may in principle produce only those documents on which they rely. Exemptions from production naturally vary in similar ways. Production of documentary evidence in international arbitration is now largely 'harmonized', combining elements of the two systems[7].

Privilege rules impact on the admissibility of evidence. Claims of legal privilege can arise in several ways. For example, a party might seek documents from another party that are covered by legal privilege under the latter party's local law. A party witness might be asked about discussions with his or her lawyer. If applicable, evidentiary privileges allow a person to refuse to testify or to disclose certain information or to oblige others to refrain from doing so, even though that information might be relevant for the outcome of the dispute.

Although it is an essential pre-requisite of privilege that the communication is confidential, one needs to distinguish between privilege and the related issue of the duty of confidentiality, which will not be discussed in this article. Privilege is arguably a specific expression of the issue of confidentiality[8]. However, it is not linked to the duty to keep confidential the proceedings and the award and any

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6 This article is not intended to be a comprehensive analysis and many of the issues covered are necessarily summary in nature. Our focus is on legal privilege which – apart from the protection of business and trade secrets – is the privilege most likely to appear in international arbitration. Other typical privileges are e.g. privilege against self-incrimination, 'without prejudice' privilege, family testimony, privilege of civil servants or persons appointed to a public office; See also RICHARD M. MOSK/ TOM GINSBURG , op. cit., p. 349 ss.

7 See e.g. GABRIELLE KAUFMANN-KOHLER/PHILIPPE BÄRTSCH, *Discovery in International Arbitration: How Much is too Much?*, SchiedsVZ (January 2004), p. 17; DAVID P. RONEY/ANNA K. MÜLLER, *The Arbitral Procedure*, in: International Arbitration in Switzerland, Gabrielle Kaufmann-Kohler/Blaise Stucki (eds.), 2004, p. 60 ss; ALAIN REDFERN/MARTIN HUNTER, *Law and Practice of International Commercial Arbitration*, 4th edition, 2004, p. 300.

8 See e.g. LOUKAS A. MISTELIS, *Confidentiality and Third Party Participation*, in: Arbitration International, Vol. 21 No. 2 (2005), p. 216. Also *Prudential Assurance Co.* v *Fountain Page Ltd* [1991] IWLR 756 at 765: legal privilege provides a permissive right while a duty of confidence refers to a legal obligation.

materials submitted by another party in the framework of the arbitral proceedings[9].

Variations on a theme: different concepts of (legal) privilege

While largely in agreement on the fundamental underlying principles, different jurisdictions have different concepts as to the nature and scope of privileges. Parties to an arbitration may enjoy different privileges before their national courts resulting in a "conflict of privileges" in their "international" dispute.

One of the problems of the reality of modern commerce is that clients operate across borders and are therefore subject simultaneously to different systems. When dealing with a multinational corporation, it is not possible to maintain a firewall between different procedures in different countries. Indeed, managing the interaction between the multiple jurisdictions and foreseeing the consequences a seemingly prudent move in one instance could have in another is an important aspect of modern legal practice. It is often only during the course of a dispute that the extent of the differences and the problems they can cause become obvious.

The right to proper legal advice is reflected in the principle of legal privilege, as it is known in common law countries[10], and the principle of the "professional secrecy" of civil law countries[11]. Both concepts, in current legal thinking, are mainly based on the principle of a client's right of defense, and therefore a proper functioning of the administration of justice.

Many privileges were developed in the common law jurisdictions as a result of obligations to disclose internal documents or communications as part of the discovery process and where, in contrast to proceedings in civil law jurisdictions, parties must disclose all relevant documents, even those detrimental to one's case. To allow a party to seek proper legal advice, to negotiate settlements and to prepare for litigation, protections were developed whereby documents under these headings did not have to be disclosed, subject to certain specific criteria. Such protections, known as "attorney-client privilege" (US), "solicitor-client privilege" (Canada), "legal professional privilege" (UK) or "client legal privilege" (Aus-

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9 For a detailed discussion, see e.g. BERNHARD F. MEYER-HAUSER, op. cit., p. 67 ss.; CHRISTOPH MÜLLER, *La confidentialité en arbitrage commercial international: Un trompe-l'oeil?*, 23 ASA Bulletin 2/2005 (June), p. 216 ss.

10 According to the US Supreme Court in *Upjohn Co v. US (1981) 449 US 383*, the purpose of legal privilege is *"to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice [...] The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client"*; see also *R* v *Derby Magistrates' Court, ex parte B* (1996) AC 487; and Lord Hoffmann in *R (Morgan Grenfell & Co Ltd)* v *Special Commissioner for Income Tax (2002)* 2 MRI 299.

11 See e.g. PETER BURCKHARD, *Legal Professional Secrecy and Privilege in Switzerland*, IBA Section on Business Law, International Litigation News, October 2004, p. 33 ss: *"[...] clients should be encouraged to avail themselves of professional legal advice, and to be frank with their lawyers about their situation without fear of sensitive information later being disclosed to other parties or the court; it is only through open communication and based on the knowledge of all relevant facts that lawyers are able to give accurate legal advice. [...] effective legal advice protected behind the veil of confidentiality is considered necessary to promote equality under the law in adversarial systems. There is general consent that this veil should not be lifted even if information highly relevant for the outcome of the legal proceedings is kept hidden behind it; the public interest in "correct" decisions has to stand back."*

tralia), have been recognized by the highest courts in the various common law jurisdictions although the precise scope of such privileges can vary slightly between the common law jurisdictions. For the most part these are recognized as doctrines of *substantive law*, not easily dislodged except by clear legislative intent. In broad terms, the privilege is best described as a right to resist the (otherwise) compulsory disclosure of confidential information contained in a communication made orally or in writing between a lawyer (including an in-house counsel) and client, where the statements or materials were made or brought into existence for the dominant purpose of obtaining or giving legal advice, or where the communications took place for use in existing or contemplated proceedings[12].

The term "legal professional privilege" is really a misnomer as the privilege in question vests in the "client". The privilege is that of the client not the lawyer. The role of the lawyer is crucial to the existence of the privilege, but it is the client who can waive the privilege. The lawyer must protect the privilege unless instructed otherwise. The privilege rule is mitigated by the fact that a lawyer may not aid a client to commit a felony and the privilege does not extend to cases where the communications were intended to further criminal or fraudulent purposes.

