
I. Introduction

It has been said that the settlement of a dispute through agreement of the parties is of the essence of the spirit of arbitration.\(^1\) Sometimes, however, these settlement talks, conducted prior to or during the arbitration with or without the assistance of a third neutral, fail for whatever reasons and the arbitration commences or continues. In such a scenario, a party may feel inclined to introduce into the subsequent arbitration procedure views, admissions, proposals, suggestions, indications of readiness to accept a certain proposal for settlement, made in writing or orally by the other side during the settlement negotiations. That side will object to such an undertaking. It will argue that its statements made during settlement negotiations or ADR proceedings to bring about a settlement agreement between the parties to the dispute should not be admitted as evidence in the subsequent arbitration because they are privileged. The party’s position that the tribunal must reject the motion to produce such evidence will be based on Art. 9 (2) IBA Rules\(^2\) which provides that the tribunal shall exclude evidence if it is privileged ‘under the legal or ethical rules determined by the Arbitral Tribunal to be applicable’. While in many cases, the law applicable to such a privilege objection must be determined by classical conflict of laws analysis,\(^3\) the

II. The Mediation Privilege

(a) The Transnational Rule

There is a unanimous view today in international ADR and arbitration practice that a general mediation privilege exists which protects settlement negotiations both with and without the presence of a third neutral.
which renders all evidence, whether written or oral, stemming from mediation, conciliation and similar ADR processes between the parties inadmissible as evidence in subsequent arbitration proceedings. The privilege follows from the notion of confidentiality which constitutes a central pillar of international ADR-processes. Art. 7 of the ICC ADR Rules reflects the resulting privilege principle. It provides:

(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 Conciliation Rules, 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. Pennsylvania’s statutory mediation privilege provides:

Except as provided in subsection (b), all mediation communications and mediation documents are privileged. Disclosure of mediation communications and mediation documents may not be required or compelled through discovery or any other process. Mediation communications and mediation documents shall not be admissible as evidence in any action or proceeding, including, but not limited to, a judicial, administrative or arbitration proceeding.

The Pennsylvania Statute further provides that a ‘mediation communication’ is any communication, verbal, nonverbal, oral or written, that is ‘made by, between or among a party, mediator, mediation program or any other person present to further the mediation process when the communication occurs during a mediation session or outside a session when made to or by the mediator or mediation program’. A ‘mediation document’ consists of ‘written material, including copies, prepared for the purpose of, in the course of or pursuant to mediation’. Provisions to this effect can also be found in Rule 62 (2) Rules of Court of the European Court of Human Rights. 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. It is argued that strong views exist that this privilege should extend to the mediator(s) and to the parties. Even if statements are not expressed to be ‘without prejudice’, privilege will still attach, if in substance they constitute a genuine attempt to reach a compromise. Art. 131-14 French Code of Civil Procedure and
contain provisions on a privilege related to mediation/conciliation proceedings. In German law, the third neutral’s duty of confidentiality may follow from his ethical duties if he is a member of the respective legal profession. In addition, the duty of confidentiality is qualified as an implied duty arising out of his service contract which he has concluded with the parties. The parties’ duty of confidentiality is regarded as an implied duty of their ADR-agreement. These implied duties of confidentiality create privilege protection for the parties in subsequent court or arbitration proceedings.

(b) The Policy Considerations Underlying the Mediation Privilege

The above quotation from Art. 7 (2) ICC-ADR Rules reveals that the scope of the mediation privilege is extremely broad. This follows from the purpose of this privilege which is to ‘ensure settlement efforts by the parties unimpeded by any fear of later disadvantages in other proceedings’. The protection granted by the mediation privilege is intended to ensure a candid, free and uninhibited flow of information between the parties during their settlement talks as a basic prerequisite for any efficient dispute resolution process that is based on a negotiation process between both sides. It has been said about the mediation privilege in US law:

This frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes ... Such party-candor justifications for mediation confidentiality resemble those supporting other communications privileges, such as the attorney-client privilege, the doctor-patient privilege and various other counseling privileges.

If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute.

The same policy considerations apply in English law. UNCITRAL’s Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation explains that this is also the underlying rationale of the mediation privilege in international ADR:

The possibility of such a “spillover” of information may discourage parties from actively trying to reach a settlement during conciliation proceedings, which would reduce the usefulness of conciliation (A/CN.9/WG.II/WP.108, para. 18). Thus, article 10 is designed to encourage frank and candid discussions in conciliation by prohibiting the use of information listed in paragraph 1 in any later proceedings.

