



Attorney Secrecy v Attorney–Client Privilege in International Commercial Arbitration

By

Bernhard F. Meyer-Hauser and Philipp Sieber

Reprinted from
(2007) 73 *Arbitration* 148–188

Sweet & Maxwell Limited
**100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)**

THOMSON
—★—™
SWEET & MAXWELL

Articles

Attorney Secrecy v Attorney-Client Privilege in International Commercial Arbitration

by BERNHARD F. MEYER-HAUSER and PHILIPP SIEBER

1. INTRODUCTION

An effective legal system requires that confidentiality between client and attorney be protected. Only if the law recognises the confidential nature of the information passing between client and attorney will the client be willing to confide in the attorney and the attorney be able to represent the client's interests effectively. However, there are major differences between civil law and common law concepts in this respect. In the following discussion, Swiss attorney secrecy serves as an example of the civil law system, whereas English legal professional privilege (LPP) and the US attorney-client privilege (ACP) represent the common law tradition of attorney-related confidentiality.

First, the basic legal understanding lying behind these concepts varies. According to Swiss law, attorney secrecy imposes a personal secrecy obligation on the attorney. The attorney must assert attorney secrecy during judicial proceedings, unless the client waives it. Attorney secrecy covers everything the attorney knows about the client's affairs, including facts. Clients may not assert attorney secrecy themselves. By contrast, English LPP and the US ACP are exceptions to the general and extensive duty of disclosure of all parties involved in litigation. Clients as well as attorneys may invoke the privilege, which covers any communication, excluding facts, between client and attorney (or vice versa) which have the main goal of providing legal services.

Secondly, the civil law and common law concepts also differ with regard to the person who may rely on the confidentiality. Whereas Swiss attorney secrecy may (or must) be claimed by the attorney, English LPP and US ACP belong—so it is said—to the client.

Thirdly, the scope of Swiss attorney secrecy, English LPP and US ACP is not the same. Information which is protected by one concept may not be protected by the other.

In international commercial arbitration these differences may cause problems. The law of international arbitration has the difficult mission of trying to reconcile these different traditions protecting confidentiality between client and attorney. At the very least, a *modus vivendi* must be found. Of central importance is the question how the conflict, between the arbitral search for truth in the interest of dispute settlement and confidentiality in order to guarantee the integrity of the proceedings, can be resolved in a truly international manner.

This article has two main goals. First, to make international arbitration practitioners aware of the differences between civil law and common law concepts of attorney-related confidentiality; secondly, to present considerations which should be taken into account when faced with different concepts in international commercial arbitration.

The discussion is divided as follows: Swiss attorney secrecy, English LPP and US ACP are outlined and contrasted (part 2); the legal nature of the conflicts caused by these different concepts in international arbitration is analysed (part 3); Swiss, English, and US national legislation on international arbitration is assessed (part 4); widely used arbitration rules and arbitration practice are considered (parts 5 and 6); and, based on the foregoing, some key considerations and conclusions are presented (part 7).

2. OUTLINE OF THE NATIONAL CONCEPTS

General remarks

The complexity of modern life often makes it impossible for citizens to defend their rights without the help of competent and independent legal counsel. As attorneys are bound to secrecy by law, clients may unconditionally place their trust in them. Such open communication is an important requirement for the effective representation of the client's interests.¹ Swiss, English and US law have all developed concepts which aim at protecting the confidentiality between client and attorney. These concepts vary, however, in nature and scope. This part summarises Swiss Attorney Secrecy, English LPP and related concepts as well as the US ACP and related concepts. It concludes by comparing and highlighting some of the main differences between the (Swiss) civil law and the (English and US) common law doctrines.

Swiss attorney secrecy

Introduction

Swiss attorney secrecy imposes a personal secrecy obligation on the attorney which may (or must) be invoked during judicial proceedings.² Attorney secrecy stems from several sources in Swiss law.³ The term "attorney secrecy" actually summarises a number of rules intended to protect the secrecy of information clients pass to their attorneys.⁴ Independently from the sources of attorney secrecy, a general terminology has been established. Thereby, the client is defined as master of the secret. Attorneys with whom the secret has been shared or who have discovered it through their role as confidant are termed keepers of the secret. The term holder of the secret includes both master and keeper of the secret. This terminology does not define who may actually assert a legal claim for the maintenance of secrecy.⁵

In general, only information which the master of the secret (from a subjective point of view) intends to keep secret and which actually is (from an objective point of view) secret is protected by Swiss attorney secrecy. A secret is objectively secret if it refers to information which is neither widely known nor generally available, but is restricted to a limited number of people.⁶ Information which the master or the keeper of a secret (intentionally or inadvertently) makes available to a third party will not therefore be considered per se as being generally known or disclosed.

¹ M. Sindler and T. Wüstemann, "Privilege across Borders in Arbitration: Multi-Jurisdictional Nightmare or Storm in a Teacup?" (2005) *ASA Bulletin* 610 *et seq.*, 614 *et seq.*

² On the importance of the concept, see, e.g. W. Schlupe, *Das Anwaltsgeheimnis 1: Über Sinn und Funktionen des Anwaltsgeheimnisses im modernen Rechtsstaat* (Zürich, 1994); M. Pfeifer "Die zentrale Bedeutung des Anwaltsgeheimnisses" in *Professional Legal Services: Vom Monopol zum Wettbewerb* (H. Nater ed., Zürich, 2000), pp.89 *et seq.*

³ On Swiss attorney secrecy, see in particular N. Oberholzer on StGB, art.321 in *Basler Kommentar, Strafgesetzbuch II, Art. 111-401 StGB* (M. Niggli and H. Wiprächtiger eds, Basel, 2003); J. Schwarz "Das Anwaltsgeheimnis—Einige Gedanken zur heutigen Rechtslage" in *Schweizerisches Anwaltsrecht* (W. Fellmann, C. H. Jacobs, T. Poledna and J. Schwarz eds, Bern, 1998), pp.110 *et seq.*; G. Testa, *Die zivil- und standesrechtlichen Pflichten des Rechtsanwalts gegenüber dem Klienten* (Zürich, 2000), pp.135 *et seq.*; S. Trechsel, *Schweizerisches Strafgesetzbuch, Kurzkommentar* (2nd edn, Zürich, 1997), art.321; M. Pfeifer on BGFA, art.13 in *Kommentar zum Anwaltsgesetz, Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte* (W. Fellmann and G. Zindel eds, Zürich, 2005).

⁴ Overviews of the different legal sources of attorney secrecy are provided by Pfeifer, above fn.3, BGFA, art.13, nos 1 *et seq.*; Schwarz, above fn.3, pp.110 *et seq.*; Testa, above fn.3, pp.135 *et seq.*

⁵ Schlupe, above fn.2, p.14.

⁶ Schlupe, above fn.2, pp.18 *et seq.*

ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

This general concept is reflected by a number of provisions in Swiss law, both substantive and procedural. The following remarks outline the most important elements in the context of commercial disputes.

Criminal law basis

The Swiss Criminal Code 1937 (SCC) provides:

“Disclosure by an attorney... of a secret of which he has gained knowledge in his professional capacity or the pursuit thereof, shall, upon application, be punished by imprisonment or fine.”

Violation of this provision may cause imprisonment of up to three years (SCC, art.36), and/or a fine of up to CHF 40,000 (SCC, art.48, no.1).

By SCC, art.321 the term attorney includes not only attorneys admitted to the bar, who practise and are recognised by cantonal law, but also attorneys admitted to the bar working in other professional fields, as well as foreign attorneys so far as they provide legal services.⁷

Attorneys are entrusted with a secret in their professional capacity or the pursuit thereof if the secret is related to their profession as attorney. This does not apply when the commercial element of an attorney’s activity is predominant, e.g. if the attorney acts as a member of the board of a company, or administers a clients’ assets.⁸ However, attorneys who work as in-house counsel for a company are not considered as attorneys pursuant to SCC, art.321. Only independent attorneys, i.e. attorneys who work on the basis of a mandate and not on the basis of an employment contract, fall within it.⁹

Any piece of information which a client passes to its attorney, or which the latter is entrusted with while carrying out his or her profession may qualify as secret.¹⁰ The form of the information is irrelevant. Oral statements, recordings, printed documents, etc. are covered. The piece of information must be considered as secret.

Only information which the master of the secret (from a subjective point of view) intends to keep secret and which actually is secret (from an objective point of view) falls under SCC art.321. A secret is objectively secret if it refers to information which is neither commonly known nor generally available, but is restricted to a limited number of people.¹¹

The secrecy obligation does not end when the attorney’s mandate is accomplished or terminated but lasts as long as the attorney lives.¹²

SCC, art.321 provides exceptions. An attorney who discloses a secret with the consent of its master or of the supervisory authority is not liable to prosecution (SCC, art.321, no.2). It is up to the client or the supervisory authority to determine the extent of consent. A partial consent, i.e. allowing the disclosure of information relating to specific questions or facts, is permissible. Furthermore, attorneys are not punishable when federal or cantonal laws stipulate a duty to disclose or testify before public authorities (SCC, art.321, no.3).¹³

⁷ Oberholzer, above fn.3, StGB, art.321, no.5; Trechsel, above fn.3, StGB, art.321, no.19.

⁸ BGE (Decision of the Swiss Federal Court) 115 Ia 197 at 197 *et seq.*; BGE 112 Ib 606 at 608; Oberholzer, above fn.3, StGB, art.321, no.13; Trechsel, above fn.3, StGB, art.321, no.19.

⁹ Trechsel, above fn.3, StGB, art.321, no.5; Pfeifer, above fn.3, BGFA, art.13, no.90. M. Pfeifer, “Gilt das Berufsgeheimnis nach Art. 321 StGB auch für Unternehmensjuristen?” (2006) *Anwaltsrevue*, pp.166 *et seq.* offers a critical assessment. M. Niggli, “Unterstehen dem Berufsgeheimnis nach Art. 321 StGB auch Unternehmensjuristen?” (2006) *Anwaltsrevue*, pp.277 *et seq.*, rejects Pfeifer’s arguments.

¹⁰ BGE 101 Ia 10 at 11 *et seq.*

¹¹ Oberholzer, above fn.3, StGB, art.321, no.10.

¹² SCC, art.321, no.1, para.3; Oberholzer, above fn.3, StGB, art.321, no.14.

¹³ Oberholzer, above fn.3, StGB, art.321, no.18. In the canton of Zurich, the supervision of attorneys is the responsibility of the Attorney Supervisory Authority (Zurich Act on Attorneys 2003, §§18).

Contractual basis

Attorney secrecy is also based on contract law. The work of independent, i.e. self-employed, attorneys is based on mandates (Swiss Code of Obligations 1911 [CO], art.394 *et seq.*). This contractual relationship imposes a fiduciary duty on attorneys (CO, art.398, para.2) which requires them to keep all received information secret, unless the client consents to disclosure.¹⁴ The duty of secrecy is part of the contract even if it has not been specifically and expressly agreed upon.

Personality rights basis

Attorney secrecy is also embedded in the personality rights of the client, i.e. Swiss Civil Code 1907 (CC), art.27.¹⁵ Referring to this provision, the Swiss Federal Court decided that:

“the confidentiality between attorney and client is protected by the personality rights and may only be breached if such breach is inevitable in order to safeguard higher interests.”¹⁶

Professional law of attorneys

Another basis for attorney secrecy is the professional law of attorneys. The Swiss law consists of federal and cantonal rules. On a federal level, the Federal Act on the Attorneys' Freedom to Provide Services (AFPS) 2000 is authoritative. An example on a cantonal level is the Zurich Act on Attorneys 2003.

AFPS, art.13, para.1 provides:

“Attorneys are bound—towards any person and unlimited in time—to professional secrecy regarding all information entrusted to them by their clients whilst carrying out their profession.”

This provision applies to all attorneys admitted to the bar who professionally represent parties before civil and criminal courts (AFPS, art.2, para.1). Like SCC, art.321, AFPS, art.13, para.1 is limited to independent attorneys, i.e. attorneys who work on the basis of a mandate and not under a contract of employment.¹⁷ Also in line with SCC, art.321, AFPS, art.13, para.1 is not applicable when the commercial element of an attorney's activity is predominant. A genuinely legal function is required.¹⁸ And the other principles basically apply as under criminal law. If an attorney violates professional secrecy, the competent supervisory authority may impose disciplinary sanctions. These sanctions include warning, reprimand, fine, or limited or permanent prohibition from practice (AFPS, art.17).

By virtue of the Zurich Act on Attorneys 2003, §14, the obligation of professional secrecy established under AFPS, art.13, para.1 also applies to attorneys who do not fall under the scope of the AFPS. This means that Zurich law extends the professional secrecy obligation to every person admitted to the bar, who provides legal services and calls himself attorney (Zurich Act on Attorneys 2003, §10).

¹⁴ Testa, above fn.3, p.136. See also Weber on OR, art.398, no.11 in *Basler Kommentar zum Schweizerischen Privatrecht, Obligationenrecht I, Art. 1-529 OR* (H. Honsell *et al.* eds, 3rd edn, Basel, 2003).

¹⁵ Weber, above fn.14, OR, art.398, no.12.

¹⁶ BGE 91 I 200 at 206.

¹⁷ Pfeifer, above fn.3, BGFA, art.13, no.17. In its recent decision BGE 130 II 87, the Federal Court confirmed this view.

¹⁸ Pfeifer, above fn.3, BGFA, art.13, no.13.

ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

Procedural effects

Up to this point, one might have the impression that attorney secrecy is nothing more than the obligation of attorneys to keep secret whatever they are informed about by their clients or find out while working for them. In a procedural context, however, attorney secrecy turns from a duty into a right which attorneys may (or must) invoke. To fully understand the consequences of the following remarks, a general rule of Swiss evidence law, as codified in cantonal and federal legislation, should be highlighted: according to Swiss law of civil procedure, the parties are not obliged to support the proceedings in an active manner and, consequently, the court may not force them. The procedural mechanism is that if the claimant does not present its case with sufficient clarity and does not substantiate its allegations, it will probably lose. The respondent may adopt a passive role and restrict itself to merely contesting the allegations, but this may be to its disadvantage as its version of the facts will remain unheard.¹⁹ The situation is completely different for third parties, who are under an obligation to actively support the proceedings when ordered by the court.²⁰ In this context, attorney secrecy becomes important as it gives an attorney the right to refuse active support of the proceedings even when not a party.

For instance, the Federal Act on the Federal Civil Procedure Rules 1976 (FCP) provides:

“Right to refuse testimony (FCP art. 42 para. 1 letter b):

‘Testimony can be refused: ... by persons enumerated in art. 321 no. 1 of the Swiss Criminal Code regarding facts which fall under the scope of their professional secrecy, unless the master of the secret consents to disclosure of the secret.’

Right to refuse production of a document (FCP art. 51 para. 1):

‘Third parties are obliged to provide the court with documents they possess. They are relieved from this obligation if the documents refer to facts regarding which they could refuse testimony according to art. 42.’

Right to refuse inspection (FCP art. 55 para. 2):

‘Third parties are obliged to tolerate inspection of objects they possess, unless they have a right to refuse according to art. 42, analogously applied.’”

First, it must be stressed that these rights may only be invoked by the attorney. The client does not have similar rights. Secondly, attorneys have some discretion whether they want to invoke these rights. The following statutory provisions make this clear:

“AFPS art. 13 para. 1: ‘Consent to disclosure does not oblige an attorney to disclose information he was entrusted with.’

Zurich CP § 159 no. 3 sentence 2: ‘The witness has the right to refuse testimony even when he has been released from the secrecy obligation.’”

According to legal doctrine, the same is true under SCC, art.321.²¹ These remarks show the dual nature of attorney secrecy. In a litigation context, attorney secrecy turns from a duty towards the client to a right towards the judicial authorities. The fact that the attorney

¹⁹ FCP, arts 40, 50 and 55, para.1. Zurich Act on Civil Procedure 1976 (Zurich CP), §154, 170, paras 1 and 183. Where the attorney is a litigation party, see L. Vieli, *Das Anwaltsgeheimnis 2: Der Anwalt als Partei im Zivilrecht* (Zürich, 1994).

²⁰ FCP, arts 42, 51 and 55, para.2; Zurich CP, §157, para.1, §170, para.2 and §184.

²¹ Oberholzer, above fn.3, StGB, art.321, no.20.

(2007) 73 ARBITRATION 2

is not obliged to testify, produce documents or to allow inspection, even with the client's allowance, is a powerful sign that attorney secrecy is not only construed for the benefit of the client but also for the benefit of just legal proceedings.

Legal ethics

In the Swiss Rules of Professional Conduct 2005 (RPC), art.15, para.1, the Swiss Bar Association has adopted the following rule:

“Attorneys are bound—towards any person and unlimited in time—to professional secrecy regarding all information entrusted to them by their clients whilst carrying out their profession.”

This wording corresponds—with only two minor semantic discrepancies—to AFPS, art.13, para.1. In line with current law, legal ethics also give attorneys some discretion whether they want to rely on attorney secrecy (RPC, art.15, para.2): “In the interest of their clients, they may invoke the professional secrecy even if they were relieved from it.” It must be noted that only attorneys who are self-employed (or employed by self-employed attorneys) may become members of one of the cantonal bar associations or the Swiss Bar Association. In-house counsel are excluded.²²

Non-applicability to in-house counsel

Attorneys employed as in-house counsel, legal advisers or in-house lawyers by non-law firms are not on a par with self-employed attorneys and those employed by them.²³ They are not considered as attorneys for the purpose of SCC, art.321 or AFPS, art.13, and they may not become members of a bar association. Of course, they are forbidden to disclose secrets but this ban is based on a different legal foundation. As employees they are under a contractual duty of secrecy as stipulated by their employment contract. The relevant CO, art.321a, para.4 states:

“The employee shall not use or disclose confidential information such as trade and industrial secrets of which he gains knowledge during employment; to the extent that it is in the interest of the employer, the employee shall remain under duty of secrecy even after termination of employment.”

Since in-house counsel's knowledge is generally considered to be a business secret, they are subject under SCC, art.162 to criminal sanctions for breach of the secrecy obligation. This provision prohibits disclosure of business and industrial secrets in general.

In a procedural context it is important to note that in-house counsel have no right to refuse testimony, production of documents or inspection. Procedural law, however, provides other means of protection for trade and business secrets. For example, FCP, art.38, sentence 2 provides:

“Where necessary for the protection of a party's or a third party's business secrets, the court shall consider the means of evidence without the presence of the opposing party or parties.”

²² Articles of the Swiss Bar Association 2001, art.3; Articles of the Zurich Bar Association 2005, §3, para.1.

²³ Schwarz, above fn.3, p.125. For an overview see L. Mundi, *In-House Counsel and the Attorney-Client Privilege, A Lex Mundi Multi-Jurisdictional Survey* (Houston, 2005), pp.67 *et seq.* (available at www.lexmundi.com [4.12.2006]).

English legal professional privilege and related concepts*Overview*

To ensure confidentiality between client and attorney, English law developed the concepts of lawyer’s confidence and LPP. These concepts differ from Swiss attorney secrecy not only with regard to content but also dogmatically. In particular, LPP has developed from English civil procedure whose evidence rules require—compared to Swiss law—an extensive duty to disclose. The rules of discovery oblige both parties to disclose all relevant facts and information, independent of who has access to them. LPP represents an exception to this duty of disclosure, which is why it is generally termed “privilege” rather than “secrecy obligation”. LPP served as the historical basis for the US ACP, with which it still shares many similarities even though substantive differences exist.

Lawyers’ confidentiality

Lawyer’s confidentiality is comparable to the continental European attorney secrecy. It obliges all attorneys to confidentiality in matters relating to their clients. Professional organisations take measures against violations of lawyer’s confidentiality and the wronged party may resort to civil but not criminal action.²⁴ The legal basis of lawyers’ confidentiality is disputed. Contracts, equitable obligations or a branch of law *sui generis* provide the most likely foundations²⁵:

“There has been debate among scholars about the jurisprudential foundation of the law of confidentiality. . . . Contract apart, the principal views are either that it is founded on an equitable obligation, but for breach of which the court has inherent power to award monetary compensation in addition to or instead of remedies. . . . or that it is a branch of law *sui generis*, founded on a multifaceted jurisdiction, under which the court may award a full range of equitable and common law remedies.”

The Law Society’s Solicitors’ Practice Rules 1990 do not mention lawyer’s confidentiality or any other confidentiality obligation. The Bar’s Code of Conduct provides (para.702):

“Whether or not the relation of counsel and client continues a barrister must preserve the confidentiality of the lay client’s affairs and must not without the prior consent of the lay client or as permitted by law lend or reveal the contents of the papers in any instructions to or communicate to any third person. . . . information which has been entrusted to him in confidence or use such information to the lay client’s detriment or to his own or another client’s advantage.”

Legal professional privilege

LPP²⁶ gives a client the right to refuse testimony or production of certain documents in a civil procedure. Furthermore, the client may in some cases compel its attorney and third

²⁴ M. D. Snoxall “Legal Professional Privilege and its Place in the Legal System of the United Kingdom” (1980) *Anwaltsblatt* 321 *et seq.*

²⁵ *General Mediterranean Holdings SA v Patel* [1999] 3 All E.R. 673.

²⁶ On LPP see in particular J. Auburn, *Legal Professional Privilege, Law & Theory* (Oxford, 2000); for an overview see A. Keane, *The Modern Law of Evidence* (5th edn, London, 2000); for a concise summary see C. McAlhone and M. Stockdale, *Evidence in a Nutshell* (2nd edn, London, 1999). In a criminal law context, LPP is discussed by I. Dennis, *The Law of Evidence* (2nd edn, London, 2002) and R. Munday, *Evidence* (3rd edn, Oxford, 2005).

(2007) 73 ARBITRATION 2

parties to do the same. LPP is based on case law but was codified in the Police and Criminal Evidence Act 1984, s.10, which reproduces the common law²⁷:

- “(1) Subject to subsection (2) below, in this Act ‘items subject to legal privilege’ means
- (a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
 - (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
 - (c) items enclosed with or referred to in such communication and made
 - (i) in connection with the giving of legal advice; or
 - (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, when they are in the possession of a person who is entitled to possession of them.
- (2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege.”

Therefore two types of LPP exist: the legal advice privilege and the litigation privilege.²⁸ Under s.(1)(a) a client may refuse testimony or disclosure of a document (and may require an attorney to do the same) if the testimony or document concerns confidential communications between client and attorney and was intended as legal advice. Under s.(1)(b) and (c)(ii) a client may refuse testimony or disclosure of documents if the testimony or documents concern confidential communications between client and attorney and relate to pending or contemplated litigation. The client may require the attorney to do the same. LPP is a matter of substantive law.²⁹

Beneficiary of LPP

The term LPP is misleading since it is a privilege enjoyed by the client, not the attorney:

“The expression ‘legal professional privilege’ is unhappy, because it falsely suggests a privilege enjoyed by the legal profession when in truth it is not the legal profession but the client who enjoys the privilege.”³⁰

The privilege is jointly held if there are several clients although each client has the individual right to decide whether to invoke LPP. Towards third parties, such decisions require unanimity.³¹

²⁷ *R. v Central Criminal Court Ex p. Francis & Francis (A Firm)* [1989] A.C. 346 at 392.

²⁸ *Three Rivers District Council v Bank of England (Disclosure) (No.3)* [2003] EWCA Civ 474 at [1]; Dennis, above fn.26, pp.332 *et seq.*; McAlhone and Stockdale, above fn.26, p.41; Munday, above fn.26, no.3.23.

²⁹ A. Sheppard, “England, Evidentiary Privileges in International Arbitrations” in *Arbitration and ADR Newsletter of Committee D of the International Bar Association Section on Business Law* Vol.5, No.3 (December 2000), p.13: “Legal professional privilege has been held to be not a rule of evidence but a substantive rule of law.”

³⁰ *Ventouris v Mountain (The Italia Express) (No.1)* [1991] 3 All E.R. 472.

³¹ N. Andrews, *Principles of Civil Procedure* (London, 1994), no.12-016.

ATTORNEY SECRECY v ATTORNEY–CLIENT PRIVILEGE

*Legal advice privilege*³²

The term legal adviser not only includes independent, i.e. self-employed attorneys admitted to the bar according to continental European understanding but also in-house counsel.³³ English law does not make a distinction in this regard as LPP is not tied to formal criteria but to a function.³⁴ This role-related view is expressed in the Courts and Legal Services Acts 1990, s.63:

- “(1) This section applies to any communication made to or by a person who is not a barrister or solicitor at any time when that person is
- (a) providing advocacy or litigation as an authorised advocate or authorised litigator;
 - (b) providing conveyancing services as an authorised practitioner; or
 - (c) providing probate services as a probate practitioner.
- (2) Any such communication shall in any legal proceedings be privileged from disclosure in like manner as if the person in question had at all material times been acting as his client’s solicitor.”

Even foreign (non-English) lawyers are covered by LPP³⁵:

“The basis of the privilege is just as apt to cover foreign legal advisors as English lawyers, provided only that the relationship between lawyer and client subsists between them.”³⁶

The privilege requires an attorney–client relationship. Such a relationship does not exist where an attorney gives cordial and confidential but non-committing legal advice to an acquaintance. In addition, the attorney–client relationship must be confidential. Not all relationships between clients and legal advisers are. For example, confidentiality no longer applies if the attorney is in possession of an original document of which the client has disclosed a copy to a third party. Confidential communication between attorney and client is mutually privileged. Not only does the privilege protect information the client passes to the attorney, but also that which attorney passes to client. On the other hand, legal advice privilege does not attach to documents which a client receives from a third party with the intention to forward them to the attorney.³⁷

The notion of communication is to be understood in a broad sense: The privilege extends beyond letters, memoranda, etc. which have actually passed between each other to unsent drafts and notes which the attorney composed for the purpose of giving legal advice. It is sufficient that the purpose of seeking and providing legal advice is the dominant purpose of a communication. Legal advice does not have to be the sole purpose. Legal advice is advice with regard to the law, i.e. assistance in relation to legal rights and obligations in the broadest sense.³⁸ In a recent decision, the High Court summarised the current scope of legal advice privilege:

³² A review of the current law is offered by *Three Rivers District Council v Bank of England (Disclosure) (No.4)* [2004] UKHL 48.

³³ *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No.2)* [1972] 2 All E.R. 353.

³⁴ Snoxall, above fn.24, p.321.

³⁵ *International Business Machines Corp v Phoenix International (Computers) Ltd (Discovery)* [1995] 1 All E.R. 413.

³⁶ *Duncan (Deceased), Re* [1968] 2 All E.R. 395.