In civil law jurisdictions, even though there is no similar concept of discovery, lawyers can generally also call on privileges in civil proceedings: privileges which provide for the obligation of secrecy for persons (including lawyers) who through their functions are depositories for the secrets or confidential information of others. In-house counsel in civil law jurisdictions are generally not able to invoke the privilege. The civil law concept of "professional secrecy" founded essentially in professional ethics, is again seen as necessary to allow a client to seek legal advice in full confidence that the information given to the lawyer will not be used against him. The principle is often reflected in the criminal codes of the countries concerned and a breach by the lawyer is sanctioned under criminal law. Unlike in common law jurisdictions, in the context of (civil) proceedings, the issue of privileges is considered to be a matter of *procedure*[13]. As in the common law system, "professional secrecy" cannot be invoked to help a client commit a felony. In certain civil law systems, professional secrecy may even provide for the confidentiality of communications between lawyers (e.g. France, where correspondence between lawyers is confidential and may not even be disclosed to the client) while in many other civil law systems and in the common law systems this is not the case. On the contrary, the lawyer has an obligation to his client to pass on that

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12 See e.g. *Baker v. Campbell (1983) 153 CLR 52*. Also *US v British American Tobacco* fn 1 above: the proceedings must actually be taking place or there must be a "real prospect" of litigation taking place. See also *Grant v Downs (1976) 135 CLR 674 (High Court of Australia)*. Communications between several parties in anticipation of litigation remain privileged even if not all the parties become party to the litigation. This is referred to as "common interest privilege".

13 Legal privilege in Switzerland is governed by a variety of rules on the international, federal and cantonal level and its infringement constitutes a severe criminal offence. For a more detailed discussion, see FURRER ANDREAS, *Die Reichweite des Anwaltsgeheimnisses im Zivilprozess, Plädoyer für ein schweizerisches attorney client privilege*, AJP 202 895 ss, 903; PETER BURCKHARDT, op. cit., p. 33 ss.

communication (this difference of itself can lead to problems and misunderstandings if counsel are not aware of the different requirements or obligations)[14].

Legal privilege under Swiss law includes everything that is confined to an independent lawyer in connection with a mandate regardless of the nature or content of the information whether it is accurate, its source or timing. Only the lawyer and not the client can invoke the privilege: the cloak of protection is over the lawyer, not the lawyer/client relationship. The client may waive the lawyer's obligation with the result that the lawyer is free to disclose the information within the limits of the waiver obtained[15]. Only information in the lawyer's possession which is part of his core business is protected (primarily representation of the client's interests and/or the rendering of legal advice). The same information or advice attracts no protection in the hands of the client[16]. This distinct feature of Swiss privilege law has been heavily criticized[17].

What is clear in both common law and civil law jurisdictions is that privilege cannot be relied on as a blanket defense to disclosure. Objections must be raised and considered on a case-by-case basis and the privilege must be claimed with respect to each specific communication at issue. Courts will not simply accept a blanket claim for privilege covering all communications between a lawyer and his client[18].

Documents which are not otherwise privileged are not, and do not become, privileged merely because they pass between lawyer and client or (especially in civil law jurisdictions) because they are handed over by the client to the lawyer. There is much the privilege does not protect. The privilege does for example not protect communications generated or received by a lawyer acting in some other capacity, or communications in which a lawyer is giving business advice rather than legal advice. A written or electronic communication does not have to be identified as being "privileged" or "confidential" for the privilege to attach but a party cannot protect a communication simply by marking it "confidential" or "privileged" or "attorney work product". The test is always whether a communication satisfies

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14 See also JAVIER H. RUBINSTEIN/BRITTON G. GUERRINA, op. cit., p. 592.

15 As regards the question whether the lawyer, as a result of the waiver, is not only entitled but obliged to disclose, in Switzerland resort must be had to the applicable cantonal procedural codes and the professional codes of conduct where the solutions offered vary. Article 13 of the Federal Act on the Freedom of Movement for Lawyers ("FAFML") now grants the lawyer an absolute right of refusal to give evidence if there is an overweighing public interest in maintaining secrecy. Art. 13 FAFML is also in line with § 159(3) ZPO ZH and Article 157 1(b) of the new Draft Federal Code of Civil Procedure, both providing for an absolute right to refuse testimony.

16 BGE 114 III 108.

See also recent (though heavily criticized) decision of the Swiss Federal Tribunal dated 13.8.2004 (IP.133/2004) addressing issues of Swiss legal privilege in the context of criminal proceedings. The court held that documents containing legal advice located at the client's premises that are not related to the client's defense are not privileged from seizure.

As regards Swiss competition law investigations, Swiss competition law now provides a clear legal basis for search of premises of entities domiciled in Switzerland by WEKO, the Swiss Competition Authority. According to the recent guidelines of the Secretariat of the WEKO, documentation of an external lawyer at the company's premises now has some very limited protection to the extent it relates to the specific investigation at stake (See also FRANZ HOFFET/DOROTHEA SECKLER, op. cit., p. 333 ss.).

17 There are currently discussions going on as to protect also correspondence in the hands of the client; see e.g. FURRER ANDREAS, op. cit., p. 903; FRANZ HOFFET/DOROTHEA SECKLER, op.cit.

18 See e.g. *US* v *Philip Morris Inc*, above fn. 1.

the elements necessary to establish the privilege, not how the communication is identified or labeled.

An arbitrator or mediator, whose function can be described as judicial rather than legal, does not generally qualify as a lawyer for privilege purposes. However, an arbitrator may be subject to a general duty of confidentiality[19].

Should a Tribunal take a privilege claim into account, and if so how?

Answers about what is or could be privileged are not obvious or simple at domestic level; cross-border complexities make the questions even more tricky when the issue is considered in the context of international arbitration.

Consider this scenario: A US multinational company is involved in an arbitration in Switzerland against a German multinational company for breach of an agreement between them governed by English law. Each requests production of documents. Among the documents requested are communications between management and in-house counsel and reports prepared by an outside consulting firm and taxation advice prepared by the company's accountants. Also included in the request are notes prepared by the employees of the company to external lawyers for advice on the transaction with the other party.

How should arbitrators proceed when presented with a claim of legal privilege with respect to these documents? On what basis should they decide the issue? Are these communications privileged? Should the Tribunal order disclosure? If so, must the parties and Counsel comply? What are the consequences if they refuse? No shortage of potential issues, but a dearth of accessible practical experience to guide many of those grappling with them.

The first question is of course whether the privileges that apply in civil litigation also exist in international arbitration. There seems to be general agreement at least in principle that by choosing arbitration the parties do not automatically waive their right to privilege protection[20] and that some protection should be afforded in arbitration because of the important public policy goals privileges reflect. But what privilege protection actually applies?

Surprisingly, or perhaps not surprisingly, most national arbitration laws are silent on questions of privilege and none of the rules of the major international arbitral institutions provide any real substantive guidance or assistance in determining how issues of privilege should be handled. Some arbitral institutions have rules which provide that a tribunal may admit all evidence that is "not privileged"[21].

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19 BERNHARD F. MEYER-HAUSER, op.cit., p. 75 and 77.

