Evidentiary privileges in international arbitration : a comparative analysis under English, American, Swiss and French law

Gregoire, Nicolas

Droit international

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To my family and my wife
for their continuous support and encouragement

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Abbreviations

AAA	American Arbitration Association
AAA Commercial Rules	AAA Commercial Arbitration Rules of 1 October 2013
Ala. L. Rev.	*Alabama Law Review*
Alb. L. Rev.	*Albany Law Review*
ALI/UNIDROIT Principles	ALI/UNIDROIT Principles of Transnational Civil Procedure
Amend.	Amendment
Am. J. Med.	*American Journal of Mediation*
Am. Rev. Int'l Arb.	*American Review of International Arbitration*
Am. U. L. Rev.	*American University Law Review*
Arb. Int.	*Arbitration International*
Arbitration Act	*English Arbitration Act (1996)*
Art. / Arts	*Article / Articles*
AT Rev	*Australian Tax Review*
ATF	*Arrêt du Tribunal Fédéral (Switzerland)*
BIS	*Bank for International Settlements*
B.U. Pub. Int. L.J.	*Boston University Public Interest Law Journal*
Calif. L. Rev.	*California Law Review*
CAMCA Rules	*Commercial Arbitration and Mediation Center for the Americas Arbitration Rules*
Case W. Res. J. Int'l L.	*Case Western Reserve Journal of International Law*
CEDR Settlement Rules	*Centre for Effective Dispute Resolution Rules for the Facilitation of Settlement in International Arbitration*
C.J.C.R.	*Cardozo Journal of Conflict Resolution*
C.J.Q.	*Civil Justice Quarterly*
Colum. L. Rev.	*Columbia Law Review*
Cong. Research Serv.	Congress Research Service
consid.	considérant
CPR	English Civil Procedure Rules

CPR Administered Rules	International Institute for Conflict Prevention & Resolution Administered Arbitration Rules
CPR Non-Administered Rules	International Institute for Conflict Prevention & Resolution Non-Administered Arbitration Rules
Def. Couns. J.	*Defense Counsel Journal*
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO)
ed. / eds	editor, edition / editors, editions
e.g.	exempli gratia
FAA	U.S. Federal Arbitration Act
FAAUC	Swiss Federal Act Against Unfair Competition (RS 241) (available in English at http://www.admin.ch)
FAFML	Swiss Federal Act on the Freedom of Movement for Lawyers (RS 935.61) (available in English at www.admin.ch)
FAPA	Swiss Federal Act on Patent Attorneys (RS 935.62) (available in English at http://www.admin.ch)
FCC	French Civil Code (available in English at http://www.legifrance.gouv.fr)
FCCP	French Code of Civil Procedure (a former version is available in English at http://www.legifrance.gouv.fr, the current version of Articles 1442 to 1527 is available in English at http://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf)
FDC	French Defense Code (partial English translation available at http://www.conseil-constitutionnel.fr)
Fed. R. Civ. P.	U.S. Federal Rules of Civil Procedure
Fed. R. Evid.	U.S. Federal Rules of Evidence
FIPC	French Intellectual Property Code (available in English at http://www.legifrance.gouv.fr)
fn. / fns	footnote / footnotes

FPC	French Penal Code (available in English at http://www.legifrance.gouv.fr)
Hague Convention	Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters
Harv. L. Rev.	*Harvard Law Review*
Hastings Int'l & Comp. L. Rev.	*Hastings International and Comparative Law Review*
HKIAC	Hong Kong International Arbitration Centre
HKIAC Mediation Rules	HKIAC Mediation Rules of 1 August 1999
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration of 29 May 2010
IBA Rules (1999)	IBA Rules on the Taking of Evidence in International Arbitration of 1 June 1999
ICC Mediation Rules	Rules of Mediation of the International Chamber of Commerce of 1 January 2014
ICC Rules	Rules of Arbitration of the International Chamber of Commerce of 1 January 2012
ICDR	International Centre for Dispute Resolution (American Arbitration Association)
ICDR Guidelines	ICDR Guidelines for Arbitrators Concerning Exchange of Information
ICDR Mediation Rules	ICDR International Mediation Rules of 1 June 2009
ICDR Rules	ICDR International Arbitration Rules of 1 June 2009
ICJ	International Court of Justice
ICJ Reports	*International Court of Justice Reports*
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
i.e.	*id est*
Int. A.L.R.	*International Arbitration Law Review*

Int'l & Comp. L.Q.	*International and Comparative Law Quarterly*
J. Int'l Arb.	*Journal of International Arbitration*
JDI	*Journal du droit international*
LCIA	London Court of International Arbitration
LCIA Mediation Rules	LCIA Mediation Rules of 1 July 2012
LCIA Rules	LCIA Arbitration Rules of 1 October 2014
let.	letter
Lewis & Clark L. Rev.	*Lewis & Clark Law Review*
Marq. L. Rev.	*Marquette Law Review*
Melb. J. Int'l L.	*Melbourne Journal of International Law*
Model Law	Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (as amended in 2006)
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
no.	number
N.Y.U. L. Rev.	*New York University Law Review*
para. / paras	paragraph / paragraphs
PCIJ	*Permanent Court of International Justice*
PILA	Swiss Private International Law Act (available in English at https://www.swissarbitration.org/sa/download/IPRG_english.pdf)
PLI/Lit	*Practising Law Institute, Litigation and Administrative Practice Course Handbook Series*
RDAI	*Revue de droit des affaires internationales*
RdC	*Recueil des Cours de l'Académie de Droit International de la Haye*
Rev. arb.	*Revue de l'arbitrage*
R.F.C.	*Revue française de comptabilité*
R.I.D.C.	*Revue internationale de droit comparé*
Rome Convention	1980 Convention on the Law Applicable to Contractual Obligations
s.	section

SCC	Swiss Criminal Code (available in English at http://www.admin.ch)
SCO	Swiss Code of Obligations (available in English at http://www.admin.ch)
SCPC	Swiss Civil Procedure Code (available in English at http://www.admin.ch)
Sc.St.L.	*Scandinavian Studies in Law*
S. Tex. L. Rev.	*South Texas Law Review*
Suppl.	Supplement
Swiss Mediation Rules	Swiss Rules of Commercial Mediation of April 2007
Swiss Rules	Swiss Rules of International Arbitration of 1 June 2012
Syd. LR	*Sydney Law Review*
TDM	*Transnational Dispute Management*
Tex. Intell. Prop. L.J.	*Texas Intellectual Property Law Journal*
Tex. Int'l L.J.	*Texas International Law Journal*
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TvA	*Tijdschrift voor Arbitrage*
U. Mem. L. Rev.	*University of Memphis Law Review*
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law of 28 April 1976 (as revised in 2010)
UNCITRAL Rules (1976)	Arbitration Rules of the United Nations Commission on International Trade Law of 28 April 1976
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
Unif. L. Rev.	*Uniform Law Review*
Unif. R. Evid.	Uniform Rules of Evidence
U. Pitt. L. Rev.	*University of Pittsburgh Law Review*
U.S.	United States of America

U.T.S.A.	Uniform Trade Secrets Act
Vand. J. Transnat'l L.	*Vanderbilt Journal of Transnational Law*
Vill. L. Rev.	*Villanova Law Review*
vol. / vols	volume / volumes
WAMR	*World Arbitration & Mediation Review*
WIPO	World Intellectual Property Organization
WIPO Rules	WIPO Arbitration Rules of 1 October 2002
WTO	World Trade Organization
Y.B. Comm. Arb.	*Yearbook Commercial Arbitration*
Zurich Rules	International Arbitration Rules of the Zurich Chamber of Commerce (no longer in force)

Terminology

"Arbitration" shall be understood as international arbitration.

"Chapter" means a chapter of this work, unless reference is made otherwise.

"Communication" refers to both oral and written communications.

"Court" means a national court.

"Privilege" shall be understood as a reference to testimonial privileges and/or information (or evidentiary[1]) privileges.[2] Testimonial privileges seek to protect the confidentiality of a relationship (such as the attorney-client privilege) while the information privilege protects the information contained in a communication (trade secrets, for example).[3] When referring to privileges in this work, the English and American terminology will be used alternatively.

"Section" means a section of this work, unless reference is made otherwise.

"Tribunal" must be understood as a reference to an arbitral tribunal.

The masculine has been used for ease of reading.

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1 Mosk and Ginsburg, "Evidentiary Privileges in International Arbitration" 50 *Int'l & Comp. L.Q.* (2001) 345, at 345.

2 J. H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law including the Statutes and Judicial Decisions of All Jurisdictions of the United States and Canada (2d Ed., Vol. 4)* (1923), at 662; Shaughnessy, "Dealing with Privileges in International Commercial Arbitration", 51 *Sc.St.L.* (2007) 451, at 464 (distinguishing testimonial privileges from information privileges).

3 Shaughnessy, *supra* note 2, at 464.

INTRODUCTION

> There are some kinds of evidence which the law *excludes*, or dispenses with, *on grounds of public policy*; because greater mischiefs would probably result from requiring or permitting its admission, than from wholly rejecting it.[4]

I. The Issue

A privilege is the right or the obligation of a party to refuse to disclose evidence. Privileges are particularly important in common law jurisdictions where civil procedure provides for a system of document disclosure[5] under which the parties are obliged to produce evidence that is also prejudicial to their own case.[6] Common law jurisdictions, which generally provide for extensive disclosure, will usually contain highly developed and varied privilege rules, while civil law jurisdictions, where disclosure is limited, will afford less protection to privileges.[7] Indeed, civil law jurisdictions have less need for protection from disclosure given that the scope of disclosure is much narrower.[8] This explains why a greater number of privileges are found in common law jurisdictions than in civil law jurisdictions. Exclusionary rules and objections to disclosure, such as privileges, are a corollary to extensive disclosure rights.[9]

While the common law considers privileges as a right to refuse disclosure of evidence, civil law treats them as a legal obligation to withhold evidence.[10]

Privileges have recently begun to attract more attention in international arbitration.[11] They are said to be "one of the crucial questions in international

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4 S. Greenleaf, *A Treatise on the Law of Evidence* (1860), at 328.

5 Baudesson and Rosher, "Le secret professionnel face au *legal privilege*", *RDAI* (2006) 37, at 45.

6 *Id.*, at 45; Kaufmann-Kohler, "Globalization of Arbitral Procedure", 36 *Vand. J. Transnat'l L.* (2003) 1313, at 1525.

7 Meyer, "Time to Take a Closer Look: Privilege in International Arbitration", 24 *J. Int'l Arb.* (2007) 365, at 369-70; Yanos, "Problems Arising from the Interplay of Common Law and Civil Law in International Arbitration: Defining the Scope of the Attorney-Client Privilege, vol. 3 issue 2 *TDM* (2006); McComish, "Foreign Legal Professional Privilege: A New Problem for Australian Private International Law", 28 *Syd. LR* (2006) 296, at 298-9.

8 Meyer, *supra* note 7, at 370.

9 El Ahdab and Bouchenaki, "Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?", in A.J. van den Berg (ed.), *Arbitration Advocacy in Changing Times* (2011) 65, at 76.

10 Baudesson and Rosher, *supra* note 5, at 39, 44.

11 Heitzmann, "Confidentiality and Privileges in Cross-Border Legal Practice: The Need for a Global Standard", 26 *ASA Bulletin* (2008) 205, at 205; Alvarez, "Evidentiary Privileges in International Arbitration", in A.J. van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (2007) 663, at 664; Shaughnessy, *supra* note 2, at 464; Sindler and Wüstemann, "Privileges Across Border in Arbitration: Multi-Jurisdictional Nightmare or a Storm in a Teacup?", 23 *ASA Bulletin* (2005) 610, at 610-1; Kozlowska, "Privilege in the Multi-Jurisdictional Area of International Commercial Arbitration",

arbitration today"[12] and "truly ... considered as hot topics in international arbitration."[13] Indeed, global markets offer a multitude of business opportunities and, as a consequence, international trade and cross-border activities are said to "have become the norm rather than the exception."[14] This shift towards cross-border business and multi-jurisdictional transactions has resulted in an increase in international disputes.[15] Rules of evidence, including rules of privilege, on the other hand, have been conceived for proceedings in local courts and are not adjusted to international disputes,[16] hence bringing unpredictability and uncertainty to the parties in foreign forums.[17]

Privileges are problematic in arbitration for a number of reasons. First, the concept of privilege varies throughout the different jurisdictions,[18] although privileges are recognized, in a form or another, in almost if not all, legal systems.[19] As a commentator once said: "Such contrasting [privilege] rules ... provide a fruitful source of mismatched expectations and resultant headache for the arbitral tribunal."[20] Moreover, when the rules of privilege are unclear, there is a risk that tribunals erroneously order the production of privileged evidence.[21] In certain jurisdictions, this may entail that that the privilege protection is nullified and can no longer be claimed.[22]

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14 *Int. A.L.R.* (2011) 128, at 128; N. O'Malley, *Rules of Evidence in International Arbitration* (2012), at 274.

12 de Boisséson, "Evidentiary Privileges in International Arbitration", in A.J. van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (2007) 705, at 705.

13 Heitzmann, *supra* note 11, at 205.

14 Feder, *Privilege in Cross-Border Litigation* (available at http://apps.americanbar.org/litigation /committees/international/docs/1009-materials-privilege-border-lit.pdf), at 1.

15 *Id.*; de Boisséson, *supra* note 12, at 705; Alvarez, *supra* note 11, at 664; Sindler and Wüstemann, *supra* note 11, at 611.

16 Feder, *supra* note 14, at 1.

17 *Id.*; Fry, "Without Prejudice and Confidential Communications in International International Arbitration (When Does Procedural Flexibility Erode Public Policy?)", 1 *Int. A.L.R.* (1998) 209, at 209.

18 Comment P-18A, ALI/UNIDROIT Principles; Comment P-18B, ALI/UNIDROIT Principles; de Boisséson, *supra* note 12, at 706; Alvarez, *supra* note 11, at 664; Sindler and Wüstemann, *supra* note 11, at 611; Tawil and Lima, "Privilege-Related Issues in International Arbitration", in *Dossier of the ICC Institute of World Business Law: Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (2009) 29, at 33; Gallagher, "Legal Privilege in International Arbitration", 6 *Int. A.L.R.* (2003) 45, at 45; Reiser, "Applying Privilege in International Arbitration: The Case for a Uniform Rule", 13 *C.J.C.R.* (2012) 653, at 659; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", 2 *Arb. Int.* (2006) 501, at 502; G. Born, *International Commercial Arbitration* (2009), at 1911.

19 Comment P-18A, ALI/UNIDROIT Principles; Reiser, *supra* note 18, at 659; von Schlabrendorff and Sheppard, "Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Hollistic Solution", in G. Aksen et al. (eds), *Global Reflections on International Law, Commerce and Dispute Resolution* (2005) 743, at 744; Born, *supra* note 18, at 1910.

20 Fry, *supra* note 17, at 211.

21 Glynn, "Federalizing Privilege", 52 *Am. U. L. Rev.* (2002) 59, at 131.

22 *Id.*, at 130-1.

Second, the parties have usually not agreed on the rules applicable to privileges when the dispute arises.[23] Resolving matters of privilege when the parties disagree on the applicable rules of privilege may delay the arbitral proceedings.[24]

Third, there exists no guidance in arbitration laws[25] or arbitration rules[26] on how arbitrators should treat claims of privilege.

Fourth, the parties expect that the rules of privilege applicable in their home jurisdiction will also apply in arbitration proceedings.[27]

Fifth, many privileges are linked to codes of professional conduct and ethics, and their application may have "unexpected and far-reaching consequences on the conduct of the arbitration."[28] For example, in France, the disclosure of privileged information by an attorney is punishable by one year of imprisonment and 15,000 Euros.[29]

Sixth, there are conflicting policy considerations to be taken into account by tribunals in determining the applicable privilege rules and the scope of document production.[30]

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[23] Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 509; J. Waincymer, *Procedure and Evidence in International Arbitration* (2012), at 802; Meyer-Hauser and Sieber, "Attorney Secrecy v Attorney-Client Privilege in International Commercial Arbitration", 73 *Arbitration* (2007) 148, at 183; Tawil and Lima, *supra* note 18, at 37; de Boisséson, *supra* note 12, at 713.

[24] Rubinstein and Guerrina, "The Attorney-Client Privilege and International Arbitration", 18 *J. Int'l Arb.* (2001) 587, at 597.

[25] Sindler and Wüstemann, *supra* note 11, at 622; Alvarez, *supra* note 11, at 677; Born, *supra* note 18, at 1910; Waincymer, *supra* note 23, at 802; Meyer, *supra* note 7, at 366-7; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 506; Tevendale and Cartwright-Finch, "Privilege in International Arbitration: Is It Time to Recognize the Consensus?", 26 *J. Int'l Arb.* (2009) 823, at 825; Kaufmann-Kohler and Bärtsch, "Discovery in International Arbitration: How Much is Too Much?", *Schieds VZ* (2004) 13, at 19.

[26] Born, *supra* note 18, at 1911; Waincymer, *supra* note 23, at 802; Meyer-Hauser and Sieber, *supra* note 23, at 181; Meyer, *supra* note 7, at 367; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 506; Player and Morel de Westgaver, "Lawyer-Client Privilege in International Arbitration - A Blurred Area Prone to Unpredictability or Useful Flexibility?", 12 *Int. A.L.R.* (2009) 101, at 101; Rubinstein and Guerrina, *supra* note 24, at 592; von Schlabrendorff and Sheppard, *supra* note 19, at 757; Mosk and Ginsburg, *supra* note 1, at 374; Fry, *supra* note 17, at 210; Tevendale and Cartwright-Finch, *supra* note 25, at 825; Tawil and Lima, *supra* note 18, at 31; de Boisséson, *supra* note 12, at 706; Sindler and Wüstemann, *supra* note 11, at 622; Reiser, *supra* note 18, at 661; Alvarez, *supra* note 11, at 678; Kaufmann-Kohler and Bärtsch, *supra* note 25, at 19.

[27] Tevendale and Cartwright-Finch, *supra* note 25, at 828; Reiser, *supra* note 18, at 662-3; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 502.

[28] Alvarez, *supra* note 11, at 664.

[29] "The disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year's imprisonment and a fine of €15,000." (Art. 226-13 FPC).

[30] International Bar Association, *Due Process in International Arbitration*, Transcripts (available at http://www.ibanet.org/Document/Default.aspx?DocumentUid=0ABF4D05-65B8-4ECC-BD13-82BF767BF21F), at 87; See Section 1.4.

Finally, the withholding of relevant evidence necessary to resolve a dispute will ultimately affect the quality and fairness of the decision.[31]

We have identified certain characteristics which represent the most problematic cases of privilege claims. These characteristics are as follows:

a) The parties to the arbitration are located in different jurisdictions;

b) The parties have not determined the rules applicable to privileges;

c) The allegedly privileged communication originates from one jurisdiction and was received in another jurisdiction; and

d) Those jurisdictions may be different than those of the domicile of the parties and of the seat of arbitration.

II. Purpose and Structure of this Work

The purpose of this work is to review the privileges existing in English, American, French and Swiss law that are the most likely to be invoked in arbitration, to determine which laws govern issues of privilege in international arbitration and, finally, to determine whether there exists a preponderance of practice suggesting that certain privileges could develop into transnational rules in international arbitration.

Accordingly, an introductory first chapter will discuss the taking of evidence in arbitration by addressing the various arbitration laws and rules, with an emphasis on privileges and mandatory rules of due process and public policy. This chapter also contains a section on the rationale and origins of privileges.

The second chapter will examine the rules of privilege under English, American, French and Swiss law likely to be invoked in arbitration. At this time, no publication contains a consolidated analysis of privileges under those four jurisdictions.

The third chapter will identify the conflict of laws approaches available to tribunals and will determine whether these are appropriate for privileges.

Finally, the fourth chapter is divided in two parts. The first part examines whether transnational rules of evidence are desirable in international arbitration and the second part endeavors to determine whether there exists a preponderance of practice suggesting that certain privileges could develop into transnational rules in international arbitration. Where this is so, we will propose a formulation for those transnational rules.

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[31] M. T. Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (2009), at 318.

As mentioned, the research focuses on England, the United States (Federal law), France, and Switzerland, as those jurisdictions largely reflect the various practices concerning privileges in common law and civil law systems.