³⁷ *Three Rivers District Council v Bank of England* [2004] UKHL 48 at [24]; *United States v Philip Morris Inc.* [2003] EWHC 3028 (Comm) at [38]; *Three Rivers District Council v Bank of England (No.5)* [2003] EWCA Civ 474 at [19] and [21]. See also McAlhone and Stockdale, above fn.26, p.41.

³⁸ *Three Rivers District Council v Bank of England* [2004] UKHL 48 at [34]–[45]; *Balabel v Air India* [1988] 2 All E.R. 246; *Three Rivers District Council v Bank of England (No.5)* [2003]

(2007) 73 ARBITRATION 2

“Legal advice privilege is restricted to communications passing between the client and his legal advisers for the purpose of requesting and communicating legal advice, to documents evidencing such communications and documents intended to be such communications.”³⁹

Litigation privilege

Litigation privilege requires that legal proceedings are pending or if there is a reasonable prospect of their commencement. Arbitral proceedings are treated as legal proceedings. In any case, only adversarial proceedings are sufficient.⁴⁰ Documents for which litigation privilege is claimed must have been created for the dominant purpose of being used in litigation. A document will not pass the dominant purpose test if there were other equally important reasons (such as briefing of the executive board) for its creation⁴¹:

“On principle I would think that the purpose for litigation ought to be either the sole purpose or at least the dominant purpose of it; to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem excessive, and unnecessary in the interest of encouraging truthful revelation.”

This test is a strict one. For example, in the case mentioned before, an internal investigative report of an accident was not protected as it was considered to have been conducted for security purposes as well as for litigation.

Limits

LPP protects communications and not facts. The underlying facts of a privileged statement are not privileged. For instance, an attorney may not refuse to disclose whether he met his client. Nor may he refuse to disclose declarations concerning his client’s physical and psychological state or his handwriting. In practice, however, it is often difficult to draw a distinction between privileged communication and underlying facts. Documents that existed previous to the attorney–client relationship and were sent to the attorney (who possibly forwarded them to a third party) are not covered by LPP. A pre-existing document can therefore not be protected simply by transfer into the attorney’s custody. The attorney must disclose what a client would be required to disclose. The same rule applies when the attorney copies a (pre-existing) document: the act of copying does not protect the document.⁴² LPP may not be invoked where privileged communication would further a criminal or fraudulent cause, even if neither attorney nor client was aware of the criminal or fraudulent nature of a cause.⁴³

Waiver and loss of LPP

Only the client may waive⁴⁴ the privilege of a communication or document. The attorney is bound by the client’s decision. The privilege once waived may not subsequently be reinvoked.

EWCA Civ 474 at [22]; *Three Rivers District Council v Bank of England (No.4)* [2004] EWCA Civ 218 at [26] and [37]. See also Andrews, above fn.31, nos 12-006 and 12-025.

³⁹ *United States v Philip Morris Inc.*, above fn.37 at [36].

⁴⁰ *ibid.* at [40] and [46]; Andrews, above fn.31, no.12-018.

⁴¹ *Waugh v British Railways Board* [1979] 2 All E.R. 1169.

⁴² *Bursill v Tanner* (1885–86) L.R. 16 Q.B.D. 1; *Dwyer v Collins* (1852) 7 Exch. 639. See also Andrews, above fn.31, no.12-031; Dennis, above fn.26, p.340; Keane, above fn.26, pp.576 *et seq.*; McAlhone and Stockdale, above fn.26, p.43.

⁴³ *United States v Philip Morris Inc.*, above fn.37 at [60]; *R. v Cox (Richard Cobden)* (1884–85) L.R. 14 Q.B.D. 153; Police and Criminal Evidence Act 1984, s.10(2); for extensive examination of the crime-fraud exception, see Auburn, above fn.26, pp.149 *et seq.*

⁴⁴ For extensive examination of the waiver, see Auburn, above fn.26, pp.195 *et seq.*

ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

A waiver affects the entire document; partial waivers are not possible.⁴⁵ If a client takes legal action against an attorney, LPP is (implicitly) waived.⁴⁶

Inadvertent disclosure of a privileged document is treated as follows: if a party has (accidentally) come into possession of a copy of a privileged original document, it may be used as evidence despite the protection the original enjoys. However, the party against which the copy of a privileged original document is to be used may request the exclusion of its use in a trial.⁴⁷

US attorney-client privilege and related concepts

Introduction

To ensure confidentiality between client and attorney, US federal law has developed the concepts of duty of confidentiality, ACP and work-product doctrine (WPD).⁴⁸ These concepts have their historical roots in English law but, although there are a number of essential similarities, substantive differences remain. They differ from Swiss attorney secrecy not only with regard to content but also dogmatically. In particular, ACP and the WPD have developed from US civil procedure whose evidence rules require an extensive duty to disclose.

Duty of confidentiality

The duty of confidentiality is a professional secrecy obligation.⁴⁹ The American Bar Association's (ABA) Model Code of Professional Responsibility, which serves as a model for the states' bar associations, has nine canons, each based on ethical considerations and formalised in disciplinary rules. Canon 4 relates to confidentiality: "a lawyer should preserve the confidences and secrets of a client". This general principle is specified in Disciplinary Rule 4-101 (B):

"A lawyer shall not knowingly: (1) Reveal a confidence or secret of his client. (2) Use a confidence or a secret of his client to the disadvantage of the client. (3) Use a confidence or secret of his client for the advantage of himself or a third party, unless the client consents after full disclosure."

The ABA Model Rules of Professional Conduct (2004 edn) serve as model for the law of attorneys of the states. Presently over 40 states have adopted codes based on the Model Rules.⁵⁰ Rule 1.6 provides:

- "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;

⁴⁵ *Great Atlantic Insurance Co v Home Insurance Co* [1981] 2 All E.R. 485.

⁴⁶ *Lillicrap v Nalder & Son* [1993] 1 All E.R. 724.

⁴⁷ Auburn, above fn.26, pp.233 *et seq.*

⁴⁸ See in particular E. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* (4th edn, Chicago, 2001). A shorter overview can be found in C. Mueller and L. Kirkpatrick, *Evidence* (Boston, 1995), pp.357 *et seq.* D. Slansky, *Evidence, Cases, Commentary and Problems* (New York, 2003), pp.549 *et seq.*, provides a recent collection of leading cases.

⁴⁹ J. Noonan and R. Painter, *Professional and Personal Responsibilities of the Lawyer* (New York, 1997), p.106.

⁵⁰ Among the demographically important states to have based their codes on the Model Rules are Florida, Illinois, and Texas. Prominent exceptions are New York and California.

(2007) 73 ARBITRATION 2

- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order."

Violations of the Rules may have disciplinary consequences. Serious infringements may cause claims for damages or the revocation of a practising certificate.

Attorney–client privilege: background and purpose

Unlike continental European civil proceedings, taking of evidence in the United States is not carried out by the judge but by the lawyers in pre-trial discovery under the guidance of the judge. The aim of discovery is to reveal the objective truth. Therefore, the parties have to disclose all evidence to which they have access. This comprehensive duty of disclosure is considered an important element of legal protection. It aims at reaching the truth regardless of the financial means or expertise of the parties. Exceptions are called privileges and are allowed restrictively:

"Privileges against forced disclosure are exceptions to the demand of every man's evidence and are not lightly created nor expansively construed, since they are in derogation of the search for truth."⁵¹

Among the oldest and most important is the ACP, which guarantees the client comprehensive legal advice. The client will only provide the attorney with complete information if assured that its statements will not be held against it at the trial.⁵² This concerns foremost information which is unfavourable to the client.⁵³

Basis and content

On a federal level, ACP is based on case law: it is part of the unwritten federal common law and has not been codified. Rule 501 of the Federal Rules of Evidence (2004 edn) refers only to judicial practice:

"the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience."

ACP also exists at state level but its content does not always correspond to the federal. In principle, federal courts apply federal ACP although state privilege may be applied in

⁵¹ *U.S. v Nixon* 418 U.S. 683, 710 (1974).

⁵² *Swidler & Berlin v U.S.* 524 U.S. 399, 403 (1998); *Upjohn Co. v U.S.* 449 U.S. 383, 389 (1981); *Hunt v Blackburn* 128 U.S. 464, 470 (1888).

⁵³ Epstein, above fn.48, p.3; Mueller and Kirkpatrick, above fn.48, pp.358 *et seq.*

ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

exceptional cases where the statement of claim or defence is based on the (substantive) law of that state.⁵⁴

Contrary to continental European attorney secrecy, which is based on substantive law but is codified and considered a concept of procedural law, the privilege is considered substantive in the United States.⁵⁵

Around 1900, the US scholar Wigmore gave the following classic definition of ACP:

“Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose made in confidence by the client are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.”⁵⁶

ACP therefore entitles the client to refuse disclosure of certain statements and documents in civil procedure if those statements or documents relate to communications made to the client’s attorney in confidence and for the purpose of seeking legal advice (right to refuse testimony and production of documents). The client can request the attorney to do the same (duty to refuse testimony and production of documents).

Requirements

Modern doctrine has developed the following catchphrase: ACP requires four things: (1) a communication, (2) in confidence, (3) between a lawyer and a client, (4) in the course of the provision of professional legal services.⁵⁷

(1) The privilege applies to communications between client and attorney and vice versa. Communication includes oral communication and documents. According to r.34(a) of the Federal Rules of Civil Procedure (2006) (FRCP), “document” also extends to information in electronic format. The privilege also covers non-verbal communication (e.g. nodding or miming) to the extent that its communicative intent was clear.⁵⁸ The privilege extends only to the communications, not their underlying facts:

“The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.”⁵⁹

“A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.”⁶⁰

The client’s identity and residence are generally considered facts, as are the impressions an attorney has of a client.⁶¹ Pre-existing documents, which the attorney received or reviewed,

⁵⁴ Epstein, above fn.48, pp.19 *et seq.*

⁵⁵ R. Mosk and T. Ginsburg, “Evidentiary Privileges in International Arbitration” (2001) Int. Comp. L.Q. 345 *et seq.*, 368 with reference to *Erie R. Co v Tompkins* 304 U.S. 64 (1938).

⁵⁶ Quoted after D. Louisell, J. Kaplan and J. Waltz, *Cases and Materials on Evidence* (4th edn, New York, 1981), p.431.

⁵⁷ Slansky, above fn.48, p.555.

⁵⁸ Mueller and Kirkpatrick, above fn.48, pp.374 *et seq.*

⁵⁹ *Upjohn Co. v U.S.*, above fn.52, at 395.

⁶⁰ *Philadelphia v Westinghouse Electric Corp.* 205 F. Supp. 830, 831 (ED Pa. 1962).

⁶¹ *U.S. v Kendrick* 331 F.2d 110 (4th Cir. 1964); Noonan and Painter, above fn.49, p.106; Mueller and Kirkpatrick, above fn.48, pp.413 *et seq.*

(2007) 73 ARBITRATION 2

are not covered by the privilege. Accordingly, a document will not be privileged merely because it passed into the attorney's possession.⁶²

(2) The communication must have been made in confidence. Confidentiality is primarily determined in relation to its intention, and depends on the circumstances. Communications made in public or in the presence of third parties, or made accessible to third parties, or made in private but in the presence of persons other than those necessary for providing legal advice, are not confidential. Confidentiality is admitted for communications made in the presence of assistants or members of the attorney's office staff. The same applies to the client's representatives.⁶³

(3) ACP assumes the presence of a client and a legal adviser, including not only self-employed attorneys but also in-house counsel⁶⁴:

"... the apparent factual differences between these house counsel and outside counsel are that the former are paid annual salaries, occupy offices in the corporation's building, and are employees rather than independent contractors. These are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client privilege. And this is apparent when attention is paid to the realities of modern corporate law practice. The type of service performed by house counsel is substantially like that performed by many members of large urban law firms. The distinction is chiefly that house counsel gives advice to one regular client, the outside counsel to several regular clients."⁶⁵

Furthermore, legal adviser includes attorneys admitted to the bar as well as any person the client believes to be an attorney.⁶⁶

(4) The communication must have served the purpose of seeking legal advice, including legal evaluation of the facts of a case, provision of legal services and assistance in legal procedures. If the advice was not only aimed at clarifying legal issues, then the attorney's work must at least have been predominantly or primarily of legal nature. Legal advice is to be distinguished from other services attorneys provide, notably business advice. It is up to the client to clearly state an intention to seek legal advice.⁶⁷

The attorney–corporate client privilege

ACP applies also to corporate clients, because a corporation has:

"an economic nature because of which it needs legal advice in the same way that the early individual needed, and his contemporary counterpart needs that advice. The corporation, as well as the individual, in seeking that advice, may of necessity communicate through its representatives secrets about its conduct in business. And in these necessitous circumstances, no good reason exists why the impartial administration of justice should not afford the corporation the protection of the privilege in appropriate cases."⁶⁸

It has been disputed how far ACP extends to corporations. The main question is whether the privilege extends only to communications made by its (top) management or also to those made by ordinary employees. Originally, district courts decided at their own discretion, which

⁶² Noonan and Painter, above fn.49, p.106.

⁶³ *U.S. v Evans* 113 F.3d 1457 (7th Cir. 1997); *U.S. v Gann* 732 F.2d 714 (9th Cir. 1984); *U.S. v Lawless* 709 F.2d 485 (7th Cir. 1983). See also Mueller and Kirkpatrick, above fn.48, pp.379 *et seq.*

⁶⁴ For an overview see L. Mundi, above fn.23, pp.73 *et seq.*

⁶⁵ *U.S. v United Shoe Machinery Corp.* 89 F. Supp. 357, 360 (D. Mass. 1950).

