Title:

Table of Contents:
Evidentiary Privileges: Best Practice Standards versus/ and Arbitral Discretion
I. Introduction
II. The Nature And Purpose of Evidentiary Privileges
   (a) General Observations
   (b) Diversities in the Law of Privileges: Attorney-Client Privilege and In-House Counsel
III. Conflict of Laws issues
   (a) The Silence of Arbitration Laws and Rules
   (b) Qualification of Privileges
      (i) Procedural or substantive?
      (ii) Comparative approach to qualification
      (iii) Substantive nature of privileges
   (c) Possible Conflict of Laws Approaches
      (i) Choice of law by the parties?
      (ii) 'Closest connection test'
IV. Do We Need Harmonised Best Practice Standards
   (a) Balancing Conflicting Privilege Standards: Reliance Interest versus Arbitral Due Process
   (b) Pre-formulated Rules or Arbitral Discretion?
      (i) Transnational privilege standards?
      (ii) General principles for balancing conflicting privileges
   (c) Levelling the Playing Field
      (i) 'Most favoured nation rule'
      (ii) 'Least favoured nation rule'
V. CONCLUSION

Content:
Evidentiary Privileges: Best Practice Standards versus/ and Arbitral Discretion

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I. Introduction

It has been said about the determination of privileges in international commercial arbitration that '[t]he only thing that is clear is that nothing is clear in this area',¹ that the law of evidentiary privileges in international arbitration is 'substantially unsettled'² and that 'there is very little authority addressing how international arbitrators should proceed when presented with a claim of privilege'.³ In spite of these uncertainties, or because⁴ of them, international arbitral tribunals have been facing an increasing number of claims of privilege in recent years.

Arbitral practice and legal doctrine mention three reasons why legal issues related to privilege determination in international arbitration are regarded as diverse, complex and disputed:

(1) the nature and concept of evidentiary privileges is different in civil law and common law;

(2) there are essential differences in the qualification of privileges as substantive or procedural matters in common and in civil law;
(3) there are no established conflict-of-laws rules for the determination of the law applicable to privileges in international arbitration.

However, there is not only agreement on differences but also on two basic policy considerations. They form the bottom line of any discussion on the treatment of evidentiary privileges in international arbitration. First, international arbitrators should accede to an appropriate privilege objection raised in good faith. Secondly, the need for legal certainty and predictability and the need to safeguard the parties’ legitimate expectations as to the application of a certain privilege standard is particularly strong in this field of law because ‘[p]arties rely on privileges’.

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.

As in any other field of international arbitration law, a ‘trial by ambush’, i.e. unfair surprises of parties who have relied on the protection standard of a certain evidentiary privilege, must be avoided. However, there are at least two parties in an arbitration. They may have relied on different privileges with different protection standards. In view of the risk of unequal treatment caused by the parties’ diverse legal backgrounds it has been suggested to develop best practice standards, i.e. to prefer ex ante rule-making by formulating agencies such as the IBA instead of ad hoc decision-making by international arbitrators in a given case.

II. The Nature And Purpose of Evidentiary Privileges

(a) General Observations

Evidentiary privileges are legally recognised rights to withhold certain testimonial or documentary evidence from a legal proceeding, including the right to prevent another from disclosing such information. The fact that such privileges must be observed is acknowledged by such international instruments as the ALI/UNIDROIT Rules on Transnational Civil Procedure and the Hague Convention on the Taking of Evidence Abroad in Civil or Criminal Matters.

There are various types of privileges. Professional privileges apply to certain kinds of communications received or transmitted in the course of the exercise of professional relationships. The legal professional privilege or attorney-client privilege provides a practical example of such a professional privilege. It relates to communications made between an attorney and his or her client in the course of, or in anticipation of, legal advice. It is generally accepted today in many jurisdictions all over the world. It is an essential characteristic of the attorney-client privilege that it covers all those communications which ‘originate in a confidence that they will not be disclosed’.

While there is agreement in principle on the benefits and intrinsic value of such a privilege, there are differences with respect to the nature, quality and scope of privileges. In common law jurisdictions, the justification for the attorney-client privilege focuses on the client who needs to be protected from the comprehensive discovery rights which exist there: ‘a man must be able to consult with his lawyer in confidence, since otherwise he might hold back half the truth’. In civil law jurisdictions, the attorney-client privilege stems from the secrecy obligation of the attorney who is subject to criminal sanctions if he violates his professional duty of confidentiality. The focus is thus not on the client but on the integrity of the legal profession.

This intrinsic difference in the justification of privileges in common and in civil law has important repercussions on the effect and nature of privileges. Thus, while in Germany or Switzerland it is the attorney and not the party who may invoke the privilege (‘professional secrecy’), the privilege belongs to the party under American and English law. Consequently, protection under the privilege may be waived by a party under American and English law, but not under Swiss or German law. In any event, the mere fact that the parties have agreed to arbitrate their disputes cannot be regarded as a waiver of applicable privilege law.

There are other privileges which play a role in international arbitration. The business or trade secrets privilege protects
business secrets. The settlement privilege extends to statements made 'without prejudice' during settlement discussions. There is also a privilege in common law for government information related to documents which are classified as confidential, secret or top secret. These national security privileges are based on the idea that the danger to the national interest from disclosure outweighs any public or private interest in truthful fact-finding in a particular litigation. The existence of such a national security privilege has been acknowledged by many international tribunals. 19

(b) Diversities in the Law of Privileges: Attorney-Client Privilege and In-House Counsel

A typical example of the differences and disagreements prevailing in the law of privileges is the attorney-client privilege. A worldwide survey by Lex Mundi reveals that the attorney-client privilege is known in more than 90 jurisdictions. However, it also reveals that there are substantial differences in the application and scope of this privilege. One of the most important questions is whether the attorney-client privilege extends to in-house counsel.