CHAPTER 1 – EVIDENCE IN INTERNATIONAL ARBITRATION

1.1 Introduction

It is the responsibility of the tribunal to take evidence.[32] Establishing the facts is essential for the tribunal to reach a decision, especially given that many cases are decided on the facts or their interpretation.[33] However, despite the importance of evidence in arbitration, arbitration laws and rules contain very few specific rules on the taking of evidence, leaving wide discretion to the tribunal.[34] This is even truer in the field of privileges where rules are almost inexistent.[35]

This chapter addresses three main topics: First, the origins, nature, and rationale of privileges in general; Second, the taking of evidence in international arbitration, with particular attention to privileges; Third, how privileges may impact the finality of international arbitral awards.

1.2 An Introduction to Privileges

1.2.1 Nature and rationale of privileges

Privileges may be defined as "the right [or the obligation][36] of a party to refuse to disclose a document or produce a document or to refuse to answer questions on the ground of some special interest recognised by law,"[37] regardless of the relevance, weight or value of this evidence.[38] Indeed, privileges "impede the search for truth by excluding evidence that may be highly probative."[39]

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32 J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (2007), at 550; Born, *supra* note 18, at 1851.

33 J. D. M. Lew, L. A. Mistelis and S. M. Kröll, *Comparative International Commercial Arbitration* (2003), at 553.

34 *Id.*; T. Zuberbühler et al., *IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration* (2012), at 167; Poudret and Besson, *supra* note 32, at 550.

35 See Section 1.3.3.

36 Alvarez, *supra* note 11, at 665.

37 Civil Procedure Rules - Glossary (available at http://www.justice.gov.uk/courts/procedure-rules/civil/glossary).

38 Saleh, "Reflections on Admissibility of Evidence: Interrelation Between Domestic Law and International Arbitration", in 15 *Arb. Int.* (1999) 141, at 141-2; Alvarez, *supra* note 11, at 665.

39 L. C. Kirkpatrick, C. B. Mueller and C. H. Rose III, *Evidence: Practice Under the Rules* (2011), at § 5.1.

1.2.1.1 Confidentiality and privilege

Although confidentiality by itself neither prevents the disclosure of documents or information in the process of litigation[40] nor does it establish privilege,[41] confidentiality is said to be a necessary ingredient of privilege.[42]

In *Alfred Crompton Amusement Machines Ltd v Customs & Excise Comrs (No 2)*, Lord Cross of Chelsea declared that "'Confidentiality' is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest."[43] Courts often confuse confidentiality and privilege.[44] The distinction between confidentiality and privilege was summarized by the U.S. District Court for the Central District of California in *Molina*:

> Communications are confidential when the freedom of the parties to disclose them voluntarily is limited; they are privileged when the ability of third parties to compel disclosure of them, or testimony regarding them, is limited.[45]

As stressed by Phipson, "[a] distinction should be drawn ... between confidence and privilege"[46] in practice. For example, the fact that an attorney may not reveal the identity of a client or confirm whether it represents such client, unless authorized to do so by his client, falls within the ambit of the attorney's duty of confidence but is not covered by privilege in English law.[47] Indeed, there have been recent cases where English solicitors have been ordered to provide the names of the persons instructing them.[48]

1.2.1.2 Categories of privileges

Given that privileges are potential obstacle to the discovery of truth, the law recognizes very few categories.[49] Having a different view on the matter, Kirkpatrick, Mueller and Rose assert that "[t]he extent to which privileges

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40 R. G. Toulson and C. M. Phipps, *Confidentiality* (2006), at 315.

41 Ashurst, *Privilege* (available at http://www.ashurst.com/doc.aspx?id_Resource=4655), at 1.

42 *Id.*, at 2.

43 *Alfred Crompton Amusement Machines Ltd v Customs & Excise Comrs (No 2)* [1974] AC 405 (HL), at 433.

44 Zacharias, "Harmonizing Privilege and Confidentiality", 41 *S. Tex. L. Rev.* (1999) 69, at 71-2.

45 Molina v. Lexmark International, Inc., 2008 WL 4447678 (C.D. Cal. 2008), at 10 (Quoted in Pollack, *Mediation Confidentiality: A Federal Court Oxymoron* (available at http://www.dcchapterfba.org /Mediation_Confidentiality_A_federal_Court_Oxymoron3_1_.pdf), at 11).

46 S. L. Phipson, H. M. Malek and J. Auburn, *Phipson on Evidence* (2005), at 630; C. Hollander, *Documentary Evidence* (2006), at 271.

47 Phipson, Malek and Auburn, *supra* note 46, at 630.

48 *Id.*

49 B. Thanki (ed.), *The Law of Privilege* (2006), at xv.

interfere with the factfinding process is sometimes exaggerated."[50] The authors argue that if a communication would not have occurred in the absence of a privilege, the privilege cannot be said to interfere with the taking of evidence.[51] The privilege would only exclude from disclosure communications which otherwise would have never existed.

For the purpose of this work, we have identified eleven categories of privileges which could possibly be invoked in international arbitration: the attorney-client privilege,[52] the work product doctrine, the joint and common interest privilege, the without prejudice privilege, the mediation privilege, the self-critical analysis privilege, the trade secrets privilege, the privilege against self-incrimination in civil proceedings, the state secrets privilege, the patent agent privilege, and the accountant privilege. It is important to note that not all of these privileges are present in the jurisdictions examined herein and that this list is not exhaustive. There exist a number of other privileges in civil procedural law, such as the spousal privilege and the medical privilege, but those are unlikely to arise in international arbitration.[53]

Privileges protect certain communications from disclosure. The attorney-client privilege applies to communications exchanged between attorneys and their clients, the work product doctrine to communications created for use in contemplated or existing litigation, the joint and common interest privilege to communications between parties sharing a common legal interest, the without prejudice privilege to communications created between parties in a genuine attempt to settle a dispute, the mediation privilege to communications created during mediation, the self-critical analysis privilege to communications created during a party's self-evaluation of its practices, the trade secrets privilege to confidential business secrets, the privilege against self-incrimination in civil proceedings to declarations which would expose the witness to criminal proceedings, the state secrets privilege to highly sensitive information which disclosed could endanger national security, the patent agent privilege to communications between patent agents and their clients, and the accountant privilege to communications between accountants and their clients.

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50 Kirkpatrick, Mueller and Rose, *supra* note 39, at § 5.1.

51 *Id.*

52 Kozlowska refers to the attorney-client privilege as the main privilege in arbitration: "[W]hat is commonly understood as privilege in international arbitration is the protection of confidential communications between a lawyer and a client." (Kozlowska, *supra* note 11, at 131).

53 Mosk and Ginsburg, *supra* note 1, at 384.

1.2.1.3 Rationales and public policy

Different categories of privileges have different rationales. However, all privileges are based on a public policy justification which can be summarized as follows: the public interest in maintaining secrecy outweighs the general requirement that all relevant evidence be presented to the adjudicator to be fully and properly considered in deciding the merits of a dispute.[54] In the words of Lord Templeman, "[a claim of privilege] can only be justified if the public interest in preserving the confidentiality [of the communication] outweighs the public interest in securing justice."[55] Many privileges rest on instrumental grounds,[56] meaning that the objective of the privilege is to ensure that the communication is done in a free manner and without the withholding of information,[57] whether it is between a client and a professional, such as in the case of the attorney-client privilege, or between the parties, in the course of without prejudice negotiations for example. In addition, privileges are also intended to safeguard "the values of privacy, freedom, trust, and honor in important personal and professional relationships."[58]

The different privileges examined in this work and their underlying rationales can be summarized as follows.

The attorney-client privilege protects communications between an attorney and his client. The rationale of the privilege is "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[59]

The work-product privilege protects communications created in the course of litigation. This privilege aims at creating a "zone of privacy" around the preparation for litigation in adversarial proceedings.[60]

The joint and common interest privilege aims at encouraging the free flow of information between parties in relation to their common legal interests, in order to enhance the quality of legal advice.[61]

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54 Toulson and Phipps, *supra* note 40, at 317; Alvarez, *supra* note 11, at 665.

55 *R v Chief Constable of West Midlands, ex p Wiley* [1994] 3 WLR 433, at 436 (Quoted in C. Foster, *Disclosure and Confidentiality: a Practitioner's Guide* (1996), at 61).

56 Kirkpatrick, Mueller and Rose, *supra* note 39, at § 5.1.

57 *Id.*

58 *Id.*

59 Upjohn Co. v. United States, 449 U.S. 383 (1981), at 389.

60 Thanki, *supra* note 49, at 121.

61 Schaffzin, "Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It", 15 *B.U. Pub. Int. L.J.* (2005) 49, at 51.

Under the without prejudice privilege, the parties are encouraged to settle their disputes outside courts knowing that what is said in the course of those negotiations may not be used to their prejudice in litigation proceedings.[62]

The rationale of the mediation privilege is very similar to the one of the without prejudice privilege in the sense that it encourages settlement of disputes outside courts but within the framework of mediation proceedings.

The rationale of the self-critical analysis privilege is to encourage voluntary compliance with legal and regulatory requirements and the remediation of deficiencies in products or practices, through meaningful self-analysis or self-evaluation of own practices and procedures.[63]

The trade secrets privilege is aimed at encouraging owners of trade secrets to enforce their rights in court without risking public disclosure of such trade secrets.[64]

The privilege against self-incrimination in civil proceedings encourages witnesses to come forward with evidence by protecting them from being prosecuted as a result of doing so.[65]

The rationale of the state secrets privilege is to avoid harming the nation by disclosing confidential information.[66]

The patent agent privilege extends the attorney-client privilege to patent agents rendering legal advice on patent law.[67]

The rationale of the accountant privilege is to ensure that the accountant is in possession of all relevant facts and information necessary to provide professional advice and that such advice is provided candidly and independently by the accountant.[68]

Privileges reflect the public policies of a state.[69] However, the absence of privileges in the laws of a particular state does not mean that such state has no public policy on the matter; it only means that it has a policy favoring disclosure over confidentiality.[70]

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62 *Rush and Tompkins Ltd. v Greater London Council* [1988] 2 WLR 533 (CA), at 537.

63 D'Silva and Guthrie, *Self-Evaluation Privilege* (available at http://www.van.stikeman.com/Self-Evaluative_Privilege-DSilvaGuthrie-Mar2007.pdf).

64 J. G. Snider and H. A. Ellins, *Corporate Privileges and Confidential Information* (1999), at § 8-2.

65 Phipson, Malek and Auburn, *supra* note 46, at 669.

66 *Conway v Rimmer* [1968] A.C. 910, at 940.

67 See McCabe, "Attorney-Client Privilege And Work Product Immunity In Patent Litigation", in A. B. Askew and E. C. Jacobs (eds), *2001 Intellectual Property Law Update* (2001).

68 Maples and Blissenden, "The Proposed Client-Accountant Tax Privilege in Australia: How Does It Sit with the Comon Law Doctrine of Legal Professional Privilege?", 39 *AT Rev* (2010) 20, at 28.

69 Bradford, "Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution", 52 *U. Pitt. L. Rev.* (1991) 909, at fn. 53; Mosk and Ginsburg, *supra* note 1, at 346.

70 Bradford, *supra* note 69, at fn. 53; Mosk and Ginsburg, *supra* note 1, at 382.

In the same vein, some privileges may be absolute in certain jurisdictions and not in others.[71] For the latter jurisdictions, a balancing exercise between the different public interests at stake may be necessary.[72] For example, Lord Scott of Foscote in *Three Rivers* reaffirmed the absolute nature of the attorney-client privilege in English case law in opposition to Canadian case law:

> The Supreme Court of Canada has held that legal professional privilege although of great importance is not absolute and can be set aside if a sufficiently compelling public interest for doing so, such as public safety, can be shown ... But no other common law jurisdiction has, so far as I am aware, developed the law of privilege in this way. Certainly in this country legal professional privilege, if it is attracted by a particular communication between lawyer and client or attaches to a particular document, cannot be se aside on the ground that some other higher public interest requires that to be done.[73]

The definitions of absolute and qualified privileges vary from a jurisdiction to another and from a commentator to another. For example, in French law, the legal privilege is said to be absolute because it cannot be waived,[74] not even by the client. However, in English law the privilege is said to be absolute because it "cannot be overridden by some supposedly greater public interest," although "[i]t can be waived by the person, the client, entitled to it and it can be overridden by statute."[75] Mosk and Ginsburg provide the following distinction in this respect:

> An absolute privilege allows the holder to refuse to testify or to submit evidence under any circumstance, whereas a qualified privilege can be overcome under certain conditions, such as when showing is made that the evidence is necessary for a fair determination.[76]

However, Mosk and Ginsburg do acknowledge that an absolute privilege may nevertheless have exceptions.[77] In fact, importance should not be given to the actual characterization attributed to a given privilege by the courts or commentators but should be given to the actual characteristics of, and policy considerations behind, such privilege.

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71 Toulson and Phipps, *supra* note 40, at 323.

72 *Medcalf v Mardell* [2002] UKHL 27, at 60 (Cited in Toulson and Phipps, *supra* note 40, at 323).

73 *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6)* [2004] 3 WLR 1274 (HL), at 1282 (Quoted in Toulson and Phipps, *supra* note 40, at 323).

74 See Section 2.3.3.

75 *Three Rivers (No 6)* (HL), *supra* note 73, at 1281-2.

76 Mosk and Ginsburg, *supra* note 1, at 346.

77 *Id.*

1.2.2 Origins

Privileges[78] have developed in common law and civil law on different grounds. In common law, privileges have their origins in the emergence of testimonial compulsion and were considered as a rule of civil procedure from the outset.[79] Whereas in civil law, the French Penal Code of 1810 made the disclosure of certain categories of secrets an offense under criminal law.[80] Only later did it become a rule of civil procedure.[81]

1.2.2.1 In common law

Until the 15th century, witnesses in the present meaning were practically unknown to trials of common law.[82] Witnesses were summoned with the jurors and gave their testimony solely to the jurors during the deliberations, which made them "half jurors, half witnesses."[83] At the end of the 15th century, this practice fell into disuse and the witness appeared as we know him today, *i.e.* "the person who happens to know something on the matter in issue."[84] At that time, witnesses could not be compelled to appear and were not even welcome in court.[85] The law did not distinguish the witness trying to influence the jury for his own interests from the witness who objectively tells the facts.[86] Moreover, witnesses who came voluntarily risked being sued for maintenance[87] by the party against whom they had spoken[88]:

> If he had come to the bar out of his own head and spoken for one or the other, it is maintenance, and he will be punished for it. And if the jurors come to a man where he lives, in the country, to have knowledge of the truth of the matter, and he informs them, it is

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78 Reference is made to the categories of privileges examined in this work. The medical privilege and the priest-penitent privilege, for instance, have different origins and rationales.

79 See Section 1.2.2.1.

80 P. Lambert, *Le secret professionnel* (2005), at 21.

81 See Section 1.2.2.2.

82 Wigmore, *supra* note 2, at 641.

83 *Id.*, W. Holdsworth, *A History of English Law (Vol. I)* (1966), at 334; J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), at 122.

84 Wigmore, *supra* note 2, at 642.

85 *Id.*, Holdsworth, *A History of English Law (Vol. I)*, *supra* note 83, at 335.

86 Wigmore, *supra* note 2, at 642-3.

87 "Improper assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else's litigation." (B. A. Garner (ed.), *Black's Law Dictionary* (2009)).

88 Holdsworth, *A History of English Law (Vol. I)*, *supra* note 83, at 335; W. Holdsworth, *A History of English Law (Vol. IX)* (1966), at 182; Wigmore, *supra* note 2, at 642-3; Thayer, *supra* note 83, at 126.

> justifiable; but if he comes to the jurors, or labours to inform them of the truth, it is maintenance, and he will be punished for it.[89]

The jury was less and less able to do justice given the existence of the doctrine of maintenance.[90] Creating a testimonial compulsion was the solution to this obstacle: "What a man does by compulsion of law cannot be called maintenance."[91] In 1562, the Statute 5 Elizabeth c. 9 § 12 provided that a penalty would be imposed and civil action granted against any person who refused to appear as a witness after being served and tendered his reasonable costs.[92] This statute introduced the duty to testify in civil cases[93] but appears as having served a different purpose, as suggested by Wigmore:

> By giving a command to those who were willing enough, but were timorous, it represented their right to come and to testify, unmolested by the apprehension of maintenance-proceedings. Its provision for a civil action against persons refusing – a provision which at first sight gives us of to-day an incorrect impression – was intended still further to counteract their fears of maintenance-proceedings by the opponent if they did come, by subjecting them to an action by the summoning party if they did not come.[94]

Although this statute imposed the obligation to attend, it was only in the 17th century that answering a specific question on the stand could be compelled[95]:

> You must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery. If there be anything that imports the king's service, they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer.[96]

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89 [1450] Y.B. 28 H. VI, 6 (Quoted in Wigmore, *supra* note 2, at 643).

90 Holdsworth, *A History of English Law (Vol. I)*, *supra* note 83, at 335; Wigmore, *supra* note 2, at 643.

91 [1450] Y.B. 28 H. VI, 6, *supra* note 89 (Quoted in Thayer, *supra* note 83, at 128-9).

92 Statute 5 Elizabeth c. 9, § 12: "'If any person or persons upon whom any process out of any of the courts of record within this realm or Wales shall be served to testify or depose concerning any cause or matter depending in any of the same courts, and having tendered unto him or them according to his or their countenance or calling, such reasonable sums of money for his or their costs or charges as having regard to the distance of the places is necessary to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful and reasonable let or impediment to the contrary, that then the party making default' shall forfeit £10 and give further recompense for the harm suffered by the party aggrieved." (Quoted in Wigmore, *supra* note 2, at 643).

93 Compulsory testimony in criminal cases only appeared in the 17th century and was enacted in general statutes in the 18th century (Wigmore, *supra* note 2, at 645-646).

94 Wigmore, *supra* note 2, at 644-5.

95 *Id.*, at 645.

96 Sir Francis Bacon in *Countess of Shrewsbury's Trial* [1612] 2 How. St. Tr. 769, at 778 (Quoted in Wigmore, *supra* note 2, at 645).

This testimonial duty applied to every form of evidence, including documents.[97]

From the obligation to give testimony emerged privileges.[98] Indeed, given that the society imposes on individuals a duty to testify, those individuals may fairly demand that society "make[s] the duty as little onerous as possible"[99] by compelling witnesses to sacrifice their privacy only when their knowledge is essential for the ascertainment of truth, or when the benefits of exacting it outweighs the disadvantages caused;[100] "The various privileges are merely attempts to define the situations in which, by experience, the exaction would be unnecessary or disadvantageous."[101]

1.2.2.2 In civil law

The first privilege codified in civil law was the *secret professionnel* or professional secrecy. The notion of *secret professionnel* was first codified in the French Penal Code of 1810 as follows:

> 378. The physicians, surgeons, and other officers of health, likewise the apothecaries, midwives, and all other persons, to whom, in consequence of their state or profession, secrets are confided, and who, except in cases in which the law obliges them to give information, shall have disclosed such secrets; shall be punished with imprisonment from one month to six months, and a fine of from 100 to 500 francs.[102]

The objective of this provision, as presented by Monseignant during the *travaux préparatoires*, was to prevent individuals to whom secrets are confided in consequence of their state or profession from naming and shaming persons whose trust could be betrayed.[103] This provision was said to be a tribute to morality and justice.[104]

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97 Wigmore, *supra* note 2, at 652.

98 *Id.*, at 662; Harvard Law Review Association, "Developments in the Law - Privileged Communications", 98 *Harv. L. Rev.* (1985) 1450, at 1455; Holdsworth, *A History of English Law (Vol. IX)*, *supra* note 88, at 131; Holdsworth, *A History of English Law (Vol. IX)*, *supra* note 88, at 197, 201-2.

99 Wigmore, *supra* note 2, at 650.

100 *Id.*, at 650-1.

101 *Id.*

102 Art. 378 French Penal Code of 1810 (Translated in Holmberg, *Penal Code 1810* (available at http://www.napoleon-series.org/research/government/france/penalcode/)).

103 Monseignant to the Legislative Body on 17 February 1810 (J.-G. Locré, *Législation civile* (1837), at 464 (Quoted in Lambert, *supra* note 80, at 22)).