⁶⁶ *U.S. v Kovel* 296 F.2d 918 (2nd Cir. 1961).

⁶⁷ Above fn.65, at 358; Mueller and Kirkpatrick, above fn.48, p.373 and pp.367 *et seq.*

⁶⁸ *Radiant Burners Inc. v American Gas Association* 320 F.2d 314, 324 (1963).

ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

led to inconsistent jurisprudence. Subsequently, a “control group test” prevailed, for which the decisive question was whether a person was part of a control group of the corporate client. Finally, the US Supreme Court rejected the “control group test” since it found that the circle of relevant persons was excessively restricted by the test, but without proposing an alternative theory.⁶⁹ But careful analysis of the *Upjohn* decision nevertheless provides a few general criteria. ACP applies if: (1) the communication between the corporation’s employee and in-house counsel was made by order of a superior in order to obtain legal advice for the corporation; (2) the relevant information was not available to the higher levels of management; (3) the information related to matters in the employees’ scope of duties; (4) the employees were aware that they were making communications for the purpose of legal advice for the corporation; and (5) the information was and remained confidential.⁷⁰

The problem is that the circle of a corporation’s employees is not congruent with those who can take the decision to waive the privilege. If a corporation’s attorney questions an ordinary employee about the circumstances of an accident, the latter cannot rely on the corporation claiming privilege. The management may subsequently decide to waive the privilege in order to protect ulterior higher interests. Employees would be ill-advised to disclose information to in-house or outside counsel if they risk incriminating themselves, e.g. by admitting to having caused the accident.⁷¹

The client may waive the privilege, expressly or by implication.⁷² A client intentionally giving a third party access to a document is an example of implied waiver.⁷³ The waiver cannot be limited to part of a document but always extends to the whole. A waiver is final and comprehensive.⁷⁴ As ACP is held by the client, only the client can waive it. It has been said, though, that in practice privilege is often deemed waived because of actions by the attorney, on the ground that the attorney was acting as the agent of the client.⁷⁵

Waiver must be distinguished from inadvertent disclosure, which may occur if a client accidentally sends a document to a third party or an opponent counsel. Legal practice is inconsistent and controversial on this point because certain decisions put inadvertent disclosure on a par with voluntary waiver, thus resulting in complete forfeit of privilege. Other decisions do not assume waiver, thereby maintaining privilege. A third view assesses the importance of the client’s fault leading to the inadvertent disclosure.⁷⁶

ACP cannot be invoked if a client has sought legal advice to pursue criminal or fraudulent aims. This crime-fraud exception concerns current and future but not past illegal actions. It is not necessary that the client or the attorney be aware of the illegality.⁷⁷

The work-product doctrine

The US Supreme Court developed the WPD as a complement to ACP in *Hickman v Taylor*.⁷⁸ The claimant demanded the production of documents which the respondent’s attorney had

⁶⁹ *Upjohn v U.S.*, above fn.52, at 392; J. Gergazc “Attorney-Corporate Client Privilege” (1982) *The Business Lawyer* 461 *et seq.*

⁷⁰ Mueller and Kirkpatrick, above fn.48, pp.390 *et seq.*; J. Gergazc “Attorney-Corporate Client Privilege after Upjohn” (1983) *The Business Lawyer* 1653 *et seq.*

⁷¹ P. Rice “The Corporate Attorney-Client Privilege: Loss of Predictability does not justify crying Wolfinbarger” (2000) *The Business Lawyer* 739 *et seq.*

⁷² This rule was already established in *Blackburn v Crawfords* 70 U.S. 175, 194 (1865).

⁷³ *U.S. v Bernard* 877 F.2d 1463 (10th Cir. 1989).

⁷⁴ Mueller and Kirkpatrick, above fn.48, pp.448 *et seq.*

⁷⁵ Slansky, above fn.48, p.578.

⁷⁶ Mueller and Kirkpatrick, above fn.48, pp.450 *et seq.*; Noonan and Painter, above fn.49, p.107.

⁷⁷ *U.S. v Zolin* 491 U.S. 554, 562 (1989); *Clark v U.S.* 289 U.S. 1, 15 (1933); Mueller and Kirkpatrick, above fn.48, pp.419 *et seq.*

⁷⁸ *Hickman v Taylor* 329 U.S. 495 (1947).

(2007) 73 ARBITRATION 2

prepared in anticipation of litigation, and which primarily contained the statements of potential witnesses. The respondent refused. The Court first established that ACP did not extend to the disputed documents:

“The protective cloak of the privilege does not extend to information which an attorney secures from a witness while acting in anticipation of litigation. Nor does this privilege the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client’s case; and it is equally unrelated to writings which reflect an attorney’s mental impressions, conclusions, opinions, and legal theories.”⁷⁹

However, the Court considered it unreasonable to force the respondent to produce the disputed documents. It found that files and mental impressions which counsel prepares in anticipation of litigation should not be revealed to the other party. Such a requirement would demoralise counsel and would be contrary to the client’s interests and the cause of justice:

“Not even the most liberal of discovery theories can justify unwanted inquiries into the files and mental impressions of an attorney. . . . Were such material open to the disclosing party on mere demand, much of what is now put down in writing would remain unwritten. . . . The effect on the legal profession would be demoralizing. Inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. . . . The interests of the client and the cause of justice would be poorly served.”⁸⁰

Based on these reflections, the Court decided to protect counsel’s work-product which is prepared in anticipation of litigation. According to the Court, the work-product is reflected “in interviews, statements, memoranda, correspondence, briefs, mental impressions, and countless other tangible and intangible ways.”⁸¹ Thus, the work-product need not be in writing. The work-product is not attached to a person or a person’s statements. Rather, it acts like a protective cloak which denies the court direct and indirect access to documents and information which fall under the WPD. Neither can such documents and information be seen or used in court, nor can the parties or third parties be questioned about their content. The protection of the work-product is not unconditional. For example, the production of written records of statements by potential witnesses may be requested if the witnesses are no longer reachable or only reachable with difficulty. In all cases production must be justified by adequate reasons:

“Production might be justified where the witnesses are no longer available or can be reached only with difficulty. . . . The general policy against invading the privacy of an attorney’s course of preparation is so well recognized and so essential to orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through subpoena or court order.”⁸²

In 1970, the judicial practice of the US Supreme Court was (partly) codified in the FRCP, r.26(b)(3):

“A party may obtain discovery of documents and tangible things otherwise discoverable. . . and prepared in anticipation of litigation for trial by or for another party or by or for that party’s representative. . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without

⁷⁹ *ibid.* at 508.

⁸⁰ *ibid.* at 510.

⁸¹ *ibid.* at 511.

⁸² *ibid.* at 511.

ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

any undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation.”

As this refers only to “documents and tangible things” *Hickman v Taylor* remains decisive for immaterial and intangible work-products. It is clear, however, that r.26(b)(3) applies not only to writings as such but also to photographs, diagrams, drawings and computer files.⁸³

The scope of WPD is both narrower and wider than ACP; narrower in that it protects only work-products that have been created in anticipation of litigation; wider in that work-products need not be part of an attorney-client communication. WPD and ACP are not necessarily mutually exclusive. In fact, double protection is possible. An attorney’s notes of a communication with a potential witness are protected by the WPD only. On the other hand, notes of a communication with the client, are protected by both WPD and ACP.⁸⁴ Waiver and loss of WPD are less likely to be admitted than waiver and loss of ACP. Transfer of documents to a third party will result in loss of legal protection only if the third party provides the information to persons representing the opponent in the proceedings.

Comparison of the concepts

	Swiss (civil) law	English and US (common) law
Name	Attorney secrecy	England: lawyer’s confidence, LPP (Legal advice and litigation privilege) United States: duty of confidentiality, ACP, WPD
Concepts in a nutshell	Attorney secrecy imposes a personal secrecy obligation on the attorney. The attorney must claim it during judicial proceedings, unless the client waives it. It covers everything the attorney knows about the client’s affairs, including facts. The client may not invoke attorney secrecy.	The privileges are exceptions to the general and extensive duty of disclosure of all parties. The client as well as the attorney may invoke them. They cover any communication between client and attorney with the main goal of providing legal services, excluding facts.
Primary sources	Criminal law, codes of civil procedure, law of attorneys.	Common law on evidence.

⁸³ Mueller and Kirkpatrick, above fn.48, p.463.

⁸⁴ Noonan and Painter, above fn.49, p.108.

(2007) 73 ARBITRATION 2

	Swiss (civil) law	English and US (common) law
Legal nature	Considered to be part of procedural law. General and personal secrecy obligation of the attorney (and not client). In litigation, this duty turns into a right: the court may not order the attorney to give testimony or produce documents.	Considered to be part of substantive law. Evidentiary privilege of the client and attorney. Client and attorney are excluded from the general duty to disclose all relevant facts and documents in a discovery process.
Procedural background	Under Swiss (federal and cantonal) civil procedure rules, claimant and respondent may not be ordered to actively support the proceedings in any way. In contrast, third parties have an obligation to actively support the proceedings, unless relieved by special statutory provision.	English and (to an even greater extent) US civil procedure rules recognise extensive duties of disclosure: claimant, respondent and third parties must disclose any relevant information, unless they can claim privilege.
General scope of protection	Any knowledge an attorney gains as attorney about a client's business or case is protected, irrespective of how it was obtained. Facts (including pre-existing facts) are protected. Non-public factual information passed to an attorney becomes protected on the attorney's side.	Confidential communications passing between client and attorney regarding legal advice and litigation are protected. Facts underlying the communications are not. Merely passing the attorney non-public factual information does not make such facts protected.
The prerequisite of secrecy/ confidentiality	Only information which the client (from a subjective point of view) intends to keep secret and which actually is secret (from an objective point of view) is protected by attorney secrecy. A secret is objectively secret if it refers to information which is neither widely known nor generally available, but is restricted to a limited number of people.	Only information explicitly or impliedly declared to be confidential constitutes protected information. Communication that finds its way into the public domain, or is shared with third parties, loses its privileged status.

ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

	Swiss (civil) law	English and US (common) law
Who may invoke the protection	Only attorneys may (and must) invoke attorney secrecy when ordered to testify in court or to produce documents.	Client and attorney are entitled to invoke and rely on ACP, both during the pre-trial discovery process and in court hearings.
In-house counsel	Attorney secrecy does not apply to in-house counsel.	In-house counsel are treated in the same way as outside counsel.
Corporate clients	Attorneys may invoke attorney secrecy on behalf of their corporate client. The legal entity itself may not invoke attorney secrecy.	Legal entities, just like natural persons, may invoke the privilege provided the requisite conditions are met.
Waiver	The client may waive attorney secrecy. Attorneys are not then obliged to testify or produce documents, but have some discretion. Partial waiver (e.g. regarding a part of a document) is possible. The Attorney Supervisory Authority may also waive attorney secrecy.	The client may waive the privilege. A partial waiver is not possible. A waiver or loss of the privilege as to certain pieces of information triggers the total loss of the privilege. No judge, lawyer or supervisory authority may waive the protection of privileged communication.
Inadvertent disclosure	The secrecy obligation of an attorney is not waived by inadvertent disclosure. But, if the inadvertent disclosure causes the information to become public, i.e. non-secret, attorney secrecy may no longer be claimed.	The issue is not settled. Different approaches exist: According to some decisions, the privilege is lost altogether (just as in the case of a partial waiver). According to others, the inadvertent disclosure does not affect the privilege and the disclosed information may not be used by the opposing party. Yet others take into consideration the fault of the client when making the assessment.
Are foreign counterparts respected in domestic courts?	Not automatically. Depends on the applicable conflict of law rules: a difficult question.	Generally yes. Depends on the applicable conflict of law rules: a complex question.

3. THE LEGAL PROBLEM

Definition

The question at issue is: to what extent should national concepts of attorney-related confidentiality be respected in international arbitration? And how should conflicts between different concepts be solved? In the literature this topic is addressed under the subject of “evidentiary privileges”.⁸⁵

Approaches: introduction

International arbitral proceedings take place in a multi-jurisdictional context. Hence, the basic question to be asked regarding any legal issue is: which set of rules has to be applied? In the present context, this leads to the question: on what legal foundation does the “law of privileges” rest? Basically, and in line with the dualism which can be found both in civil and common law jurisdictions, the answer is that evidentiary privileges are either procedural or substantive. Or is there a third possibility?

The Procedural law approach

According to Swiss law, the matter seems clear: attorney secrecy is primarily based on criminal law and the law of attorneys. However, it owes its practical consequences (the rights of refusal of testimony, production of documents or inspection) to provisions contained in civil codes of procedure. Swiss lawyers will, therefore, determine such rights according to the applicable procedural codes. Legal issues in this domain tend to fall under procedural law.⁸⁶

The Substantive law approach

Evidentiary privileges in common law countries are different. In particular, the English concept of LPP and the US concepts of ACP and WPD are generally regarded as substantive.⁸⁷ For English and American lawyers evidentiary privileges (and their procedural effects) are therefore not a matter of procedural law but determined by the *lex causae* underlying the attorney–client relationship.