III. From Mediation Privilege to Settlement Privilege

Mediation and conciliation are settlement negotiations between parties to a dispute structured and facilitated by a third neutral. The underlying rationale of the mediation privilege is derived from the special nature and character of these negotiations conducted in good faith between the parties. Such policy considerations apply irrespective of whether one is dealing with formalized mediation proceedings, or with private, informal settlement negotiations conducted between the parties without the presence of a third neutral. In fact, it has been stated in US law that ‘[t]he notion that parties expect settlement talks to be private is so axiomatic that it has little concrete support’. The Court of Appeals for the Sixth Circuit has stated in a landmark decision that:

In order for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromise that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross-examination ... Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative quid...
pro quos, and generally make statements that would otherwise belie their litigation efforts. Without a privilege, parties would more often forego negotiations for the relative formality of trial. Then, the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost.\textsuperscript{32}

This view has been confirmed repeatedly in the case law of the Iran-United States Claims Tribunal:

The Tribunal did adopt \textit{one clear rule of exclusion}. It refused to consider a party’s settlement proposals as evidence against that party ... It is generally, and wisely accepted that views, admissions, and proposals made by one party during settlement negotiations may not be used as evidence by the other party in later judicial or arbitral proceedings.\textsuperscript{33} Certain kinds of evidence, \textit{such as information concerning confidential negotiations between the parties prior to the arbitral proceedings}, are generally considered inadmissible as evidence, and should therefore be rejected.\textsuperscript{34}

This consistent case law of the Iran-United States Claims Tribunal is particularly relevant in the area of international ADR-law since the Tribunal is a forum in which for twenty years, arbitrators from disparate legal backgrounds (civil and common law) have forged solutions to a host of legal problems, including recurrent disputes over the discovery of evidence ... [and] its corpus of precedent is a treasure trove of guidance for other international arbitral tribunals, including on issues of discovery.\textsuperscript{35}

This basic policy consideration underlying the settlement privilege is also accepted in arbitration practice. In ICC Award No. 6653 of 1993, the tribunal concluded that it is a well-established general privilege rule that negotiations to settle the dispute by the parties are confidential and that there exists a resulting privilege principle with respect to evidence stemming from such negotiations:

\begin{quote}
The arbitral tribunal also considers that it is customary, not only in French law - where the custom is equally a rule of professional conduct for \textit{avocats} - but also in the field of international commerce, that exchanges of proposals between parties with a view to reaching an agreement aimed at resolving a dispute submitted to a tribunal - arbitral or not - are and must remain confidential. If the parties have tried in good faith to reconcile their positions, one of them cannot, in the event the negotiations fail, use for its benefit the proposals of the other to deduce an alleged admission of fault.\textsuperscript{36}
\end{quote}

Jean-Jacques Arnaldez, former Counsel at the ICC International Court of Arbitration, has approved this holding of the ICC arbitral tribunal as follows:

\begin{quote}
It is with some force that the arbitral tribunal, in the present award, refuses to take into consideration the elements reported so far. This must be approved. The confidential character of discussions conducted by the parties in order to attempt an amicable settlement must be respected, unless, of course, the parties agree otherwise ... It seems that the confidential character of the exchange of proposals between parties who attempt to achieve an amicable settlement \textit{stems from a general principle of international commerce}. This principle is a corollary of the general principle of good faith.\textsuperscript{37}
\end{quote}

There is thus a transnational settlement privilege which applies equally to settlement negotiations with or without the presence of a third neutral. The reverse view of equalizing settlement negotiations and mediation/conciliation processes with respect to the application of the settlement privilege is advocated for in rule 408 of the US Federal Rules of Evidence which excludes from evidence both offers to compromise and ‘evidence of conduct or statements made in compromise negotiations’, if introduced ‘to prove liability for or invalidity of the claim or its amount’.\textsuperscript{38}

Can a mediation be analogized to a settlement negotiation to satisfy the Rule 408 requirements that an offer be made ‘to compromise a claim which was disputed’? The policy behind the rule, to promote ‘the out-of-court settlement of disputes’, \textit{should apply to any form of settlement discussion}, whether it be an informal negotiation between counsel or parties, a structured settlement conference, or a mediation.\textsuperscript{39}
It is due to these intrinsic characteristics common to negotiation and mediation that the emphasis with respect to the value of ADR procedures for the efficient resolution of commercial disputes is not on the presence of a third neutral but on the fact that these processes ‘should ... with or without the assistance of a third party, enable the parties to agree the terms for the settlement of their differences’.\textsuperscript{40} If the common denominator of ADR proceedings is not the presence of a third neutral but the fact that the parties are enabled (‘empowered’) to settle their dispute amicably, then the settlement privilege, which is intended to protect the efficiency and integrity of this process,\textsuperscript{41} must apply to mediation/conciliation and related proceedings as well as to ‘plain’ settlement negotiations without the presence of a third neutral.