104 *Id.*

Even prior to the Penal Code of 1810, jurisprudence acknowledged the existence of privileges in French law.[105] However, the jurisprudence only recognized privilege for secrets which were explicitly confided and not for "implicit secrets" (secrets which were not formally confided).[106]

As of the middle of the 19th century, Article 378 of the Penal Code of 1810 governed privileges before French courts, including civil courts.[107] A provision of penal law was thus applicable to civil procedure, which ultimately opened the door to a number of difficulties in the taking of evidence by courts.[108] French law has evolved since 1810 but the *secret professionnel* is still found in the Penal Code.[109]

1.2.3 Forms of objections

Privileges can arise various ways in arbitration. The following situations are the most likely to come up: (i) refusing to produce evidence requested by the opposing party, (ii) refusing to produce evidence requested by the tribunal, (iii) contesting the admissibility of evidence produced by the opposing party, (iv) refusing to appear as a witness, (v) refusing to answer certain questions as a witness, (vi) refusing to produce evidence when appearing as a witness, (vii) contesting the appearance of a witness, (viii) contesting the admissibility of questions asked by the opposing party to a witness, (ix) contesting the admissibility of questions asked by the tribunal to a witness, (x) contesting the admissibility of a witness statement in part or in its entirety, (xi) contesting the admissibility of answers given by a witness, (xii) contesting the admissibility of declarations made by the opposing party, (xiii) refusing to answer certain questions from the tribunal directed at the parties or their counsel when they are not appearing as witnesses, (xiv) refusing to answer certain questions asked by the opposing party when not appearing as a witnesses, and (xv) contesting the questions asked by the tribunal to the opposing party or their counsel.

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105 J.-L. Baudouin, *Secret professionnel et droit au secret dans le droit de la preuve: Étude de droit québecois comparé au droit français et à la Common Law* (1965), at 8; C. Morizot-Thibault, *De l'instruction préparatoire (étude critique du Code d'instruction criminelle)* (1906), at 432.

106 Morizot-Thibault, *supra* note 105, at 433.

107 *Id.*

108 *Id.*

109 "The disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year's imprisonment and a fine of € 15,000." (Art. 226-13 FPC, *supra* note).

1.3 The Taking of Evidence in Arbitration: Laws and Rules

1.3.1 Arbitration laws

1.3.1.1. Model Law

The Model Law on International Commercial Arbitration has been drafted by the United Nations Commission on International Trade Law "in view of the desirability of uniformity in the law of arbitral procedures and the specific need of international commercial arbitration practice."[110] As of October 2012, more than 60 states had enacted legislation based on the UNCITRAL Model Law.[111]

The UNCITRAL Model Law does not specifically provide for the powers of the tribunal to take evidence. Article 19 provides that "the parties are free to agree on the procedure to be followed by the tribunal in conducting the proceedings"[112] and "[f]ailing such agreement, the arbitral tribunal may, subject to the provisions of [the Model Law], conduct the arbitration in such manner as it considers appropriate."[113] In the conduct of the arbitration, the tribunal has the power "to determine the admissibility, relevance, materiality and weight of any evidence."[114]

Moreover, Article 18 provides that "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."[115] Article 18 constitutes a "fundamental principle … applicable to the entire arbitral proceedings"[116] and is said to be one of the "pillars" of the Model Law by representing the basis of a fair trial.[117] For this reason, Article 18 is the most uniformly adopted provision of the Model Law.[118]

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110 Resolution on the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law Adopted by the General Assembly on 11 December 1985 (A/40/72) (Quoted in P. Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (2000), at 3).

111 Status of the UNCITRAL Model Law on International Commercial Arbitration (available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html).

112 Art. 19(1) Model Law.

113 Art. 19(2) Model Law.

114 *Id.*

115 Art. 18 Model Law.

116 Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (Vienna, 3-21 June 1985) (A/40/17), at para. 176 (Quoted in Binder, *supra* note 110, at 123).

117 Binder, *supra* note 110, at 123.

118 *Id.*

1.3.1.2 English law

Section 34 of the Arbitration Act provides that it is for the tribunal "to decide all procedural and evidential matters, subject to the right of the parties to agree any matter."[119] This includes "whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage [and] 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."[120]

For "decisions on matters of procedure and evidence,"[121] and more generally in conducting the arbitration, the tribunal must "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] adopt procedures suitable to the circumstances of the particular case."[122]

1.3.1.3 American law

The Federal Arbitration Act (FAA), enacted in 1925, governs international arbitrations having their seat in the United States.[123] Most states, such as New York State, have also enacted international arbitration legislation.[124]

Although the FAA does not specifically provide for the powers of the tribunal to take evidence, it stipulates at Section 7 that the tribunal "may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."[125] The taking of evidence will most likely be addressed in state enacted statutes[126] and in arbitration rules (and their suggested guidelines[127])

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119 Section 34(1) Arbitration Act.

120 Section 34(2) Arbitration Act.

121 Section 33(2) Arbitration Act.

122 Section 33(1) Arbitration Act.

123 Lindsey and Lahlou, "The Law Applicable to International Arbitration in New York", in J. H. Carter and J. Fellas (eds), *International Commercial Arbitration in New York* (2010) 1, at 2, 4.

124 *Id.*, at 2; Holtzmann and Donovan, "National Report for the United States of America (2005)", in J. Paulsson (ed.), *International Handbook on Commercial Arbitration* (1984, 2005 Suppl. No. 44), at 2; Conflicts between the FAA and state enacted statutes are resolved by the preemption doctrine, which is outside the scope of this work. (See Lindsey and Lahlou, *supra* note 123, at 3-4).

125 § 7 FAA.

126 Holtzmann and Donovan, *supra* note 124, at 38.

127 *Id.*, at 40; Gardiner, Kuck and Bédard, "Discovery", in J. H. Carter and J. Fellas (eds), *International Commercial Arbitration in New York* (2010) 269, at 274.

frequently incorporated into arbitration agreements. United States courts uphold the principle that "[t]he arbitrator is the judge of the admissibility and relevancy of evidence submitted in an arbitration proceeding."[128]

The parties' autonomy to agree on the rules governing the arbitration, including in the taking of evidence, is a fundamental principle established by federal and state case law,[129] although it is not expressly referred to in the FAA.[130]

1.3.1.4 French law

Under French law, it is the responsibility of the tribunal[131] to take evidence, and more specially to "take all necessary steps concerning evidentiary and procedural matters."[132] The parties to the arbitration may determine the procedure to be followed by the tribunal in the taking of evidence. If the parties fail to do so in the arbitration agreement, it will be the responsibility of the tribunal to determine the procedure, as set out in Article 1509 of the French Code of Civil Procedure (FCCP):

> An arbitration agreement may define the procedure to be followed in the arbitral proceedings, directly or by reference to arbitration rules or to procedural rules.
>
> Unless the arbitration agreement provides otherwise, the arbitral tribunal shall define the procedure as required, either directly or by reference to arbitration rules or to procedural rules.[133]

In the taking of evidence, the tribunal may call witnesses and may order a party to produce documentary evidence.[134] More particularly, if a party is in possession of evidence, the tribunal may enjoin that party to produce it, determine the manner in which it is to be produced and, if necessary, attach penalties to such order for production. Article 1467 of the FCCP provides for such powers of the tribunal:

> The arbitral tribunal shall take all necessary steps concerning evidentiary and procedural matters, unless the parties authorise it to delegate such tasks to one of its members.

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128 Hoteles Condado Beach, La Concha and Convention Center v. Union De Tronquistas Local 901, 763 F.2d 34 (1st Cir.1985), at 39; See also Shaughnessy, "Dealing with Privileges in International Commercial Arbitration", 792 *PLI/Lit* (2009) 257, at 264.

129 Gardiner, Kuck and Bédard, *supra* note 127, at 271; Born, *supra* note 18, at 1752.

130 T. H. Webster, *Handbook of UNCITRAL Arbitration* (2010), at 269; Born, *supra* note 18, at 1752.

131 The parties may authorize the arbitral tribunal to delegate such task to one of its members. (Art. 1467 FCCP).

132 Art. 1467 FCCP.

133 Art. 1509 FCCP.

134 Art. 1467 FCCP.

> The arbitral tribunal may call upon any person to provide testimony. Witnesses shall not be sworn in.[135]

Throughout the arbitration, the tribunal "shall ensure that the parties are treated equally and shall uphold the principle of due process."[136] If one of the parties wishes to rely on evidence held by a third party, such party may "upon leave of the arbitral tribunal, have that third party summoned before the President of the *Tribunal de grande instance* for the purpose of obtaining a copy thereof *(expédition*) or the production of the … evidence."[137]

1.3.1.5 Swiss law

In Swiss law, Article 184 of the Private International Law Act (PILA) provides that the tribunal shall take evidence:

> The Arbitral tribunal shall itself conduct the taking of evidence.
>
> If the assistance of state judiciary authorities is necessary for the taking of evidence, the Arbitral tribunal or a party with the consent of the Arbitral tribunal may request the assistance of the state judge at the seat of the Arbitral tribunal; the judge shall apply his own law.[138]

Article 184 PILA must be read in conjunction with Article 182 PILA, which reads as follows:

> The parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.
>
> If the parties have not determined the procedure, the Arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration.
>
> Regardless of the procedure chosen, the Arbitral tribunal shall ensure equal treatment of the parties and the right of both parties to be heard in adversarial proceedings.[139]

As is the case under the other arbitration laws examined here, the tribunal has broad discretion in the taking of evidence[140] and, while the parties may agree upon the methods for gathering and presenting evidence, it is for the

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135 *Id.*

136 Art. 1510 FCCP.

137 Art. 1469 FCCP.

138 Art. 184 PILA.

139 Art. 182 PILA.

140 von Segesser and Schramm, "Swiss Private International Law Act (Chapter 12), Article 184 [Procedure: Taking of Evidence]", in L. A. Mistelis, *Concise International Arbitration* (2010) 938, at 938.

tribunal to ultimately rule on the admissibility and relevance of any evidence.[141]

The tribunal may order the production of documents, put questions to the witnesses, appoint its own expert or proceed with site inspection.[142]

The tribunal, or a party with the consent of the tribunal, may request the assistance of the Swiss court at the seat of the arbitration to assist in the taking of evidence. In such case, the Swiss court shall apply its own law.[143]

1.3.2 Arbitration rules

All arbitration laws studied in this work recognize the autonomy of the parties to determine the rules governing the conduct of the arbitral proceedings, including in relation to the taking of evidence. The parties may determine the procedure before or after the dispute has arisen[144] by establishing their own procedural rules or referring to pre-existing rules such as institutional arbitration rules or the IBA Rules.[145] Although the parties may establish their own set of procedural rules, the parties rarely develop a complete procedural code for a particular case.[146] The parties may also refer to a law of civil procedure governing proceeding before courts or to a foreign arbitration law.[147]

While most sets of arbitration rules such as the UNCITRAL Rules,[148] the LCIA Rules,[149] the ICC Rules,[150] and the ICDR Rules[151] recognize the agreement of the parties on procedural matters, they also permit deviations from those rules under the principle of party autonomy. The autonomy of the parties is further limited by the provisions of the *lex arbitri*. However, most *leges arbitri* contain no specific provisions as to the admissibility of evidence or do they address the issue of privileges.

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141 Roney and Müller, "The Arbitral Procedure", in G. Kaufmann-Kohler and B. Stucki (eds), *International Arbitration in Switzerland* (2004) 49, at 59.

142 *Id.*, at 60-5.

143 Art. 184(2) PILA.

144 Poudret and Besson, *supra* note 32, at 459.

145 *Id.*

146 *Id.*; Karrer, "Freedom of an Arbitral Tribunal to Conduct Proceedings", 10 *ICC International Court of Arbitration Bulletin* (1999) 14, at 17.

147 Poudret and Besson, *supra* note 32, at 460.

148 Art. 1(1) UNCITRAL Rules.

149 Art. 14.2 LCIA Rules.

150 Art. 19 ICC Rules.

151 Art. 1(a) ICDR Rules.

It is extremely rare in practice that the parties anticipate the question of privileges when negotiating the arbitration agreement.[152] As Tawil rightly points out, "[n]egotiating parties seek business success, not legal disputes."[153] However it is not entirely uncommon to see in arbitration agreements wording to the effect that communications with in-house counsel are protected by the attorney-client privilege.

It is also possible for the parties to anticipate the question of privileges once the dispute has arisen. For example, in *ad hoc* or institutional mediation, the parties may agree that all communications and documents exchanged in the course of the mediation be protected by the mediation privilege. In institutional mediation, a provision is usually found in the mediation rules.[154] For example, the Swiss Mediation Rules provide that "[a]ny observation, statement or proposition made before the mediator or by him/herself cannot be used later, even in case of litigation or arbitration, unless there is a written agreement of all the parties."[155] As another example, the LCIA Mediation Rules contain quite comprehensive provisions on privileges arising from mediation proceedings:

> The mediation process and all negotiations, and statements and documents prepared for the purposes of the mediation, shall be confidential and covered by "without prejudice" or negotiation privilege,[156]
>
> All documents or other information produced for or arising in relation to the mediation will be privileged and will not be admissible in evidence or otherwise discoverable in any litigation or arbitration, except for any documents or other information which would in any event be admissible or discoverable in any such litigation or arbitration, and[157]
>
> The parties shall not rely upon, or introduce as evidence in any arbitral or judicial proceedings, any admissions, proposals or views expressed by the parties or by the mediator during the course of the mediation.[158]

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152 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 509; Waincymer, *supra* note 23, at 802; Meyer-Hauser and Sieber, *supra* note 23, at 183; Tawil and Lima, *supra* note 18, at 37; de Boisséson, *supra* note 12, at 713.

153 Tawil and Lima, *supra* note 18, at 37.

154 See, *e.g.*, Art. 18(1) Swiss Mediation Rules, Art. 10 LCIA Mediation Rules, Art. 10 ICDR Mediation Rules, Art. 12 HKIAC Mediation Rules.

155 Art. 18(1) Swiss Mediation Rules.

156 Art. 10.2 LCIA Mediation Rules.

157 Art. 10.4 LCIA Mediation Rules.

158 Art. 10.6 LCIA Mediation Rules.

The parties may also agree on privileges during the course of the arbitral proceedings.[159] In *Glamis Gold*, for instance, the tribunal concluded that, in their submissions and at the hearings, the parties appeared to have agreed that the privilege laws of the United States should guide the tribunal, even though they disagreed on which state's laws should be taken into consideration.[160]

1.3.2.1 ICC Rules

The first Rules of Arbitration of the International Chamber of Commerce were published in 1922 and the current rules have been in force since 2012.

In arbitration proceedings under the ICC Rules, it is the task of the tribunal to "establish the facts of the case"[161] and this "by all appropriate means."[162] In the taking of evidence and, more generally, in the conduct of the arbitration, the tribunal "shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."[163]

In relation to the present subject matter, particular attention must be paid to Article 22, which provides at paragraph 3 that "[u]pon the request of any party, the arbitral tribunal ... may take measures for protecting trade secrets and confidential information."[164]

1.3.2.2 LCIA Rules

Under the LCIA Rules, unless the parties have agreed otherwise, and "only after giving the parties a reasonable opportunity to state their views,"[165] the tribunal has the power "to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant [and] 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 issue of fact."[166]

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159 See Poudret and Besson, *supra* note 32, at 462.

160 Glamis Gold, Ltd. v. The United States of America, Decision on Parties' Request for Production of Documents Witheld on Grounds of Privilege (17 November 2005), at para. 19.

161 Art. 25(1) ICC Rules.

162 *Id.*

163 Art. 22(4) ICC Rules.

164 Art. 22(3) ICC Rules.

165 Art. 22.1 LCIA Rules.

166 *Id.*

The tribunal has "a duty 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(s)."[167]

1.3.2.3 ICDR Rules

The American Arbitration Association introduced the first set of AAA rules specifically drafted for international arbitration in 1991.[168] Those rules were modeled on the UNCITRAL Rules (1976).[169] The AAA is the most important arbitral institution in the United States[170] and is one of the largest in the world.[171]

The ICDR Rules provide that "[t]he tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party [and that t]he tribunal shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and a client."[172] It is further stipulated that "the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided 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."[173] Moreover, the ICDR Rules grant to the tribunal the power to "order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate."[174]

1.3.2.4. Swiss Rules

The Swiss Rules of International Arbitration came into effect in 2004 when the Chambers of Commerce of the Cantons of Basel, Berne, Geneva, Ticino, Vaud, and Zurich agreed to abandon their respective international arbitration rules in order to adopt a unified set of rules.[175] The Swiss Rules were originally

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167 Art. 14.4(i) LCIA Rules.

168 M. F. Gusy, J. M. Hosking and F. T. Schwarz, *A Guide to the ICDR International Arbitration Rules* (2011), at 9, 15.

169 *Id.*

170 Holtzmann and Donovan, *supra* note 124, at 11.

171 Gusy, Hosking and Schwarz, *supra* note 168, at 13-4

172 Art. 20(6) ICDR Rules.

173 Art. 16(1) ICDR Rules.

174 Art. 19(3) ICDR Rules.

175 Füeg, "The Swiss Chambers' Court of Arbitration and Mediation", in R. Füeg (ed.), *The Swiss Rules of International Arbitration - Five Years of Experience* (2009) 4, at 4.

based on the 1976 UNCITRAL Arbitration Rules.[176] They were revised in 2012 to take into account the 2010 revision of the UNCITRAL Rules.[177]

Under the Swiss Rules, it is the responsibility of the tribunal to "determine the admissibility, relevance, materiality, and weight of the evidence."[178] Article 24(3) vests in the tribunal the power to order the parties "to produce documents, exhibits, or other evidence."[179] The Swiss Rules further provide that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that it ensures equal treatment of the parties and their right to be heard."[180]

1.3.2.5 UNCITRAL Rules

The UNCITRAL Rules (1976) have been developed by the United Nations Commission on International Trade Law and were first adopted in 1976.[181] In 2010, a revised version was adopted "to conform to current practices in international trade and to meet changes that have taken place over the last thirty years in arbitral practice."[182]

The UNCITRAL Rules provide that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."[183] Moreover, the tribunal can "require the parties to produce documents, exhibits or other evidence."[184] In conducting the arbitration, the tribunal must ensure that "the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case."[185]

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176 Geisinger, "How to Work with the Swiss Rules – The Arbitrator's View", in R. Füeg (ed.), *The Swiss Rules of International Arbitration - Five Years of Experience* (2009) 32, at 33.

177 Habegger, "The Revised Swiss Rules of International Arbitration", 5 *New York Dispute Resolution Lawyer* (2012) 61, at 61.

178 Art. 24(2) Swiss Rules.

179 Art. 24(3) Swiss Rules.

180 Art. 15(1) Swiss Rules.

181 C. Croft, C. Kee and J. Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (2013), at 2; Webster, *supra* note 130, at 9.

182 Resolution Adopted by the General Assembly on 6 December 2010 on the Report of the Sixth Committee (A/65/465).

183 Art. 27(4) UNCITRAL Rules.

184 Art. 27(3) UNCITRAL Rules.

185 Art. 17(1) UNCITRAL Rules.

1.3.2.6 IBA Rules

The first IBA Rules were published in 1983.[186] The IBA Rules are not institutional arbitration rules covering all aspects of arbitration proceedings. They are limited to the taking of evidence; they complement the institutional or *ad hoc* arbitrations rules chosen by the parties, if any.[187] The IBA Rules can be incorporated by reference in the arbitration agreement or adopted by the parties during the proceedings.[188] Even when the parties have not made any reference to the IBA Rules, they are nevertheless a frequent source of guidance for tribunals.[189]

The IBA Rules (2010) are "intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions."[190]

These Rules provide that the "Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence"[191] and shall further, "at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection"[192] for reasons of "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable,"[193] "grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling,"[194] and "grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling."[195] Article 9(3) provides the following guidance to the tribunal in considering issues of privilege:

> 3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:

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186 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, *Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* (available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx), at 2; Poudret and Besson, *supra* note 32, at 552.