⁸⁵ K. P. Berger, *Evidentiary Privileges, Best Practice Standard vs./and Arbitral Discretion* (unpublished), presentation held at the ASA Conference, Zürich, January 27, 2006; G. Burn and Z. Skelton, “The Problem with Legal Privilege in International Arbitration” (2006) 72 *Arbitration* 124 *et seq.*; N. Gallagher, “Legal Privilege in International Arbitration” (2003) *Int. A.L.R.* 45 *et seq.*; B. Meyer-Hauser, *Das Anwaltsgeheimnis 6: Anwaltsgeheimnis und Schiedsgericht* (Zürich, 2004); R. Mosk and T. Ginsburg, above fn.55; D. Rivkin and B. Cremades, “The Difficult Issue of Privilege” (2000) *Arbitration and ADR, Newsletter of Committee D of the IBA Section on Business Law* 1 *et seq.*; J. Rubinstein and B. Guerrina, “The Attorney-Client Privilege and International Arbitration” (2001) *Journal of International Arbitration* 587 *et seq.*; M. Sindler and T. Wüstemann, above fn.1; A. Sheppard, “Evidentiary Privileges in International Arbitration: England” (2000) *Arbitration and ADR, Newsletter of Committee D of the IBA Section on Business Law* 13 *et seq.*; R. Smit and L. Gougne, “Evidentiary Privileges in International Arbitration: United States” (2000) *Arbitration and ADR, Newsletter of Committee D of the IBA Section on Business Law* 23 *et seq.*; F. von Schlabrendorff and A. Sheppard, “Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution” in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Brinner* (G. Aksen *et al.*, eds, Paris, 2005), pp.743 *et seq.*

⁸⁶ Berger, above fn.85, p.8; Mosk and Ginsburg, above fn.55, p.368; Rubinstein and Guerrina, above fn.85, p.616.

⁸⁷ Berger, above fn.85, p.8; Mosk and Ginsburg, above fn.55, p.368; Sindler and Wüstemann, above fn.1, p.615.

ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

The cumulative approach

Some authors are of the opinion that it is not possible to fit the issue of privileges into either procedure or substance as it encompasses elements from both.⁸⁸

Conclusion

These remarks show that the nature of evidentiary privileges is far from clear. National laws differ. In international arbitration law there is no consensus. This is illustrated by the following quotations regarding evidentiary privileges:

“both the procedural law governing the arbitration and the law of the closest relationship to the evidence should apply and, in the event of conflict, the most protective one should prevail.”⁸⁹

“A comparative qualification of evidentiary privileges will almost certainly lead to the conclusion that these issues have substantive nature. This follows from the public policy judgement underlying these privileges.”⁹⁰

As the present debate may not be expected to produce unanimous and authoritative results in the near future, it is futile to attempt to determine the nature of privileges in such a general way. A more pragmatic approach must be taken. Turning the nature debate upside down, the question should be: what nature should evidentiary privileges have in international arbitration? How far should they be determined by the applicable procedural law, the law applicable to the substance of the dispute or any other law? This approach focuses on the purpose of evidentiary privileges and not on a more or less technical and artificial qualification.

A few examples will help to demonstrate the relevance of the issue in actual practice.⁹¹

In-house counsel

The position of in-house counsel is one of the most controversial issues.⁹² Take the following example: a US company is respondent in an international arbitration. Respondent possesses documents which are vital for claimant's claim, claimant being a Swiss company. Claimant requests respondent to produce these documents. Respondent refuses, arguing that the documents were prepared by the company's in-house counsel. Such an objection will be regarded as commonplace by parties and arbitrators with a common law background. Swiss parties and arbitrators, however, will find it difficult to accept such an objection since the fact that the documents were prepared by in-house counsel does not distinguish them from documents that were prepared by other employees. According to Swiss law, the respondent could not refuse production on this ground. This conflict is of practical relevance as in some jurisdictions in-house counsel are regarded as regular employees with no special rights while in other jurisdictions they have the rights of a self-employed attorney.⁹³ This divergence has been said to stem from different perceptions of their role. While in some countries (e.g.

⁸⁸ Burn and Skelton, above fn.85, p.125, with reference to *Three Rivers District Council v Bank of England* [2004] UKHL 48 at [26]; Mosk and Ginsburg, above fn.55, p.381; Sindler and Wüstemann, above fn.1, p.624; von Schlabrendorff and Sheppard, above fn.85, pp.763 *et seq.*

⁸⁹ Sindler and Wüstemann, above fn.1, pp.624 *et seq.*

⁹⁰ Berger, above fn.85, p.10.

⁹¹ See also Meyer-Hauser, above fn.85, nos 154 *et seq.*; Sindler and Wüstemann, above fn.1, pp.627 *et seq.*; Rubinstein and Guerrina, above fn.85, pp.588 *et seq.*

⁹² Berger, above fn.85, pp.5 *et seq.*; Rubinstein and Guerrina, above fn.85, p.627.

⁹³ A multi-jurisdictional survey is provided by L. Mundi, above fn.23. See also Berger, above fn.85, pp.5 *et seq.*

Switzerland) in-house counsel are considered to be potential collaborators in a corporation's wrongdoing, the US and English law expect corporate counsel to play an important role in ensuring a company's compliance with the law.⁹⁴

Transfer of documents from attorney to client

A US company is respondent in an international arbitration. It possesses documents vital for the claim, claimant being Swiss. Claimant requests respondent to produce. Respondent refuses, arguing that the documents were prepared by the company's (self-employed) attorney in preparation of the litigation. Once again, while common law parties and arbitrators are used to this objection, Swiss parties and arbitrators will not approve: Swiss attorney secrecy may only be invoked by the attorney. If the attorney prepares a document and sends it to the client, the document which is in the client's possession is no longer privileged.⁹⁵ So, if we assume a self-employed attorney who establishes the facts of a case, assesses the procedural risks, and sums up her findings in a memorandum which she submits to her client, we are faced with different consequences as regards the act of transferring the memorandum: while LPP and ACP/WPD are not affected by this act, Swiss attorney secrecy ceases in so far as it cannot be invoked by the client.

The different concepts are clearly visible. Whereas Swiss attorney secrecy prevents counsel from having to disclose a client's confidential information by surrounding the attorney with its protective shield (protection against disclosure of confidential information by the attorney; personal secrecy obligation), common law privileges have a different focus; they cover communications between client and attorney, no matter if the product of such communication is in possession of the client or the attorney.

Presentation of possibly protected evidence

The following example draws from our own practical experience.⁹⁶ Claimant C disputed the legality of the cancellation of a licensing and distribution agreement by respondent D. C was domiciled in an Eastern European country, while D had its headquarters in southern Europe. In the course of the proceedings, C submitted evidence in the form of two letters which D's attorneys had sent their client, and which addressed the matter at hand. How and via whom C had obtained the attorneys' documents was unclear. It was merely stated that "they were received by post", although the sender was unknown. D's legal representative (a common law educated attorney) invoked the inadmissibility of the two letters which, according to his common law understanding, were protected by ACP. He further pointed out that admitting documents which were obtained by breach of law would violate the rules of due process. C denied having obtained the documents by breach of law and argued that the documents had lost their protected status when they left the possession of D's attorney. C also alleged that admitting these two important pieces of evidence would be in line with international arbitration practice and general principles of procedural law and would be consistent with the precept of fairness. Therefore, C requested the tribunal to admit the evidence. The tribunal ruled that it was impossible to establish how the letters had come into C's possession, and

⁹⁴ A. van Fleet, E. Krennerich and D. Krishnan, "In-House Counsel: Should they be More Privileged in the US than in the EU?" (2006) *Business Law International* 1 *et seq.*, p.3.

⁹⁵ On this difference, see A. Furrer, "Die Reichweite des Anwaltsgeheimnisses im Prozess, Plädoyer für ein schweizerisches attorney-client privilege" (2002) *Aktuelle Juristische Praxis* 895 *et seq.* Furrer considers the absence of the client's right to refuse production of a document to be a loophole in the Swiss law of civil procedure which must be closed through case law. On a European Union level, van Fleet, Krennerich and Krishnan, above fn.94, p.11, advocate the equality of in-house and self-employed counsel.

⁹⁶ The example, formally edited and rendered disguised here, is a case which was governed by the rules of arbitration of the Austrian Federal Economic Chamber.



ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

whether or not this had happened in a lawful manner. Regarding the question of which law should apply to the claimed privilege, the tribunal opined:

“The relevant issues are definitely not controlled by any concepts of common law as there is no connection to common law in this case other than that counsel of Defendant has been trained in a common law system. This last element is not sufficient to have the issue decided under common law principles. . . . Rather than applying any countries’ specific law(s) to the question at hand⁹⁷, the Arbitral Tribunal will address the issue. . . in accordance with general principles developed by civil law and in civil law arbitrations, i.e. general procedural rules on disclosure and due process and general standards of fairness applicable in international arbitration proceedings.”

Regarding the issue of possible protection of the presented evidence, they said:

“In civil law. . . , a distinction is generally made between illegally obtained evidence. . . in criminal proceedings, and illegally obtained evidence. . . in civil cases. In criminal procedures, the. . . risk of an abuse of powers by the state which may, in some instances, lawfully invade a person’s privacy by monitoring telephone calls, the mail or other communication channels. . . is much bigger than in cases where a private party brings a suit. A private party has neither the legal nor the technical means to control the opponent party’s communication. When preparing its case in a civil procedure, a private party, therefore, is in a much weaker position than the state in a criminal proceeding. Thus, it is a widely adopted view in civil law countries that a state cannot rely on illegally obtained evidence in a criminal case, whereas in civil procedures, the parties are regarded as equal and there is no such risk as to the abuse of powers. . .



A party in a civil law proceeding has no. . . discovery powers comparable to the ones of a party in an Anglo-Saxon or American pre-trial procedure. On the other hand. . . the claimant bears the burden of proof, and he will fail in the process if he alleges relevant facts which cannot be proved later. Thus, fairness requires that critical evidence adduced by a private party in a civil court proceeding is to be treated differently from critical evidence adduced by a state attorney in a criminal court proceeding, or even from critical evidence adduced by a party in a. . . case governed by common law principles of pre-trial discovery and evidence.



As a general legal principle of fairness, civil law courts and arbitration tribunals acting under civil law concepts do not automatically consider evidence that is adduced by one party as being ‘poisoned’ or ‘inadmissible’ even though it may have been obtained in a reprehensible or even illegal manner. If one party produces illegally obtained evidence in a civil procedure, such evidence may, as a general rule, be considered by the tribunal. An exclusionary rule of evidence is not consistent with the tribunal’s duty to establish the truth and to give each party a fair chance to prove its case. One party’s unscrupulousness in providing such evidence must always be seen against the other party’s unscrupulousness in hiding relevant evidence. Not a mechanical exclusionary rule of evidence but a careful balancing of the parties’ mutual interests in a given case ensures fair treatment. . . A fair trial consists therefore in balancing the interests of the party bearing the burden of proof and the seriousness of a (possible) illegal act in securing such proof. It would not be fair to exclude illegally obtained evidence, however mild the misconduct of the party bearing the burden of proof could be, and hence disregard the truth that may be discovered by the illegally obtained evidence. . .

Defendant maintains that by admitting the documents in evidence, it would be compelled to submit other confidential information to this Tribunal to rebut Claimant’s contention, and

⁹⁷ Potentially applicable laws would have been Austrian law (as the proceedings took place in Vienna), Swiss law (the substantive law applicable to the contract), the law of the claimant’s (eastern European) country, or the law of the respondent’s (southern European) country.

this would be unfair to Defendant. The Arbitrators cannot follow this rationale. By admitting the disputed documents in evidence, Defendant is not per se forced to submit other written and/or oral confidential evidence to this Tribunal. If the finding of the truth requires such a course of action, so be it, and it is the Defendants' decision whether or not to lift that confidentiality. It cannot be said that the need to rebut questionable evidence prejudices Defendant's case...

To sum up, the balancing of interests as explained above leads to the conclusion that even if Claimants were to have obtained the documents illegally, their interest in providing the truth outweighs the seriousness of a possible illegal act committed by Claimants or others."

As a result of these reflections and because the tribunal did not follow the rationale of a comprehensive common law privilege with a protective surrounding cloak claimed by respondent's counsel, the evidence was admitted.

Final remarks

The issue of evidentiary privileges, in particular the conflict between different national concepts of attorney-related confidentiality, is almost natural in a context as multi-jurisdictional as international arbitration. Clearly, as shown by the foregoing remarks, the debate on the nature of evidentiary privileges may not be expected to lead to unanimous results in the near future. As a consequence, the legal problem should not be regarded as a purely technical matter. Instead, attention should be given to the public policy considerations underlying the (different) evidentiary privileges. A teleological interpretation of the concepts is required.

4. ANALYSIS OF NATIONAL ARBITRATION LAW

Introduction

Arbitral tribunals are private courts. Their authority to hand down binding decisions is based on the power conferred on them by the state. As such, they are part of the state judicial organisation. Thus, although arbitral tribunals are non-state courts, their decisions are recognised and enforced by the state courts.⁹⁸ This interrelation with national judicial systems makes clear that international arbitral tribunals have to cope with contradicting interests. On the one hand, international arbitration aims at resolving disputes in a genuinely international, i.e. supranational manner. On the other hand, the national legal foundation of international arbitration must be taken into account to ensure that arbitral awards can be enforced. These remarks show that an in-depth discussion of attorney-related confidentiality in international commercial arbitration must take national law into account.