20 NORAH GALLAGHER, op. cit., p. 45; JAVIER H. RUBINSTEIN/BRITTON B. GUERRINA, op. cit., p. 593 ss.

21 e.g. Article 20(6) American Arbitration Association (AAA) International Arbitration Rules; Article 9 2(b) IBA Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules").

That is all very well but it begs the crucial basic question - what is or should be "privileged" in that context?

Where does one begin? The complexity can be illustrated by a series of questions:

i) What law governs a privilege claim?[22]

- The law of the parties' agreement or contract?
- The law of the place where the arbitration is held (*lex arbitri*)? Is this appropriate where the parties have not selected that seat and/or where there are no other connections with that jurisdiction?
- The law of the jurisdiction where the party or lawyer claiming protection resides? If a party is a multinational, what is its jurisdiction of residence? Who is "the client"?
- The law of the place where the communication or information was created?
- The law of the place to which the communication or information was sent? What if it was sent to more than one place?
- The law of the place where the record of the communication is stored? What if it is "stored" in a number of places, as can happen more and more with modern technology (e.g. e-mails)?
- The law where the lawyer with whom the communication took place is admitted? What if the lawyer is admitted in multiple jurisdictions? If the lawyer is an in-house counsel, can privilege be claimed? What about communications with "foreign lawyers"? Or the law of the place where counsel for a party to the arbitration is admitted?
- The law of the judicial forum where enforcement of any order or award will be sought?
- General principles (without reference to any national law)?

ii) Should one apply choice of law rules to determine the proper law to apply? If so, which choice of law rules should be applied? Should one apply those of the forum or even those of the law of the contract? What about the rules of any arbitral institution involved?

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22 See e.g. BERNHARD F. MEYER-HAUSER, op. cit., p. 61 N 181; GARY B. BORN, *International Commercial Arbitration in the United States*, Commentary and Materials, Deventer 1994, p. 840; JAVIER H. RUBINSTEIN/BRITTON B. GUERRINA, op. cit., p. 589.

iii) Whichever law is chosen, additional questions arise:

- Would the same law have to apply to both parties to an arbitration even though the parties are located in different jurisdictions?

- If not, does that mean that particular types of communications could be protected for one party but not the other?

iv) Once the governing law is decided:

- What is privileged under that law? What is the scope of the privilege under that law?

- Are the documents sought or passages of them in fact covered by the alleged privilege?

- Is the privilege claim made in good faith? How can this be determined?

- To whom does the privilege belong? Can privilege be waived? In what circumstances, and by whom?

- What duties do the lawyers involved have towards their clients in terms of protecting privileged communications or information?

- Are the lawyers involved in the arbitration bound by the laws/professional rules of their respective countries of admission regarding legal ethics, confidentiality, and professional responsibility notwithstanding the law of privilege a tribunal decides to apply?

None of these questions has an easy answer. While everyone seems to agree that strict rules of evidence do not apply in arbitration, there is less consensus about what does apply. There are few if any rules on the issue, and little if any precedent in most jurisdictions as to any choice of law analysis pertaining to privileges[23]. With no ready-made solution and sparse precedent in any given case, these issues will most often have to be determined by an arbitral tribunal well *after* the communications concerned have in fact occurred.

What then of the parties' and counsel's expectations? If during the course of an arbitration, different rules of privileges are applied than what the parties expect (which would normally be that they will be accorded at least the same privilege rights as they would have in domestic proceedings), parties and their counsel may find themselves in the position of having to reveal information that they rea-

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[23] For examples where privilege issues have been addressed in international arbitration, see NORAH GALLAGHER, op. cit., p. 45 ss.; see also *ICC Case No. 7626 of 1995*, published in ICC ARBITRAL AWARDS 1996-2000 – Arnaldez, Derains and Hascher, eds., Collection of ICC Arbitral Awards 1996-2000 (ICC Publishing/Kluwer 2000), p. 119 ss..

sonably expected was protected at the time the communication was made or advice given. Parties are likely to be surprised, to say the least, to learn that their agreement to arbitrate could have the effect of imposing on them a general obligation to disclose all relevant documents including internal communications and legal advice which would not be subject to disclosure under their own domestic national procedures.

These matters are all important from the perspectives of the various players in arbitration. Entities doing business cross-border need to know the risks of doing business (including risks that their communications with their lawyers may be open to scrutiny where domestically they may not). Legal advice that is privileged in the country in which it is given or from which it is sent to the client, may not be protected everywhere a client operates or everywhere the advice is intended to be received. Clients and users of arbitration look for a predictable mechanism for dispute resolution yet the application of privileges can be very uncertain. How then can they avoid unpleasant surprises?

Arbitrators have an overriding duty in resolving the disputes before them in such a way as to render an award that is enforceable both in the country where it is rendered and in any country in which it is likely to be enforced. The award ought not to be vulnerable to challenge, for example, under Article V of the New York Convention. This means, in particular, that arbitrators must ensure that the requirements of due process are observed. The most important requirement of due process is that each party must be treated equally and given a fair and equal opportunity to be heard and present its case[24]. How can arbitrators best navigate their way through the issues arising with respect to privilege without putting their award at risk? Tribunals will often seek to adopt procedures that treat parties from different legal traditions equally, by providing a neutral, "international" procedural dispute resolution framework. Is it possible to do this with respect to privileges?

The role of the arbitration clause

Some commentators have suggested that to provide some certainty, privileges should be addressed in the arbitration clause[25]. Yet very little time is however generally spent on that clause during contract negotiations. The issue of the dispute resolution mechanism is often left to the end of any negotiation (one of the reasons it is sometimes colloquially referred to as "the midnight clause"). Addressing the issue of privilege in the arbitration agreement could be a way of avoiding some surprises but it could also create others because in most cases parties will not have taken the time to consider the full implications of their choices. In practice, a standard clause of an arbitral institution is often adopted with no relevant reference to the issue of privileges.

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24 See e.g. Article 182(3) and Art. 190(2) (d) PIL; s33 (i) (a) English Arbitration Act 1996; and Art. V para. 1 lit. b New York Convention.

25 JAVIER H. RUBINSTEIN/BRITTON G. GUERRINA, op. cit., p. 598; BERNHARD F. MEYER-HAUSER, op. cit., p. 63 N 188.

What are the arbitration rules?

National arbitration laws and institutional arbitration rules do not provide much guidance for the arbitrators as to the determination of privilege issues and, more particularly, how they should exercise the discretion they have in the conduct of the proceedings and the admission of evidence.

Most national arbitration laws contain no specifics as to the admissibility of evidence in general nor do they address the issue of privileges. For example, the English 1996 Arbitration Act does not expressly require a tribunal sitting in England to apply the same privileges as would a court in respect of the parties' evidence. Section 34 (1) of the Act provides that "*it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter*"[26].

