Discovery in international arbitration: How much is too much?  

A procedural characterization leads to the law governing the arbitration (but not to the civil procedure rules applicable in court at the place of arbitration), and a substantive characterization to the law with the closest relationship to the privileged communication or information\(^{60}\). In order to take into consideration the dual nature of privileges, one may think of submitting them both to the law of the arbitration and to the law of the closest relationship to the evidence. In the event of conflict, the most protective would apply.

This cumulative application\(^ {61}\) may provide a workable solution as long as no issues of equal treatment arise. What if a German corporation faces a US firm in an arbitration in Switzerland and each of them seeks the production of communications between management and inhouse counsel of its opponent? The law of the arbitration is Swiss law. It provides that matters of procedure are agreed by the parties or otherwise determined by the arbitral tribunal. The law with the closest relationship in respect of the communications between the US firm and its inhouse legal department is US law, which protects such communications under the attorney-client privilege\(^ {62}\). The law governing the communications between the German firm and its inhouse counsel is German law, which does not protect such communications\(^ {63}\). If it accepts one set of communications and not the other, the tribunal may well be in breach of the general principle of equal treatment in procedural matters. Hence, it may end up applying the law of the arbitration, which leaves broad discretion and allows a solution taking both the need for protection and the need for equal treatment into account, not to speak of the need to assemble the evidence required to resolve the dispute.

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\(^{1}\) Expanded version with added footnotes of a presentation of Prof. Gabrielle Kaufmann-Kohler at the Petersberger Schiedstage in February 2003.

\(^{60}\) So Mock/Ginsburg, p. 381. It appears correct not to resort to the law governing the substance of the dispute. A choice of law clause in a contract would not cover issues such as privileges, nor would the law determined to be applicable failing a contractual choice. Applying the law with the closest connection to the evidence at issue also appears in line with the parties’ legitimate expectations.

\(^{61}\) Which resembles to some extent the cumulative application of the law of the court of origin (the court in which the action is pending and which issued the letters rogatory) and the court of execution (the court which carries out the request and takes the evidence) found in Article 11 Hague 1970 Evidence Convention.

\(^{62}\) See Rule 26(b)(3) Federal Rules of Civil Procedure. See also Teply/Whitten, op.cit., p. 748.

\(^{63}\) See for example Lücke/Walchshüfer, Münchener Kommentar zur Zivilprozessordnung, ad § 383, n° 37 and § 203 StGB (Strafgesetzbuch).
XII.7 - Most favorable privilege rule