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6. Arbitration Practice

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The (published) practice of international arbitration does not give much guidance regarding the issue of differing concepts of evidentiary privileges. One of the reasons is inherent in arbitration: arbitral proceedings are generally considered confidential. Consistent case law may develop only with difficulty.

In deciding on which rules to base privileges, tribunals have resorted to: the procedural law of the arbitration, the law governing the parties' arbitration agreement, the law of the judicial forum where enforcement is sought, or the law most closely connected to the allegedly privileged information. This means that arbitrators may choose from a broad range of potentially applicable laws, including: the substantive law of the contract; the law of the place where the arbitration is held (lex arbitri); the law of the place of residence of a party or the attorney; the law of the place where the protected information was created; the law of the place where the sender or the receiver of the protected information is located; the law of the place where the information is stored; and, the law of the place where the attorney was admitted.

What is presumed to be the current practice has been summarised as: tribunals lend to apply the rules of privileges that are shared by the parties (without regard to the rules of the forum). In order to "level the playing field", where one party would expect to enjoy greater evidentiary privileges, tribunals also lend to allow the other party to benefit from such additional protection. It seems that arbitrators often adopt a pragmatic stance rather than relying on strict application of a certain set of rules.

[...]

8. Conclusion

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This discussion has revealed the potential for conflict caused by different concepts of attorney-related confidentiality, e.g. Swiss attorney secrecy, English LPP and US ACP. This clash of concepts does not come as a surprise in a context as multi-jurisdictional as international commercial arbitration. Indeed, it would be extraordinary if there were no conflicts. The handling of conflicts is left to a great extent in the arbitrators' discretion. National arbitration laws (at least Swiss, English and US) do not provide ready-made solutions. Neither do ICC, UNCITRAL, ICDR, LCIA and Swiss arbitration rules, nor arbitration instruments (IBA Evidence Rules). Arbitration practice seems to adopt a pragmatic approach: "give the parties..."
what they demand and even out inequalities” appears to be the motto. Among legal authors there is consensus that evidentiary privileges are to be taken into account. However, on which law they are to be based and how national structural differences are to be counterbalanced remains uncertain. In these circumstances, it seems most appropriate to determine the law of privileges for each party by *voie directe* and according to a closest connection test.

Whatever solution a tribunal selects (and there are many choices) one precept must not be violated, equal treatment of the parties, because an award which does not respect basic requirements of due process (also as regards evidentiary privileges) may not be enforced. Nevertheless, within the scope of their duty to guarantee the parties’ equal treatment and conduct a fair trial, the arbitrators enjoy considerable freedom.

127 Born, above fn. 103, p. 490; Sindler and Wüstemann, above fn. 1, p. 618.
129 Born, above fn. 103, p. 490 letter d.
130 Rubinstein and Guerrina, above fn. 85, p. 589; Sindler and Wüstemann, above fn. 1, p. 619.
131 Sindler and Wüstemann, above fn. 1, p. 637.
132 Burn and Skelton, above fn. 85, p. 129.

**Referring Principles:**

- XII.6 - Attorney-client privilege
- XII.7 - Most favorable privilege rule