Similarly, in Switzerland, Chapter 12 of the Federal Statute on Private International Law ("PIL") lacks special provisions on the admissibility of evidence and evidentiary privileges in particular. Articles 182 and 184 PIL contain no specifics as to the admissibility of evidence nor do they address the issue of privileges.

While the majority of international arbitration rules give an arbitral tribunal the power to direct the parties to provide documents, only few of them even mention the issue of privilege or professional secrecy[27] and none of them address the question in any detail. Most overlook the issue completely. There are for example no specific provisions in the UNCITRAL[28], WIPO[29], LCIA[30], ICSID[31] or the new Swiss Rules of International Arbitration[32]. According to the IBA Rules on the Taking of Evidence, privileges must be respected and where different conceptions of such privileges would lead to an unfair treatment of the parties, the tribunal shall use its discretion to even out such discrepancies[33]. However, the IBA Rules also do not address which rules should be applicable as to the determination of privilege. This is left to the discretion of the arbitrators subject to acting fairly between the parties.

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26 Section 34 (2) states that procedural and evidential matters include: *"whether and if so which documents should be disclosed between and produced by the parties"*, and also whether *"to apply strict rules of evidence"* (or any other rules) as to the admissibility of any material. Courts are generally reluctant to interfere with a tribunal's decision whether a particular document is privileged or not. See also NORAH GALLAGHER, op. cit., p. 46.

27 See e.g. Article 38(2) of the former International Rules of the Zurich Chamber of Commerce (IAR); Article 20(7) ICC Rules; Article 20(6) AAA International Arbitration Rules.

28 Article 25(6) UNCITRAL

29 Article 48(a) WIPO

30 Article 22.1(f) LCIA

31 Article 34.1 ICSID

32 Article 25.7 Swiss Rules

33 Article 9 IBA Rules. See also e.g. H. RAESCHKE-KESSLER, *The Production of Documents in International Arbitration – A Commentary on Article 3 of the New IBA Rules of Evidence*, in: Arbitration International, Volume 18 Number 4, 2002, p. 411 ss.

What should arbitrators do?

Where should arbitrators begin in their consideration of privilege issues in the absence of party agreement or guidance in the rules or any standard-setting mechanism?

As privilege is widely recognized in legal systems of different traditions, arbitrators may regard it as a general principle of law and apply it without reference to any national law or particular legal system. They will still however have to decide on the scope and extent of the privilege protection. If the privilege claimed is common to all the relevant legal systems, it is likely that a tribunal would grant the protection so long as it is invoked properly and in good faith[34]. It is far more likely however, that claim for privilege will not be common to all the relevant systems and that it will be insisted on by one side and disputed by the other.

Is privilege a matter of procedure or of substance? National laws characterize privilege differently. The approach chosen will lead to a different applicable law. A "procedural approach", brings one to the law governing the arbitration; a "substantive approach" leads essentially to the law with the closest relationship to the communication claimed to be protected[35]. Different factors may need to be taken into account to decide which jurisdiction has the strongest connection or closest relationship such as (i) where the communication took place or where the documents are stored, (ii) where the lawyer is admitted or (iii) where the party/client has its home state[36].

What could be the consequences? Take our example above and imagine that both the German and US party request from each other documents prepared by their in-house counsel. Applying the law with the closest connection, in respect of communications between the US firm and its in-house counsel is likely to be US law, which protects such communications under US attorney-client privilege. The law governing the communications between the German firm and its in-house counsel on the other hand would be German law, which does not protect such communications. If the tribunal accepts one set of communications and not the other, the tribunal might be in breach of the general principle of equal treatment. Moreover, as multinational corporations, both parties may in fact find there are communications with a variety of in-house counsel with different qualifications, located in different places and these would all potentially need to be considered differently.

Commentators generally agree however that it is not really possible to fit privilege questions in arbitration neatly into either a procedural or a substantive mat-

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34 GABRIELLE KAUFMANN-KOHLER/PHILIPPE BÄRTSCH, op. cit., p. 19. Absent party agreement, the arbitrators will still have to decide on the extent and scope of any privilege.

35 RICHARD MOSK/TOM GINSBURG, op. cit., p. 381; G.KAUFMANN-KOHLER/P. BÄRTSCH, op. cit., page 19.

36 See e.g. JAVIER H. RUBINSTEIN/BRITTON G. GUERRINA, op. cit., p. 598.

ter category, as they encompass elements from both[37]. Therefore one might suggest a cumulative approach where both the procedural law governing the arbitration and the law of the closest relationship to the evidence should apply and, in the event of conflict, the most protective one should prevail. Again, however this may only work as long as no issues of equal treatment arise[38].

Another approach with similar results would follow the lines of Article 9(2)(b) of the IBA Rules[39]: (i) the tribunal acknowledges the privileges invoked as generally enjoyed by each party in its home jurisdiction (which is in line with the parties' background and reasonable expectations); (ii) if the privileges vary in scope, the tribunal should use its discretion to even out this discrepancy in accordance with the principles of fairness and equal treatment of the parties[40]. As a result, where one party would expect to enjoy greater evidentiary privileges before its national courts, a tribunal would allow the other party to also benefit from such additional privileges (in the sense of the notion of "most favoured nation treatment"). The advantage of such an approach is that it is more predictable in that the parties could be confident that they would never be required to produce information that is considered privileged under the law of their home jurisdiction.

Some authors have suggested that the model principles should be developed defining the nature and scope of legal privilege in international arbitration following the example of the IBA Rules of Evidence[41]. One has to question if this is really an option as it is difficult to see how such universal standard would be promulgated and enforced. Questions of privilege are different to the sorts of issues that have been dealt with rather effectively through the IBA Rules. With respect to privilege and professional secrecy, ethical and professional conduct and responsibility concerns are an integral part of the discussion (i.e. lawyers are bound to honor the professional ethic codes/rules of the jurisdictions where they are licensed) which makes any kind of harmonization or standardization much more complex and delicate.

How to decide what is in fact privileged?

Rather than choosing the applicable law, the difficulty in practice for a tribunal is often to determine whether the documents sought or passages of them are *in fact* covered by an alleged privilege. As a practical matter, it generally falls to lawyers to raise the privilege on their client's behalf. In evaluating claims of privilege, arbitrators cannot be expected to have complete knowledge of privilege law

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37 RICHARD MOSK/TOM GINSBURG, op. cit., p. 377; G.KAUFMANN-KOHLER/P. BÄRTSCH, op. cit., page 19.

38 See e.g. G.KAUFMANN-KOHLER/P. BÄRTSCH, op. cit., page 19. This approach is similar to the one under Article 11 of the Hague Evidence Convention.

39 Cf. also HILMAR RAESCHKE/KESSLER, op. cit., p. 428.
BERNHARD F. MEYER-HAUSER, op. cit., page 62.
JAVIER H. RUBINSTEIN/BRITTON G. GUERRINA, op. cit., p. 598 ss.