This chapter outlines the legal basis for international arbitration in Switzerland, England and the United States. An assessment is then made whether national case law and legislation provide any guidance as to the issue of differing concepts of evidentiary privileges. It is important to determine whether national law limits the discretion of the participants at an arbitral tribunal (parties, party representatives, witnesses, arbitrators) in any way. It would be futile to discuss possible solutions if they were incompatible with national law. Three

⁹⁸ This statement reflects the jurisdictional theory of arbitration (as advocated in Switzerland, see, e.g. O. Vogel and K. Spühler, *Grundriss des Zivilprozessrechts und des internationalen Zivilprozessrechts der Schweiz* (8th edn, Bern, 2005), ch.14 no.2, as opposed to the contractual theory of arbitration (as advocated in England and the United States). Harmonising and autonomous theories also exist. This debate is, however, only of minor practical relevance. For an overview, see J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (The Hague, 2003), nos 5–9 *et seq.*; F. B. Weigand, "Introduction" in *Practitioner's Handbook on International Arbitration* (F. B. Weigand, ed., Munich, 2002), pp.1 *et seq.*, nos 26–28.

ATTORNEY SECRECY v ATTORNEY–CLIENT PRIVILEGE

sets of rules are analysed: the rules to be applied to procedure, the law applicable to the substance of a dispute, and the grounds for refusal of enforcement of arbitral awards. It ends with concluding remarks.

Legal basis

General remarks

To begin with, the set of rules applicable to international arbitration must be determined, be it a specific statute (as one might expect in a civil law jurisdiction) or a tradition of case law (as one might expect in a common law jurisdiction). This determination requires some care as dualism exists in many jurisdictions. Traditionally, domestic arbitration is distinguished from international arbitration and a different set of rules is often provided for each of them.⁹⁹

Switzerland

In Switzerland, international arbitration is governed by the Federal Act on International Private Law 1987 (FAIPL), c.12 (FAIPL, art.1, para.1, letter e). FAIPL c.12 is a codification of the Swiss law on international arbitration, consisting of 19 concise articles (FAIPL, arts 176–194). The legislator addressed important issues in a general manner, leaving room for the development of arbitration law. As a special legal basis for domestic arbitration exists—the Concordat on Arbitration 1969 (CoA)—it is necessary to define the application of FAIPL, c.12. According to FAIPL, art.176, para.1, the application of c.12 requires that the arbitral tribunal has its seat in Switzerland and that it is considered international:

“The provision of this chapter shall apply to arbitral tribunals with seat in Switzerland, provided that, at the time the arbitration agreement was concluded, at least one party’s domicile or ordinary residence was not in Switzerland.”

As can be seen from this quotation, internationality is defined by reference to the parties’ legal or physical place of being: domicile or ordinary residence.¹⁰⁰ The international character of the subject matter of the dispute is of no importance.

England

In England, international arbitration is governed by the Arbitration Act 1996 (AA 1996),¹⁰¹ which applies to arbitral tribunals with seat in England and Wales or Northern Ireland (AA 1996, s.2(1)). It does not distinguish between domestic and international arbitration.¹⁰²

United States

In the United States, international arbitration is governed primarily by a body of rules developed by the US Supreme Court. In addition, the Federal Arbitration Act (FAA; 9 U.S.C.) is of importance. Historically, c.1 of the FAA was limited to domestic arbitration, whereas, by integrating international treaties into US federal law, cs 2 and 3 were devoted to international arbitration. However, the Supreme Court developed a uniform common law doctrine which makes the distinction more or less redundant. The FAA is not a systematic and comprehensive codified statute. Indeed, it regulates only a number of key matters focusing on the validity of arbitration agreements. This has historical reasons: at the time it was

⁹⁹ Weigand, above fn.98, no.45.

¹⁰⁰ C. Müller, *International Arbitration, A Guide to the Complete Swiss Case Law (Unreported and Reported)* (Zürich, 2004), p.9.

¹⁰¹ K. Maxwell, “England” in Weigand, above fn.98, pp.593 *et seq.*, no.5.

¹⁰² As a matter of policy, the Government has decided not to bring ss.85–87 into effect.

(2007) 73 ARBITRATION 2

adopted, US courts were somewhat hostile to arbitration so the FAA's goal was to ensure the enforceability of arbitration agreements.¹⁰³ In connection with the New York Convention, 9 U.S.C., §202 defines international arbitral tribunals:

“An agreement... which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”

This definition combines two elements: nationality of the parties and subject matter of the transaction.¹⁰⁴ This is in contrast to Swiss law which relies solely on the parties' legal or physical place of being.

Analysis of procedural law framework

Switzerland

Regarding the rules to be applied to arbitral proceedings, FAIPL, art.182, paras 1 and 2 provide:

- “1. The parties may decide upon the arbitration procedure either directly or indirectly or by reference to existing rules of arbitration; they may also submit the procedure to a procedural law of their choice.
2. If the parties fail to decide upon the procedure, it shall, to the extent necessary, be determined by the arbitral tribunal either directly or by reference to a law or to existing rules of arbitration.”

The FAIPL does not define what matters need be considered as procedural. As regards evidence, FAIPL, art.184, para.1 states only that the arbitral tribunal shall itself take evidence. As can be concluded from the marginal note to this provision, the legislator considered taking evidence to be a matter of procedure. In any case, the FAIPL establishes two binding minimum standards: regardless of the procedural rules chosen, the arbitral tribunal must guarantee the equality of the parties and their right to be heard in adversarial proceedings (FAIPL, art.182, para.2).

England

Regarding the rules to be applied to arbitral proceedings AA 1996, s.34(1) states:

“It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter”

and gives a number of examples:

“Procedural and evidential matters include:

- (d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;
- (e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;

¹⁰³ G. Born, *International Commercial Arbitration, Commentary and Materials* (The Hague, 2001), pp.35 *et seq.*; T. Carbonneau, “United States” in Weigand, above fn.98, pp.1087 *et seq.*, nos 2, 5 and 10.

¹⁰⁴ Carbonneau, above fn.103, no.12.

ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

- (f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;
- (g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law.”

Section 43(4) states:

“A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings.”

It seems that this mirrors the concept of privilege in an arbitration-related context.¹⁰⁵

Section 33(1) establishes the following mandatory (AA 1996, sch.1) rules:

“The tribunal shall

- (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
- (b) adopt procedures suitable to the circumstances of the particular case... so as to provide a fair means for the resolution of the matters falling to be determined.”

Unlike Swiss law, s.33(1) mentions the concept of fairness. Whereas Swiss law demands that the equality of the parties and their right to be heard is guaranteed, English law seems to go one step further.

United States

The parties are free to adopt whatever rules they like. In the absence of agreement, the arbitrators may determine the procedure. Evidential matters are mostly decided by the tribunal, which enjoys wide discretion. In any event, the tribunal must conform to a basic due process standard. This standard includes the right of the parties to be heard and to present their case. According to 9 U.S.C., §10, the standard is violated¹⁰⁶:

- “(2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct... in refusing to hear evidence pertinent and material to the controversy...”

This shows that the US law on international arbitration is similar to its Swiss and English counterparts as concerns party autonomy and the arbitrator’s discretion in determining procedure. The absence of any general or detailed statutory provisions makes it even more apparent how much freedom the parties and the tribunal enjoy.

Conclusions

None of the three analysed laws explicitly addresses the issue of differing concepts of evidentiary privileges in its procedural law framework. Therefore, it cannot be concluded whether it is considered as procedural or not. The only law that gives a clue is the English, AA 1996, s.34(1) stating:

“Procedural and evidential matters include... ”

¹⁰⁵ Consenting: von Schlabrendorff and Sheppard, above fn.85, p.748.

¹⁰⁶ Carbonneau, above fn.103, nos 81, 89 and 108.

- (d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage. . .”

This provision may be interpreted as indirectly referring to the issue as a procedural matter: surely, attorney-related confidentiality is of great importance as regards disclosure. As it is for the arbitral tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter (AA 1996, s.34(1)), the tribunal has the broadest discretion in this respect.

All the same, the national procedural law frameworks offer guidance inasmuch as they set limits. Whatever the solutions proposed or adopted as to the handling of conflicts between different confidentiality concepts, they must never collide with basic principles of due process. Any solution must guarantee—according to Swiss law—the equality of the parties and their right to be heard in an adversarial procedure (FAIPL, art.182, para.2), or—according to English law—will allow the arbitral tribunal to act fairly, impartially, giving each party a “reasonable opportunity of putting his case and dealing with that of his opponent” (AA 1996, s.33(1)(a)).

Analysis of substantive law framework

Switzerland

Regarding the law to be applied to the substance of a dispute, FAIPL, art.187, para.1 provides:

“The arbitral tribunal shall decide the dispute according to the law chosen by the parties or, in absence of the choice, according to the law having the closest connection with the dispute.”

The FAIPL does not define what matters belong to the dispute, i.e. substance as opposed to procedure.

England

The arbitral tribunal shall decide the dispute “in accordance with the law chosen by the parties as applicable to the substance of the dispute” (AA 1996, s.46(1)(a)). In line with Swiss law, the AA 1996 does not define what matters belong to substance as opposed to procedure. Whereas Swiss law refers to the general conflict of laws principle of “closest connection”, AA 1996, s.46(3) is vaguer:

“If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”

United States

Regarding the rules to be applied to substance, the parties are free to adopt whatever law they like. How substance is distinguished from procedure is left to the arbitrators. Usually, in the absence of a choice of law, tribunals tend to apply the conflict of law rules at their seat, perhaps because neither federal nor state arbitration laws have developed conflict of law rules.¹⁰⁷

Conclusions

None of the three analysed laws explicitly addresses the issue of differing concepts of evidentiary privileges in its substantive law framework. Therefore it cannot be concluded

¹⁰⁷ Carbonneau, above fn.103, nos 84, 182 and 187 *et seq.*

ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

whether this question is considered substantive or not. However, if the matter was assumed to be substantive, the applicable frameworks offer some guidance.

Three ways to resolve the problem may be found in the national laws: Swiss law emphasises the general conflict of laws rule of “closest connection” (FAIPL, art.187, para.1). This rule may be understood as a basic, quasi-supranational rule to resolve multi-jurisdictional conflicts. The English law is less specific. In the absence of agreement by the parties, the arbitral tribunal is advised to apply the law determined by the conflict of laws rules which it considers applicable (AA 1996, s.46(3)). English law, thus, refers to existing national conflict of laws rules, the tribunal’s task being that of determining which of these sets of rules is the most appropriate. US law has an even simpler approach. Arbitral tribunals apply the national conflict of laws rules at their seat.

This overview shows the spectrum of possible approaches: a truly international solution may be applied (Swiss approach); the arbitral tribunal may decide case by case which of the existing national laws should be given effect (English approach); or the *lex arbitri* may apply (US approach).

The Law of Enforcement of International Arbitral Awards

Switzerland, England and the United States have all adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (New York Convention; NYC),¹⁰⁸ which provides that the recognition and enforcement of a foreign tribunal may *inter alia* be refused if “The party against whom the award is invoked was... unable to present his case”¹⁰⁹ or “The recognition or enforcement of the award would be contrary to the public policy of that country.”¹¹⁰ Whatever the solutions proposed or adopted as to the handling of conflicts between different confidentiality concepts, according to NYC, Art.V(1)(b) and (2)(b), these solutions should not cause a ground for refusal. As regards NYC, Art.V(1)(b), the NYC does not require more than already provided for by Swiss, English and US arbitration law: exigencies of due process must not be violated.¹¹¹ The situation is much more difficult with regard to NYC, Art.V(2)(b). The concept of “public policy” is somewhat of a black box, its content is difficult to predict and of a fluid nature.¹¹² All the same, any solution should not violate basic notions of justice of the main legal cultures involved in international commercial arbitration.

Conclusion

The Swiss, English and US arbitration laws do not offer ready made solutions to the problem of differing concepts of evidentiary privileges. However, they provide a number of important indicators. First and foremost, the national laws emphasise the importance of equality and fairness in international arbitration. Whatever solution is applied to the problem at hand, it must not violate the precepts of due process. Secondly, the parties to an international arbitration may determine almost any important aspect as regards both procedure and substance of their dispute. Why should this be different regarding evidentiary privileges? Thirdly, the national laws give much discretion to arbitrators to decide issues not addressed by the parties. It follows that such discretion must take into account the circumstances of the individual case. This is also true in the present context. Fourthly, at least English law

¹⁰⁸ Switzerland: FAIPL, art.194; England: AA 1996, ss.100 *et seq.*; US: FAA, c.2 (9 U.S.C. §§ 201).

¹⁰⁹ NYC, Art.V(1)(b).

¹¹⁰ NYC, Art.V(2)(b).

¹¹¹ Gallagher, above fn.85, p.49, Sindler and Wüstemann, above fn.1, pp.621 and 636, and von Schlabrendorff and Sheppard, above fn.85, pp.767 *et seq.*, emphasise the importance of securing the enforceability of the arbitral award.

¹¹² von Schlabrendorff and Sheppard, above fn.85, pp.767 *et seq.*

seems to take it for granted that evidentiary privileges are applied in international arbitration. Swiss and US laws do not explicitly oppose this view. Fifthly, national arbitration laws offer a variety of solutions with regard to potential conflict of laws issues. These solutions may also be drawn on in the present context.

5. ANALYSIS OF ARBITRATION INSTRUMENTS

Introduction

The analysis will now address the major arbitration instruments, i.e. the frequently used arbitration rules. For the purpose of comparison, the International Chamber of Commerce (ICC) Rules of Arbitration and the United Nations Commission on International Trade (UNCITRAL) Arbitration Rules will be studied as well as the English London Court of International Arbitration (LCIA) Arbitration Rules, the US International Center for Dispute Resolution (ICDR) International Arbitration Rules and the Swiss Rules of International Arbitration. The International Bar Association's (IBA) Rules on the Taking of Evidence in International Commercial Arbitration are also reviewed. The analysis focuses on the points which have already been defined as crucial when national arbitration laws were discussed: the rules on the procedure to be applied, the law to be applied to the substance of the dispute, and the evidence rules.