In the USA and in England, the attorney-(corporate)-client privilege applies to in-house counsel provided the relevant communication relates to legal advice and not to general business matters. 21

It is often argued that 'in Europe' the opposite rule applies. In fact, however, the legal situation in Europe is diverse. In Switzerland, France, Sweden and Italy, the attorney-client privilege is available only to outside counsel. Because of the employment relationship with their company, in-house counsel are not considered sufficiently independent to merit protection of professional secrecy. In the AM & S judgment of 1982, the European Court of Justice found that this limited notion of the attorney-client privilege constitutes a general principle of EU law. However, in 2003 the President of the European Court of First Instance posed the question whether the view maintained by the court in the AM & S judgment can still be upheld for those in-house counsel who are bound by strict rules of professional ethics. It is argued that in view of the new decentralised antitrust procedure introduced through the Anti-Trust Procedure Regulation 1/2003, which puts an increased burden on legal departments, in-house counsel of European companies should enjoy a greater degree of protection by applying the attorney-client privilege to them. In Germany, the legal situation is far from settled. The prevailing view is that in-house counsel who are admitted to the Bar and who may act as practising attorneys for clients other than their company ('Syndikusanwälte') may invoke the attorney-client privilege at least insofar as the legal work for their employer is concerned. The difference between the prevailing view in German and Swiss law is caused by the fact that in Germany, in-house counsel can be admitted to the Bar, while in Switzerland, lawyers with the status of employee are not considered independent and are usually not registered with the cantonal Bar. The same is true with respect to French in-house counsel. However, the German Federal Supreme Court has ruled that to regard in-house counsel as practising attorneys would mean that 'independence would no longer be an essential element of the profession of attorneys'. It is argued that based on this view, any professional activity of in-house counsels which relates to their position as employees of their company must be regarded as falling outside the scope of work of independent attorneys. Therefore, according to this view, in-house counsel may not rely on the attorney-client privilege.

It is due to these inherent differences in the treatment of privileges in domestic laws that the risk of unequal and unfair treatment of parties with different legal backgrounds in an international arbitration arises.

III. Conflict of Laws issues

(a) The Silence of Arbitration Laws and Rules

All major arbitration laws and rules contain general choice of law provisions with respect to the subject matter of the arbitration. They also contain general provision on the tribunal's discretion in the taking and evaluation of evidence. However, they remain silent on the issue of the law applicable to evidentiary privileges that might arise in an arbitration conducted under its auspices. There are only very few exceptions to this rule. An express provision is found in s. 20.6 of the ICDR Arbitration Rules which provides that the tribunal 'shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client'. Likewise,
s. 9(2)(b) of the IBA Rules on the Taking of Evidence allows the tribunal to exclude from evidence or production any document, statement, oral testimony or inspection due to a legal impediment or privilege ‘under the legal or ethical rules determined by the arbitral tribunal to be applicable’. Article 38 of the International Arbitration Rules of the Zurich Chamber of Commerce of 1989 provided that a witness may refuse to testify against himself and refuse testimony which would infringe official or professional secrecy protected by criminal law, unless the witness has been freed of its secrecy obligation. The Swiss Rules of International Arbitration which have superseded the Zurich Rules do not contain such a provision.

Even those rules which contain express provisions on privileges remain silent on the question of which privilege rules apply or which conflict rules should be applied by the tribunal in determining the applicable privilege rules. This is not surprising given that it is generally acknowledged that there are no established choice of law rules that govern the determination of the law applicable to privileges in international arbitration. The situation resembles that of determining the law applicable to professional ethics of attorneys practising across borders. The problems related to this area have been characterised as ‘the last unresolved mysteries of professional ethics’ or as ‘catch 22 situations’.

(b) Qualification of Privileges

A first step in any conflict of laws process is the qualification of the relevant issue. It is here that the problems with evidentiary privileges begin.

(i) Procedural or substantive?

Some common law jurisdictions tend to qualify evidentiary privileges as a substantive matter. Others regard them as procedural. Civil law jurisdictions also favour a qualification as a procedural issue. The difference between these views is substantial. Under a procedural view, the tribunal would have to apply the privilege rules of the law applicable to the arbitral procedure. Under the territorial theory which prevails in almost all modern arbitration laws, this would be the arbitration law at the seat of the arbitration, the lex loci arbitri. Such an approach has the beauty that a single law could be applied to the issue of evidentiary privileges immaterial of which party raises the privilege. Unequal treatment of the parties could be avoided at the outset. Under a substantive perspective, the arbitral tribunal would have to apply the general conflict of laws rules contained in the applicable arbitration law. This approach, however, has a potential for unequal and unfair treatment of the parties because it could lead to the application of different laws with different privilege standards.

(ii) Comparative approach to qualification

As a first step one must decide which rules an international arbitral tribunal is to apply in qualifying privileges. The development of such rules must be based on three basic premises. First, it is generally acknowledged today that an international arbitral tribunal is under no obligation to apply the general conflict of laws rules which the courts at the seat of the arbitration have to apply as part of their lex fori. An international arbitral tribunal has no lex fori. Secondly, international arbitral tribunals, by their very nature, are inclined and entitled to take a comparative approach in tackling choice of law issues. In the area of qualification, this approach finds support in the works of the late Ernst Rabel who favoured a ‘comparative qualification’ even under domestic conflict of laws rules due to the inherent comparative nature of the qualification process. This thought applies with even more justification in international arbitration. Thirdly, it is generally acknowledged that in making choice of law decisions, international arbitral tribunals should do justice to the legitimate expectations of the parties. It has been emphasised above that the parties’ reliance interest is particularly relevant in the area of evidentiary privileges. Application of the law of the seat of the arbitration would not do justice to this strong reliance interest of the parties. The seat merely serves to provide the ‘formal legal domicile’ (formales Legaldomizil) of the arbitration. This limited function is reflected in the notion of the ‘juridical seat’ of the arbitration as opposed to the place where the hearings are actually conducted and evidence is taken. It would be highly unsatisfactory and not in line with the legitimate expectations of the parties if the law of the seat of the arbitration would be applied to the issue of evidentiary privileges when the relevant communication took place or
the relevant documents were exchanged in another jurisdiction or even in another continent, years before the seat was chosen (for mere purposes of convenience) or the arbitration was commenced.55

(iii) Substantive nature of privileges

A comparative qualification of evidentiary privileges will almost certainly lead to the conclusion that these issues have a substantive nature. This follows from the public policy judgements underlying these privileges.56 Very often, these judgements relate to the value of certain kinds of information or communication. Such judgements are substantive in nature, even if they are manifested in procedural law in certain jurisdictions because they relate to the taking of evidence.57 Focusing on the value of the relevant information or communication allows a substantive qualification irrespective of whether the privilege is a right of the client, as in common law, or a right of the attorney, as in civil law.58

(c) Possible Conflict of Laws Approaches

Based on this substantive qualification of evidentiary privileges, an international arbitral tribunal must determine the law applicable to the privilege at issue by reference to the classical conflict of laws rules embedded in most modern arbitration laws or rules.