IV. Scope of the Settlement Privilege

(a) Application to Strategic Documents Prepared for Use in Settlement Negotiations

The transnational settlement privilege relates not only to oral or written statements submitted to the other side during the negotiations but also to internal documents prepared specifically for these negotiations.\textsuperscript{42} Given that the purpose of the privilege is to protect the parties and to ensure efficient settlement talks between them\textsuperscript{43} it can make no difference whether such ‘views’ or ‘suggestions’ are formulated by the parties or their experts prior to the settlement negotiations in order to be presented in these settlement talks or whether these pre-formulated views, suggestions or proposals are actually read or otherwise presented or communicated to the other side during these negotiations. To decide otherwise would lead to the strange and unacceptable result that the parties are protected during their settlement talks but would not enjoy the same degree of privilege protection when they prepare for these talks and draft the arguments, views, suggestions and proposals which they want to present in these negotiations. Without a safe and privilege-protected preparation phase, the key policy goal of the settlement privilege - to ensure free and uninhibited settlement talks between the parties, and to allow for careful and deliberate preparation involving both internal and external counsel - would be perverted into a mere farce. Therefore, Art. 10 (1) (f) UNCITRAL Model Law provides that a party to the conciliation proceedings shall not in arbitral, judicial or similar proceedings rely on, or introduce as evidence: ‘[a] document prepared solely for purposes of the conciliation proceedings.’\textsuperscript{44}

(b) Offer of a Party’s Own Statements, Views, Admissions and Concessions

The settlement privilege does not prevent a party to introduce as evidence in subsequent arbitration proceedings its own statements, views or concessions made in previous settlement negotiations. The policy goals of the privilege are not at stake because it is in that party’s control whether the evidence will be submitted to the arbitral tribunal or not. The policy goals of the settlement privilege are at stake, however, if introduction of the statements, views, admissions or concessions of the offering party would reveal the other party’s settlement posture.\textsuperscript{45} In such a case, the need to protect that party prevails and the settlement privilege applies.

(c) Good Faith Limitations

As stated above,\textsuperscript{46} the sole purpose of the settlement privilege is to ensure a candid and uninhibited flow of information between the parties. It also goes without saying that just as much as the settlement privilege has its roots in the general principle of good faith,\textsuperscript{47} the privilege objection, like any other legal right, is subject to limitations derived from the principle of good faith.\textsuperscript{48} The good faith requirement is violated and the settlement privilege cannot be invoked if a party has introduced a statement or document 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. The settlement privilege may not be misused to pervert the mediation or negotiations into a ‘grave of facts’.\textsuperscript{49}

It follows from this good faith limitation that the settlement privilege does not extend to facts which one side would have been able to prove had there been no settlement negotiations between the parties.\textsuperscript{50} It is for this reason that the third sentence of Rule 408 of the US Federal Rules of Evidence provides that ‘[t]his rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations’.\textsuperscript{51} Likewise,
some statutes on the mediation privilege in the US provide that the privilege applies to admissions, representations, or statements made in mediation, provided that they are ‘not otherwise discoverable or obtainable’.\(^5\) In the same vein, Art. 7 (2) (a) ICC ADR Rules provides that the privilege applies ‘unless [the information] can be obtained independently by the party seeking to produce them in the judicial, arbitration or similar proceedings’.\(^5\)

In addition, evidence stemming from settlement negotiations between the parties must be admitted if they do not relate to statements, views or admissions made by the parties but to objective facts. For example, a report introduced into the settlement negotiations about the inspection of goods which no longer exist at the time of the other proceedings should be admissible in these proceedings.\(^5\)

\(\text{(d) The General Principle}\)

The essence of the above observations can be framed in a general principle of international ADR-law:

> Statements, views, admissions, proposals, suggestions, indications of readiness to accept a certain proposal for settlement, whether written or oral, submitted by a party during settlement negotiations, mediation/conciliation or any other ADR proceedings, or statements made or views expressed by a third neutral involved in such proceedings, and any document, witness statement and expert report submitted in or prepared solely for these negotiations or stemming from settlement negotiations, mediation/conciliation or any other ADR process between the parties are inadmissible as evidence in subsequent arbitration or court proceedings between the same parties, provided that the privilege objection is raised in the arbitration or court proceedings in good faith and does not relate to facts which one side would have been able to prove had there been no settlement negotiations.