187 Zuberbühler et al., *supra* note 34, at 11.

188 Preamble IBA Rules.

189 Poudret and Besson, *supra* note 32, at 552.

190 Preamble IBA Rules.

191 Art. 9(1) IBA Rules.

192 Art. 9(2) IBA Rules.

193 Art. 9(2)(b) IBA Rules.

194 Art. 9(2)(e) IBA Rules.

195 Art. 9(2)(f) IBA Rules.

> (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
>
> (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;
>
> (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;
>
> (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and
>
> (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.[196]

Article 9 of the IBA Rules of Evidence (2010) is a substantial improvement in regard to privileges in comparison with the IBA Rules of Evidence (1999). The 1999 Rules were said, on matters of privilege, to "provide scant guidance on (a) the substance and application of the rules to be applied and (b) how to determine them."[197] Article 9(1) of the IBA Rules (1999) only provided that the tribunal could exclude from evidence or production any document, statement, oral testimony or inspection for reason of privilege under the legal or ethical rules determined by the tribunal to be applicable,[198] whereas Article 9(3) of the IBA Rules (2010) provides additional non-binding guidance on determining the applicable privileges.[199]

Even so, the IBA Rules still leave room for "debate, argument and uncertainty"[200] on matters of privilege.

1.3.3 The lack of guidance on privileges in arbitration laws and rules

As Lord Chancellor Bacon once said, the best law is the one leaving the less room for the arbitrariness of the judge.[201] Unfortunately, arbitration laws and

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196 Art. 9(3) IBA Rules.

197 Cohen, "Options for Approaching Evidentiary Privilege in International Arbitration", in T. Giovannini and A. Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (2009) 423, at 424.

198 Art. 9(2)(b) IBA Rules.

199 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, *supra* note 186, at 25.

200 Burn and Skelton, "The Problem with Legal Privilege in International Arbitration", 72 *Arbitration* (2006) 124, at 128.

201 Lambert, *supra* note 80, at 14.

rules do not offer much guidance to the tribunal in relation to privileges. In fact, most arbitration laws contain no specific provision as to the admissibility of evidence or do they address the issue of privileges.[202] Institutional arbitration rules do not provide much additional guidance,[203] save as for a few references to privileges but without addressing "the core question of which communications should be treated as privileged."[204] In fact, it has been said that "arbitration rules typically do little more than repeat what the *lex arbitri* has already said."[205]

Institutional arbitration rules containing provisions on privileges are the ICC Rules, the AAA ICDR Rules, the WIPO Arbitration Rules, the ICSID Rules, the International Institute for Conflict Prevention and Resolution Rules for Non-Administered Arbitration, and the Commercial Arbitration and Mediation Center for the Americas (CAMCA) Arbitration Rules. The IBA Rules (2010) also contain references to privileges.

As set out above, the ICDR Rules provide that the tribunal must take into account applicable rules of legal privilege.[206] This provision is also found in the AAA Commercial Rules.[207] The ICDR Guidelines for Arbitrators Concerning Exchanges of Information, applicable to all international arbitrations managed by the ICDR as from 31 May 2008, also provide that:

> The tribunal should respect applicable rules of privilege or professional ethics and other legal impediments. When the parties, their counsel or their documents would be subject under applicable law to different rules, the tribunal should to the extent possible apply the same rule to both sides, giving preference to the rule that provides the highest level of protection.[208]

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202 Sindler and Wüstemann, *supra* note 11, at 622; Alvarez, *supra* note 11, at 677; Born, *supra* note 18, at 1910; Waincymer, *supra* note 23, at 802; Meyer, *supra* note 7, at 366-7; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 506; Tevendale and Cartwright-Finch, *supra* note 25, at 825; Kaufmann-Kohler and Bärtsch, *supra* note 25, at 19.

203 Born, *supra* note 18, at 1911; Waincymer, *supra* note 23, at 802; Meyer-Hauser and Sieber, *supra* note 23, at 181; Meyer, *supra* note 7, at 367; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 506; Player and Morel de Westgaver, *supra* note 26, at 101; Rubinstein and Guerrina, *supra* note 24, at 592; von Schlabrendorff and Sheppard, *supra* note 19, at 757; Mosk and Ginsburg, *supra* note 1, at 374; Fry, *supra* note 17, at 210; Tevendale and Cartwright-Finch, *supra* note 25, at 825; Tawil and Lima, *supra* note 18, at 31; de Boisséson, *supra* note 12, at 706; Sindler and Wüstemann, *supra* note 11, at 622; Reiser, *supra* note 18, at 661; Alvarez, *supra* note 11, at 678; Kaufmann-Kohler and Bärtsch, *supra* note 25, at 19.

204 Rubinstein and Guerrina, *supra* note 24, at 593.

205 Karrer, *supra* note 146, at 17.

206 Art. 20(6) ICDR Rules.

207 R-34(c) AAA Commercial Rules.

208 Section 7 ICDR Guidelines.

The ICC Rules stipulate at Article 22(3) that "[t]he arbitral tribunal may take measures for protecting trade secrets and confidential information."[209] Under this provision, the tribunal could theoretically authorize limited disclosure of documents to certain persons within the proceedings or the submission of two sets of documents: a redacted version for the opposing party and an unredacted version for the tribunal.[210] However, some commentators suggest that Article 22(3) should be interpreted as a reference to commercial confidence and not to privileges.[211] This provision was initially inspired by Article 52 of the WIPO Arbitration Rules.[212] Moreover, the ICC Mediation Rules forbid the production in judicial and arbitration proceedings of any document (except documents which can be independently obtained), statement, communication, views, suggestions, and admissions, expressed or made in the course of meditation proceedings.[213]

The WIPO Rules is one of the rare sets of arbitration rules which provides for a mechanism to deal with privileges and, more specifically, trade secrets. Indeed, one of the objectives of the World Intellectual Property Organization being "to promote the protection of intellectual property throughout the world,"[214] naturally one expects that trade secrets be protected in arbitrations held under the WIPO Rules. While Articles 73 and 74 of the WIPO Rules forbid disclosure of confidential information obtained in the proceedings, Article 52 provides additional protection from the outset; that is, before the actual disclosure by the parties.[215] Contrary to the protection offered by Articles 73 and 74, protection under Article 52 can be obtained only by making an application to the tribunal.[216] For completeness, it should be noted that the parties may also secure confidentiality by entering into a special confidentiality agreement between themselves to avoid the procedure of Article 52.[217]

Under Article 52, a party can make an application to the tribunal to have information classified as confidential, if the information qualifies as follows: the information is "(i) in the possession of a party; (ii) not accessible to the

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209 Art. 22(3) ICC Rules.

210 M. Bühler and T. Webster, *Handbook of ICC arbitration: commentary, precedents, materials* (2008), at 311.

211 Tevendale and Cartwright-Finch, *supra* note 25, at 826; See also Y. Derains and E. A. Schwartz, *A Guide to the ICC Rules of Arbitration* (2005), at 286, fn. 256 (Expressing doubts on the possibility of submitting documents solely to the arbitral tribunal and not to the other party under the ICC Rules).

212 Derains and Schwartz, *supra* note 211, at 285.

213 Art. 9(2) ICC Mediation Rules.

214 Art. 3, Convention Establishing the World Intellectual Property Organization.

215 Smit, "Disclosure of Trade Secrets and Other Confidential Information", in H. Smit (ed.), *WIPO Arbitration Rules: Commentary and Analysis* (2000) 177, at 178.

216 Art. 52(b) WIPO Rules.

217 Smit, "Disclosure of Trade Secrets and Other Confidential Information", *supra* note 215, at 178.

public; (iii) of commercial, financial or industrial significance; and (iv) treated as confidential by the party possessing it."[218] Any protective order shall specify under which conditions and to whom the confidential information may in part or in whole be disclosed.[219]

At the request of a party or on its own motion, and in exceptional circumstances, the tribunal can delegate to a confidentiality advisor the task of assessing whether information should be classified as confidential.[220] The tribunal can also appoint the confidentiality advisor as an expert to report to the tribunal on specific issues related to the confidential information which he has been entrusted with without disclosing this confidential information to the parties or the tribunal.[221] The resort to a confidentiality advisor will be further examined in Section 4.5.3 below. Finally, considering the type of disputes subject to them, the WIPO Arbitration Rules do not address other types of privileges.[222]

Rule 32.2 of the ICSID Arbitration Rules stipulates, in relation to the logistical arrangements for allowing third parties to attend the hearings, that "[t]he Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information."[223]

The International Institute for Conflict Prevention and Resolution Non-Administered Arbitration Rules provide that "[t]he Tribunal is not required to apply the rules of evidence used in judicial proceedings, provided, however, that the Tribunal shall apply the lawyer-client privilege and the work product immunity[. Moreover, t]he Tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered."[224] The Administered Rules contain a similar provision.[225]

Article 22(6) of the Commercial Arbitration and Mediation Center for the Americas (CAMCA) Arbitration Rules states that ["t]he admissibility, relevance, materiality and weight of the evidence offered by any party shall be determined by the tribunal, provided that the tribunal shall consider applicable principles of legal privilege."[226]

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218 Art. 52(a) WIPO Rules.

219 Art. 52(c) WIPO Rules.

220 Art. 52(d) WIPO Rules.

221 Art. 52(e) WIPO Rules.

222 Zammit, Hambidge and Hu, "Disclosure and Admission of Evidence in the International Arbitration of Intellectual Property Disputes", in T. D. Halket (ed.), *Arbitration of International Intellectual Property Disputes* (2012) 325, at 379.

223 Rule 32(2) ICSID Arbitration Rules.

224 Art. 12.2 CPR Non-Administered Rules.

225 Art. 12.2 CPR Administered Rules.

226 Art. 22(6) CAMCA Rules.

It is also worth noting that while the International Arbitration Rules of the Zurich Chamber of Commerce of 1989 provided that "a witness may refuse to testify against himself and refuse testimony which would infringe official or professional secrecy protected by criminal law, unless the witness has been freed of its secrecy obligation,"[227] the Swiss Rules which replaced[228] these rules contain no similar provision.

Finally, the provisions on privileges contained in the IBA Rules are examined above in Section 1.3.2.6.

1.3.4 Is the arbitration agreement an implicit waiver of privilege?

Even though arbitrators are generally not required to apply the rules of evidence applicable in national courts, it is broadly accepted that the parties do not implicitly waive their right to invoke privileges by choosing to arbitrate.[229] Indeed, nowadays, arbitration scholars are of the opinion that tribunals should accede to claims of privilege made in good faith.[230] Protecting privileges in arbitration is even referred to as a principle of arbitral procedure representing sound practice.[231]

Nevertheless, knowing that U.S. courts at least consider that "[w]hen contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial,"[232] one can wonder why tribunals take into account claims of privilege. If arbitration laws, arbitration rules and, more often than not, arbitration clauses and terms of reference are silent on the issue of privileges, what is the rationale for doing so?

One of the rationales is to fulfill the legitimate expectations of the parties. Indeed, for a number of commentators, the parties expect that privileged

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227 Art. 28 Zurich Rules.

228 See Section 1.3.2.4.

229 Alvarez, *supra* note 11, at 676; Sindler and Wüstemann, *supra* note 11, at 618; Mosk and Ginsburg, *supra* note 1, at 376; Tawil and Lima, *supra* note 18, at 31; Gallagher, *supra* note 18, at 45.

230 Mosk and Ginsburg, *supra* note 1, at 381; Shaughnessy, *supra* note 2, at 467; Alvarez, *supra* note 11, at 676; Tevendale and Cartwright-Finch, *supra* note 25, at 833; Tawil and Lima, *supra* note 18, at 35; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 503; Heitzmann, *supra* note 11, at 237; Zuberbühler et al., *supra* note 34, at 172.

231 G. Petrochilos, *Procedural Law in International Arbitration* (2004), at 218, 221.

232 Burton v. Bush, 614 F.2d 389 (4th Cir. 1980), at 390 (Quoted in Holtzmann and Donovan, *supra* note 124, at 62).

communications will remain privileged regardless of the type of dispute resolution mechanism to which their dispute is subject.[233]

A second reason is the (almost) universal recognition of the concept of privilege[234] in courts and in international dispute settlement. Examples are the Hague Convention[235] and the ALI/Unidroit Principles.[236] In arbitration, the IBA Rules at Art. 9(2)(b) specifically require that the tribunal exclude privileged evidence.[237] Indeed, it was important for the IBA Rules 1999 working party that privileges, namely the attorney-client privilege and the settlement privilege, be recognized in international arbitration.[238] As another example, in *Gallo v. Canada*, in reference to the attorney-client privilege, the NAFTA arbitral tribunal declared that "it would be unreasonable for an international tribunal to dispense with such a fundamental privilege."[239]

Thirdly, privileges are no longer considered as mere procedural rules but are increasingly considered as substantive rules by the legal community.[240]

Moreover, privileges produce several social benefits.[241] The attorney-client privilege, for instance, ensures effective legal representation through full and frank communication between the client and the attorney.[242] Effective legal representation outside the litigation context means that the attorney will have all necessary information required to facilitate his client's ongoing compliance with the laws by advising on the meaning and effect of such laws.[243]

Finally, even though one can have reservations concerning this argument, in a 2001 article, Mosk and Ginsburg wrote that "[i]f international arbitrators ignore important privileges, governmental and private parties may be reluctant to submit disputes to arbitration."[244]

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233 Tevendale and Cartwright-Finch, *supra* note 25, at 828, 833; von Schlabrendorff and Sheppard, *supra* note 19, at 765; *Due Process in International Arbitration*, Transcripts, *supra* note 30, at 88; Mosk and Ginsburg, *supra* note 1, at 382.

234 Meyer-Hauser and Sieber, *supra* note 23, at 182; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 503; Mosk and Ginsburg, *supra* note 1, at 381.

235 Art. 11 Hague Convention.

236 Principle 18, ALI/UNIDROIT Principles.

237 Art. 9(2)(b) IBA Rules.

238 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, *supra* note 186.

239 Vito G. Gallo v. Government of Canada, Procedural Order No. 3 (8 April 2009), at para. 50.

240 See Section 3.2; Alvarez, *supra* note 11, at 676.

241 Glynn, *supra* note 21, at 70.

242 *Id.*

243 *Id.*, at 71.

244 Mosk and Ginsburg, *supra* note 1, at 381.

In conclusion, to quote Professor Hazard, "In present-day law, the issue concerning the … privilege is not whether it should exist, but precisely what its terms should be."[245]

1.4 Public Policy Considerations

Public policy considerations may also come into play when dealing with privileges. This section does not intend to be an exhaustive examination of the different principles examined herein but is rather aimed at showing that privileges must be carefully considered by the parties and the tribunal.

1.4.1 The rules determined by the parties

As noted in Section 1.3.3, arbitration laws and rules do not offer much guidance to the tribunal in relation to privileges. Although it is extremely rare in practice,[246] if the parties have chosen a set of procedural rules or a law applicable to privileges, under the principle of autonomy of the parties, the tribunal must follow such agreement.[247] The binding nature of the agreement of the parties is enshrined in the New York Convention,[248] in nearly all arbitration laws of developed jurisdictions,[249] and in arbitration rules of most leading arbitral institutions.[250]

1.4.2 The right to be heard

The right to be heard is one of the fundamental procedural rights[251] provided for in the arbitration laws examined herein.[252] A violation of the right to be heard also constitutes a ground for refusing enforcement of an award under

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245 Hazard, "An Historical Perspective on the Attorney-Client Privilege", 66 *Calif. L. Rev.* (1978) 1061, at 1062.

246 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 509; Waincymer, *supra* note 23, at 802; Meyer-Hauser and Sieber, *supra* note 23, at 183; Tawil and Lima, *supra* note 18, at 37; de Boisséson, *supra* note 12, at 713; Rubinstein and Guerrina, *supra* note 24, at 598; Burn and Skelton, *supra* note 200, at 129; O'Malley, *supra* note 11, at 293.

247 Mosk and Ginsburg, *supra* note 1, at 383; J. G. Frick, *Arbitration and Complex International Contracts* (2001), at 45; Poudret and Besson, *supra* note 32, at 553.

248 Article V(1)(d) New York Convention.

249 Born, *supra* note 18, at 2595.

250 *Id.*, at 1749.

251 *Id.*, at 2575; Poudret and Besson, *supra* note 32, at 471.

252 Art. 18 Model Law; Section 33(1)(a) Arbitration Act; § 10(a)(3) FAA; Art. 1520(4) FCCP; Art. 182(3) PILA.

the New York Convention.[253] The right to be heard takes into consideration both the right to present evidence and the right to respond to the evidence presented by the opposing party.[254] The right to be heard may come into play when the tribunal refuses to order production of, or to admit, allegedly privileged evidence.[255]

The right to be heard is not absolute.[256] For example, the English Arbitration Act provides for a "reasonable opportunity"[257] to present one's case rather than a "full opportunity." The ICC Rules, as well as the UNCITRAL Rules, also provide that each party be given a "reasonable" opportunity to present its case.[258]

In the same vein, courts have dismissed annulment applications on grounds that the tribunal's decision to exclude allegedly privileged evidence did not constitute a breach of the right to adduce evidence if such evidence was cumulative,[259] *i.e.* supporting a fact already established by the existing evidence.[260]

In *Sté Thalès SA et Sté Thalès Underwater Systems SAS c/ Marine de la République de Chine (Taïwan)*, one of a series of landmark cases related to the Taiwan frigates saga,[261] the Paris Court of Appeals held that there was no

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253 Article V(1)(b) New York Convention.

254 G. Kaufmann-Kohler and A. Rigozzi, *Arbitrage International: Droit et pratique à la lumière de la LDIP* (2010), at 514; ATF 130 III 35, at consid. 5; J.-L. Delvolvé, G. H. Pointon and J. Rouche, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2009), at 253; Pierce and Cinotti, "Challenging and Enforcing International Arbitral Awards in New York Courts", in J. H. Carter and J. Fellas (eds), *International Commercial Arbitration in New York* (2010) 357, at 390; Bernardini, "The Role of the International Arbitrator", 20 *Arb. Int.* (2004) 113, at 117 (Quoted in Verbist, "Challenges on Grounds of Due Process Pursuant to Article V(1)(b) of the New York Convention", in E. Gaillard and D. Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008) 679, at 682); Poudret and Besson, *supra* note 32, at 736.

255 Meyer, *supra* note 7, at 366; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 518; Bühler, "La production de documents dans l'arbitrage commercial et international – comment préserver le secret des affaires et le contradictoire? Existe-t-il un «*implied duty*» que les documents et les informations divulgués dans la procédure ne soient utilisés que pour les fins de procédure?", in Actes du colloque CEPANI du 12 novembre 2009, *L'administration de la preuve en matière d'arbitrage* (2009) 79, at 85; Marossi, "The Necessity for Discovery of Evidence in the Fact-Finding Process of International Tribunals", 26 *J. Int'l Arb.* (2009) 511, at 515.

256 Webster, *supra* note 130, at 272.

257 Section 33(1)(a) Arbitration Act.

258 Art. 22(4) ICC Rules; Art. 17(1) UNCITRAL Rules.

259 Howard University v. Metropolitan Campus Police Officer's Union, 512 F.3d 716 (D.C. Cir. 2008); Robbins v. Day, 954 F.2d 679 (11th Cir. 1992).

260 *Black's Law Dictionary* (2009), *supra* note 87.

261 For further reading, see Delanoy, "Les arrêts *frégates de Taïwan* ou le nouveau théorème de Thalès: *si 0 = 0, alors 1 = 2*", 3 *Cahiers de l'arbitrage* (2011) 741, at 743.

violation of the right to be heard when a party is unable to rely on privileged evidence but has other available legal means to present its case.[262]

In brief, Thalès filed an application for annulment before the Paris Court of Appeals in relation to an award rendered in Paris by which the tribunal ordered Thalès to pay more than five hundred million U.S. dollars to the Republic of China.[263] The tribunal concluded that Thalès paid commissions in order to obtain the contract even though this was expressly forbidden under the contract.[264] Indeed, the contract provided that if any commissions were paid in relation to the contract, the Republic of China to could elect, at its own discretion, to cancel the contract or deduct such commissions from the contract price. Thalès argued before the Paris Court of Appeals that the tribunal had violated the adversarial principle as well as international public policy.[265]

During the proceedings, the Republic of China produced evidence that contained information classified as defense secrets by the French authorities. Following the production of this evidence, Thalès' counsel notified the Republic of China that it had produced defense secrets. In response, the Republic of China produced a new memorandum where some of the defense secrets were redacted. However, the new memorandum still contained defense secrets. Upon request from the tribunal, the Republic of China filed a third memorandum, replacing the previous two, in which the information containing defense secrets and references to defense secrets were removed.