40 In Switzerland, Article 182(3) PILS; cf. also Art. 15 (2) ICC.

41 JAVIER H. RUBINSTEIN/BRITTON G. GUERRINA, op. cit., p. 601; See also NATHALIE VOSER, *Harmonization by Promulgating Rules of Best International Practice in International Arbitration*, SchiedsVZ 3/2005, p. 113 ss.

in the domestic law of the parties. The burden must be on the person asserting the privilege to show its existence and applicability.

The party asserting a privilege bears the burden of establishing its application to a particular communication. In most domestic systems of litigation, the burden of proof lies on the person making a claim. It is no different in international arbitration. As the party asserting the privilege is generally required to prove its existence, the tribunal will not need to conduct its own separate enquiry other than evaluating the evidence and law on the issue brought before it. Of course, the arbitrators must assess whether the privilege asserted is properly applied. Clearly, international arbitrators should not sustain protection if it is claimed in bad faith. The tribunal, like a court, will also need to balance the privilege claimed with the need for the evidence[42].

When a party objects to a request for production of documents on the grounds that the information is confidential or a trade secret, tribunals generally have the power to put in place special measures to protect this information[43] by way of confidentiality agreements, protective orders or by requiring redaction of the respective documents. One might consider the same approach with respect to legal privilege claims. In some cases, it may be necessary to review the contents of the documents to decide if and to what extent protection is due. The tribunal can review the documents itself without the party requesting the documents having access to them or may entrust the review of the controversial materials to a third party expert or advisor. This private investigation approach is however not without its own pitfalls, particularly if the tribunal itself looks at the documents yet denies access to one of the parties[44]. The appointment of a neutral expert[45] may avoid delay in the proceedings as the proceedings can continue while the expert considers potential privilege issues. However, whether this would be effective in a complex case (where familiarity with all the issues may be required) is questionable.

Potential red flag issues - practical consequences of recent cases

There are a number of other issues arbitrators and counsel involved in international arbitration may need to bear in mind when considering privilege claims:

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42 A request for the production of documents should not make it possible for the requesting party to gain unauthorized knowledge of commercial or business secrets or other confidential information of the other party which is not in the public domain. Under Swiss law, trade secrets enjoy protection, principally by virtue of provisions of criminal law. Article 162 of the Swiss Penal Code (PC), for example, protects business secrets of enterprises against unauthorized disclosure by persons bound to confidentiality by contract or by law. Swiss rules of civil procedure also protect the confidentiality of trade secrets.

43 e.g. in Switzerland, Art. 183 PIL.

44 As to the potential pitfalls of such "private inspection by the Tribunal", see GABRIELLE KAUFMANN-KOHLER/PHILIPPE BÄRTSCH, op. cit, p. 20.

45 Article 3(7) IBA Rules; article 52 and 55 WIPO Rules.

a) What about in-house counsel?

This is one of the more controversial areas at present, given the divergent views highlighted above on how in-house lawyers should be regarded for privilege purposes. The dilemmas and difficulties are heightened by the fact that in many places in-house counsel are assuming more important roles in the transaction of companies' legal business. Lawyers of varied backgrounds work side by side in the same company, doing the same work, with the same obligations yet they can be treated very differently for privilege purposes.

Many civil law jurisdictions[46] do not afford any protection to communications between in-house counsel and clients at all. In these jurisdictions, company lawyers are not viewed as independent and generally do not even qualify for membership in local bar associations. As employees of a corporation, they are nevertheless subject to the general contractual duty to maintain secrecy. Under Swiss law, what an in-house counsel knows about his employer and his problems will usually qualify as a business secret in the sense of Art. 162 of the Swiss Penal Code. According to some Swiss authors however, the activity of a party's in-house counsel does seem to be protected by legal privilege if the counsel was acting on instruction of the external lawyer of the party[47].

In common law jurisdictions it is generally clear that communications between in-house counsel and clients for the dominant purpose of giving or receiving confidential legal advice are privileged from production - as long as the in-house counsel is "independent" from the client (in the sense that he or she is subject to the same standards of professional and ethical conduct as lawyers in private practice notwithstanding their employment relationship with the client)[48]. The concept of independence in Anglo-American law, requires in-house counsel to have a practicing certificate and/or belong to a local bar association.

Under EU law, the current rules on privilege date from the ECJ's judgment in 1982 in *AM&S Europe Ltd v. Commission ("AM&S")*[49]. Essentially, written communications are privileged if they are made between a company and an "independent" lawyer (defined by the ECJ as "*lawyers who are not bound to the client by a relationship of employment*") who is qualified to practice in the EU, and are

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46 See also outline in relation to 25 jurisdictions as to protection of in house counsel in DIANA GOOD, PATRICK BOYLAN, JANE LARNER, STEPHEN LACEY, op. cit.

47 FURRER ANDREAS, op. cit, p., 902.

48 *Upjohn v. US* (49 US 383 (1981)) is sometimes cited as a landmark case on the application of privilege to in-house lawyers, although in fact, the case turned not on the status of the lawyer but on the nature of the corporation as a client. See also *Waterford* v *The Commonwealth* (1987) 163 CLR 54.

See also a recent case in Australia, *Vance* v. *McCormick* [2004] ACTWC 78, *Southern Equities Coop* v. *Data Andersen* (No. 6) [2001] SASC 398); The relevant criteria for deciding whether it is available is the requirement that the individual is competent to render legal advise and is permitted by law to do so. Interestingly, in the US in *Renfield* v. *Remy Martin* (98 FRD 442 (1982), it was argued that although employed in-house lawyers were not considered "attorneys" in France and could not be members of a "Bar", they could certainly give legal advice and are permitted by law to do so. Like their American counterparts, they have legal training and are employed to give legal advice to corporate officials on matters of legal significance to the corporation and are covered (in the US) by privilege.

49 [1982] ECR 1575.

made for the purpose and in the interest of its rights of defense in relation to Commission proceedings. Protection is not only granted in relation to correspondence between lawyer and client/corporation during the investigation phase but also to correspondence exchange prior to such investigation if it has a relationship to the subject matter of that procedure. This decision provoked controversy insofar as it excluded in-house counsel and non-European Union lawyers[50]. Under the AM&S test, an US in-house counsel, and indeed even an independent (outside) counsel not qualified in the EU , will not be covered[51].

The recent decision *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission*[52] considered that the practice in AM&S needs to be reviewed. The decision is pending. It is significant that although there is no explicit provision for attorney client privilege in EU law, the Court has considered that privilege forms a general principle common to the Member States of the EU and this case highlights the increasing importance of privilege issues also within the EU[53].