(i) Choice of law by the parties?

If the parties have chosen the law applicable to the issue then the arbitral tribunal must follow this choice. In practice, however, such a case will be extremely rare. The standard choice of law clause contained in the contract before the tribunal will almost never cover evidentiary privileges. The parties almost never think of these issues when they draft the choice of law clause.59 Also, the communication and information to which the privilege relates will often have taken place in a jurisdiction other than the one chosen by the parties to govern their contract. For both reasons, extending the choice of law clause to the issue of evidentiary privileges would in most cases violate the parties' legitimate reliance interests.

(ii) 'Closest connection test'

Absent a choice of law by the parties, the tribunal must seek an objective connection between the privilege issue and a certain law. In the USA, r. 501 of the Federal Rules of Evidence requires federal courts to apply state privilege law in diversity cases but does not state which law will be applied. Therefore, a comprehensive catalogue of connecting factors has been developed for inter-state practice cases. For the attorney-client relationship they refer to the laws of:

the forum state;
the state in which the underlying cause of action arose;
the client's domicile;
the other party's domicile;
the state of the attorney's practice;
the state where the communication occurred.50

The problem with this catalogue is that it has been developed for American inter-state privilege issues and that it is based on such 'soft' and unpredictable conflict of laws concepts as 'governmental interest analysis' or 'better law approach'. These concepts are heavily criticised for being far from providing the necessary predictability and certainty.61 International arbitration therefore must develop its own conflict of laws approach for the determination of the law applicable to evidentiary privileges. Rather than setting up an abstract catalogue of possible laws which might be applied to this issue,62 this approach must be based on a 'hard and fast' conflict rule.

Irrespective of whether the tribunal is operating under conflict rules allowing for a 'voie direct or a 'voie indirect', there is
one conflict rule which almost every tribunal applies consciously or intuitively and which has developed into a transnational rule of conflict of laws: the 'closest connection' or 'centre of

gavity' test. This test has its roots in the works of Savigny who searched for the law with which a certain case has a territorial nexus, in which it has its 'seat'.

Such a test must also be applied to evidentiary privileges in international arbitration. Absent a choice of law by the parties, the tribunal must apply the law of the jurisdiction with which the events or the communication which form the subject of the evidence issue before it are most closely connected. This law can and will in many cases be different from the law applicable to the substance of the dispute and the law applicable to the arbitral procedure.

Such a conflict rule provides at least a minimum degree of predictability and certainty. It is for that reason that the development of such a 'rigid, territorial rule' has been characterised in the USA as 'the only choice of law approach consistent with the objectives of the attorney-client privilege'. However, the discussion in the USA reveals that the application of such a rigid test does not produce uniform results. While some favour the application of the law of the state of the attorney's practice, others want to focus on the place where the entire attorney-client relationship has its predominant effects, regardless of whether the lawyer was licensed in that state, thereby taking into account the fact that a lawyer may form a relationship with a client in a state other than the one in which he principally practises.

It seems that this latter approach does in fact provide the right approach for the determination of the law applicable to evidentiary privileges in international arbitration. In the case of the attorney-client privilege this will be the law with which the attorney-client relationship has its closest connection. Typically, this will be the law of the state where the attorney-client relationship was established and which prevails even when the arbitral procedure is conducted in another country. If the attorney and the client have their domicile or place of business in the same country, the law of that country applies. If they reside in different countries, one might be tempted to argue that the law where the attorney resides or is admitted to the Bar applies because only the attorney is likely to know about the scope of the privilege. One might also be tempted to differentiate between civil and common law and argue that when the party is from a common law jurisdiction where the privilege is vested in the attorney (as a right to refuse testimony), the law of the party applies whereas in those cases where the party is from a civil law country where the

privilege is vested in the attorney (as a right to refuse testimony), the law of the place where the attorney is admitted to the Bar applies. However, this would not do justice to the parties' reliance interest which plays such an important role in this context and which is focused on the parties' own privilege rules. Thus, it is the law of the jurisdiction where the party has its place of business at the moment the relevant communication took place and where most of the attorney-client contact occurred which will be applied in most of these cases. In case of witness testimony it is the law of the domicile of the witness which must be applied.

IV. Do We Need Harmonised Best Practice Standards

(a) Balancing Conflicting Privilege Standards: Reliance Interest versus Arbitral Due Process

The certainty gained through the territorial conflict of laws approach developed above is only relative. It has its drawbacks. It has been rightly emphasised that the application of the domestic law of one of the parties in international arbitration contravenes the notion of substantive neutrality. The inability of the traditional conflict of laws methods to ensure substantive neutrality has been referred to as the arbitrariness of the conflict of laws. The generality and abstract nature of legal rules such as the ones on evidentiary privileges may ensure more predictable results. However, their application in practice may also lead to 'unfair' results in some cases.