In relation to the production of defense secrets, Thalès first argued that even though the documents containing defense secrets were ultimately removed from the debate, they remained at the disposal of the tribunal for several months without Thalès being given the possibility to contradict those documents. The Court of Appeals held that this argument was unfounded given that it did not appear that the tribunal considered the case on the basis of the defense secrets produced by the Republic of China.[266]

Second, Thalès argued that the tribunal also relied on documents obtained from the Swiss authorities, namely statements showing the movements of funds in the different bank accounts connected to the case, as well as bank statements, both containing information classified as defense secrets. The Court of Appeals held that these arguments were also unfounded on the grounds that those documents were lawfully produced, having been legally gathered by, and obtained from, the Swiss authorities, and that none of these

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262 CA Paris, 9 juin 2011, no 10/11853, Sté Thalès SA et Sté Thalès Underwater Systems SAS c/ Marine de la République de Chine (Taïwan) (Quoted in Delanoy, *supra* note 261, at 784).

263 *Id.*, at 778.

264 *Id.*

265 *Id.*, at 779.

266 *Id.*, at 783.

documents were obtained from the French authorities while being classified as defense secrets.[267]

Third, Thalès argued that it was unable to respond to the documents obtained from the Swiss authorities without disclosing French defense secrets. The Court of Appeals held that Thalès could have commented on those documents without disclosing defense secrets by, for instance, alleging that these movements of funds were in fact related to other matters, instead of remaining silent as it did.[268] Indeed, the Court of Appeals reminded Thalès that it was its responsibility to use all legal means to contribute to the search for the truth. The request for annulment was ultimately dismissed.[269]

Finally, there can be no violation of the right to adduce evidence when both parties have relied on justifiable expectations of privilege, such as, for example, in settlement negotiations.[270]

1.4.2.1 Sword and shield

The principle against the use of privilege both as a sword and a shield is intended to avoid "circumstances in which the privilege is abused by using it in ways that would unfairly benefit the party entitled to it and unfairly prejudice the other party."[271]

The principle against using privilege both as sword and a shield was summarized in the *Bilzerian* case as follows:

> [T]he attorney-client privilege cannot at once be used as a shield and a sword. ... A defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes.[272]

In other words, a party should not be permitted to rely on evidence to support its claim and at the same time refuse to produce the evidence in question,[273] either partially or in its entirety, when the evidence is also detrimental to its claim. For instance, when a party relies on legal advice obtained to support its claim but refuses to produce the legal advice in question on the ground of attorney-client privilege when the opposing party

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267 *Id.*, at 784.

268 *Id.*

269 *Id.*, at 785-6.

270 Cohen, *supra* note 197, at 433.

271 *Dr. Horst Reineccius, et al. v. Bank for International Settlements*, Procedural Order No. 6 (11 June 2002), at 10; Petrochilos, *supra* note 231, at 221.

272 U.S. v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991), at 1292.

273 D. M. Cato, *Arbitration Practice and Procedure: Interlocutory and Hearing Problems* (2002), at 858; Petrochilos, *supra* note 231, at 146; Meyer, *supra* note 7, at 374; Sindler and Wüstemann, *supra* note 11, at 635; O'Malley, *supra* note 11, at 291.

wishes to review it.[274] A different scenario, but as much reprehensible, is when a party discloses privileged evidence but seeks to block the opposing party from rebutting such evidence on grounds of privilege.[275] With this in mind, relying on the privileged evidence is usually considered as a waiver of privilege.[276]

In the *Bank for International Settlements* case, for instance, the tribunal specifically condemned the use of privilege both as a sword and a shield.[277] It made a point of not giving effect to privileges used in ways to unfairly benefit the party entitled to such privilege while unfairly causing prejudice to the other party.[278] In *Gallo v. Canada*, in its Statement of Defense, Canada relied on legal advice obtained and, as a result, it was ordered to disclose such legal advice although it claimed that it was privileged.[279] Relying on the legal advice in the arbitration was considered as a waiver of privilege.[280]

1.4.3 Equal treatment of the parties

In addition to the right to be heard, the right to equal treatment is another fundamental procedural right[281] contained in the arbitration laws examined herein.[282] A violation of the right to equal treatment is a ground for refusing recognition and enforcement of an award under the New York Convention.[283]

In arbitration, the right to equal treatment of the parties is not absolute and shall be interpreted as requiring the tribunal to treat similar situations in a similar manner.[284] It does not mean that the parties must be treated identically "in a formulaic sense."[285] As Poudret and Besson rightly point out, "where objective differences so justify, separate rules can be applied to each of the parties."[286] In fact, parties are never completely equal in arbitration.[287] One

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274 See, *e.g.*, Chevron Corp. v Pennzoil Co., 974 F.2d 1156 (9th Cir. 1992); Gallo v. Canada, Procedural Order No. 3, *supra* note 239, at para. 61.

275 Mosk and Ginsburg, *supra* note 1, at 384.

276 *Id.*

277 *Bank for International Settlements*, Procedural Order No. 6, *supra* note 271, at 10.

278 *Id.*

279 Gallo v. Canada, Procedural Order No. 3, *supra* note 239, at paras 61, 62.

280 *Id.*, at para. 62.

281 Poudret and Besson, *supra* note 32, at 471; Born, *supra* note 18, at 2575.

282 Art. 18 Model Law; Section 33(1)(a) Arbitration Act; § 10(a)(3) FAA; Art. 1510 FCCP; Art. 182(3) PILA.

283 Article V(1)(b) New York Convention.

284 Roney and Müller, *supra* note 141, at 58.

285 Gusy, Hosking and Schwarz, *supra* note 168, at 172; See also Shaughnessy, *PLI/Lit*, *supra* note 128, at 271; Tevendale and Cartwright-Finch, *supra* note 25, at 832; Shaughnessy, *supra* note 2, at 461; von Schlabrendorff and Sheppard, *supra* note 19, at 767.

286 Poudret and Besson, *supra* note 32, at 479.

may have more facts to establish,[288] may need more witnesses,[289] or may have less evidence in its possession.

In the particular field of privileges, some authors seem to agree to that the equal treatment of the parties requirement must be interpreted in such way that if one of the parties is allowed by the tribunal to claim privilege for a communication, the tribunal must allow the opposing party to claim privilege for the same type of communication.[290] For instance, according to Professor Park, "a good arbitrator would shrink from assigning procedural benefits and burdens un-equally, allowing one side but not the other an opportunity to claim privilege on the very same type of document[. A]n arbitrator who gives one side such stark procedural handicaps would be inviting award vacatur."[291] For Reiser, "[i]f the arbitrator allows [a party] to view the [other party's] communications, but not the reverse, he will violate equality of arms in the most basic sense."[292] For the 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, "applying different [privilege] rules to the parties could create unfairness by shielding the documents of one party from production but not those of the other."[293] Tawil and Lima summarized it as follows: "(i) a party that requests disclosure of a certain type of document from the other party shall be precluded from raising a privilege claim with respect to a similar category of document of its own; and (ii) a party that successfully invokes a privilege with respect to a certain document shall not request disclosure of the same category of documents from its counterparty."[294] In more pragmatic terms, this also means, in reference to the attorney-client privilege, that the parties are free to choose their legal advisors and are not restricted in their choice by ulterior application of different and unexpected privilege rules.[295]

It has also been said that the tribunal may, under certain circumstances, sacrifice the equal treatment requirement to ensure that a party has a full

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287 Reiser, *supra* note 18, at 663; von Schlabrendorff and Sheppard, *supra* note 19, at 767.

288 Reiser, *supra* note 18, at 663.

289 *Id.*

290 Park, "The Procedural Soft Law of International Arbitration: Non-Governmental Instruments", in L. A. Mistelis and J. D. M. Lew (eds), *Persuasive Problems in International Arbitration* (2006) 141, at 151; Reiser, *supra* note 18, at 664; Mosk and Ginsburg, *supra* note 1, at 384; Heitzmann, *supra* note 11, at 223-4; Sindler and Wüstemann, *supra* note 11, at 637; Petrochilos, *supra* note 231, at 221; Tevendale and Cartwright-Finch, *supra* note 25, at 829; de Boisséson, *supra* note 12, at 714.

291 Park, "The Procedural Soft Law of International Arbitration: Non-Governmental Instruments", *supra* note 290, at 151.

292 Reiser, *supra* note 18, at 664.

293 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, *supra* note 186, at 25.

294 Tawil and Lima, *supra* note 18, at 49.

295 Sindler and Wüstemann, *supra* note 11, at 637.

opportunity to present its case.[296] Bishop advocates that when a party has most of the evidence in its possession, the tribunal must ensure the fairest outcome by allowing broader requests for production against such party, even if it means treating the parties unequally.[297] However, in *Gallo v. Canada*, the tribunal declared that, because it is considered a fundamental privilege, it would be unreasonable to reject claims of solicitor-client privilege even where one party has invoked the privilege for a much larger number of documents than did the opposing party.[298]

Finally, equal treatment of the parties also requires that the documents for which privilege is claimed be identified "in order to permit the Tribunal to make a reasoned judgment as to their relevance and materiality,"[299] and that claims of privilege be "clearly explained so as to allow the [opposing party] the opportunity to provide informed comments on the matter."[300]

1.4.4 Production of privileged materials in violation of rules of professional ethics

There is considerable attention devoted at present to ethics in international arbitration.[301] The objective of this section is not to fuel the debate but rather to acknowledge that professional ethics may be an issue when dealing with privileges in arbitration. In general, the disclosure of privileged evidence may amount to a violation of rules of professional ethics.

For example, the French Decree of 12 July 2005 on the professional ethics of attorneys provides that an attorney may not disclose any information in violation of professional secrecy.[302] As another example, the Swiss Federal Act on the Freedom of Movement for Lawyers also stipulates that lawyers must observe professional secrecy.[303] Attorneys are bound by the law of the jurisdiction where they are admitted to practice as well as by the rules of

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296 Bishop and Childs, *The Requirement of Fair and Equal Treatment with Respect to Document Production in International Arbitration* (available at http://www.kslaw.com/imageserver/KSPublic/library/publication/9-10IBAChilds.pdf), at 13.

297 *Due Process in International Arbitration*, Transcripts, *supra* note 30, at 94.

298 Gallo v. Canada, Procedural Order No. 3, *supra* note 239, at para. 50.

299 Pope & Talbot, Inc. v. The Government of Canada, Award on the Merits of Phase 2 (10 April 2001), at para. 193.

300 Merrill & Ring Forestry L.P. v. The Government of Canada, ICSID Administered Case, Decision of the Tribunal on Production of Documents (18 July 2008), at para. 21.

301 See, *e.g.*, Bishop and Stevens, "Advocacy and Ethics in International Arbitration: The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy", in A.J. van den Berg (ed.), *Arbitration Advocacy in Changing Times* (2011) 391, at 398.

302 Art. 4, Décret n°2005-790 du 12 juillet 2005 relatif aux règles de déontologie de la profession d'avocat.

303 Art. 13(1) FAFML.

professional ethics imposed by their bar association, and this regardless of the law applicable to the taking of evidence.[304]

Attorneys are not the only professionals involved in arbitration abiding by codes of professional ethics. Patent agents, accountants and other professionals may face restrictions concerning the disclosure of privileged information. In fact, nowadays, most professional associations in developed countries have codes of professional conduct for their members.[305] Arbitrations where attorneys are subject to different ethical rules may lead to "an uneven playing field."[306] Moreover, there is no consensus on whether national ethical rules apply to the conduct of counsel in international arbitration.[307]

Another difficulty faced by attorneys representing parties in arbitrations seated outside the jurisdiction where they are admitted is the "double deontology"[308] situation. This arises when an attorney may be subject to multiple codes of professional ethics, sometimes conflicting ones.[309] This is particularly the case when rules of professional ethics are applicable extraterritorially.[310]

As an illustration of this issue, in a 1992 article, Paulsson recalled being involved in an arbitration following the failure of a complex negotiation in which six French attorneys and one English solicitor were involved.[311] All parties waived the attorney-client privilege and summoned the attorneys and the solicitor to testify on the events.[312] Yet, the ethics commission of the French bar instructed the French attorneys not to testify although their clients had waived the privilege.[313] As a result, the English solicitor was the only one who finally testified on the events.[314]

As Yanos rightly points out, if an attorney refuses to comply with an order for production on ground of professional ethics, his client could suffer substantial harm if the tribunal draws an adverse inference from this refusal.[315]

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304 Yanos, *supra* note 7, at § IV; Matray and Matray, "L'administration de la preuve en matière d'arbitrage", in Actes du colloque CEPANI du 12 novembre 2009, *L'administration de la preuve en matière d'arbitrage* (2009) 17, at 36.

305 Bishop and Stevens, *supra* note 301, at 393.

306 *Id.*, at 394.

307 *Id.*, at 396-7.

308 Bishop, "Advocacy and Ethics in International Arbitration: Ethics in International Arbitration", in A.J. van den Berg (ed.), *Arbitration Advocacy in Changing Times* (2011) 383, at 384.

309 *Id.*

310 Cohen, *supra* note 197, at 429.

311 Paulsson, "Standards of Conduct for Counsel in International Arbitration", 3 *Am. Rev. Int'l Arb.* (1992) 214, at 215.

312 *Id.*

313 *Id.*

314 *Id.*

315 Yanos, *supra* note 7, at § IV.

The attorney could even face professional liability claims and will thus be presented with a Cornelian dilemma: to comply with the order and violate the rules of professional conduct applicable to him or refuse to comply with the order and subject his client to the risks of adverse inferences. According to some commentators, although not obliged to do so, if released from secrecy by their clients, Swiss lawyers should disclose secret information when ordered by the tribunal in order to protect their clients from adverse inferences.[316] Adverse inferences are discussed in Section 4.5.6 below.

Unless specifically provided in the rules agreed by the parties, tribunals are not required to take into consideration the ethical rules applicable to the parties, their attorneys and witnesses.[317] As a result, it is very unlikely that an award will be annulled or that its recognition and enforcement will be refused on grounds of violation of rules of professional conduct. Alvarez rightly notes that the tribunal must nevertheless take the ethical standards of counsel, witnesses and parties with regard to privileges into consideration to ensure equal and fair treatment of the parties.[318]

1.4.5 Production of privileged materials in violation of criminal law

The disclosure of privileged evidence can also amount to a breach of criminal law. For example, under French law, the violation of professional secrecy is subject to criminal sanctions:

> The disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year's imprisonment and a fine of €15,000.[319]

Swiss law contains an equivalent provision:

> Any person who in his capacity as a member of the clergy, lawyer, defence lawyer, notary, patent attorney, auditor subject to a duty of confidentiality under the Code of Obligations, doctor, dentist, pharmacist, midwife or as an auxiliary to any of the foregoing persons discloses confidential information that has been confided to him in his professional capacity or which has come to his knowledge in the practice of his profession shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.[320]

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316 Bishop and Childs, *supra* note 296, at 6.

317 Born, *supra* note 18, at 2317-26; Cohen, *supra* note 197, at 430; Alvarez, *supra* note 11, at 691.

318 Alvarez, *supra* note 11, at 692.

319 Art. 226-13 FPC.

320 Art. 321(1) SCC.

Those provisions of the French Penal Code and the Swiss Criminal Code are further examined in Chapter 2.

1.5 Conclusion

The present chapter has attempted to show that privileges can make a difference in arbitration. Disregarding privileges can ultimately jeopardize the validity or the enforcement of an arbitral award.

Brower and Sharpe note that arbitrators should err on the side of caution and exclude privileged evidence from disclosure when in doubt, a conclusion that we share:

> [C]ourts likely are more inclined to set aside awards where arbitrators have refused to recognize and protect privileges than they are in circumstances where arbitrators have excluded evidence on the basis of privilege.[321]

At the same time, because tribunals have a duty to render enforceable awards,[322] they must carefully weight the possibility that refusing to order production of, or to admit, relevant evidence on grounds of privilege may give rise to violations of the right to be heard.[323]

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321 Brower and Sharpe, "Determining the Extent of Discovery and Dealing with Requests for Discovery: Perspectives from the Common Law", in L. W. Newman and R. D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (2004) 307, at 331 (Quoted in Berger, "The Settlement Privilege", 2 *Arb. Int.* (2008) 265, at 275).

322 Horvath, "The Duty of the Tribunal to Render an Enforceable Award", 18 *J. Int'l Arb.* (2001), at 135; Sindler and Wüstemann, *supra* note 11, at 621, 636; Alvarez, *supra* note 11, at 683.

323 Meyer, *supra* note 7, at 366; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 518; Bühler, *supra* note 255, at 85; Marossi, *supra* note 255, at 515.

CHAPTER 2 – PRIVILEGES UNDER ENGLISH, AMERICAN, SWISS AND FRENCH LAW

2.1 Introduction

Privileges vary from one jurisdiction to another. Certain privileges are present in all jurisdictions, such as the attorney-client privilege, albeit under different names and characteristics, while other privileges, such as the self-critical analysis privilege, have developed in one or more jurisdictions without being recognized on a transnational level.

This chapter does not pretend to be an in-depth analysis of the different rules of privilege in the jurisdictions examined herein, it is more a brief overview of such rules, which is necessary in order to better understand the subject matter of this work. The rules of privilege addressed are applicable in all courts in England and Wales, France and Switzerland. Due to the particularity of the U.S. court system, our examination of privileges for this jurisdiction is, for the most part, limited to the rules applicable in federal courts.

Because civil law is substantially more codified than common law, the review of French and Swiss rules of privilege will be more succinct than for U.S. and English privileges. Moreover, when examining privileges in French and Swiss law, reference will be made to their equivalent in English and American law. For instance, the terms legal professional privilege and attorney-client privilege will be used when referring to the professional secrecy of the attorney under French and Swiss law, although this is not completely accurate. In fact, under English and U.S. laws, the legal professional privilege is the *right* of the client to withhold evidence, while under French and Swiss law it is the *obligation* of the attorney to withhold evidence. In any case, to ensure consistency, the common law terms will be used in this work.

2.2 Legal Framework

2.2.1 England

In England and Wales, the rules governing privileges are contained in the common law. Privileges are an exception to the duty to disclose documents and the right to inspect documents under Civil Procedure Rules (CPR) Part 31. In English law, privileges are said to be "much more than ... ordinary rule[s] of

evidence."[324] They are considered as "a fundamental condition on which the administration of justice as a whole rests."[325]

2.2.2 United States

In the United States, federal privileges are governed by the common law "as interpreted by United States courts in the light of reason and experience,"[326] except if otherwise provided by the Constitution of the United States, a federal statute, or a rule prescribed by the Supreme Court.[327]

Under Federal Rules of Evidence (Fed. R. Evid.) 501, courts have the liberty of developing new rules of privilege.[328] However, privileges must not be adopted and applied by courts unless they promote "sufficiently important interests to outweigh the need for probative evidence in the administration of ... justice."[329] Indeed, privileges must be developed "in the light of reason."[330] Such requirement can be fulfilled by having "significant public and private interests supporting recognition of the privilege"[331] while having only modest evidentiary benefit resulting from the denial of the privilege.[332]

Moreover, privileges are also developed in the light of experience.[333] In *Jaffee v. United States*, the Supreme Court concluded that the recognition of a privilege in some form in all 50 states fulfilled such requirement.[334] Rules of privilege must also be modified by the courts when they are no longer justified by reason and experience such as, for example, when "such a rule is the product of a conceptualism long ago discarded"[335] and "support for the privilege [by the courts] has been eroded."[336]

The draft Article V of the Federal Rules of Evidence originally contained 9 categories of specific non-constitutional privileges when submitted to Congress.[337] It also provided that only the privileges set forth therein or in an

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[324] *R v Derby Magistrates' Court, Ex p B* [1996] AC 487, at 507.

[325] *Id.*

[326] Fed. R. Evid. 501.

[327] *Id.*

[328] Jaffee v. Redmond, 518 U.S. 1 (1996), at 9; Trammel v. United States, 445 U.S. 40 (1980), at 47.

[329] Trammel v. United States, *supra* note 328, at 51; See also University of Pennsylvania v. EEOC, 493 U.S. 182 (1990), at 189.

[330] Fed. R. Evid. 501.

[331] Jaffee v. Redmond, *supra* note 328, at 11.

[332] *Id.*

[333] Fed. R. Evid. 501.

[334] Jaffee v. Redmond, *supra* note 328, at 6.

[335] Trammel v. United States, *supra* note 328, at 54.

[336] *Id.*, at 48.

[337] Notes of Committee on the Judiciary, House Report No. 93–650.