Given the complexity of the in-house counsel situation and the diversity of views on how they should be treated, one might well imagine that a tribunal will have to be very alert to a whole variety of potential claims and arguments with respect to privilege claims for (for example) legal advice from in-house counsel of multinational corporations. Theoretically at least, using our example, one may imagine a situation where a request for production of the memoranda/communications from the German in-house counsel is made and granted, no privilege is claimed, because it is considered none is available, and the documents are produced. Some time later, a request for the same type of documents is made with respect to the US multinational and its US in-house counsel. This is met by a claim for privilege. In its consideration of the claim, must the Tribunal be mindful of the fact the German documents have already been produced? Granting the privilege protection now would certainly meet the US party's expectations but could well result in claims of unequal treatment by the other side. This highlights of course the necessity for a tribunal decide early on in the proceedings how privilege claims will be addressed, and not leave it until a claim for privilege is made.

b) What kind of advice is protected?

Crucial to whether privilege applies are two questions: in what capacity is the lawyer giving the advice; and what is the purpose of the communication? The

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50 Decisive is that the independent lawyer is *"entitled to practice his profession in one of the Member States"*, which is to be determined by reference to the Directive on Legal Services (Council Directive Nr. 77/249/EWG (see e.g. CHRISTOPH KERSE/NICHOLAS KHAN, *EC Antitrust Procedure*, Fifth Edition, London, 2005, p. 150). Article 1 para. 2 lit. a of the Council Directive Nr. 77/249/EWG has been amended by the Bilateral Treaty I between Switzerland and the EU (AS 2002, 1584). Some Swiss authors support the view that Swiss lawyers are now also covered by the privilege.

51 In *Hilti AG V. Commission [1990] Rs. T-30/89* it was confirmed that if an in-house lawyer is merely reporting the text or content of legally privileged communications received from an external, EU-qualified lawyer, then such report will also be privileged. However, privilege will be lost if the advice is amended, contains the in-house lawyer's opinion, or is widely circulated beyond relevant staff.

52 [2003] ECR II – 4771.

53 See also CLAUDIA SEITZ, *Unternehmensjuristen und das Anwaltsprivileg im europäischen Wettbewerbsverfahren – Wandel in der europäischen Rechtsprechung?*, EuZW, Heft 8/2004, p. 231 ss.

privilege protection applies provided the communication relates to legal rather than business advice; to a legal as distinct from an administrative matter.

One problem that often arises is the problem of lawyers wearing several hats. An external lawyer may act as board member or officer of the corporation to which the advice is given. If acting as board member or officer, there is no privilege. Organizations employing in-house lawyers expect their lawyers to "know the business" of the organization, and in many cases they expect their in-house lawyers to participate in business decisions and often ask them for business, technical or strategic advice.

Which hat, then, is the lawyer wearing during the relevant conversation or during the creation of the relevant document, and how does that affect the privilege? Is the advice purely "legal" or is it more "business oriented"? If the latter, it may not attract privilege protection.

In our example, if any of the lawyers (in-house or external) whether for the US company or the German company provided advice to management of an administrative or business nature this is unlikely to be privileged. The prosaic formulation of the test for protection in *Three Rivers* was whether the lawyer giving the advice was asked to "*put on legal spectacles*"[54].

c) *Who is "the client" for the purposes of legal privilege?*

In the corporate context, the most common problem for privilege purposes in common law is determining who among the corporation's employees speaks on its behalf: who is the client? In larger entities, "the client" may not be the entity itself but a specific group or body within that entity for example, the Board, a specific committee or even an individual. Similar issues can arise in relation to in-house counsel: who is their "client"?

To the extent "the client" is only a specific group or an individual, communications with other employees of a company may not be privileged, even though they may otherwise fall within the relevant privilege definition. This means that when the "client" seeks the help of colleagues in preparing materials for the lawyers, the colleagues' work will not be protected by legal advice privilege nor will their communication with the lawyers[55]. In the US, courts have traditionally applied a "control group" test or a "subject matter" test to see who within the cor-

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54 The scope of legal advice privilege came under scrutiny in the *Three Rivers cases*. The House of Lords confirmed that, provided a lawyer acts in "relevant legal context", any communication relating to the performance of the lawyer's duties, including presentational advice, should be protected. The House of Lords confirmed that legal advice privilege is not confined only to advice on the law, but also applies to "advice as to what should prudently and sensibly be done in the relevant legal context." See also *Balabel* v *Air India* [1988] 1 Ch 317.

55 In *Three Rivers* (see fn 1 above), the House of Lords did not give any guidance on communications between lawyer and client's employees. Careful consideration needs to be given as to how a client obtains advice from its internal or external lawyers, and from whom those lawyers should obtain information and instructions. Problems could arise if it is arguable that the employee does not constitute the "client".

poration is in a position to control or take a substantial part in the determination of corporate action or who has responsibility to deal with the lawyers.

If otherwise privileged documents are circulated too widely, protection may be lost. Issues may arise about whether legal advice from a US or UK lawyer (whether in-house or external) retains its privilege in the hands of the client's German, French, Italian, Swiss or other civil law qualified in-house lawyer or in the hands of an employee of the client who has no relation whatsoever to the matter. In these circumstances, is it conceivable that there is some obligation on the tribunal to consider or investigate these issues? What about advice with input from both UK and a Swiss In House Counsel?

d) What is the position of communications with third parties?

As noted, under Swiss legal privilege, the source from which the lawyer learns about a fact does not matter, nor does the time when this happened. No distinction need be made between facts learned by the lawyer from the client and those learned from a third party to fall under the privilege protection. However, communications between a party to a litigation and a third party who is not an independent lawyer are not privileged. Party-appointed experts can in principle not invoke a legal privilege under Swiss law (unless the expert is an independent lawyer).[56]

In common law jurisdictions the traditional view[57] has been that a client's communication with a third party could only be privileged if made for the purpose of actual or anticipated litigation. The only 'exception' to this was where the third party could be considered the client's "agent" in making the communication with the lawyer. Communications and documents prepared by or obtained from independent third parties such as expert non-legal advisers (e.g. brokers or economists or accountants, as well as ex-employees of a client) with the dominant purpose of obtaining legal advice and then sent to the client or the lawyer traditionally attracted protection only in specific circumstances.

According to a recent Australian decision[58] privilege can now attach to documents prepared by a third party at a client's request, provided that the documents were prepared for the dominant purpose of the client obtaining legal advice. The decision reflects a shift from focusing on the nature of a third party's relationship with the client (i.e., whether it is the client's agent), to focusing on the nature of the function the third party has performed (i.e., whether it was for the purpose of the client obtaining legal advice). The decision also reflects the court's practical approach, recognizing the increasingly numerous and complex situations where legal advice is required; and clients' increasing reliance on services and advice from third party experts in obtaining thorough and complete legal advice. How-

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56 See e.g. FURRER ANDREAS, op. cit., 902.