An example: In an arbitration between a party from the USA and a party from Switzerland, the Swiss party submits to the tribunal a request to produce (art. 3(2) and (3) of the IBA Rules on the Taking of Evidence) certain documents which might be relevant for that party's claim (legal reports, telephone memos on legal issues, contract drafts, email communication with board on legal issues, etc.). These documents are in the possession of the in-house counsel of the American party. The American party invokes the attorney-client privilege, which, in that jurisdiction, also applies to in-house counsel. The Swiss side objects because in Switzerland and other European jurisdictions, the attorney-client
privilege does not apply to in-house counsel.\textsuperscript{77}

If the tribunal accepts the privilege invoked by the American side and refuses to order production of the documents pursuant to s. 9(2)(b) of the IBA Rules on the Taking of Evidence, the Swiss party would find it hard to accept that the American party can shield the documents from any requests to produce while the Swiss side does not have the same defence against a potential request from the American side. The Swiss side finds that it is treated in an unfair manner by the tribunal. If the tribunal would reject the American party's privilege objection, that side would argue that it feels treated in an unfair way because it had relied on the privilege of its home jurisdiction.

(b) Pre-formulated Rules or Arbitral Discretion?

Arbitrators who are faced with such a situation are called upon to reconcile the conflicting standards of protection under the different laws. The flexibility of the arbitral process has always enabled and continues to enable a mitigation of the differences of the domestic systems from which the parties come.\textsuperscript{78} However, it has been argued that leaving such issues to arbitral decision-making during the proceedings leads to the 'dark side of [arbitral] discretion' which lies in the discomfort that a party may feel when arbitrators make up their own rules as they go along, divorced from any precise procedural canons set in advance.\textsuperscript{79} Does this mean that we need harmonised best practice standards in order to provide the parties with legal certainty and to prevent trials by ambush? The answer to this question requires a look at the alternatives.

(i) Transnational privilege standards?

It has been suggested that in order to avoid arbitrariness in the practical application of evidentiary privileges, transnational privilege standards or a global privilege standard should be developed as part of a new lex mercatoria or transnational ordre public for those privileges which are well established in most jurisdictions.\textsuperscript{80}

THE RULE: NO TRANSNATIONAL PRIVILEGE STANDARDS

It is true that the value judgements underlying some privilege rules like the attorney-client privilege are to be found in many jurisdictions and are recognised also by international tribunals.\textsuperscript{81} It is also true that soft law instruments 'codifying' professional ethics exist in the European Union.\textsuperscript{82} Also, the European Court of Justice has developed the attorney-client privilege as a general principle of European law even though there is no explicit provision in European law to that effect.\textsuperscript{83} However, there are no such soft law standards on a global scale. The ALI/UNIDROIT Principles of Transnational Civil Procedure are intended to be applied on a global scale but they do not contain detailed rules on privileges.\textsuperscript{84} Therefore, arbitrators would be left with the task of developing a transnational privilege standard on an ad hoc basis in a given case. The substantial differences with respect to the nature, scope and limits of privileges contained in domestic laws\textsuperscript{85} reveal that this is not an easy task. The potential arbitrariness arising out of the application of different domestic laws is substituted by the uncertainty related to the question whether a tribunal will in fact accept a certain rule as being part of transnational law, how it will formulate the rule and its scope and where it sees its limits. It is for this reasons that the development of such transnational rules has been characterised as '[n]ot very realistic at this point in time'.\textsuperscript{86}

THE EXCEPTION: THE TRANSNATIONAL NATURE OF THE ‘WITHOUT PREJUDICE’ PRIVILEGE

One exception to the general rule developed above must be made. There is a transnational privilege principle related to evidence stemming from settlement negotiations between the parties. Under English law, any written or oral communication made for the purpose of ‘a genuine attempt to compromise a dispute between the parties’ is subject to the ‘without prejudice’ privilege.\textsuperscript{87} In international ADR, the notion of confidentiality constitutes a central pillar of such processes. Article 7 of the ICC ADR Rules reflects the resulting privilege principle. It provides:

\textbf{(2) Unless required to do so by applicable law and in the absence of any agreement of the parties to the contrary, a party shall not in any manner produce as evidence in any judicial, arbitration or similar proceedings:}
(a) any documents, statements or communications which are submitted by another party or by the Neutral in the ADR proceedings, unless they can be obtained independently by the party seeking to produce them in the judicial, arbitration or similar proceedings;

(b) any views expressed or suggestions made by any party within the ADR proceedings with regard to the possible settlement of the dispute;

(c) any admissions made by another party within the ADR proceedings;

(d) any views or proposals put forward by the Neutral; or

(e) the fact that any party had indicated within the ADR proceedings that it was ready to accept a proposal for a settlement.

Almost all institutional mediation rules, as well as the UNCITRAL Model Law on International Commercial Conciliation, the draft EU Directive on certain aspects of mediation in civil and commercial matters and the US Uniform Mediation Act contain similar, detailed provisions on confidentiality and privilege. There is thus a transnational privilege principle with respect to written or oral statements made in good faith by the parties to an arbitration during previous settlement negotiations between them. In general, however, no such transnational privilege standards exist.

(ii) General principles for balancing conflicting privileges

It is argued that, instinctively, good arbitrators shrink from assigning procedural benefits and burdens according to the parties’ national practices and laws because giving one side a stark procedural handicap is an excellent way to invite challenge to an award. Mere reliance on a tribunal’s practical expertise and instinct, however, comes close to the dark side of arbitral discretion. The alternative to a transnational best practice standard would be generally accepted procedural principles which provide the tribunal and the parties with secure and predictable guidelines which allow for the reconciliation of conflicting privileges in individual cases.

ARBITRAL DISCRETION IN THE TAKING OF EVIDENCE

As far as privileges are concerned, it must be noted that even if characterised as issues of substantive law due to their underlying policy judgements, their effects are felt in the area of the taking of evidence. In this area, international arbitral tribunals enjoy wide unfettered discretion. Article 9(1) of the IBA Rules, like most arbitration laws and rules, provides that the tribunal shall determine the admissibility, relevance, materiality and weight of the evidence. The Working Group that drafted the UNCITRAL Model Law has rightly emphasised the strong force of the tribunal's discretion in the area of the taking of evidence (art. 19(2) of the Model Law) as opposed to applicable law issues (art. 28 of the Model Law):

The Commission determined that the discretion accorded to the arbitrators by Art. 19(2) should not be affected by the choice of law applicable to the substance of the dispute under Art. 28. This result is sound. As a matter of interpretation, the specific provision in Art. 19(2) should prevail over the general one in Art. 28.