\(\text{V. Conclusion: Lessons to be Learnt by International Arbitral Tribunals}\)

There are various lessons to be learnt by international arbitral tribunals, which are faced with a request to produce a document that is related to settlement negotiations between the parties of the arbitration.

\(\text{(a) Preserving the Parties’ Reliance Interest}\)

First and foremost, it is important to understand that protection of evidence under the transnational settlement privilege is required by the parties’ reliance interest. It is generally acknowledged today in international arbitration law and practice that the need for legal certainty and predictability, i.e. the need to safeguard the parties’ legitimate expectations as to the application of a certain privilege, must be the guiding principle in a tribunal’s consideration of a privilege objection raised by one side in good faith because ‘[t]he first expectation [of the parties] is that communications which are privileged when made will remain privileged’.\(^5\)

In view of the strong policy considerations underlying the settlement privilege,\(^5\) the need to be especially mindful of the legitimate expectations of the parties is particularly relevant in the context of this specific privilege.\(^5\) It follows from these strong policy considerations that, 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 at the time a certain document was drafted, must be avoided.\(^5\) It is for this reason that Art. 9 (2) (g) IBA Rules on the Taking of Evidence in International Commercial Arbitration provides that the 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’ (emphasis added).

The requirement of fair treatment of the parties in an arbitration as an essential element of arbitral due process would be violated if a party would have to present a document even though, at the moment the document was drafted, it relied in good faith and with just reason on the generally accepted settlement privilege elaborated above. Any tribunal that would fail to respect the settlement privilege would risk the setting aside of the award or refusal of enforcement of the award for violation of arbitral due process.\(^5\) As Judge Brower has rightly stated:

> courts likely are more inclined to set aside awards where arbitrators have refused to recognize and protect privileges than they are in circumstances where arbitrators have excluded evidence on the basis of privilege.\(^6\)
(b) Preserving the Policy Goals of the Settlement Privilege

Also, the intrinsic value of settlement negotiations between the parties requires that international arbitral tribunals, in deciding on the admissibility of evidence relating to such negotiations, are mindful of their responsibility to preserve the strong policy considerations in favour of a comprehensive protection of these negotiations:

arbitral tribunals should think hard before accepting evidence of a without prejudice character. The greater flexibility and economy now afforded to arbitral tribunals may in fact undermine what has long been accepted as the desirable goal that it is better that parties should attempt to resolve their disputes themselves.51

International arbitral tribunals must therefore resist the temptation to order the production of documents related to settlement negotiations between the parties. They must understand that in settlement talks, words are always taken with a pinch of salt. Given the special, informal nature of such negotiations, the parties do not submit carefully formulated legal positions but seek an interest-oriented, commercially sensible resolution of their dispute. Finally, international arbitrators should not underestimate the persuasive force of contemporaneous documents:

a tribunal ... should not be quick to receive such evidence. An experienced tribunal may well intend to attach little weight to the evidence, but once considered, more than a modicum of mental agility is surely required to put an admission or concession from their mind when considering the merits of a party’s case.62