ICC Rules of Arbitration

As regards procedure, ICC Rules, Art.15(1) provides:

“The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on...”

In the absence of agreement, the tribunal is not expected to resort to national rules of civil procedure. Indeed, such resort is considered unusual and not in line with the supranational character of international arbitration.¹¹³ The ICC Rules demand the following minimal due process requirements (ICC Rules, Art.15(2)):

“In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.”

As regards the rules to be applied to the substance of a dispute, ICC Rules, Art.17(1) states:

“The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.”

This makes it clear that the tribunal in the absence of agreement is not obliged to apply national conflict of law rules but may directly determine the law to be applied (so-called *voie directe*).¹¹⁴

As regards evidence, the ICC rules provide (ICC Rules, Art.20(7)): “The Arbitral Tribunal may take measures for protecting trade secrets and confidential information.” However,

¹¹³ Y. Derains and E. Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd edn, The Hague, 2005), p.226; M. Bühler and S. Jarvin, “The Arbitration Rules of the International Chamber of Commerce” in Weigand, above fn.98, pp.103 *et seq.*, Art.15, no.10. See also E. Schäfer, H. Verbist and C. Imhoos, *ICC Arbitration in Practice* (The Hague, 2005).

¹¹⁴ Bühler and Jarvin, above fn.113, Art.17, no.9; Derains and Schwartz, above fn.113, p.240.

ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

the purpose of this provision is not to secure respect for privileges but to guarantee the confidentiality of the arbitral proceedings in general.¹¹⁵

UNCITRAL Arbitration Rules

With regard to procedure, UNCITRAL Rules, Art.15(1) provides: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.” Once again, in the absence of agreement, arbitrators have broad discretionary powers regarding conduct of the proceedings.¹¹⁶ The UNCITRAL Rules demand the following minimal due process requirements (UNCITRAL Rules, Art.15(1)):

“The arbitral tribunal must guarantee that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”

On the substance of a dispute, UNCITRAL Rules, Art.33(1) states:

“The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”

In contrast to ICC Rules, Art.17(1), UNCITRAL Rules, Art.33(1) does not provide for the *voie directe*, but requires the application of conflict of laws rules.¹¹⁷

As regards evidence, the UNCITRAL Rules provide: Art.24(3):

“At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine”;

Art.25(6): “The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.” Article 24(3) may be explained by the rule makers’ intention to find a balance between common law and civil law systems. The tribunal’s authority to demand the production of evidence is emphasised but its limits are not addressed. Article 25(6) is more enlightening as it raises the question of admissibility of evidence. It implies that some types of evidence are not admissible. This question is to be determined by the arbitrators.¹¹⁸

LCIA Arbitration Rules

With regard to procedure, the LCIA Rules provide (LCIA Rules, art.14):

“14.1 The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal’s general duties at all times. . .

14.2 Unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable. . .”

¹¹⁵ Bühler and Jarvin, above fn.113, Art.20(7), nos 35 and 40; Derains and Schwartz, above fn.113, p.286.

¹¹⁶ R. Trittman and C. Duve, “UNCITRAL Arbitration Rules” in Weigand, above fn.98, pp.315 *et seq.*, Art.15, no.1.

¹¹⁷ *ibid.*, Art.33, no.2.

¹¹⁸ *ibid.*, Art.24, no.3 and Art.25, no.9.

(2007) 73 ARBITRATION 2

The LCIA Rules demand the following minimal due process requirements (LCIA Rules, art.14.1(i) and (ii)):

“to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent”

and, “to provide a fair and efficient means for the final resolution of the parties’ dispute.”

This wording corresponds to AA 1996, ss.33(1)(a) and (b).

On the rules to be applied to the substance of a dispute, LCIA Rules, art.22.3 states:

“The Arbitral Tribunal shall decide the parties’ dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal determines that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.”

This brings the concept of *voie directe* to mind. No reference is made to national conflict of laws rules.

As regards evidence, the LCIA rules provide (LCIA Rules, art.22.1):

“Arbitral Tribunal shall have the power. . .

- (e) to order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant;
- (f) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion. . .”

The evidence rules of the LCIA rules (including the ones stated here) are more detailed than those of the ICC and the UNCITRAL Rules. For the present discussion, the fundamental concept is that of admissibility of evidence. For instance, if the arbitral tribunal is of the opinion that (according to common law understanding) a document is privileged or if (according to civil law understanding) the attorney has an obligation to keep it secret, the tribunal may consider the document to be inadmissible.

ICDR International Arbitration Rules

With regard to procedure, ICDR Rules, art.16(1) provides: “Subject to these rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate. . .” The ICDR Rules demand the following minimal due process requirements (ICDR Rules, art.16(1)): the arbitral tribunal must guarantee that:

“the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”

As regards the substance, ICDR Rules, art.28(1) states:

“The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.”

Once again, the law to be applied to the substance is determined *voie directe*, i.e. without resort to national conflict of laws rules.

As regards evidence, the ICDR Rules, art.20(1) provides:

ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

“The tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party. The tribunal shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.”

For the first time, the question of privilege is expressly referred to. Short of offering a clear definition of the “applicable principles of legal privileges” this provision requires the arbitral tribunal to respect ACP. This provision must be understood against the background of US law. In the United States a choice-of-law analysis is made to determine which state’s law should be applied to the privilege.¹¹⁹ As the privileges of the different states are not fundamentally different, this method is workable within the United States and leads to consistent results. However, in international arbitration the conflict between the opposing views exposes the lack of clarity in the words “applicable principles of legal privileges”. As in the LCIA Rules, the concept of admissibility of evidence is fundamental.

Swiss Rules of International Arbitration

With regard to procedure, Swiss Rules, art.15(1) provides: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. . .” The Swiss Rules demand that the arbitral tribunal must ensure “the equal treatment of the parties and their right to be heard” (Swiss Rules, art.15(1) in fine). This wording is similar to that in UNCITRAL Rules, Art.15(1) and ICDR Rules, Art.16(1).

On the rules to be applied to the substance, Swiss Rules, art.33 states:

“The arbitral tribunal shall decide the case in accordance with the rules of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection.”

The Swiss Rules are the only ones of those analysed which provide a specific conflict of laws rule: the closest connection rule.

As regards evidence, Swiss Rules, art.25(7) provides: “The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.” This wording corresponds exactly to UNCITRAL Rules, Art.25(6).

IBA Evidence Rules

The International Bar Association’s (IBA) Rules on the Taking of Evidence in International Commercial Arbitration try to merge civil and common law rules on evidence. They were designed to create predictability regarding procedure.¹²⁰ Regarding admissibility of evidence, IBA Rules, Art.9 provides:

- “1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.
2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons:
...
(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable. . .
(g) considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.”

¹¹⁹ Smit and Gougne, above fn.85, p.25.

¹²⁰ IBA Working Party, Preamble no.5.



(2007) 73 ARBITRATION 2

The drafting committee comments on these provisions¹²¹:

“Article 9.2(b) provides protection for documents and other evidence that may be covered by certain privileges, under the appropriate applicable law, such as the attorney-client privilege or professional secrecy. The Working Party felt that it was important that such privileges be recognized in international arbitration.”

“Article 9.2(g) is a catch-all provision, intended to assure fairness and equality for all sides in the case. For example, documents that might be considered to be privileged within one national legal system may not be considered to be privileged within another. If this situation were to create an unfairness, the Arbitral Tribunal may exclude production of the technically non-privileged documents pursuant to this provision.”

The IBA Evidence Rules have three merits: first, they admit the possibility of conflicts between divergent privilege and secrecy concepts; secondly, they stress the necessity to solve these problems in accordance with fairness and equality standards¹²²; and thirdly, they suggest an international approach. The third merit needs some explanation. From Art.9.2(b) it may be concluded that the issue of privilege or secrecy ought not to be seen from a purely national perspective. The provision refers not only to “legal rules” but also to “ethical rules”.¹²³ Furthermore, the provision seems to be inspired by *voie directe* considerations. Article 9.2(b) does not refer to any national conflict of laws rules but just says that the rules shall be determined by the arbitral tribunal. Despite these merits, the major question remains unanswered: the IBA Rules do not define which legal or ethical rules are to be considered in determining privileges.



Conclusion

Based on this analysis a number of conclusions may be drawn. First, the arbitration instruments offer little or no guidance regarding the issue of differing concepts of evidentiary privileges, which, by and large, is left in the arbitrators’ discretion.¹²⁴ Secondly, it is undecided whether the question should be resolved on a procedural law, substantive law or another (e.g. mixed or autonomous) basis. Thirdly, there is a tendency to determine the law to be applied by *voie directe*, i.e. without reference to national conflict of laws rules.¹²⁵ Fourthly, the concept of admissibility or non-admissibility of evidence seems to be of fundamental importance regarding the question. Fifthly, in any event, the application of privileges must not violate the equality of the parties, the parties’ rights to present their case and the fairness of the proceedings.¹²⁶

6. ARBITRATION PRACTICE

The (published) practice of international arbitration does not give much guidance regarding the issue of differing concepts of evidentiary privileges.¹²⁷ One of the reasons is inherent



¹²¹ IBA Working Party, Art.9, nos 2 and 5.

¹²² von Schlabrendorff and Sheppard, above fn.85, p.760.

¹²³ Burn and Skelton, above fn.85, p.128.

¹²⁴ Burn and Skelton, above fn.85, p.128; Gallagher, above fn.85, p.46; Rubinstein and Guerrina, above fn.85, p.590; von Schlabrendorff and Sheppard, above fn.85, p.757.

¹²⁵ Lew, Mistelis and Kröll, above fn.98, no.17.70; A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration* (4th edn, London, 2004), no.2-84.

¹²⁶ Burn and Skelton, above fn.85, p.128; Gallagher, above fn.85, p.46.

¹²⁷ Born, above fn.103, p.490; Sindler and Wüstemann, above fn.1, p.618.



ATTORNEY SECRECY v ATTORNEY–CLIENT PRIVILEGE

in arbitration: arbitral proceedings are generally considered confidential.¹²⁸ 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.¹²⁹ This means that arbitrators may choose from a broad range of potentially applicable laws, including¹³⁰: 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 tend 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 tend to allow the other party to benefit from such additional protection.¹³¹ It seems that arbitrators often adopt a pragmatic stance rather than relying on strict application of a certain set of rules.¹³²

7. CONSIDERATIONS

It is now time to consider some of the most important aspects and to draw some conclusions.



No implicit waiver of privilege

It could be argued that by choosing arbitration the parties automatically and implicitly waive the privileges they are entitled to under the applicable national jurisdiction. This argument has not found general acceptance. The concept of privilege is almost universally recognised. Therefore, it seems only natural to apply it in international commercial arbitration as well. There is consensus among international arbitration practitioners that evidentiary privileges are to be given adequate consideration.¹³³

Various international instruments support this view.¹³⁴ For instance, the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 18, 1970 provides in Art.11:

“The person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—

- a) under the law of the State of execution; or
- b) under the law of the State of origin, and the privilege or duty has been... confirmed to that authority by the requesting authority.”

¹²⁸ D. Sutton and J. Gill, *Russell on Arbitration* (London, 2003), no.1-014; Weigand, above fn.98, no.16. See also UNCITRAL Notes on Organizing Arbitral Proceedings 1996, no.31.

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.

¹³³ Burn and Skelton, above fn.85, p.124; Gallagher, above fn.85, p.45; Meyer-Hausser, above fn.85, no.183; Rivkin and Cremades, above fn.85, p.1 *et seq.*; Rubinstein and Guerrina, above fn.85, pp.593 *et seq.*; Sindler and Wüstemann, above fn.1, p.618; von Schlabrendorff and Sheppard, above fn.85, p.766.

¹³⁴ Berger, above fn.85, p.3; von Schlabrendorff and Sheppard, above fn.85, pp.762 *et seq.*

(2007) 73 ARBITRATION 2

ALI /UNIDROIT Principles of Transnational Civil Procedure 2004, s.18.1 provides: "Effect should be given to privileges, immunities, and similar protections of a party or non-party concerning disclosure of evidence or other information." The law of the European Community provides in its rules regarding the co-operation of civil courts¹³⁵:

"A request for the hearing of a person shall not be executed when the person concerned claims the right to refuse to give evidence or to be prohibited from giving evidence,

- (a) under the law of the Member State of the requested court; or
- (b) under the law of the Member State of the requesting court, and such right has been specified in the request, or, if need be, at the instance of the requested court, has been confirmed by the requesting court."

It would violate the parties' legitimate expectations if an implicit waiver of privileges was assumed¹³⁶:

"Parties and their counsel may find themselves in the position of having to reveal information that they reasonably expected was protected at the time the communication was made or advice given. Parties are likely to be surprised, to say the least, to learn that their agreement to arbitrate could have the effect of imposing on them a general obligation to disclose all relevant documents. . . which would not be subject to disclosure under their own domestic national procedures."¹³⁷

Therefore, it may be concluded that parties entering into an arbitration agreement tacitly assume that they may invoke attorney secrecy, LPP or ACP.¹³⁸

Party autonomy

A party agreement as to the rules to be applied to privileges is binding on the arbitral tribunal. Such an agreement prevails over a rule contained in the arbitration rules or a statutory provision (unless mandatory).¹³⁹ It may be contained in the arbitration clause or a separate agreement, e.g. in the terms of reference. However, in practice, arbitration clauses generally do not refer to the issue of privilege and, in the heat of battle, consensus is hard to reach, in particular when the question of privilege predetermines the inclusion or exclusion of important evidence.¹⁴⁰ Nevertheless, difficulties can be avoided if the parties agree which confidentiality standard should be applied to a specific document or information. Although contrary to the civil law principle of *iura novit curia*, such practice can be justified on the basis of arbitration's inherent flexibility.¹⁴¹

Should the parties be urged to include a clause in the arbitration agreement specifying the law applicable to the attorney's confidentiality?¹⁴² Even if they recognise the problem, it is doubtful whether they would agree on a (single) law. If they do, they are most likely to

¹³⁵ Art.14(1) of Council Regulation 1206/2001 of May 28, 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters.

