A. Attorney-client privilege

Under early Roman law, an attorney could not be compelled to testify against his client.28 This was the precursor of the modern attorney-client privilege, which privilege serves the important public policy goal of candid communications between lawyers and their clients.29 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.30 The attorney-client privilege also exists in international criminal law. For example, it is provided for under the Rules of the International Criminal Tribunal for the former Yugoslavia (ICTY) and has been successfully invoked there.31 In most legal systems, the attorney-client privilege generally is seen as belonging to the party and not to the attorney, and is waivable by the party. This contrasts with other professional privileges that are sometimes not waivable in civil law jurisdictions. The improper disclosure of attorney-client communications by a lawyer can be subject to sanction under professional ethical rules and requirements.32 The attorney-client privilege, although absolute in the sense that a court may not fail to apply it in a particular case, has exceptions. Thus, it may not be invoked if the communication itself constitutes a criminal act or fraud,33 or in some instances of litigation between the attorney and the client.34 The privilege is usually limited to communications made in the course of, or in anticipation of, legal advice.35 A recent United States Supreme Court case held that the privilege survives the death of the client.36 There is a controversy about whether there can be an inadvertent waiver of the privilege, such as by mistakenly including a privileged communication in the production of otherwise non-privileged documents.37 In European Union law, the existence of the attorney-client privilege was confirmed in the case of AM and S Europe Ltd. v. Commission.38 The issue concerned the European Commission's antitrust investigation of a U.K. company. The company refused to provide for production and inspection of certain documents created by counsel on the staff of the company on the grounds that the attorney-client privilege protected the documents. Although the Commission's investigation power is plenary and there is no explicit provision for attorney-client privilege in European Union law, the Court found that the Commission's investigatory power is subject to a restriction for attorney-client privileges for any communications between a company and independent lawyers in the Member States of the European Union. While the European Court of Justice did not extend this privilege to "in-house counsel" in the case before it, it is highly significant that the Court found an attorney-client privilege despite the lack of any explicit provision in European law to that effect. The Court's findings suggest that the privilege forms a general principle common to the Member States of the European Union.39 In other jurisdictions, certain communications between a company and its in-house counsel are treated the same as a communication between the company and its outside counsel.40
X. WAIVERs AND OTHER CONSIDERATIONS

If one party can assert the privilege, the question may arise as to whether the other party should be able to, as a matter of mutuality or equal treatment, assert the same privilege notwithstanding the lack of the privilege in the law with the closest relationship to the evidence. Because the requirement of equal treatment demands that the rules and law of the arbitration be applied uniformly to both parties, a party should be able to invoke a privilege that has been asserted by the other party.

29 "Developments" supra n.6, at p.1501; 8 Wigmore on Evidence, §2290-91.
31 ICTY Rules of Evidence, Rule 97 ("All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless: (i) the client consents to disclosure; or (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure"). Decision on Prosecution Motion for Production of Defence Witness Statements, Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Trial Chamber II, 27 Nov. 1996, reprinted in G. K. McDonald and O. Swaak-Goldman (eds.), Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts (2000), Vol. II, p.966. See also Rule 14 of proposed rules of evidence for the International Criminal Court as quoted in M. Rasmussen, "Rules of Evidence for the International Criminal Court" (1995) 64 Nordic J. Int'l L. 275, 281; R. Wedgwood, "International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaskic" (1998) 11 Leiden J. Int'l L. 635, 635-36 (describing difficulty of constructing a system of evidence before international criminal tribunals).
32 American Bar Association, Model Rules of Professional Conduct Rule 1(6) and Model Code of Professional Responsibility, Canon 4 (professional rules proscribing the conduct); Standards for Imposing Lawyer Sanctions, Standard 4.21 (describing disbarment as an appropriate sanction for knowingly improper disclosure which causes injury or potential injury).
33 Cross and Tapper, supra n.19, at p.440.
37 In the United States, courts have come to different conclusions as to whether inadvertent disclosure constitutes a waiver. Compare In re Sealed Case, 877 F. 2d 976 (D.C. Cir. 1989) (privilege waived by inadvertent disclosure) with Aramony v. United Way of America, 969 F. Supp. 226, 235 (S.D.N.Y. 1997) (privilege not waived).


Referring Principles:

XII.7 - Most favorable privilege rule