Title: XII.5 - Settlement privilege

Content:
No. XII.5 - Settlement privilege

(a) Privileged information is inadmissible as evidence in subsequent arbitration or court proceedings between the same parties, provided that the privilege objection
i) is raised in the arbitration or court proceedings in good faith, and
ii) does not relate to evidence which one side would have been able to prove had there been no settlement negotiations between the parties.

(b) Privileged information relates to
i) 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
ii) statements made or views expressed by a third neutral involved in such proceedings, or
iii) any document, witness statement or expert report submitted in or prepared by a party solely for these negotiations, mediationconciliation or any other ADR process between the parties.

Commentary:
1 The transnational settlement privilege established by this Principle 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. Given that the purpose of the privilege is to protect the parties and to ensure efficient settlement talks between them 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 on International Conciliation 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."

2 The privilege objection, like any other legal right, is subject to limitations derived from the Principle of good faith. 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".

3 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 if there had been no settlement negotiations between the parties. 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". 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". 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".
4 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.