Act of Congress could be adopted by federal courts.[338] The Committee on the Judiciary eventually amended the draft in order to remove specific rules on privileges and introduced a single rule, Fed. R. Evid. 501, which provides that rules of privilege shall be developed by United States courts.[339] Congress indeed realized that by legislating over specific privilege rules, "it would run a huge political risk, namely, offending a large number of influential special interest groups."[340] Interestingly, despite the fact that the specific rules were removed from the final version, federal courts have recognized the same privileges as the ones provided for in the original draft.[341] In fact, privileges omitted from the original draft are far from having found majority support in federal courts.[342] In other words, federal courts have reached the same outcomes as if the original draft had been upheld.[343] This can be explained by the fact that federal courts have often referred to the draft provisions of the Federal Rules of Evidence in their decisions.[344] According to the Supreme Court in *Trammel v. United States*, such limitation does not reflect Congress' desire: "In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege."[345]

2.2.3 France

The French Civil Code (FCC) provides that "[e]veryone is bound to collaborate with the court so that truth may come out."[346] The obligation to collaborate[347] in civil proceedings is codified in the French Code of Civil Procedure (FCCP) under Articles 11 and 205. These provisions read as follows:

> The parties are held to cooperate for the implementation of the investigation measures, even if the judge notes the consequences of abstention or refusal to do so. Where a party holds evidence material, the judge may, upon the petition of the other party, order him to produce it, where necessary under a periodic penalty payment. He may, upon the petition by one of the parties, request or order, where necessary under the same penalty, the production of all documents

338 *Id.*

339 *Id.*

340 Imwinkelried, "Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted: The Strength of the Ingroup Loyalty of the Federal Judiciary", 58 *Ala. L. Rev.* 41, at 43.

341 *Id.*

342 *Id.*, at 55.

343 *Id.*, at 56.

344 *Id.*, at 52-3; See, *e.g.*, Jaffee v. Redmond, *supra* note 328; U.S. v. Gillock, 445 U.S. 360 (1980).

345 Trammel v. United States, *supra* note 328, at 47.

346 Art. 10 FCC.

347 The English translation of the French Civil Code refers to the term "cooperate" while the English translation of the French Code of Civil Procedure refers to the term "collaborate."

> held by third parties where there is no legitimate impediment to doing so.[348]
>
> Any person summoned to testify will be bound to do so. Persons who present a legitimate excuse may be exempted from testifying.[349]

The legislators in Article 11 FCCP did not make conditional the production of evidence held by a party to the proceedings to the absence of a legitimate impediment of doing so, as in the case of evidence held by third parties. However, the production of evidence by both the parties to the proceedings and third parties is nevertheless dependent upon the absence of an overriding interest, such as the professional secrecy.[350] The protection of professional secrecy in France is a question of public interest[351] and, therefore, is said to be a legitimate excuse for not testifying under Art. 206 FCCP.[352]

Although professional secrecy is cited by various scholars as an example of legitimate impediment to refuse to collaborate in the taking of evidence, according to Gridel, such refusal on the grounds of professional secrecy is based on the fact that a violation of professional secrecy is a criminal offense under French law.[353] Gridel argues that because the French Code of Civil Procedure provides that "*[e]st tenu de déposer quiconque en est légalement requis*,"[354] an individual is not legally required (*légalement requis*) to testify if this would amount to a violation of professional secrecy since such testimony is prohibited by law.[355] This conclusion is also a result of the *a contrario* interpretation[356] of Article 9 and 10 FCCP and Article 10 FCC which read as follows:

> Each party must prove, according to the law, the facts necessary for the success of his claim.[357]
>
> The judge has the authority to order *sua sponte* any legally appropriate investigation measures.[358]

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348 Art. 11 FCCP.

349 Art. 206 FCCP.

350 Lacroix-Andrivet, "Pièces", in S. Guinchard (ed.), *Droit et pratique de la procédure civile* (2012) 896, at 899, 901.

351 B. Corboz, *Les infractions en droit suisse, vol II* (2010), at 759.

352 Lacroix-Andrivet, *supra* note 350, at 919; J. Héron and T. Le Bars, *Droit judiciaire privé* (2010), at 902.

353 Gridel, "La valeur du témoignage en droit civil, 46 *R.I.D.C.* (1994) 437, at 443.

354 Art. 206 FCCP; However, it important to note that in the English translation available on http://www.legifrance.gouv.fr, the terms "*légalement requis*" have been translated to "summoned to testify." It is very likely that this translation does not reflect the will of the legislators.

355 Gridel, *supra* note 353, at 443.

356 *Id.*, at 444.

357 Art. 9 FCCP.

358 Art. 10 FCCP.

> Everyone is bound to collaborate with the court so that truth may come out.
>
> He who, without legitimate reason, eludes that obligation when it has been legally prescribed to him, may be compelled to comply with it, if need be on pain of periodic penalty payment or of a civil fine, without prejudice to damages.[359]

In any event, regardless of the reasons, professional secrecy is well rooted in French civil procedural law as a ground for refusal to collaborate in the taking of evidence.

2.2.4 Switzerland

In Switzerland, the rules applicable to privileges are codified in various legal texts, the most important ones being the Swiss Civil Procedure Code and the Swiss Criminal Code. The Swiss Civil Procedure Code provides that parties and third parties are under the obligation to "cooperate"[360] in the taking of evidence.[361] Such cooperation may include the submission of witness statements and the production of documents.[362] However, under certain circumstances, parties and third parties have the right to refuse to cooperate. Such right of refusal corresponds to the common law principle of privilege. Privileges constitute restrictions to the obligation to cooperate in the taking of evidence[363] and to the right or opportunity to be heard guaranteed by the Swiss Civil Procedure Code.[364] Those restrictions are justified by "overriding public or private interests."[365]

2.3 Attorney-Client Privilege

The rationale of the attorney-client privilege "is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[366] Indeed, the attorney can only fulfill his function as

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359 *Id.*

360 Translation of the term "*coopérer*" provided in the English translation of the Swiss Code of Civil Procedure available at http://www.admin.ch/ch/e/rs/2/272.en.pdf.

361 Art. 160 SCPC.

362 *Id.*

363 *Id.*

364 Art. 53(1) SCPC.

365 Art. 53(2) SCPC.

366 Upjohn Co. v. United States, *supra* note 59, at 389.

"problem-solver"[367] if he has knowledge of all aspects of his client's situation, including both the good and the bad ones.[368] The attorney-client privilege is the oldest of the privileges known to common law[369] and is said to be on of the most likely to be invoked in international arbitration.[370]

Although it goes beyond the scope of this work, Sexton completely rejects the attorney-client privilege's rationale.[371] He argues that clients will continue to disclose information to their attorneys, regardless of whether the information is protected or not, because there is no substitute for legal advice.[372] In other words, "the costs of withholding information from their legal representatives are likely to outweigh the consequences which might result from any compelled disclosure of confidential information."[373]

2.3.1 England

The attorney-client privilege is known in English law as the legal advice privilege.[374] The legal advice privilege, along with the litigation privilege, is a sub-head of the legal professional privilege.[375] The legal professional privilege is recognized as a single integral privilege in English law.[376]

The expression "legal professional privilege" is said to "falsely suggest a privilege enjoyed by the legal profession when in truth it is not the legal profession but the client who enjoys the privilege."[377] The legal advice privilege can be traced back to at least the 16th century.[378] At that time, the rationale was that a lawyer could not, in honor, be required to disclose what he had been told in confidence[379]:

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367 Cross, *Evidentiary Privileges in International Intellectual Property Practice* 2008 (available at http://ssrn.com/abstract=1328481), at 2.

368 *Id.*

369 Upjohn Co. v. United States, *supra* note 59, at 389; See also Section 1.2.2.1.

370 Sindler and Wüstemann, *supra* note 11, at 612; Mosk and Ginsburg, *supra* note 1, at 358.

371 Bradford, *supra* note 69, at fn. 157.

372 Sexton, "A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege", 57 *N.Y.U. L. Rev.* (1982) 443, at 470-1 (Quoted in Bradford, *supra* note 69, at fn. 157).

373 Sexton, *supra* note 372, at 470-1 (Quoted in Bradford, *supra* note 69, at fn. 157).

374 Thanki, *supra* note 49, at 5; Phipson, Malek and Auburn, *supra* note 46, at 619.

375 Thanki, *supra* note 49, at 4; *Three Rivers (No 6)* (HL), *supra* note 73, at 1312; Phipson, Malek and Auburn, *supra* note 46, at 602; Hollander, *supra* note 46, at 256.

376 *Id.*

377 *Ventouris v Mountain* [1991] 1 WLR 607, at 611; See also Sindler and Wüstemann, *supra* note 11, at 615.

378 Harvard Law Review Association, "Developments in the Law - Privileged Communications", *supra* note 98, at 1456; Thanki, *supra* note 49, at 6; Holdsworth, *A History of English Law (Vol. IX)*, *supra* note 88, at 201-2; See Section 1.2.2.1.

379 Thanki, *supra* note 49, at 6; Hazard, *supra* note 245, at 1070; Holdsworth, *A History of English Law (Vol. IX)*, *supra* note 88, at 202.

> A man of honour would not betray a confidence, and the judges as men of honour themselves would not require him to. Thus originally legal professional privilege was that of the legal adviser, not the client.[380]

This approach was eventually rejected by English courts in the second half of the 18th century[381] and the modern policy has been explained by Baroness Hale of Richmond in *Three Rivers 6* as follows:

> Legal advice privilege restricts the power of a court to compel the production of what would otherwise be relevant evidence. It may thus impede the proper administration of justice in the individual case. This makes the communications covered different from most other types of confidential communication, where the need to encourage candour may be just as great. But the privilege is too well established in the common law for its existence to be doubted now. And there is a clear policy justification for singling out communications between lawyers and their clients from other professional communications. The privilege belongs to the client, but it attaches both to what the client tells his lawyer and to what the lawyer advises his client to do. It is in the interests of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct. The client may not always act upon that advice (which will sometimes place the lawyer in professional difficulty, but that is a separate matter) but there is always a chance that he will. And there is little or no chance of the client taking the right or sensible course if the lawyer's advice is inaccurate or unsound because the lawyer has been given an incomplete or inaccurate picture of the client's position.[382]

Since the early 19th century, it has been well established that the legal advice privilege extends to communications made in other circumstances than in existing or contemplated litigation.[383] However, at present, some courts still erroneously confine the legal advice privilege to advice related to contemplated or existing litigation.[384]

In order for a communication to benefit from the legal advice privilege, such communication must comply with a number of conditions.

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380 *D v NSPCC* [1978] AC 171, at 238 (Quoted in Toulson and Phipps, *supra* note 40, at 320).

381 Holdsworth, *A History of English Law (Vol. IX)*, *supra* note 88, at 202; Thanki, *supra* note 49, at 6.

382 *Three Rivers (No 6)* (HL), *supra* note 73, at 1294-5.

383 Thanki, *supra* note 49, at 6; *Three Rivers (No 6)* (HL), *supra* note 73; It was in *Greenough v Gaskell* [1833] 1 My & K 98 that the legal advice privilege was first "unequivocally upheld" in the absence of pending or contemplated litigation. (*Three Rivers District Council and Others v Governor and Company of the Bank of England (No 5)* [2003] Q.B. 1556, at 1563); Hollander, *supra* note 46, at 259; Holdsworth, *A History of English Law (Vol. IX)*, *supra* note 88, at 202-3.

384 Thanki, *supra* note 49, at 7; See, *e.g., Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6)* [2004] QB 916 (CA) appealed allowed in *Three Rivers (No 6)* (HL), *supra* note 73; Phipson, Malek and Auburn, *supra* note 46, at 602.

First, the communication must be between a legal professional, acting in a professional capacity as a lawyer,[385] and his client.[386] Identifying the client is easy for an individual.[387] The difficulty lies with entities, such as corporations and government departments, seeking legal advice.[388] It is assumed that the client is the entity itself.[389] This was indeed the case before *Three Rivers 5*.[390] In *Three Rivers 5*, the Court of Appeal "appears to have held [that] the client only comprises those individuals within a corporation who are designated to seek and receive the lawyers' advice."[391] According to Thanki, this approach is too restrictive.[392] Thanki gives the example of the in-house counsel. The in-house counsel often provides legal advice on an *ad hoc* basis to employees of the corporation and it is not always clear which employees are authorized to seek or receive legal advice.[393] A logical approach, according to Thanki, would be the position taken by the Law Society of England and Wales in its submissions in *Three Rivers 6*, which is summarized as follows: the client is the corporation and any communication between an employee and a lawyer should be privileged if the communication is created for the company to obtain legal advice and if such employee has been authorized to communicate with the attorney in this regard.[394]

Under English law, legal advisers include qualified solicitors and barristers.[395] The privilege also extends to employees or subordinates of solicitors and presumably of barristers.[396] Foreign lawyers also attract legal advice privilege.[397] Contrary to French law,[398] Swiss law,[399] and to a large

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385 Thanki, *supra* note 49, at 20; "But the law is clear that it is so refused in respect of every profession other than that of the law. In these circumstances it is important that it be confined to its proper limits. The judges of the 19th century thought that it should only apply to communications between client and adviser. That is the proper compass of the privilege. It is not, in our judgment, open to this court to extend the privilege, even if we thought we should." (*Three Rivers (No 5)*, *supra* note 383, at para. 26).

386 Communications between lawyers and third parties are not privileged.; Hollander, *supra* note 46, at 259.

387 For intermediaries, see Thanki, *supra* note 49, at 69-73.

388 Thanki, *supra* note 49, at 39; Hollander, *supra* note 46, at 261-3; Lord Scott in Three Rivers 6 said, "the issue is a difficult one with different views, leading to diametrically opposed conclusions, being eminently arguable." (*Three Rivers (No 6)* (HL), *supra* note 73, at 1289).

389 Thanki, *supra* note 49, at 40, 52-3.

390 *Id.*, at 53.

391 *Id.*, at 45.

392 *Id.*

393 *Id.*, at 55.

394 *Id.*, at 52.

395 *Id.*, at 17; Phipson, Malek and Auburn, *supra* note 46, at 606.

396 Thanki, *supra* note 49, at 17; Phipson, Malek and Auburn, *supra* note 46, at 606.

397 Thanki, *supra* note 49, at 17; Phipson, Malek and Auburn, *supra* note 46, at 606; For further reading, see Phipson, Malek and Auburn, *supra* note 46.

398 See Section 2.3.3.

399 See Section 2.3.4.

number of European Member States,[400] under English law, in-house counsel are also considered as legal advisors for the purpose of the legal advice privilege.[401] According to Lord Denning MR, communications between in-house legal counsel and their employer are subject to legal advice privilege for the following reasons:

> [In-house counsel] are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences.[402]

This conclusion has not been challenged on appeal.[403]

Second, the communication must relate to legal advice.[404] The House of Lords in *Three Rivers 6* reaffirmed the conditions of "legal context" and "advice" set out in *Balabel v Air India*[405] as follows: "[L]egal advice is not confined to telling the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."[406]

Three Rivers 6 concerns an action brought against the Governor and the Company of the Bank of England (the "Bank") by the liquidators and creditors of the Bank of Credit and Commerce International SA (the "BCCI") for misfeasance in public office in respect of their supervision of the BCCI before its collapse. During the course of the proceedings, the claimants sought an order for inspection of communications exchanged between the Bank and its solicitors in the course of an independent inquiry, the Bingham Inquiry, initiated by the Chancellor of the Exchequer into the Bank's supervision of the BCCI. The Bank's solicitors were retained to assist the Bank in dealing with the Bingham Inquiry and the Bank's solicitors provided advice as to the preparation and presentation of the Bank's evidence and submissions to the Bingham Inquiry. The issue for decision on the appeal before the House of Lords was summarized by Lord Scott of Foscote as follows: "Do the communications between the Bank of England, their solicitors, Freshfields, and counsel relating to the content and preparation of the so-called overarching statement submitted on behalf of the Bank to the Bingham Inquiry qualify for

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400 Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, judgment of 14 September 2010, not yet published, at para. 72.

401 Thanki, *supra* note 49, at 18; Phipson, Malek and Auburn, *supra* note 46, at 606.

402 *Alfred Crompton Amusement Machines Ltd v Customs & Excise Comrs (No 2)* [1972] 2 QB 102 (CA), at 129 (Quoted in Thanki, *supra* note 49, at 18).

403 Thanki, *supra* note 49, at 22, fn. 160.

404 *Id.*, at 83.

405 *Balabel v Air India* [1988] Ch 317.

406 *Id.*, at 330 (Quoted in *Three Rivers (No 6)* (HL), *supra* note 73, at 1286).

legal professional privilege?."[407] The House of Lords ultimately ruled that these communications indeed qualified for legal professional privilege under the sub-head of legal advice privilege.[408]

As for the condition of legal context, Lord Scott of Foscote declared that "[i]f a solicitor becomes the client's 'man of business,' and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may lack a relevant legal context."[409] In addition, Lord Scott of Foscote provided guidance in order to determine if the legal context condition was fulfilled by recommending that, in cases of doubt, judges should ask "whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law."[410] Once the legal context is confirmed, the requirement of "legal advice" must be fulfilled.[411]

In addition to reaffirming the statement of the Court of Appeal in *Balabel v Air India*,[412] the House of Lords in *Three Rivers 6*, adopted a broader[413] definition of legal advice to include all communications between lawyers and clients provided (i) that they are related to the performance of the professional duties of lawyers as legal advisers, or in the words of Lord Rodger of Earlsferry, "lawyers […] being asked qua lawyers to provide legal advice"[414] and (ii) that they are made for the purpose of obtaining legal advice.[415]

For example, in *United States of America v Philip Morris Inc & Others*,[416] the Court of Appeal was asked to set aside a letter of request issued by the United States for examination of an English solicitor concerning his role in the creation and implementation of a document management policy for the appellants. The solicitor argued that all communications exchanged between him and the appellants were protected by both the legal advice privilege and the litigation privilege.[417] However, Lord Brook said that:

> [T]here is obvious force in the general thrust of [Respondent's] submission that advice or assistance in collecting and collating, listing, spring-cleaning, storing, transporting and warehousing documents does not amount to legal advice concerning [the

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407 *Three Rivers (No 6)* (HL), *supra* note 73, at 1275-6.

408 *Id.*, at 1288-9.

409 *Id.*, at 1287.

410 *Id.*

411 Thanki, *supra* note 49, at 79, 82.

412 *Balabel v Air India*, *supra* note 405, at 330.

413 Thanki, *supra* note 49, at 82.

414 *Three Rivers (No 6)* (HL), *supra* note 73, at 1293.

415 *Id.*, at para. 111.

416 *United States of America v Philip Morris Inc & Others* [2004] EWCA Civ 330.

417 *Id.*, at para. 20.

> Appellant's] legal rights and obligations and is not the sort of assistance that requires any knowledge of the law.[418]

The appeal was ultimately dismissed.

Third, the communication must be confidential.[419] The legal advice privilege only applies to the communication exchanged and not to the facts communicated.[420] What is considered as a communication for the purpose of the legal advice privilege? The Court of Appeal in *Three Rivers 5* declared that "the only documents or parts of documents ... which the [Client] is entitled to withhold from inspection on the ground of legal advice privilege are: (1) communications passing between the [Client] and its legal advisors ... for the purposes of seeking or obtaining 'legal advice'; (2) any part of a document which evidences the substance of such communication."[421] Thanki, through substantial review of English common law,[422] sums up the list of materials protected by the legal advice privilege into five categories:

> Confidential oral or written communications that cross the line between lawyer and client for the purpose of giving or receiving legal advice.
>
> Documents or parts of documents evidencing the substance of such communications.
>
> Documents intended to be communications between lawyer and client but not sent or received.
>
> Confidential documents created by a lawyer for the purpose of giving legal advice. This will include the lawyer's memoranda, drafts, or working papers.
>
> Where disclosure is sought from the lawyer, facts known to the lawyer about the client even thought they have not been learnt from a lawyer-client communication provided (i) the facts have only been learnt by the lawyer as a consequence of the lawyer-client relationship, (ii) the facts are confidential and (iii) the facts have not been learnt by the lawyer from a third party or any other extraneous source.[423]

The legal advice privilege is absolute; it cannot be overridden by public policy considerations and no balancing exercise needs to be performed.[424] However, the legal advice privilege cannot be claimed for communications which are in relation to a crime (most notably the crime of fraud), when the

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418 *Id.*, at para. 80.