57 Generally said to be based on *Wheeler* v *Le Marchant* (1881) 17 Ch 675

58 *Pratt Holdings Pty Ltd* v. *Commissioner of Taxation*, see fn. 1 above.

ever, for the protection to apply, it must still be established that the client's intention to use the third party's document to obtain legal advice was the main reason the document came into existence. In our example, where the client is undertaking a transaction with crucial tax elements and the advice of an accountant needed for legal advice on the transaction, whether the accountant is hired by the lawyer or by the client, ought not destroy the privilege. If however the client filters, adapts or uses the communication from the accountant also for other purposes, privilege protection may be lost.

Some common law courts have also recognized that a strict treatment of communications with external experts such as accountants may be unfair because smaller companies that are forced to obtain external accounting advice could be disadvantaged compared to large corporations with internal accounting departments that do not need to use external experts.

e) *Communications between clients and "foreign lawyers"*

Anyone familiar with the international dimension that complex proceedings may take on, and given the potential wide reach of discovery, must recognize there is a need to recognize that "foreign" or overseas legal advice needs to be privileged in the same way as purely domestic communications and irrespective of reciprocity in the country of the advising lawyer's establishment. However, there do not appear to be settled practices in this regard.

From a Swiss perspective, a Swiss independent lawyer may be punished for breach of professional secrecy if committed abroad. On the other hand, lawyers practising abroad are subject to their domestic statutes with regard to legal privilege but when acting in Switzerland, Swiss law applies to them[59].

Another recent Australian decision[60] has provided some further guidance (at least on a domestic level) on protecting from disclosure communications between clients and foreign lawyers. The case involved seizure under warrant in Australia of handwritten notes made by an individual in London and in Zurich. Privilege was claimed over the notes with the individual asserting that they had been prepared for the purposes of obtaining legal advice from a Swiss lawyer, who also managed some of the individual's overseas financial affairs. The main reason the notes were held not to be privileged was that the court found the dominant purpose for which they were made was to discuss business issues rather than obtain legal advice. The Court did however also address the general issues of whether privilege extends to communications between clients and foreign lawyers and held that privilege can be available in relation to legal advice from foreign lawyers. The court acknowledged that in the current commercial environment, cli-

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59 It is noted that the application of the professional codes of conduct incorporated into the Federal Act on the Free Movement of Lawyers of 23 June 2000 ("FAFM") is limited to lawyers licensed to practice law and inscribed in a professional register in Switzerland.

60 *Kennedy* v. *Wallace* see fn. 1 above.

ents may need to seek advice from foreign lawyers, and that to treat privilege as jurisdictionally specific right is both impractical and contrary to the purpose of the privilege to enable persons to seek legal assistance in conducting their affairs[61]. This argumentation could potentially be quite useful also in international arbitration.

Human Rights Issues

There has been speculation in recent years that human rights legislation which gives effect to the European Convention on Human Rights (ECHR) could affect the operation of the doctrine of privilege.

In interpreting existing legislation and fashioning the law, it is increasingly argued that courts must give effect to the ECHR including the Article 6 right to a fair trial[62]. To ensure a fair trial in accordance with Article 6, a client must be able to seek legal advice without fear that those communications will be disclosed. On the other hand, those "protected" communications might be vital to a fair trial of another party. The question arises as to the extent to which a court (or a tribunal) might indeed have to conduct a balancing exercise between upholding privilege and ensuring all relevant evidence is made available[63].

Whether or not human rights issues are or could be applicable in arbitration (whether in the applicability or application of privileges, or otherwise) is a whole new chapter and largely outside the scope of this article. There may well be good reasons why an arbitrator should not apply Article 6 of the ECHR. Many argue that quite simply, Article 6 was not designed for arbitral proceedings. The trend of the case law has been to the effect that Article 6 (1) rights are waivable, i.e. the parties can opt out of their right to an independent and impartial tribunal in the public system of justice by choosing private arbitration. The question is: Does justice have to be seen to be done in arbitration?[64]

It seems reasonably sensible that so long as basic notions of fairness and equality are respected, there is no reason why the ECHR should play any significant role[65]. Nevertheless, failing to consider human rights issues can potentially be a

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61 See also *Renfield* v *Remy Martin* in the US (fn. 48 above) which, although relating to foreign in-house counsel was along the same lines.

62 *General Mediterranean Holdings SA* v *Patel & Anor* 1999 QB (all ER) 673 found that interference with the right to consult a lawyer of one's choosing violates Article 6 of the European Convention on human rights (ECHR) guaranteeing the right to a fair hearing, including legal assistance. The same case decided that interference with correspondence between lawyer and client infringes the principle of respect for privacy enshrined in Article 8 of ECHR. It is to be noted that there is now consistent case law and doctrine that corporate entities can also be the beneficiaries of human rights.

63 See e.g. the decision of the European Court of Human Rights in *Dowsett* v. *United Kingdom* (App No. 39482/98) where withholding relevant evidence on the grounds of public interest immunity was held to violate a defendant's right to a fair trial under Article 6 (1) of the Convention.

64 In *R* v. *Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, Lord Hewart CJ famously said: "*Justice should not only be done, but should manifestly and undoubtedly be seen to be done*".

65 The fact that the Convention should not play a significant role in arbitration was originally the clearly expressed view of the Swiss Federal Supreme Court. Since then, the Swiss Court has almost casually referred to Article 6 when talking about procedural fairness without basing any decision on it. More recently, it has declared that by agreeing to arbitrate, parties waive their Article 6 rights. See BGE 112 Ia 166; BGE 128 III 50.

question of due process which while not a basis for a separate action challenging an award, may become a factor in enforcement depending on local requirements and policy issues. Where parties have contractually agreed to relevant procedures or issues such as confidentiality and privilege it may not be an issue, however the position is less clear where they have not.

Matters such as disclosure, privilege and evidence are governed primarily by rules of domestic law, rather than the ECHR[66]. What this could mean for international arbitration is uncertain (particularly as many regard private arbitration as outside the scope of the ECHR anyway) but arbitrators and counsel need to be aware that by applying different systems of privilege to different parties, or to different issues, without the parties' consent, there could be an inequality of arms.

Approach of the Tribunal

One of the concerning trends commentators warn of, is the judicialisation of arbitration. This may well be one of the reasons why privilege has become a 'hot topic' – more claims of privilege are being made and have to be dealt with by arbitrators. Arbitrators and counsel face increasingly complex situations and potentially also more complex claims for privilege, some no doubt justified, and equally, some not.[67] If there is indeed a trend to increased judicialisation and this is not stemmed, the next years will witness increasing challenges also in this areas for all involved.