The tribunal’s procedural discretion also extends to the treatment of evidentiary privileges. Thus, privileges share the fate of arbitral decision-making in this area. It is a general problem that, in the absence of clear evidentiary standards for international arbitration, the tribunal's rulings on evidence can appear unfair and arbitrary in certain cases.
TRIBUNAL'S DUTY TO TREAT THE PARTIES WITH EQUALITY AND FAIRNESS

This potential for arbitrary treatment of the parties in the application of evidentiary privileges runs counter to a fundamental principle of arbitral due process: the tribunal's duty to treat the parties fairly and equally. In fact, it is one of the principal functions of an arbitral tribunal to act as a guarantor and guardian of the parties' fundamental procedural right for equal treatment and their right to be heard as the Magna Charta of arbitral procedure.102

A party may be treated unequally and unfairly when the tribunal applies different privilege standards to the parties resulting in different standards for the production of evidence. In exercising its discretionary powers in the taking and evaluation of evidence, the tribunal must therefore vary or modify the result reached when applying the conflict rule explained above in order to ensure fairness and equality in the taking of evidence and to avoid due process imbalances between the parties.103 It is for this reason that both 'flexibility and equality' are regarded as the two fundamental principles of arbitral procedure.104

BEST PRACTICE STANDARD IN ART. 9(2)(G) OF THE IBA RULES: 'COMPPELLING CONSIDERATIONS OF FAIRNESS AND EQUALITY'

It is at this juncture that the non-harmonised law of evidentiary privileges meets with the transnational law of arbitral procedure (due process as a generally accepted principle of arbitral procedure) and harmonised arbitral best practice standards as laid down in art. 9(2)(g) of the IBA Rules. That article provides that the arbitral tribunal shall exclude from evidence or production any document, statement, oral testimony or inspection based on 'considerations of fairness or equality of the parties that the arbitral tribunal determines to be compelling'.

The Commentary formulated by the IBA Working Group has indicated that this provision should serve to establish 'equality of arms' in cases of an unfair distribution of privilege standards between the parties.105 It is therefore not surprising that today, this rule reflects a general consensus which also applies to evidentiary privileges.106 It is generally accepted today that the application of rules of evidence in international arbitration is not an end in itself and that parties should not place endless reliance upon technical rules concerning the admissibility of evidence.107 However, we have seen that there is also consensus that international arbitrators should accede to an appropriate privilege objection raised in good faith.108 Article 9(2)(g) of the IBA Rules makes it clear that diverging privilege rules must be reconciled by the tribunal if their rigorous application leads to an imbalance between the parties which contravenes the basic notions of procedural fairness and equality.

Considerations of fairness and equality are 'compelling'109 when the tribunal, in applying the rules of evidentiary privileges rigorously and without taking into account the specificities of the case, would risk the setting aside of the award. While the tribunal's choice of law decisions are, to a large extent, immune from court control due to the prohibition of the 'révision au fond' of the tribunal's decision on the merits by domestic courts, the violation of arbitral due process rules provides a ground for setting aside of the award.

(c) Levelling the Playing Field

Based on the above considerations, an international arbitral tribunal that is faced with conflicting privilege standards and sees 'compelling' reasons to (re-)establish equality and fairness between the parties with respect to a concrete privilege issue can proceed in two directions. They reflect the dual role 111 which arbitral due process plays in the taking of evidence by international arbitral tribunals.

(i) 'Most favoured nation rule'
The first way is to establish a 'most favoured nation rule' and to apply to a given privilege issue only the law of that party which accords the broadest protection to privileged information.\textsuperscript{112} Based on the conflict of laws considerations outlined above,\textsuperscript{113} this means that a party is entitled to rely on the protection standard of its home jurisdiction as long as this standard is also granted to the other side and the privilege is not invoked \textit{mala fides}.\textsuperscript{114} Such an approach would do justice to the reliance interests of the parties because they could be confident that they would never be required to produce information that is considered privileged under their own laws.\textsuperscript{115} This is the concept underlying art. 9(2)(g) of the IBA Rules which allows the tribunal to 'exclude' evidence based on considerations of equality and fairness between the parties. Such an approach does not invite forum shopping by the parties, \textit{i.e.} the search for counsel from countries with more favourable privilege rules. As shown above,\textsuperscript{116} it is not the law of the jurisdiction where counsel is admitted to the Bar but the law of the country where the party has its residence or place of business that applies to the privilege.

A tribunal faced with the in-house counsel problem described above would thus exclude from evidence the communication in the possession of the American in-house counsel applying the broader concept of the American attorney-client privilege. At the same time, it would extend this privilege to any communication in the possession of the European in-house counsel which the American party wants to have disclosed in the arbitration.\textsuperscript{117}

(ii) 'Least favoured nation rule'

The tribunal could also adopt the opposite approach. Rather than excluding evidence from both sides, the tribunal could decide to compel submission of evidence from both sides based on the consideration that neither set of communications should be protected.\textsuperscript{118} In this case, the tribunal would apply the law with the lowest protection standard. This approach, like the most favoured nation rule, serves to establish formal equality between the parties, because it serves to ensure that the tribunal will not be faced with uneven or imbalanced information. However, it can be unfair because it violates the legitimate interests of one of the parties. What would be equal to the parties must not necessarily be fair to both of them. It is possible to have 'equality in unfairness'.\textsuperscript{119} In most cases, such an approach would indeed defeat the legitimate expectations of the parties in the application of their privilege standards. Also, this approach could put counsel in a tough position in those cases where the privilege is regarded as belonging to the attorney and not to the party. In such a case, the attorney may be subject to professional sanctions if he does not comply with the privilege.

In the in-house counsel example, the tribunal, which orders the American party to submit documents in the possession of its in-house counsel, would defeat the American party's legitimate expectation to be protected by its own privilege standards.