419 Thanki, *supra* note 49, at 11.

420 *Id.*, at 57.

421 *Three Rivers (No 5)*, *supra* note 383 (Quoted in *Three Rivers (No 6)* (HL), *supra* note 73, at 1279).

422 See Thanki, *supra* note 49, at 58-69.

423 *Id.*, at 68.

424 Phipson, Malek and Auburn, *supra* note 46, at 598-9; Thanki, *supra* note 49, at 12.

communications are themselves part of the crime or created for the purpose of obtaining advice on facilitating the commission of a crime.[425] Indeed, affording protection to those communications "cannot possibly be otherwise than injurious to the interests of and to those of the administration of justice."[426]

Because the legal advice privilege belongs to the client and not to the lawyer,[427] only the client can invoke the privilege and has the right to waive the privilege.[428] Moreover, a waiver of privilege for a part of document held to be privileged as a whole amounts to a waiver of privilege for the whole document.[429] Privileged documents for which inspection has been inadvertently allowed may only be used with the authorization of the court.[430] It is also well established that if a party realizes that a privileged document was disclosed by mistake, the receiving party cannot use it.[431]

2.3.2 United States

Rule 502 of the Federal Rules of Evidence defines the attorney-client privilege as "the protection that applicable law provides for confidential attorney-client communications."[432]

The attorney-client privilege has always been recognized by U.S. courts.[433] For example, in *Chirac v. Reinicker*, an 1826 Supreme Court decision, Story J. affirmed that the general rule of the privilege was "that confidential communications between client and attorney, are not to be revealed at any time"[434] and that "the privilege ... is not that of the attorney, but of the client."[435] In addition, in the first reported case of attorney-client privilege in New England,[436] *Dixon v. Parmelee*, Paddock J. held that:

> It has long been the established law, that counselors, solicitors and attorneys, ought not to be permited to discover the secrets of their clients: it is declared repugnant to the policy of the law, to permit the disclosure of secrets by him whom the law has intrusted therewith. It

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425 Thanki, *supra* note 49, at 184.

426 *R v Cox and Railton* (1884-5) L.R. 14 Q.B.D. 153, at 167.

427 Thanki, *supra* note 49, at 14; Phipson, Malek and Auburn, *supra* note 46, at 610.

428 Thanki, *supra* note 49, at 14-15; Phipson, Malek and Auburn, *supra* note 46, at 610; For further reading on waivers of privilege, see Thanki, *supra* note 49, at 217-267.

429 Phipson, Malek and Auburn, *supra* note 46, at 615.

430 CPR r.31.20.

431 Thanki, *supra* note 49, at 210.

432 Fed. R. Evid. 502(g)(1).

433 Nix, "In Re Sealed Case: The Attorney-Client Privilege - Till Death Do Us Part?", 43 *Vill. L. Rev.* (1998) 285, at 285.

434 Chirac v. Reinicker, 24 U.S. 280 (1826), at 294.

435 *Id.*

436 Hazard, *supra* note 245, at 1087-8.

> is the privilege of the client, that the mouth of his counsel should be forever sealed against the disclosure of things necessarily communicated to him for the better conducting his cause ..."[437]

Like the legal advice privilege in English law, the attorney-client privilege is applicable if a number of requirements are fulfilled. These requirements are the same ones as those under English law, although they slightly vary in their interpretation. In *U.S. v. Bisanti*, the Court of Appeals for the First Circuit summarized the essential requirements of the privilege as follows:

> (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[438]

In other words, the communication for which privilege may be claimed must be between a client and his attorney, created with the objective of obtaining or providing legal advice, and treated as confidential. These requirements will be examined herein in the order that they appear in the present paragraph.

First, the client may be an individual or a corporation. The individual who seeks the legal advice and the one that possesses the information needed by the attorney to provide such advice is usually the same person. However, it is more complex in the corporate context.

In *Upjohn v. U.S.*, the Supreme Court held that communications between middle-level and lower-level employees and attorneys were also protected by attorney-client privilege.[439] In this case, the general counsel of Upjohn Company initiated an internal investigation following information received according to which one of Upjohn's subsidiaries made questionable payments to foreign government officials in order to secure government business.[440] In the course of that investigation, the general counsel sent a questionnaire to all foreign managers seeking information on such payments.[441] Following receipt of the questionnaires, the general counsel and outside counsel interviewed the questionnaire recipients and other company officers and employees.[442] In parallel, the general counsel issued a statement of policy to all employees

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437 Dixon v. Parmelee, 2 Vt. 185 (1829).

438 U.S. v. Bisanti, 414 F.3d 168 (1st Cir. 2005), at 171.

439 Upjohn Co. v. United States, *supra* note 59, at 395.

440 *Id.*, at 383.

441 *Id.*

442 *Id.*

worldwide explaining the legal implications of the internal investigation.[443] The Supreme Court ultimately opined that:

> Middle-level-and indeed lower-level-employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.[444]

The Supreme Court further stated that the legal advice provided by the attorney would also be more meaningful to employees who will put in effect the company's policy in their daily work rather than to the senior management who officially sanction the advice.[445]

As Hemphill J. puts it in *Duplan Corp. v. Deering Milliken, Inc.*, "[a]fter the lawyer forms his or her opinion, it is of no immediate benefit to the chairman of the board or the president. It must be given to the corporate personnel who will apply it."[446] Therefore, the Supreme Court concluded that limiting the privilege to communications between the attorney and senior management[447] would "frustrate the very purpose of the privilege"[448] and rejected the "control group" test in force at the time.[449] The control group "was generally considered to include persons in the corporation who had the actual authority to control, substantially participate in, or influence decisions to be taken by the corporation based upon the advice from counsel."[450]

The attorney-client privilege does not apply to communications with persons other than the client or to information obtained from public sources.[451] However, independent contractors and former employees are not considered as third parties. Indeed, *In re Bieter Co.*, the Court ruled that there should be no distinction between employees and independent contractors of a corporation for the purposes of the attorney-client privilege.[452] Moreover, in *Upjohn Co. v.*

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443 *Id.*, at 394-5.

444 *Id.*, at 391.

445 *Id.*, at 392.

446 Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146 (1974), at 1164 (Quoted in Upjohn Co. v. United States, *supra* note 59, at 392).

447 Referred to as the "control group" in Upjohn Co. v. United States, *supra* note 59, at 391.

448 Upjohn Co. v. United States, *supra* note 59, at 392.

449 *Id.*, at 397; The control group test was first formulated by federal courts in Philadelphia v. Westinghouse Electric Corp., 205 F.Supp. 830 (E.D. Pa. 1962) (Cited in P. F. Rothstein and S. W. Crump, *Federal Testimonial Privileges* (2011), at § 2:20, fn. 5).

450 Rothstein and Crump, *supra* note 449, at § 2:20.

451 *Id.*, at § 2:11.

452 In re Bieter Co., 16 F.3d 929 (8th Cir. 1994), at 937.

U.S., the Supreme Court opined that communications with former employees were also protected by the attorney-client privilege.[453]

Second, for the purpose of the privilege, the professional legal advisor must be an attorney admitted to practice law,[454] but not necessarily in the jurisdiction where he is providing legal advice.[455] Contrary to Swiss[456] and French law,[457] communications with in-house counsel may be protected by the attorney-client privilege.[458] This has been the case since at least 1915.[459] For instance, in *Upjohn v. U.S.,* the Supreme Court held that communications between the employees and the company's in-house counsel for the purpose of securing legal advice were privileged from disclosure.[460]

In *Duplan Corp. v. Deering Milliken, Inc.*, the Court made the following assertion in relation to attorneys acting as patent counsel: "It did not matter that the members were 'inside' or 'outside' house patent counsel as long as they were attorneys giving legal advice."[461] The Court further held that communications between in-house counsel and outside counsel were also privileged.[462] Finally, the attorney-client privilege also extends to individuals employed by attorneys and assisting attorneys in the provision of legal advice, such as assistants and paralegals.[463]

Third, the privilege only applies when legal advice is sought.[464] Indeed, it is not sufficient that the attorney be admitted to the bar, he also needs to act in his capacity of legal advisor.[465] Communications not created for the purpose of obtaining legal advice, such as business advice, accounting advice, and advice of a personal nature, are not covered by the attorney-client privilege.[466]

For instance, in *U.S. v. Knoll,* documents relating purely to business transactions and exchanged with an attorney were found to fall outside the

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453 Upjohn Co. v. United States, *supra* note 59, at 402-3.

454 Duplan Corp. v. Deering Milliken, *supra* note 446, at 1169.

455 Rothstein and Crump, *supra* note 449, at § 2:7.

456 See Section 2.3.4.

457 See Section 2.3.3.

458 Rothstein and Crump, *supra* note 449, at § 2:7; Upjohn Co. v. United States, *supra* note 59, at 403.

459 U.S. v. Louisville & Nashville Railroad Company, 236 U.S. 318 (1915), at 336 (Cited in Hill, "A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community", 27 *Case W. Res. J. Int'l L.* (1995) 145, at 166-7).

460 Upjohn Co. v. United States, *supra* note 59, at 403.

461 Duplan Corp. v. Deering Milliken, *supra* note 446, at 1167.

462 *Id.*

463 U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc., 2007 WL 915235 (D.D.C. 2007), at 2; Owens v. First Family Financial Services, Inc., 379 F.Supp.2d 840 (S.D. Miss. 2005), at 848; Rothstein and Crump, *supra* note 449, at § 2:7.

464 Rothstein and Crump, *supra* note 449, at § 2:8.

465 Shepard's/MacGraw-Hill (eds.), *Discovery Proceedings in Federal Court, vol. 2* (1995), at 246.

466 Rothstein and Crump, *supra* note 449.

ambit of the attorney-client privilege.[467] Internal memoranda addressed to an attorney acting as Director of Employee Relations and circulated as part of an ongoing business and management strategy were found not to be privileged in *Hardy v. New York News, Inc.*[468] In *U.S. v. Bisanti*, the Court held that communications in relation to tax matters with a tax accountant, also admitted as an attorney, were not privileged if those communications were "characteristic of an accountant-client relationship"[469] and "did not show an attorney-client relationship."[470]

The legal advice provided by the attorney is also protected.[471] However, documents created before,[472] or independently[473] from, the attorney-client relationship do not benefit from the protection. For example, *In re Vioxx Products Liability Litigation*, the Court held that corporations cannot "get[] around their discovery obligations by funneling documents through legal counsel for comment before sending them to everyone else within the corporate structure."[474] Moreover, the privilege does not protect information related to the attorney-client relationship such as the identity and address of the client, the fee arrangements, the duration of the relationship, the terms of the relationship, the services rendered, the hours worked, etc.[475]

In addition, the underlying facts of a privileged communication are not immune from disclosure.[476] Only the communication itself and evidence of the communication are privileged.[477] Indeed, in *Philadelphia v. Westinghouse Electric Corp.*, the Court affirmed as follows:

> [T]he protection of the privilege extends only to communications and not to facts. 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.[478]

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467 U.S. v. Knoll, 16 F.3d 1313 (2d Cir. 1994), at 1322.

468 Hardy v. New York News, Inc., 114 F.R.D. 633 (S.D.N.Y. 1987), at 644-5.

469 U.S. v. Bisanti, *supra* note 438, at 172.

470 *Id.*

471 Rothstein and Crump, *supra* note 449, at § 2:10.

472 *Id.*; Fisher v. U.S., 425 U.S. 391 (1976), at 404-5.

473 Rothstein and Crump, *supra* note 449, at § 2:11.

474 In re Vioxx Products Liability Litigation, 501 F. Supp. 2d 789 (E.D. La. 2007), at 810.

475 For extensive case law, see Rothstein and Crump, *supra* note 449, at § 2:11, fns 16-28.

476 Rothstein and Crump, *supra* note 449, at § 2:10; Upjohn Co. v. United States, *supra* note 59, at 395.

477 *Id.*

478 Philadelphia v. Westinghouse Electric Corp., *supra* note 449, at 831.

In reference to the above, the Court further declared, "The principles stated in this memorandum are practically horn-book law and require no elaboration or citation of authorities."[479] In a simpler manner, in *State ex rel. Dudek v. Circuit Court for Milwaukee County*, the Court declared that "the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer, nor may he secrete a preexisting document merely by giving it to his attorney."[480]

Fourth, the communication must have been made in confidence. In other words, the communication must have been expressly made confidential by the client or made under circumstances or in a way that the client could reasonably assume that the attorney would understand it as being confidential.[481] In *U.S. v. Ary*, the Court of Appeals for the Tenth Circuit held that "[b]ecause confidentiality is critical to the privilege, it will be lost if the client discloses the substance of an otherwise privileged communication to a third party."[482]

The same reasoning applies if a third party is present when the communication is made to the attorney.[483] It is important to note that, as mentioned above, individuals employed by attorneys and assisting attorneys in the provision of legal advice are not considered as third parties. A conversation held in a hallway and conducted with intonations loud enough for a passerby to hear is not considered as being made in confidence.[484] The requirement of confidentiality is also not fulfilled if the communication is distributed to employees of the corporation not directly concerned with the matters contained.[485] In *Upjohn v. U.S.*, for example, the Court took into consideration the fact that the communications in question had been treated as confidential from the outset and had not been disclosed to anyone except to the general counsel and the external counsel.[486]

Moreover, the privilege belongs to the client.[487] Only the client, or his attorney if the client is not present, can make a claim of privilege.[488] As a result, only the client can waive the privilege. The privilege may be waived in different ways. For example, privilege is waived when it is not invoked in situations where it should have been, such as in response to a disclosure

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479 *Id.*

480 State ex rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis.2d 559 (1967), at 580.

481 Sheet Metal Workers Intern. Ass'n v. Sweeney, 29 F.3d 120 (4th Cir. 1994), at 125.

482 U.S. v. Ary, 518 F.3d 775 (10th Cir. 2008), at 782.

483 U.S. v. Goodapple, 958 F.2d 1402 (7th Cir. 1992), at 1409.

484 U.S. v. Blasco, 702 F.2d 1315 (11th Cir. 1983), at 1329.

485 Muro v. Target Corp., 243 F.R.D. 301 (N.D. Ill. 2007), at 306.

486 Upjohn Co. v. United States, *supra* note 59, at 395.

487 Rothstein and Crump, *supra* note 449, at § 2:19.

488 *Id.*

request.[489] The Federal Rules of Civil Procedure contain a provision to that effect at Rule 33(b)(4).[490]

Additionally, the privilege can also be waived by voluntary disclosure of the content of the privileged communication[491]: "Where disclosure to a third party is voluntary, the privilege is waived."[492] In the corporate context, in *Muro v. Target Corp.*, the Court declared that "the privilege once established can be waived if the communication is shared with corporate employees who are not 'directly concerned' with or did not have 'primary responsibility' for the subject matter of the communication."[493] A voluntary waiver by a client of one of more communications is considered as a waiver of all communications between this client and his attorney on the same subject matter.[494] This is justified by reason of basic fairness.[495] Indeed, a party should not be able to disclose privileged communications favorable to his case and at the same time withhold the detrimental ones.[496]

Finally, the privilege can also be waived by inadvertent disclosure.[497] However, Rule 502 of the Federal Rules of Evidence provides that the inadvertent disclosure of attorney-client privileged materials does not operate as a waiver if the holder of the privilege took reasonable steps to prevent disclosure and to rectify the error.[498]

In order to limit the effect of a disclosure, the Federal Rules of Evidence provide that the court may issue an order to ensure that disclosure of privileged communications connected with the litigation pending before such court does not waive the privilege.[499] However, this agreement only applies to the parties to the proceedings and must be incorporated into a court order to apply to third parties as well.[500]

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489 *Id.*, at § 2:27.

490 "The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure." (Fed. R. Civ. P. 33(b)(4)).

491 Rothstein and Crump, *supra* note 449, at § 2:28.

492 U.S. v. Ary, *supra* note 482, at 782.

493 Muro v. Target Corp., *supra* note 485, at 306.

494 Duplan Corp. v. Deering Milliken, *supra* note 446, at 1161; Fed. R. Evid. 502(a).

495 Duplan Corp. v. Deering Milliken, *supra* note 446, at 1161-62; Fed. R. Evid. 502(a)(3).

496 Section 1.4.2.1.

497 Rothstein and Crump, *supra* note 449, at § 2:30.

498 Fed. R. Evid. 502(b).

499 Fed. R. Evid. 502(d).

500 Fed. R. Evid. 502(e).

2.3.3 France

Professional secrecy in French law is provided for in the French Penal Code (FPC) at Article 226-13, which reads as follows:

> The disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year's imprisonment and a fine of €15,000.[501]

Contrary to Article 321 of the Swiss Criminal Code, Article 226-13 FPC does not provide a list of persons who are bound by professional secrecy. Therefore, it is necessary to refer to other legal texts or to the jurisprudence.[502]

The legal privilege in French law is codified in a number of legal texts, including the Decree of 12 July 2005 on the professional ethics of attorneys[503] and the Decision of 12 July 2007 on the adoption of the national domestic regulation of the legal profession.[504] The legal privilege is a matter of public policy,[505] absolute,[506] and unlimited in time.[507] In other words, even with the express authorization of his client, an attorney is prohibited from disclosing materials protected by professional secrecy.

The professional secrecy applies to individuals considered as attorneys under French law.[508] An attorney must be registered to a bar[509] and must exercise his profession as a sole practitioner, as a member of an association or a company constituted of attorneys, or as an employee of an attorney or of an association or company of attorneys.[510] Therefore, the professional secrecy does not apply to in-house counsel. Nevertheless, the legal privilege also

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501 Art. 226-13 FPC.

502 M. Véron, *Droit pénal spécial* (2010), at 214.

503 Décret n°2005-790 du 12 juillet 2005 relatif aux règles de déontologie de la profession d'avocat.

504 Décision du 12 juillet 2007 portant adoption du règlement intérieur national (RIN) de la profession d'avocat.

505 A. Huet, *Les conflits de lois en matière de preuve* (1965), at 334.

506 Except in criminal law when documents protected by professional secrecy evidence that the attorney has committed a crime. (Cass. crim., 18 juin 2003, N°. 03-81979).

507 Art. 2.1 Décision du 12 juillet 2007 portant adoption du règlement intérieur national (RIN) de la profession d'avocat; Cass. 1re civ., 27 janvier 2004, N°. 01-13976.

508 Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques; Décision du 12 juillet 2007 portant adoption du règlement intérieur national (RIN) de la profession d'avocat.

509 Art. 1.2 Décision du 12 juillet 2007 portant adoption du règlement intérieur national (RIN) de la profession d'avocat; Art. 15 Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques, modifié par la Loi n° 97-308 du 7 avril 1997.

510 Art. 7 Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques, modifié par la Loi n° 97-308 du 7 avril 1997.

applies to the attorney's employees and to any person cooperating with the attorney in the exercise of his profession.[511]

Following a broad interpretation of the notion of information covered by professional secrecy in the jurisprudence,[512] the legislators enacted the Law of 7 April 1997[513] modifying the Law of 31 December 1971 on the reform of certain judicial and juridical professions,[514] in order to list the materials covered by the professional secrecy. The current version of the Law of 31 December 1971[515] provides that in all matters, whether in relation to legal advice or representation, the legal opinions addressed by an attorney to his client or destined to him, the communications exchanged between a client and his attorney, the communications exchanged between attorneys, the notes taken by the attorney during consultation, and, more generally, all the evidence contained in the case file, are covered by the professional secrecy.[516] As two commentators concluded; more often than not, a law firm letterhead will be sufficient to attract the privilege.[517] However, before civil courts, the legal privilege excludes the evidence gathered in the case file.[518] As Taisne puts it, it would be absurd to forbid the attorney to produce evidence which was gathered for the case.[519] However, in practice, there still remain difficulties for a party to obtain evidence in the possession of the opposing party's attorney.[520]

The Decision of 12 July 2007 on the adoption of the national domestic regulation of the legal profession[521] further provides that professional secrecy applies regardless of whether the medium is material or immaterial (paper, fax, emails, etc.) and that it covers all information and secrets which were confided to the attorney in the exercise of his profession, including the names

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511 Art. 2.3 Décision du 12 juillet 2007 portant adoption du règlement intérieur national (RIN) de la profession d'avocat.

512 Véron, *supra* note 502, at 216.

513 Loi n° 97-308 du 7 avril 1997 modifiant les articles 54, 62, 63 et 66-5 de la Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques.

514 Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques.