In the absence of shared values and common ethical norms, in areas where there are no settled rules and there are no universal standards, there is a need for decisive action by arbitral tribunals who must properly monitor and moderate divergent approaches. Arbitrators must demonstrate a willingness to take control and to be tough and pragmatic when this is needed. They cannot shy away from making difficult decisions. If you are in a contentious situation, you need a decision-maker even on sensitive issues.

Arbitrators may draw an adverse inference from the failure to produce evidence that is ordered to be produced (inferring that the contents of the document or communication would have been adverse to the interests of the party which failed to produce it)[68]. This 'solution' is incorporated into Article 9(4) of the IBA Rules but may not be an appropriate or acceptable solution - particularly where a party is not actually able to produce the document (e.g. where it has been destroyed).

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66 *L* v. *United Kingdom*, unreported, 7 September 1999.

67 One can effectively only speculate whether this is indeed so and try to gauge concerns from comments of practitioners as very few published arbitral decisions deal with privilege.

68 It would be probably problematic to say that the Tribunal should take a more drastic approach and consider the facts to be proven by the respective document deemed to be established.

The sanction of adverse inferences may also not help a party who needs the document to prove its claim. Should one shift the burden of proof to the party with access? This may not provide a solution where there is a genuine impediment to production. What is clear however is that a party who asserts a privilege over a document should not in turn attempt to make use of any aspect of the allegedly privileged document without disclosing it. One cannot try to use advantageous portions of the privileged information while shielding other portions from one's opponent that might be harmful to the case.

Another question is whether a tribunal can invite a party to waive its right to invoke legal privilege (and to draw adverse inferences in case of failure to waive the privilege). According to some US authors, already the making of such request to a party would be critical. Other authors are of the view that it is proper to ask the holder of a secrecy right (who is a party to the arbitration proceedings) to waive such right, and if he refuses, to draw respective negative inferences.[69]

Most skilled arbitrators seem to have an ample supply of velvet gloves for their iron fists and can reach solutions in a more relaxed and less technical fashion than a judge is compelled to do, while at the same time not prejudicing the enforceability of their awards and also ensuring that the arbitration moves along and does not get bogged down in a mire of privilege issues and costs.

Arbitrators often walk a tightrope, among others, trying to balance efficiency against careful consideration of all arguments, dealing with the conflict between efficiency and due process. They must however also bear in mind that: "*Truth, like all other good things, may be loved unwisely; may be pursued too keenly [and] may cost too much*"[70].

Solutions?

Some possibilities have already been highlighted above.

The overriding duty of international arbitrators when resolving the disputes before them is to do so in such a way as to render the award enforceable, both in a country where it is rendered and in any country in which it is likely to be enforced. The requirements of due process must be observed[71].

Equality before the tribunal generally requires that the same level of privilege or protection should exist for all parties. It is fair and reasonable that companies (and individuals) should be able to freely choose the sources of their legal advice

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69 See e.g. MARC BLESSING, EG / US Kartellrecht in internationalen Schiedsverfahren – 77 Aktuelle Fragen aus der Praxis, in: Swiss Commercial Law Series, Basle, 2002, p. 73 ss.

70 *Pearse* v *Pearse* (1846) 1 DeG & Sm 12.

71 See Article V (1) (b) and (d) of the New York Convention; also Section 182 (3) PIL; Article 14 (1) of the LCIA Rules; Article 15 (2) of the ICC Rules; Section 15 (1) of the UNCITRAL Rules; Article 18 of the UNCITRAL model law. Further it is interesting to note that some US courts have found that the failure to apply privilege law may be a ground for potential 'vacatur' in a domestic arbitration – see fns 212 and 213 MOCK/GINSBURG, op. cit.

and assistance. To restrict their choice (by e.g. later applying different and unexpected rules of privilege) risks being seen as unfair.

Experience shows that arbitrators apply common sense to questions of privilege and seek a workable solution. Tribunals tend to apply the rules of privilege that are shared by the parties (without regard to the rules of the forum). The requirement of equal treatment demands that the rules and law of the arbitration be applied uniformly to both parties. Consequently, where a privilege has been asserted by one party, it should be able to be invoked by the other. Where one party would expect to enjoy greater evidentiary privileges before its national courts, in practice tribunals tend to allow the other party to also benefit from such additional privilege protection to level the playing field.

It has been argued that some of the difficulties highlighted in our discussion above could be alleviated if a harmonized approach to rules of privilege, their application and scope, could be found and adopted[72]. As already mentioned, although many transnational or global standards do exist, it remains questionable whether, in light of the extent to which national rules on privilege vary, such 'harmonized' or 'transnational' approach (even if one could be found) could really be workable in practice given the nature of privilege rights and protections and the diversity in approach that exists even within the common law and civil law systems themselves.

Conclusion

The lack of procedural convergence has the potential to impact on the consistent and fair application of privileges in the international arena. Too much discretion on the part of a tribunal, particularly in a sensitive area like this, leaves perhaps too much potential for decisions which are contrary to expectations (which arose long before an arbitration was even contemplated). As Prof. William Park wrote, it is sometimes said that procedural diversity in arbitration serves to "*enliven the game*", but arbitrators must try to avoid surprises, and not give parties the impression that the "*game*" that is being played is "*American football and British rugby at the same time, never knowing whether and when the ball will be thrown forward*"[73].

There is no definitive answer, no recipe for all seasons, no cookbook for the solution that holds the key for all situations. In the event of a conflict between the privilege rights generally enjoyed in its own jurisdiction by each party to the arbitration, there is no legislation, rule, legal praxis or binding authority addressing exactly how to solve the dilemma, which can certainly be far more complex today than before because of the nature of modern business. The question is left to the discretion of the arbitrators, who must ensure fair play and a level playing field:

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72 See eg. NATHALIE VOSER, op. cit., p. 118; See e.g. GABRIELLE KAUFMANN-KOHLER/PHILIPPE BÄRTSCH, op. cit., p. 21.

73 see WILLIAM PARK, Arbitration's Discontent: Of Elephants and Pornography" in (2001) 17 (3) Arbitration International 265.

they must act fairly vis-à-vis all parties and be mindful of their legitimate expectations.

A number of cases dealing with privilege issues have been mentioned. They are of course litigation cases and not arbitral decisions. Some of them also turn on their own peculiar facts. However, they are timely reminders of the questions that could arise. Each of these issues may be, or may become, matters that need to be resolved by a tribunal in international arbitration.

This article remains very much a work in progress and is intended to be part of an ongoing discussion on the topic. Even though arbitrators often find the common sense approach to the conflicting issues that arise and apply the widest form of privilege, there is room for debate and an increase in awareness of the issues and potential pitfalls to avoid jurisdictional nightmares. The debate about privilege across borders is certainly not just a storm in a teacup, but it is also not a subject which should unduly frighten pragmatic arbitrators and counsel who, if they are alive to the issues, should be able to successfully navigate its tricky waters.

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