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55 See Klaus Peter Berger, Private Dispute Resolution in International Business, Vol. II (Handbook) 2006, paras. 16-49 et seq.
61 Sec. 4 Uniform Mediation Act, the 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...’; see generally Scott H. Hughes, ‘The Uniform Mediation Act: to the Spoiled Go the Privileges’ in (2001) 85 Marqu.L.Rev. 9 at p. 25.  
12 42 Pa. C.S.A. § 5949.  
13 Ibid.  
15 Norah Gallagher, supra n. 3 at p. 47.  
17 John Tackaberry, supra n. 4 paras. 2-740.  
18 Art. 131-14 French ‘Nouveau Code de Procédure Civile’ provides that findings of the mediator and declarations of the parties in a mediation ‘cannot be produced nor invoked in the course of subsequent proceedings without the agreement of the parties and can never be produced or invoked in any other proceedings’; see Charles Jarrosson, ‘Les Dispositions sur la Conciliation et la Médiation Judiciaire de la Loi du 8 Février 1995’ in (1995) Rev.d’Arb 219.  
19 Art. 163 (1) (d) relates to the mediator’s right to refuse testimony on facts which he or she got to know in this capacity; art. 213 (2) states that statements of the parties during a court-annexed mediation procedure before a special cantonal conciliation body may not be taken into consideration in subsequent court proceedings.  
23 Horst Eidenmüller, ibid. at p. 27; some authors require an explicit agreement between the parties, see, e.g., Jörg Risse, Wirtschaftsmediation (2003), § 6 para. 50; Bernd Eckardt/Renate Dendorfer, ‘Der Mediator zwischen Vertraulichkeit und Zeugnispflicht - Schutz durch Prozessvertrag’ in (2001) Monatsschrift für Deutsches Recht 786 at p. 790 et seq.  
24 See supra n. 6.  
26 Uniform Mediation Act, Preparatory Note, 8 (www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm); see also Brown v. Pica, 360 N.J. Super. 565, 568, 823 A.2d 899 (Law Div. 2001); United States Fidelity & Guarantee Company v. Dick Corporation/Barton Malow, 215 F.R.D. 503, 506 (W.D.Pennsylvania 2003): ‘...the rationale underlying the mediation privilege ... [is] ... that confidentiality will make the mediation more effective...’.  
27 Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2nd Cir. 1979); see also Foxgate Homeowners’ Ass’n, Inc. v. Bramalea Cal., Inc., 26 Cal. 4th 1, 108 Cal.Rptr.2d 642, 25 P.3d 1117, 1126 (2001); State of New Jersey v. Carl S Williams, 877 A.2d 1258 (N.J. 2005); Sheldone v. Pennsylvania Tumpke Commission, 104 F. Supp 2d 511 (W.D.Pa. 2000): ‘...forty-nine states and the District of Columbia have adopted “a mediation privilege of one type or another” ... it is beyond doubt that the mediation privilege is rooted in the imperative need for confidence and trust’; see also Lawrence R. Friedman/Michael L. Prigoff, ‘Confidentiality in Mediation: The Need for Protection’ in (1986) 2 Ohio St.J.Dispute Res. 37 at p. 39; see for a similar view in German law Christoph Hartmann, supra n. 22 at para. 22; see for a critical view Lynne H. Rambo, ‘Impeaching lying parties with their statements during negotiation: Demysticizing the public policy rationale behind evidence rule 408 and the mediation-privilege statutes’ in (2000) Wash.L.Rev. 1037 at p. 1066 et seq.  
28 Cutts v. Head [1982] Ch. 290, 306: ‘...parties should be encouraged to so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice in the course of the proceedings ... the public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial...’; see also John Tackaberry, supra n. 17 at para. 2-740.  
30 See, e.g., Christian Bühring-Uhle, Arbitration and Mediation in International Business (1996), p. 273: “mediation (or conciliation) is the non-binding intervention by a neutral third party who helps the disputants negotiate an agreement” (emphasis added); see also Henry Brown/Arthur Marriott, supra n. 16 at para. 7-014; Christopher W. Moore, The Mediation Process (3rd edn, 2003), p. 15 et seq.  
32 Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F. 3rd. 976, 981 (6th Cir. 2003); see also Cook v. Yellow Freight System, Inc., 132 F.R.D. 548 (E.D. Cal. 1990); see also DirectTV Inc. v. Robert Puccinelli et al., 224 F.R.D. 677, 685 (D. Kansas 2004), stating that the privilege developed in Goodyear does not protect the terms of the settlement and the settlement agreement itself; see for a comment on Goodyear Tire Jeffrey J. Lauderdale, supra n. 31 at p. 313 et seq.: ‘...the creation of a settlement privilege, in spite of the extent to which it upsets the prevailing trend, was necessary and should lead to a new era of privilege law jurisprudence.’; but see United States Fidelity & Guarantee Company, supra n. 15.
26 at p. 506 et seq., stating that the Pennsylvania statutory mediation privilege does not apply to ‘garden variety settlement discussions’ because ‘the rationale underlying the mediation privilege (i.e. that confidentiality will make the mediation more effective) is not implicated...’ However, the court reached this conclusion due to the narrow language of the statute. By referring to ‘mediation’, the court argued, the Pennsylvania statute ‘contemplates the deliberate and knowing use of a third person by disputing parties to help them reach a resolution of their dispute.’

Stewart A. Baker/Mark D. Davis, supra n. 4 at p. 115 (emphasis added); see the awards of the Iran-US Claims Tribunal, Iran and United States, 1 CTR 189, 190; Mobil Oil Iran and Iran, 16 CTR 3, 55.