¹³⁶ von Schlabrendorff and Sheppard, above fn.85, p.765.

¹³⁷ Sindler and Wüstemann, above fn.1, p.621.

¹³⁸ Lew, Mistelis and Kröll, above fn.98, no.22-45; Mosk and Ginsburg, above fn.55, p.382.

¹³⁹ Sindler and Wüstemann, above fn.1, p.622. Party autonomy is a general principle of arbitration law: Lew, Mistelis and Kröll, above fn.98, no.2-44; J. F. Poudret and S. Besson, *Droit comparé de l'arbitrage international* (Zürich, 2002), nos 525 and 679; Redfern and Hunter, above fn.125, no.1-11; Weigand, above fn.98, no.154.

¹⁴⁰ Burn and Skelton, above fn.85, p.129.

¹⁴¹ Meyer-Hauser, above fn.85, no.188. Flexibility is regarded as one of the advantages of arbitration: Sutton and Gill, above fn.128, no.1-015.

¹⁴² Rubinstein and Guerrina, above fn.85, pp.597 *et seq.*

ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

agree on the law of a third country with which both parties are unfamiliar. This would tend to increase rather than eliminate confusion.

May choice of law clauses be interpreted to cover evidentiary privileges? In general not, because that would hardly be consistent with the parties' intentions at the time of concluding the clause and would in most cases violate the parties' legitimate expectations.¹⁴³

It follows therefore that the parties to an international arbitration are free to determine whether they want to apply attorney secrecy, LPP or ACP, under what circumstances, and to what extent. Nevertheless, the parties rarely use the autonomy they are granted.

The law to be applied to privileges

Procedure or substance?

The debate on the legal nature of evidentiary privileges is too technical to provide ready-made solutions. It is more helpful to ask: what law should be applied to evidentiary privileges? The answer is probably: the law a party reasonably expects to be applied. This may be different from the *lex arbitri* or the law applicable to the substance of the dispute and it need not be the same for claimant and respondent. This law has (or rather, these laws have) to be determined independently.

Direct determination

Should the law be determined directly, *voie directe*, or by applying national conflict of laws rules?¹⁴⁴ The trend is *voie directe*.¹⁴⁵ There is no reason why this trend should not be followed.

The Closest Connection Rule

In the United States federal courts have developed specific choice-of-law rules regarding evidentiary privileges. Each state has its own rules on ACP. According to r.501 of the Federal Rules of Evidence, federal courts assess ACP according to federal law if the claim is based on federal law but state law if based on state law. The federal court will apply the conflict of law rules of the state in which it is domiciled. Most are designed to ensure that the ACP will be governed by the law of the state which has "the most significant relationship" to or "the greatest interest" in the document or communication at issue. For the most significant relationship test, the following locations are commonly considered: the place of jurisdiction; where the application for discovery was made; where the attorney-client relationship was established; where the communication in question was made; where the corporation is domiciled; where the corporation was founded, etc. The courts establish the decisive criteria by carefully balancing the interests in each case. If no professional relations existed between attorney and client when the communication was made, the state in which the communication took place is considered to have the "most significant relationship". If professional relations existed when the communication was made, the state in which the relations were centered is considered to have the "most significant relationship." An exception is if the communication was made in a state other than that in which the professional relations took place and if that state shows an important connection to the parties and the underlying transaction in which case the law of the state in which the communication was made will be applied.¹⁴⁶

¹⁴³ Berger, above fn.85, p.10.

¹⁴⁴ On these concepts Born, above fn.103, pp.526 *et seq.*; Lew, Mistelis and Kröll, above fn.98, nos 17-49 *et seq.* and 17-67 *et seq.*; Poudret and Besson, above fn.139, nos 685 *et seq.*

¹⁴⁵ Berger, above fn.85, p.9; Gallagher, above fn.85, pp.48 *et seq.*

¹⁴⁶ Smit and Gougne, above fn.85, p.24.

There is no reason not to use similar criteria in cases of international arbitration, i.e. to subject attorney-related confidentiality to the law of the country showing the closest geographical or logical connection.¹⁴⁷ This solution would be in line with FAIPL, art.187, para.1 and Swiss Rules, art.33 which both provide that the tribunal shall decide according to the law having the closest connection with the dispute. Of course, the US rules cannot just be simply taken over: international arbitration has to develop its own closest connection test.¹⁴⁸ In most cases the closest law will be the law of the country in which the attorney–client relationship was founded, centered and continues to exist even in the case of proceedings being conducted abroad. If the client and attorney do not reside in the same country, the law of the place where the client has its place of business and where most of the relationship occurred should perhaps be applied,¹⁴⁹ though one may ask if this solution is not too client-friendly, since it is the attorney who renders the characteristic performance of the—let’s say—consultancy agreement.

Alternatives?

The following alternative approaches aim at circumventing national concepts of attorney-related confidentiality. It is argued that arbitrators should regard privileges as based on general principles of law.¹⁵⁰ This would relieve the arbitrators from having to resort to a variety of national rules. Although at first sight this seems promising, this solution would be superficial. Of course, it is easier to have only one international legal basis but the core of the problem (the scope of the privilege to be applied) remains unsolved: “The problem with the general principles is that they are just that. . . They are excellent as generalisations, but lack sufficient detail.”¹⁵¹

It has also been suggested that model principles should be developed. Examples are the IBA Rules on the Taking of Evidence in International Commercial Arbitration and the IBA Guidelines on Conflicts of Interest in International Arbitration. Such (non-binding) guidelines could help to advance international standards, thereby creating predictability.¹⁵² But there is doubt whether a universal standard will be promulgated and enforced because the matter may be too complex.¹⁵³

Conclusion

For the time being, it seems most appropriate to determine the law of privileges for each party by *voie directe* according to a closest connection test.

¹⁴⁷ Meyer-Hauser, above fn.85, no.195. Consenting Berger, above fn.85, p.11; von Schlabrendorf and Sheppard, above fn.85, p.768.

¹⁴⁸ Berger, above fn.85, pp.10 *et seq.* Rubinstein and Guerrina, above fn.85, p.598, would like to implement the practice of US federal courts at the international level. Von Schlabrendorf and Sheppard, above fn.85, pp.769 *et seq.*, discuss in detail the (i) *lex arbitri*, (ii) domestic law at the place of arbitration, (iii) law governing the dispute, (iv) place where the document is located, (v) place where the document is created, (vi) domicile of the party claiming privilege, and (vii) professional domicile of the lawyer.

¹⁴⁹ Berger, above fn.85, pp.12 *et seq.*

¹⁵⁰ Sindler and Wüstemann, above fn.1, p.623.

¹⁵¹ Redfern and Hunter, above fn.125, no.2-47.

¹⁵² Rubinstein and Guerrina, above fn.85, pp.599 and 601; Nathalie Voser “Harmonization by Promulgating Rules of Best International Practice in International Arbitration” (2005) *SchiedsVZ* 113 *et seq.*

¹⁵³ Sindler and Wüstemann, above fn.1, pp.625 and 637.

The balancing approach

Arbitration practice needs to take into account the different standards of attorney-related confidentiality without jeopardising the equal treatment of the parties. A practical solution must therefore be based on two premises¹⁵⁴:

1. in principle, the arbitral tribunal recognises the country-specific interpretations of attorney secrecy, LPP, ACP, etc.;
2. and eliminates all forms of discrimination against a party by a discretionary decision in accordance with the established arbitration principles of fairness and equality.¹⁵⁵

A more formalised version of this concept could look like this: the arbitral tribunal grants each party the evidentiary privileges the opposite party claims, thereby creating a kind of “most favoured rule”.¹⁵⁶

This approach recognises the fundamental principles of fairness and equality embodied in the Swiss and English arbitration acts and the US arbitration law. All the arbitration rules discussed demand that equality between the parties be respected. The principle of equality is part of the fundamental rights that arbitrators must respect.¹⁵⁷ Given this legal basis, it is unnecessary to base this concept either on the *lex arbitralis*, or a general principle of international law, or on the international public interest.¹⁵⁸ This approach also does justice to the legitimate expectations of the parties, a vital prerequisite for any solution.¹⁵⁹

After setting the rules, check for justice

After all these more or less technical considerations, the tribunal should check if its approach to the alleged privileges meets one basic requirement, that of justice. “The first and overriding policy consideration must be the objective of doing justice between the parties.”¹⁶⁰ Therefore, as a final step the tribunal should check that its application of the law is just.

Related issues

Specific assertion

Whichever party claims a privilege must claim it with respect to each specific communication. It follows that general privilege claims are not permissible.

Burden of proof

The party asserting a privilege bears the burden of establishing its application to a particular communication.¹⁶¹

¹⁵⁴ Meyer-Hauser, above fn.85, nos 184 *et seq.* Consenting: Sindler and Wüstemann, above fn.1, p.625. The need to find a balance is also stressed by Burn and Skelton, above fn.85, p.128.

¹⁵⁵ Berger, above fn.85, p.19.

¹⁵⁶ *ibid.*, pp.19 *et seq.*; Rubinstein and Guerrina, above fn.85, pp.598 *et seq.*; von Schlabrendorf and Sheppard, above fn.85, pp.771 *et seq.* Berger also discusses the “least favored” approach but dismisses it on the grounds that such a rule would violate the parties’ legitimate interests.

¹⁵⁷ ICC Rules, Art.15(2); UNCITRAL Rules, Art.15(1); LCIA Rules art.14.1(i) and (ii); ICDR Rules, art.16(1); Swiss Rules, art.15(1). See also Poudret and Besson, above fn.139, no.554.

¹⁵⁸ These legal foundations are proposed by Mosk and Ginsburg, above fn.55, pp.378 *et seq.*

¹⁵⁹ Berger, above fn.85, p.9.

¹⁶⁰ von Schlabrendorf and Sheppard, above fn.85, p.763.

¹⁶¹ Sindler and Wüstemann, above fn.1, pp.617 and 626.

Prohibition of indirect enforcement

Respecting evidentiary privileges also means that a tribunal may not indirectly force a party to (for example) produce documents whose production is refused on the basis of privilege. For instance, a tribunal may not threaten to draw adverse inference from the non-production of evidence, inferring that the contents of the document would have been adverse to the interests of the party who failed to produce it.¹⁶² This is supported by IBA Evidence Rules, Art.9(2)(b) and (4). While Art.9(2)(b) recognises privileges as reasons for refusing to produce documents, Art.9(4) states:

“If a Party fails without satisfactory explanation to produce any document requested. . . the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.”

Article 18.2 of the ALI/UNIDROIT Principles of Transnational Civil Procedure 2004 provides:

“The court should consider whether [privilege] may justify a party’s failure to disclose evidence or other information when deciding whether to draw adverse inferences or to impose other indirect sanctions.”

Privilege claims must be justifiable reasons for refusing, e.g. document production. Any indirect sanction which undermines the otherwise accepted privileges must be avoided.

Prohibition of using privileged information

As a consequence of the principles of fairness and equality, a party asserting a privilege over a document may not make use of any aspects of the allegedly privileged document without disclosing it.¹⁶³

Confidentiality and privilege

The issue of privilege must be distinguished from the question of confidentiality.¹⁶⁴ Privilege concerns the admissibility of evidence, confidentiality with whether the proceedings, e.g. legal briefs, hearings, or the award, should be kept secret by the parties, arbitrators or anyone else involved, and whether information gained during the proceedings may be used at will.¹⁶⁵

Uncertain origin of documents

If documents or information covered by, say, ACP are introduced and the privileged party claims they left its sphere of influence against its will, what should the arbitrators do? They should consider the circumstances and the parties’ interests. There are no generally accepted formulas.

Final remarks

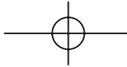
In the interests of merging different procedural traditions, especially in arbitrations between parties from civil and common law jurisdictions, recognition may be given to concepts of attorney-related confidentiality which differ from or exceed the concepts of the tribunal’s

¹⁶² *ibid.*, p.635.

¹⁶³ *ibid.*, p.635.

¹⁶⁴ *ibid.*, p.613.

¹⁶⁵ On the confidential nature of arbitral proceedings see, e.g. Lew, Mistelis and Kröll, above fn.98, no.24-99, with further references.



ATTORNEY SECRECY v ATTORNEY-CLIENT PRIVILEGE

lex loci. It may be appropriate for a tribunal domiciled in Switzerland, whose procedural law offers a rather narrow concept of attorney-related confidentiality, to expand the privilege to documents and information outside the attorney's sphere of influence. It might also be sensible for international tribunals seated in Switzerland to extend the privilege beyond the scope of the procedural *lex loci* to in-house counsel.

Basically each party should be able to invoke its home country's concepts of attorney-related confidentiality, provided that the same rights are awarded to the opponent and that does not constitute an abuse of law.

8. CONCLUSION

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.