V. CONCLUSION

The above considerations reveal that a consensus is beginning to emerge\textsuperscript{120} which provides arbitral tribunals with concrete and workable guidelines in dealing with privilege issues in their day-to-day work. This pragmatic consensus is based on four key observations:

1. Privilege issues must be qualified as substantive law issues.
2. The parties' standard choice of law clause in the contract usually does not extend to the issue of evidentiary privileges.
3. In determining the law applicable to a certain privilege issue, the tribunal shall apply the law of the jurisdiction with which the relevant communication is most closely connected, \textit{i.e.} the law where the party has its place of business.
4. The tribunal may exclude evidence from both sides which is privileged under the law of one party but not under the law of the other based on compelling considerations of fairness or equality.

In view of these concrete guidelines for the exercise of the tribunal's discretion concerning evidentiary privileges it seems that there is no need for further harmonisation. Unlimited rule-making, like unlimited preservation of arbitral discretion, is the wrong approach. Rather, what is needed is a careful balance of both in order to preserve the flexibility of the arbitral
process.\footnote{121}

Achieving fairness and equality in the handling of privileges by international arbitral tribunals requires a case-by-case analysis. Leaving aside the transnational 'without prejudice' privilege,\footnote{122} this analysis must be based on the individual circumstances of a given case, the nature, scope and limits of the privilege under the law of the party that claims protection under the privilege, the significance of the individual fact or facts which a party wants to prove as well as the overall factual situation in the case, and the potential impact of the tribunal's decision if the privilege is rejected or upheld.\footnote{123} It seems, therefore, that art. 9(2)(g) of the IBA Rules is as far as one can get in harmonising these rules. There is 'an optimal compromise between rules and discretion'\footnote{124} in the area of evidentiary privileges.

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\footnote{5} See M. Sindler and T. Wüstemann, 'Privilege across Borders in Arbitration: Multi-jurisdictional Nightmare or a Storm in a Teacup' in (2005) 23 ASA Bulletin 610 at. 635, arguing that the fact that international arbitrators are faced with an increasing number of claims of privileges may be another indication of the growing 'judicialisation' of arbitration; cf. generally for this phenomenon D. W. Rivkin, '21st Century Arbitration Worthy of its Name' in Liber Amicorum Karl-Heinz Böckstiegel (2001), pp. 661, 662.

\footnote{6} R.M. Mosk and T. Ginsburg, supra n. 3 at p. 382; F. von Schlabrendorff and A. Sheppard, supra n. 1 at p. 765; 'parties expect] that communications which are privileged when made will remain privileged'.

\footnote{7} M. Sindler and T. Wüstemann, supra n. 4 at p. 621; see also J.H. Rubenstein and B.B. Guerrina, supra n. 2 at p. 590; see also the statement by Advocate General Slynn in AM & S Europe Ltd v. Commission of the European Communities (Case 155/79) [1983] QB 878 at 913: '[the legal professional privilege] springs ... from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks' (emphasis added).

\footnote{8} F. von Schlabrendorff and A. Sheppard, supra n. 1 at p. 766.


\footnote{10} Article 18.1 provides: 'Effect should be given to privileges, immunities, and similar protections of a party or non-party concerning disclosure or production of evidence'; text available at ALI (www.ali.org) and UNIDROIT (www.unidroit.org).

\footnote{11} Article 11 provides that a person 'may refuse to give evidence in so far as he has a privilege or duty to refuse to give evidence': see www.legalanguage.com/Hague/haguexx20e.html.


\footnote{13} See R.M. Mosk and T Ginsburg, supra n. 3 at p. 351: 'Indeed, it is difficult to imagine any legal system that involves professional representation functioning without such a privilege, and this explains its long history and wide acceptance among many different legal systems'; see also S. Bradford, 'Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution' in (1991) 52 U Pitt. L Rev. 909 at p. 913 et seq. 'The attorney-client privilege is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good'.


\footnote{15} See R v. Derby Magistrates' Court [1996] AC 487 at 507: 'Legal professional privilege is ... much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests'; Three Rivers District Council, supra n. 12 at p. 649 et seq.: '[The legal advice privilege is based on] the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers ... should be secure
against the possibility of any scrutiny from others ... It justifies ... the retention of legal advice privilege in our law, notwithstanding that as a result, cases may sometimes have to be decided in ignorance of relevant probative material.

16 R v. Derby Magistrates’ Court [1996] AC 487 at 507; Balabal and others v. Air India [1988] Ch. 317; B v. Auckland District Law Society [2003] 2 AC 736 at 757; see also the statement of Advocate General Slynn in AM & S Europe Ltd v. Commission of the European Communities, supra n. 7 at p. 913: ‘[The legal professional privilege] springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation’.

17 See Three Rivers District Council, supra n. 12 at p. 635.

18 F. von Schlabrendorff and A. Sheppard, supra n. 1 at p. 776; R.M. Mosk and T. Ginsburg, supra n. 3 at p. 376.


22 B.F. Meyer-Hauser, supra n. 1 at para. 160.

23 Lex Mundi, supra n. 20 at p. 32; F. von Schlabrendorff and A. Sheppard, supra n. 1 at p. 754.

24 Lex Mundi, supra n. 20 at p. 66.

25 ibid. p. 42.


27 Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission [2003] ECR 11-4771 (interim measures), para. 122 et seq.: ‘It is ... necessary to determine whether, in the present case, the applicants ... have adduced serious evidence of such a kind as to demonstrate that, taking into account developments in Community law and in the legal orders of the Member States since the judgment in AM & S v. Commission, ..., it cannot be precluded that the protection of professional privilege should now also extend to written communications with a lawyer employed by an undertaking on a permanent basis ... The President considers that arguments to that effect have been submitted in the present case and that they are not wholly unfounded’; the decision on interim relief has been repealed, the case is still pending.


29 Lex Mundi, supra n. 20 at p. 6 et seq.

30 ibid. p. 28.

31 ibid. p. 65 et seq.