Matt Pellenpää/David D. Caron, supra n. 4 at p. 519 (emphasis added).


Rule 408 provides: ‘Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible ... This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution’; see for the scope of this rule Paul F. Rothstein, Federal Rule of Evidence, (3rd edn, 2006), p. 408 et seq.

Alan S. Rau/Edward F. Sherman/Scott R. Peppet, Processes of Dispute Resolution (3rd edn, 2002), p. 463 et seq. (emphasis added); Kristina M. Kerwin, ‘The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and beyond, in (1993) Rev. Lit. 665 et seq.; see generally Charles W. Ehhardt, ‘Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court’ in (1999) 60 Louis.L.Rev. 91 at p. 102 et seq.; see for a landmark decision which extends the admissibility rule of rule 408 to discoverability Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F. 3rd 976, 981 (6th Cir. 2003): ‘There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties’ (emphasis added); see for this decision Jeffrey J. Lauderdale, supra n. 31 at p. 290 et seq.; however, whether a federal settlement privilege exists outside the Sixth Circuit ‘remains open’, see In re: Subpoena Duces Tecum Issued to Commodity Futures Trading Commission, 2006 WL 508066 (D.C. Cir. 2006); John K. Villa, 23 No. 7 ACC Docket 122, 123 et seq., stating that most US courts have rejected an absolute principle that Rule 408 insulates settlement evidence from discovery under Rule 26 (b) of the Federal Rules of Civil Procedure, which authorizes discovery of ‘any matter, not privileged, that is relevant to the claim or defense of any party’.


See supra III.

See for a decision in which the court stated that the Appellant ‘has failed to meet its burden of demonstrating that the disputed ... documents were created for the purpose of settlement discussions and therefore would merit protection under any federal settlement privilege that the court might recognize’, In re: Subpoena Duces Tecum Issued to Commodity Futures Trading Commission, supra n. 39, ibid.

See supra III.

UNCITRAL Model Law on International Commercial Conciliation, supra n. 9.


See supra III.

See supra n. 35 et seq.

See for the good faith principle as part of transnational law, Principle I.1. of the Transnational Law Database at www.tldb.de.


See Horst Eidenmüller, supra n. 22 at p. 26; Christoph Hartmann, supra n. 22 at para. 21.

See supra n. 38; see Paul Rothstein, supra n. 38, stating that ‘[t]he third sentence of the rule makes it clear that matters that could otherwise be admitted into evidence are not immunized from admissibility merely because they are mentioned or presented in settlement discussions.’

See supra n. 6.

Gerold Herrmann, supra n. 22 at 189 et seq.

Richard M. Mosk/Tom Ginsburg, ‘Evidentiary Privileges in International Arbitration’ in (2001) 50 ICLQ 345 at p. 382: ‘parties rely on privileges’; cf. also Fabian von Schlabrendorff/Audley Sheppard, supra n. 3 at p. 765; Klaus Peter Berger, supra n. 3 at p. 20; Charles N. Brower/Jeremy K. Sharpe, supra n. 35 at p. 331.

See supra III.

Norah Gallagher, supra n. 3 at p. 48.

Fabian von Schlabrendorff/Audley Sheppard, supra n. 3 at p. 766.

Fabian von Schlabrendorff/Audley Sheppard, supra n. 3 at p. 767 et seq.; Norah Gallagher, supra n. 3 at p. 49: ‘an international tribunal cannot simply ignore a request for the laws of privilege to be applied. This could lead to subsequent difficulties at the enforcement stage’.

Charles N. Brower/Jeremy K. Sharpe, supra n. 35 at p. 331: see for a US case holding that the arbitral tribunal’s disregard of a justified privilege objection may lead to the setting aside of the award Fahnenstock & Co. v. Waltman, 935 F.2nd. 512 (C.A. 2 (N.Y.1991)).

Jason Fry, supra n. 36 at p. 213.

Jason Fry, ibid. at p. 212 et seq.; see also Gerold Herrmann, supra n. 25 at p. 190, stating that the items contained in the list of ‘classified materials’ in art. 20 UNCITRAL Conciliation Rules are characterized by the fact ‘that such information is typically given in the frank and friendly spirit of conciliation for the sole purpose of reaching an amicable settlement and that, therefore, its potentially prejudicial effect would be undesirable, if not very unfair’.

Referring Principles:

XII.5 - Settlement privilege