32 F. von Schlabrendorff and A. Sheppard, supra n. 1 at p. 752.


34 B.F. Meyer-Hauser, supra n. 1 at paras 39, 45.

35 BGH, BGHZ 141, 143, 144 (= Neue Juristische Wochenschrift 1999, 1715, 1716); see also BGH, BRRK-Mitteilungen 1988, 271, 272; but see the European Court of First Instance in Akzo Nobel Chemicals, supra n. 27 at para. 126: ‘The evidence ... tends to show that increasingly in the legal orders of the Member States and possibly, as a consequence, in the Community legal order, there is no presumption that the link of employment between a lawyer and an undertaking will always, and as a matter of principle, affect the independence necessary for the effective exercise of the role of collaborating in the administration of justice by the courts, if, in addition, the lawyer is bound by strict rules of professional conduct, which necessarily require that he observes the particular duties commensurate with his status’ (emphasis added).


40 See N. Voser, supra n. 2 at p. 118 for the IBA Rules on the Taking of Evidence.

41 J.H. Rubinstein and B.B. Guerrina, supra n. 2 at p. 592; M. Sindler and T. Wüstemann, supra n. 4 at p. 620 et seq.


See e.g. counsel for defendant in Three Rivers District Council, supra n. 12 at p. 614: ‘It is now clear that the privilege for lawyer-client communications, although probably no other privilege, is not procedural ... It is a personal substantive right and a fundamental human right'; see also the UK Attorney General, ibid, at 638: ‘As to Lord Scott's suggestion ... that the decision in Calcraft v. Guest [1898] 1 QB 759 was inconsistent with the categorisation of legal professional privilege as a substantive legal right, as opposed to a mere rule of evidence, that decision does no more than illustrate that the substantive legal basis of legal professional privilege is the law on confidence, albeit a specially protected and unique form of confidence'; see also Lord Scott of Foscote, ibid, at 646: ‘There has been some debate as to whether this right [the legal advice privilege] is a procedural right or a substantive right. In my respectful opinion the debate is sterile. Legal advice privilege is both'; see also R.M. Mosk and T. Ginsburg, supra n. 3 at p. 377; B.F. Meyer-Hauser, supra n. 1 at para. 50.


B.F. Meyer-Hauser, supra n. 1 at para. 153; R.M. Mosk and T. Ginsburg, supra n. 3 at p. 368.

See e.g. art. 1(1) of the UNCITRAL Model Law; s. 1025(1) of the German Arbitration Act; s. 2(1) of the English Arbitration Act 1996.


K.P. Berger, supra n. 39 at p. 504.

E. Rabel, 'Das Problem der Qualifikation' in (1931) 5 Rabels Zeitschrift 241.


See supra nn. 6 and 7.


See e.g. the English House of Lords in Lesotho Highlands Development Authority v. Impregilo SpA and others [2005] 3 WLR 129 at 139.

See R.M. Mosk and T. Ginsberg, supra n. 3 at p. 383: ‘The forum State does not have a policy interest in the rights and relationships of the parties or witnesses in an arbitration, if those parties or witnesses have no relationship to that State other than the fact that the arbitration is being held there’; cf. also J.H. Rubinstein and B.B. Guerrina, supra n. 2 at p. 590; F. von Schlabrendorff and A. Sheppard, supra n. 1 at p. 796.

See supra nn. 15 and 16.

F. von Schlabrendorff and A. Sheppard, supra n. 1 at p. 764; R.M. Mosk and T. Ginsberg, supra n. 3 at p. 377 with reference to the US Restatement (2nd) of Conflict of Laws, 1971, 138 comment c: ‘a rule phrased in terms of evidence may in fact be a rule of substantive law’.

See supra n. 17.


S. Bradford, supra n. 13 at p. 916 et seq.

See e.g. S. Bradford, supra n. 13 at p. 929: ‘interest analysis is difficult to analyze, because in the hardest cases, those where there are true conflicts, it disintegrates into a number of possible approaches ... The cases purporting to apply interest analysis to choice-of-law problems involving the attorney-client privilege reflect this confusion’.

See B.F. Meyer-Hauser, supra n. 1 at para. 181, who lists the applicable arbitration law (lex loci arbitri), the law applicable to the arbitration agreement, the law of the place where an order to produce evidence is sought to be enforced, and the law of the country which has the closest connection with the privileged information.


S. Bradford, supra n. 13 at p. 946.

Ibid. p. 948 et seq.

S. Felleman, ‘Ethical Dilemmas and the Multistate Lawyer: A Proposed Amendment to the Choice-of-Law Rule in the

B.F. Meyer-Hauser, supra n. 1 at para. 195.

F. von Schlabrendoff and A. Sheppard, supra n. 1 at p. 771; S. Bradford, supra n. 13 at p. 948.

See supra n. 17.

See supra nn. 7 and 8.

R.M. Mosk and T. Ginsberg, supra n. 3 at p. 382 (for international arbitration); S. Felleman, supra n. 68 at p. 1527 (for American law).


M. Petsche, supra n. 74 at p. 185 (‘fairness may ... clash with predictability’); see also J. Paulsson, ‘Standards of Conduct for Counsel in International Arbitration’ in (1992) 3 Am. Rev. Int’l Arb. 214.

See supra n. 22.


W.W. Park, supra n. 9 at p. 286.


See J.H. Rubinstein and B.B. Guerrina, supra n. 2 at p. 599.


See supra n. 10.

See supra II(b) for the attorney-client privilege.

B.F. Meyer-Hauser, supra n. 1 at para. 196; see also E von Schlabrendoff and A. Sheppard, supra n. 1 at p. 774; J.H. Rubinstein and B.B. Guerrina, supra n. 2 at p. 601 (‘Since no free-standing international bar exists in which membership is required for practising internationally, it is difficult to see how any international standard might be developed and enforced’); N. Gallagher, supra n. 3 at p. 48: ‘there is no minimum international standard that can be applied’; M. Sindler and T. Wüstemann, supra n. 4 at p. 625.

N. Gallagher, supra n. 3 at p. 47.

See e.g. s. 13 of the DIS Mediation/Conciliation Rules (available at www.dis-arb.de); s. M-12 of the ICDR International Mediation Rules (available at www.adr.org/International); s. 6 of the CEDR Code of Conduct for Mediators and Other Third Party Neutrals (available at www.cedrsolve.com).


Uniform Mediation Act, s. 4, official Comments provide that ‘Section 4 sets forth the evidentiary privilege, which provides that disclosure of mediation communications generally cannot be compelled in designated proceedings or discovery and results in the exclusion of these communications from evidence and from discovery if requested by any party or, for certain communications, by a mediator or non-party participant as well.

The sole purpose of the privilege is to ensure a candid and uninhibited flow of information between the parties. The good faith requirement is violated if it can be proven (which will be difficult in practice in most cases!) that a party has introduced a statement during settlement negotiations solely for the sake of being able to shield this information from the other side based on the settlement privilege in a subsequent arbitration.


W.W. Park, supra n. 9 at p. 287.

M. Sindler and T. Wüstemann, supra n. 4 at p. 613.


See e.g. art. 19(2) of the UNCITRAL Model Law; s. 25(6) of the UNCITRAL Arbitration Rules; s. 25(7) of the UNCITRAL Arbitration Rules.

See also J.D.M. Lew, L.A. Mistelis and S.M. Kröll, supra n. 96 at para. 22-15.

7626, reprinted in: J.J. Arnaldez, Y Derains and D. Hascher (eds), Collection of ICC Arbital Awards 1996-2000 (2003), pp. 119, 121: ‘This is an international arbitration procedure ... In accordance with the power given to the arbitrators in the terms of reference, and under the ICC Rules, the Tribunal has the right to determine whether and what evidence shall be admitted’.

100E. Gaillard and J. Savage, supra n. 19 at para. 1266; R.M. Mosk and T. Ginsburg, supra n. 3 at p. 377; G. Kaufmann-Kohler and P. Bärtsch, supra n. 80 at p. 20.


103See N. Gallagher, supra n. 3 at p. 46. ‘At all times the tribunal must act in a fair and impartial manner. In such circumstances [i.e. when a privilege claim is raised], the panel must assess the merit of the claim against the impact this may have on the other party’.

104See N. Gallagher, supra n. 3 at p. 46. ‘At all times the tribunal must act in a fair and impartial manner. In such circumstances [i.e. when a privilege claim is raised], the panel must assess the merit of the claim against the impact this may have on the other party’.

105F. von Schlabrendorff and A. Sheppard, supra n. 1 at p. 759 et seq. quoting from the Commentary to art. 9(2)(g) of the Rules: ‘Documents that might be considered to be privileged within one national legal system may not be considered to be privileged within another. If this situation were to create an unfairness, the arbitral tribunal may exclude production of the technically non-privileged documents pursuant to this provision’.


107A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration (4th edn, 2004), para. 6-64; H.M. Holtzmann and J.E. Neuhaus, supra n. 99 at p. 567: ‘As a matter of policy, it is desirable for arbitration to avoid the application of technical rules of evidence where possible’.

108See supra n. 5.

109Compelling’ reasons are also required if a tribunal wants to exclude evidence based on grounds of commercial or technical confidentiality (art. 9(2)(e) of the IBA Rules) or on grounds of special political or institutional sensitivity including national security (art. 9(2)(f) of the IBA Rules).

110W.W. Park, supra n. 101 at para. 18-039.

111See supra n. 110.

112F. von Schlabrendorff and A. Sheppard, supra n. 1 at p. 773; J.H. Rubinstein and B.B. Guerrina, supra n. 2 at p. 597 et seq.; B.F. Meyer-Hauser, supra n. 1 at para. 185; J.M. Townsend, supra n. 106 at p. 7; M. Sindler and T. Wüstemann, supra n. 4 at p. 637; see also R.M. Mosk and T. Ginsburg, supra n. 3 at p. 384; G. Kaufmann-Kohler and P. Bärtsch, supra n. 80 at p. 19.

113See supra Ill.

114B.F. Meyer-Hauser, supra n. 1 at para. 201; see also R.M. Mosk and T. Ginsburg, supra n. 3 at p. 384.

115J.H. Rubinstein and B.B. Guerrina, supra n. 2 at p. 599.

116See supra Ill(c)(ii).


118J.M. Townsend, supra n. 106 at p. 7; J.H. Rubinstein and B.B. Guerrina, supra n. 2 at p. 596.

119S.A. Baker and M.D. Davis, supra n. 93 at p. 77 with reference to the travaux préparatoires of the UNCITRAL Arbitration Rules.

120See the authors cited supra n. 106.

121A. Marriott, in A.J. van den Berg (ed.), Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration (1996), pp. 65, 71: ‘Arbitrators are not judges and we are not administering justice as understood by state courts. We should neither pretend to be judges, nor clothe ourselves in powers and procedures such as those which judges must follow. Otherwise, this attitude of mind will lead us more and more into detailed rules of arbitral procedure and lengthy and learned commentaries purporting to tell practitioners and arbitrators what to do in every given procedural situation. Procedure is the servant of arbitration and not its master. Our guiding principle must be to follow the rules of natural justice or due process so as to ensure that parties are treated equally and fairly’.

122See supra n. 93.

123See M. Sindler and T. Wüstemann, supra n. 4 at p. 617: ‘What is clear in both common law and civil law jurisdictions is that privilege cannot be relied on as a blanket defence 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’; R.M. Mosk and T. Ginsburg, supra n. 3 at p. 385; see also F. von Schlabrendorff and A. Sheppard, supra n. 1 at p. 773; G. Kaufmann-Kohler and P. Bärtsch, supra n. 80 at p. 20; N. Gallagher, supra n. 3 at p. 47 with reference to the arbitration Ireland v.
United Kingdom conducted under art. 9 of the 1992 Convention on the Protection of the Marine Environment of the North East Atlantic (OSPAR Convention).

W.W. Park, supra n. 9 at p. 300.

Referring Principles:

- XII.5 - Settlement privilege
- XII.6 - Attorney-client privilege