515 Art. 66-5 Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques, modifié par la Loi n° 97-308 du 7 avril 1997.

516 "*En toutes matières, que ce soit dans le domaine du conseil ou dans celui de la défense, les consultations adressées par un avocat à son client ou destinées à celui-ci, les correspondances échangées entre le client et son avocat, entre l'avocat et ses confrères à l'exception pour ces dernières de celles portant la mention 'officielle', les notes d'entretien et, plus généralement, toutes les pièces du dossier sont couvertes par le secret professionnel* …" (Art. 66-5 Loi n° 71-1130 du 31 décembre 1971).

517 Baudesson and Rosher, *supra* note 5, at 50.

518 J.-J. Taisne, *La déontologie de l'avocat* (2011), at 123.

519 *Id.*

520 Véron, *supra* note 502, at 216.

521 Décision du 12 juillet 2007 portant adoption du règlement intérieur national (RIN) de la profession d'avocat.

of his clients and his agenda.[522] As mentioned above, communications exchanged between attorneys, whether oral or written, and regardless of the medium, cannot be produced in court.[523]

Finally, communications between attorneys cannot be subject to waivers of privilege.[524] However, in European Union anti-trust investigations, the European Court of Justice held that, contrary to French practice, a client can waive the attorney-client privilege.[525]

2.3.4 Switzerland

The legal privilege in Swiss law is recognized by the Swiss Federal Act on the Freedom of Movement for Lawyers (FAFML),[526] the Swiss Criminal Code (SCC),[527] the Swiss Civil Procedure Code (SCPC),[528] as well as by different federal and cantonal legislations.

In civil matters, the SCPC contains various provisions governing the legal privilege. First, Article 160 SCPC provides that parties and third parties have a duty to cooperate in the taking of evidence as well as an obligation to produce physical records, with the exception of communications with attorneys related to legal representation.[529] Article 160(1)(b) SCPC reads as follows:

> Parties and third parties have a duty to cooperate in the taking of evidence. In particular, they have the duty: …
>
> b. to produce the physical records, with the exception of correspondence with lawyers provided it concerns the professional representation of a party or third party …[530]

The difficulty with the legal privilege is the medium on which the communication exists.[531] The medium is not necessarily held by the attorney; it can be in the possession of the client or of a third party.[532] Therefore, Article 160 SCPC links the communication with its medium in order to ensure

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522 Art. 2.2 Décision du 12 juillet 2007 portant adoption du règlement intérieur national (RIN) de la profession d'avocat.

523 Art. 3.1 Décision du 12 juillet 2007 portant adoption du règlement intérieur national (RIN) de la profession d'avocat.

524 *Id.*

525 Case 155/79, *A. M. & S. Europe Ltd. v Commission of the European Communities* [1983] Q.B. 878, at para. 28.

526 Art. 13 FAFML.

527 Art. 321 SCC.

528 Art. 160(1)(b) SCPC; Art. 163(1)(b) SCPC; Art. 166(1)(b) SCPC.

529 Art. 160 SCPC.

530 Art. 160(1)(b) SCPC.

531 Jeandin, "Art. 160", in F. Bohnet et al. (eds), *Code de procédure civile commenté* (2011) 640, at 646.

532 *Id.*

that the communication remains protected from disclosure regardless of the holder of the medium.[533] Former cantonal civil procedural codes only protected attorney correspondence in the possession of an attorney, whereas the SCCP does not differentiate attorney correspondence held by the client or third parties from correspondences in the possession of the attorney.[534]

This exception to the obligation to cooperate is limited to communications in relation to the legal representation of a party or a third party.[535] Those communications may consist of letters drafted by attorneys to their clients, letters drafted by clients to their attorneys, drafts of agreements drafted by attorneys, minutes of meetings with clients, and without prejudice letters exchanged between attorneys.[536]

The privilege does not apply to communications created by attorneys in the course of activities which do not qualify as "legal representation," such as when an attorney communicates in his capacity of director of a company.[537]

Article 160(1)(b) SCPC is applicable to both the parties to the proceedings and third parties.

Article 163(1)(b) SCPC provides that an attorney, party to the proceedings, may refuse to cooperate in the taking of evidence if it implies the disclosure of a secret that has been confided to him in his professional capacity or which has come to his knowledge in the practice of his profession.[538] In fact, an attorney may not only refuse to cooperate, but is obliged to do so under Article 13 para. 1 FAFML, if he has not been released from professional secrecy by his client. The same applies for Article 166(1)(b) SCPC. Article 163(1)(b) SCPC must be read in conjunction with Article 321 of the Swiss Criminal Code. Indeed, Article 163(1)(b) reads as follows:

> A party may refuse to cooperate if: …
>
> b. the disclosure of a secret would be an offence under Article 321 of the Swiss Criminal Code (SCC); the foregoing does not apply to auditors; Article 166 paragraph 1 letter b third subset applies by analogy.[539]

Reference is made to Article 321 SCC, which provides at para. 1 that:

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533 *Id.*

534 Frischknecht and Schmidt, "Privilege and Confidentiality in Third Party Funder Due Diligence: The Positions in the United States and Switzerland and the Resulting Expectations Gap in International Arbitration", vol. 8 issue 4 *TDM* (2011), at 19.

535 Art. 160(1)(b) SCPC; Jeandin, "Art. 160", *supra* note 531, at 646.

536 Jeandin, "Art. 160", *supra* note 531, at 646-7.

537 ATF 114 III 105; Jeandin, "Art. 160", *supra* note 531, at 646; C. Favre, *Code pénal: Loi fédérale régissant la condition pénale des mineurs. Code annoté de la jurisprudence fédérale et cantonale* (2011), at 738.

538 Art. 163(1)(b) SCPC; Art. 321 SCC.

539 Art. 163(1)(b) SCPC.

> Any person who in his capacity as … lawyer, defence lawyer … or as an auxiliary to any of the foregoing persons discloses confidential information that has been confided to him in his professional capacity or which has come to his knowledge in the practice of his profession shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.[540]

Similarly, Article 166(1)(b) SCPC provides that an attorney, not a party to the proceedings, may refuse to cooperate in the taking of evidence if it implies the disclosure of a secret that has been confided to him in his professional capacity or which has come to his knowledge in the practice of his profession:

> Any third party may refuse to cooperate:
>
> b. to the extent that the revelation of a secret would be punishable by virtue of Article 321 SCC; auditors excepted; however, with the exception of lawyers and clerics, third parties must cooperate if they are subject to a disclosure duty or if they have been released from duty of secrecy, unless they show credibly that the interest in keeping the secret takes precedence over the interest in finding the truth.[541]

Who is an attorney for the purposes of the legal privilege? An attorney is an individual registered to a Swiss[542] or foreign bar and practicing law independently or within a law firm.[543] For the Swiss Federal Tribunal, the traditional practice of law consists in providing legal advice, drafting legal documents, and assisting or representing clients before judicial or administrative authorities.[544] Auxiliaries and assistant of attorneys are also covered by the privilege.[545]

In-house counsel cannot invoke the legal privilege under Swiss law,[546] even when admitted to a bar.[547] On 4 June 2011, the Swiss Federal Council withdrew draft legislation concerning in-house counsel given the lack of support within Parliament.[548] The draft legislation provided for a restricted legal privilege for in-house counsel.[549]

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[540] Art. 321(1) SCC.

[541] Art. 166(1)(b) SCPC; Art. 321(1) SCC.

[542] Art. 6 FAFML.

[543] Corboz, *supra* note 351, at 762; Favre, *supra* note 537, at 1872.

[544] ATF 135 III 410.

[545] Art. 163(1)(b) SCPC; Art. 166(1)(b) SCPC; Art. 13(2) FAFML.

[546] Rapport explicatif concernant l'avant-projet de loi fédérale sur les juristes d'entreprise (LJE) (Avril 2009), at 6; Michel, "Le secret professionnel de l'avocat et ses limites (1ère partie)", 10 *Revue de l'avocat* (2009) 498, at 499; Frischknecht and Schmidt, *supra* note 534, at 18; Corboz, *supra* note 351, at 762; Favre, *supra* note 537, at 1872.

[547] Corboz, *supra* note 351, at 762.

[548] Press release of the Swiss Federal Department of Justice and Police of 4 June 2010.

[549] Press release of the Swiss Federal Department of Justice and Police of 22 April 2009.

What is a secret for the purpose of the legal privilege? A secret consists of facts, whether true or not,[550] which comply with a number of cumulative requirements.[551] First, the secret must be known to a limited circle of people and not be publicly available or easily knowable.[552] Second, the owner of the secret must have an interest in keeping the secret confidential.[553] Third, the owner of the secret must act in such a way as to keep the secret confidential or within a limited circle of people.[554] Fourth, the secret must have come to the knowledge of the attorney in the course of his profession.[555] The secret may have been confided to the attorney by his client or by a third party or come to his knowledge in the course of his profession, through consultation of the case file for example.[556] Secrets which have be confided to the attorney or come to his knowledge in the course of activities outside the traditional practice of law, such as in his capacity of wealth manager, trust officer or member of a board of directors, do not fall within the ambit of the legal privilege.[557]

In Swiss law, the legal privilege is the privilege of the attorney and not of the client.[558] It means that even if the attorney is released from his duty of secrecy by his client, he may nevertheless refuse to cooperate in the taking of evidence before Swiss courts.[559] This provision is contained in Article 166(1)(b) SCPC and applies by analogy under Article 163(1)(b) SCPC. The Swiss Federal Council presented it as follows: "*Cette protection renforcée est fondée sur la confiance toute particulière que leur accorde le public et le fait qu'ils constituent le dernier refuge de la personne.*"[560]

2.4 Work Product Doctrine

The work product doctrine is known under this name in the United States and as the litigation privilege in England. In *Anderson v Bank of British Columbia*, the Court of Appeal described the principle as being "that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief."[561] In the same vein, the U.S.

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550 Corboz, *supra* note 351, at 739; M. Dupuis et al. (eds), *Code pénal* (2012), at 1856.

551 Corboz, *supra* note 351, at 739.

552 *Id.*, at 740, 765; Dupuis, *supra* note 550, at 1857.

553 Corboz, *supra* note 351, at 765; Dupuis, *supra* note 550, at 1857.

554 *Id.*

555 Art. 321(1) SCC; Corboz, *supra* note 351, at 766-8; Dupuis, *supra* note 550, at 1876-7.

556 Corboz, *supra* note 351, at 766-8; Dupuis, *supra* note 550, at 1876-7.

557 ATF 135 III 597; Corboz, *supra* note 351, at 767-8; Dupuis, *supra* note 550, at 1876-7.

558 Art. 166(1)(b) SCPC; Art. 163(1)(b) SCPC.

559 *Id.*

560 06.062 Message relatif au code de procédure civile (CPC) du 28 juin 2006, at 6928.

561 *Anderson v Bank of British Columbia* [1876] 2 Ch. D. 644, at 656.

Supreme Court declared that the attempt to obtain "written statements, private memoranda and personal recollections"[562] prepared by an attorney "falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims."[563] It further held that "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney."[564]

2.4.1 England

While the legal advice privilege applies to communications held between an attorney and his client, regardless of whether litigation is contemplated, the litigation privilege covers only communications once litigation is in contemplation. There is still confusion in English law on whether the litigation privilege applies to communications between an attorney and his client. According to Thanki, the litigation privilege does not apply to communications between an attorney and his client; such communications will always fall within the scope of the legal advice privilege.[565] However, for Hollander, communications between an attorney and his client, when litigation is contemplated, fall within the within the scope of the litigation privilege.[566] Thanki explains that this confusion comes from the fact that originally, the legal advice privilege was limited to advice provided for litigation purposes.[567]

Lord Rodger of Earlsferry vividly summarized the rationale behind the litigation privilege as follows:

> Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or jury determining the winner. In such a system each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations.[568]

The litigation privilege in English law has its origins in 19th century cases.[569] The first case[570] was *Anderson v Bank of British Columbia*.[571] In

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562 Hickman v. Taylor, 329 U.S. 495 (1947), at 510.

563 *Id.*

564 *Id.*

565 Thanki, *supra* note 49, at 5, 120-1.

566 Phipson, Malek and Auburn, *supra* note 46, at 633-4.

567 Thanki, *supra* note 49, at 7.

568 *Three Rivers (No 6)* (HL), *supra* note 73, at 1290.

569 *Id.*, at 1308.

contemplation of a highly probable litigation, a London-based manager of the Bank of British Columbia sent a telegram to a manager in Portland, Oregon, requesting the full particulars of a transaction allegedly improperly executed. Such details were duly sent by letter to the Bank's headquarters in London and were discussed with the Bank's solicitor at a meeting of the board of directors. In following litigation, privilege was claimed for the letter. The Court of Appeal ultimately rejected the claim for privilege.[572] The importance of this case lies in the statements of the law put forward by the Court of Appeal and not in the conclusion reached.[573] In fact, the letter would have been regarded as privileged if modern principles were to be applied.[574] In this case, the Court of Appeal defined the rationale behind the litigation privilege as follows:

> [T]he solicitor's acts must be protected for the use of the client. The solicitor requires further information, and says, I will obtain it from a third person. That is confidential. It is obtained by him as solicitor for the purpose of the litigation, and it must be protected upon the same ground, other vise [*sic*] it would be dangerous, if not impossible, to employ a solicitor. You cannot ask him what the information he obtained was. It may be information simply for the purpose of knowing whether he ought to defend or prosecute the action, but it may be also obtained in the shape of collecting evidence for the purpose of such prosecution or defence. All that, therefore, is privileged.[575]

In *Three Rivers 6*, from its examination of case law dating back to the 19th century, the House of Lords concluded that communications held between clients[576] and their attorneys[577] or between those attorneys and third parties fall within the ambit of the litigation privilege only when three cumulative conditions are satisfied. The conditions are the following: "(a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the

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570 *Id.*

571 *Anderson v Bank of British Columbia*, *supra* note 561.

572 *Three Rivers (No 6)* (HL), *supra* note 73, at 1308-9.

573 *Id.*, at 1309.

574 "On modern principles (and unless the manager was disbelieved, which was not stated) I think it plain hat the representative's letter was privileged as a letter written (whether or not he knew it) for the purpose of laying before a solicitor to obtain legal advice." (*Ventouris v Mountain*, *supra* note 377, at 612 (Quoted in *Three Rivers (No 6)* (HL), *supra* note 73, at 1308-09)); Thanki, *supra* note 49, at 123.

575 *Anderson v Bank of British Columbia*, *supra* note 561, at 649-50 (Quoted in *Three Rivers (No 6)* (HL), *supra* note 73, at 1308-09).

576 In specific cases, the privilege may apply to communications between the client and third parties (See Thanki, *supra* note 49, at 122-124; Phipson, Malek and Auburn, *supra* note 46, at 639-41).

577 As mentioned above, for some authors, the privilege does not apply for communications between an attorney and his client.

litigation must be adversarial,[578] not investigative or inquisitorial."[579] Pre-existing non-privileged documents do not attract privilege even if obtained for the purpose of the litigation.[580]

Like the legal advice privilege, the litigation privilege only applies to the communications exchanged and not to the facts communicated.[581] It cannot be claimed for communications which are themselves part of a crime or created for the purpose of obtaining advice on facilitating the commission of a crime.[582] Apart from traditional communications, the litigation privilege also applies to "material generated by [the lawyer's] preparations [for the case]."[583]

Only the client can invoke the litigation privilege and has the right to waive the privilege, even for privileged communications held between his lawyer and third parties.[584]

2.4.2 United States

The English litigation privilege has its equivalent in American law under the work product doctrine, also referred to as the work product immunity. The work product doctrine is provided for in Rule 26(b)(3) of the Federal Rules of Civil Procedure, which stipulates, with certain exceptions, that materials "prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)"[585] and "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation"[586] are protected from disclosure.

The work product doctrine was definitely recognized[587] in *Hickman v. Taylor*.[588] While towing a railroad car float across the Delaware River, the tugboat 'J. M. Taylor' sank and 5 crewmembers drowned. Following the accident, the tugboat owners appointed a law firm to defend them against

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578 For further reading on the application of the litigation privilege to non-adversarial arbitration under the Arbitration Act, see Nappert and Blyth, "The Legacy of Three Rivers in Non-Adversarial Arbitral Proceedings", vol. 1 issue 3 *TDM* (2004). Nappert and Blyth argue that the "litigation privilege is not necessarily or totally excluded from non-adversarial arbitration by recent case law." It shall be noted that this article was published before *Three Rivers 6*.

579 *Three Rivers (No 6)* (HL), *supra* note 73, at 1311.

580 *Ventouris v Mountain*, *supra* note 377, at 611; Phipson, Malek and Auburn, *supra* note 46, at 641.

581 Thanki, *supra* note 49, at 122.

582 *Id.*, at 184

583 *Three Rivers (No 6)* (HL), *supra* note 73, at 1290.

584 Thanki, *supra* note 49, at 14, 15, 120.

585 Fed. R. Civ. P. 26(b)(3)(A).

586 Fed. R. Civ. P. 26(b)(3)(B).

587 Rothstein and Crump, *supra* note 449, at § 11:1.

588 Hickman v. Taylor, *supra* note 562.

potential lawsuits. Mr. Fortenbaugh, an attorney in the law firm, interviewed the survivors as well as other individuals believed to have some information on the accident. A suit was finally brought in a federal court and the claimant asked the tugboat owners to declare whether any statements in relation to the accident were taken from the crew and, if so, to provide copies of any written statement and transcripts of the oral statements. Mr. Fortenbaugh declined to summarize the statements taken on the ground that "such request called for privileged matter obtained in preparation for litigation and constituted an attempt to obtain indirectly counsel's private files"[589] and that it "would involve practically turning over ... the thoughts of counsel."[590] The Supreme Court held that memoranda and communications created by an attorney in anticipation of litigation do not fall within the ambit of the attorney-client privilege[591] but remain, nevertheless, immune from disclosure.[592]

As mentioned above, the work product doctrine in federal courts is now codified under Fed. R. Civ. P. 26(b)(3), which provides as follows:

> (3) Trial Preparation: Materials.
>
> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> (i) they are otherwise discoverable under Rule 26(b)(1); and
>
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> (B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."[593]

Under Fed. R. Civ. P. 26(b)(3)(A), a number of conditions must be fulfilled in order for materials to be protected by work product. First, the Federal Rules of Civil Procedure provide that the materials must consist of documents or tangible things. Nonetheless, as the Supreme Court ruled in *Hickman v. Taylor*,[594] courts have held that intangible materials also benefit from the

589 *Id.*, at 499.

590 *Id.*

591 *Id.*, at 508.

592 *Id.*, at 509-10.

593 Fed. R. Civ. P. 26(b)(3).

594 Hickman v. Taylor, *supra* note 562, at 512-3.

protection.[595] Materials protected by work product may consist of private memoranda, declarations of witnesses, documents evidencing mental impressions, personal beliefs, legal theories, expert opinions, strategies, and tactics.[596]

The protection is not absolute; not all materials obtained or prepared by an attorney for litigation purposes are protected from disclosure.[597] Indeed, Fed. R. Civ. P. 26(b)(3)(A)(i) stipulates that any materials discoverable under Fed. R. Civ. P. 26(b)(1) must nevertheless be produced. This provision refers to non-privileged matters relevant to the case.[598] Under Fed. R. Civ. P. 26(b)(3)(A)(ii), the courts may also order the production of materials when a party shows that it has substantial need for it and cannot be obtained otherwise without undue hardship,[599] such when a witness is no longer available[600] or in case of material discrepancies with previous witness depositions or failures to recall significant facts.[601] However, absolute protection is granted to "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."[602] In addition, as it is the case with the attorney-client privilege, there is no protection when the attorney is assisting his client to commit a crime or a fraud.[603]

Second, the materials in question must have been prepared in anticipation of contemplated or existing litigation. It is not necessary that litigation has commenced.[604]

Third, the materials must have been prepared by the party or on behalf of the party or its representative. Fed. R. Civ. P. 26(b)(3)(A) defines representatives of the party as the party's attorney, consultant, surety, indemnitor, insurer, or agent.[605] The courts have followed this broad application[606] and in *Cities Service Co. v. F.T.C.*, work product protection was granted to materials "created by those integrally involved"[607] in the pending litigation. Moreover, facts known or opinions held by an expert retained by a

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595 For case law, see Rothstein and Crump, *supra* note 449, at § 11:2.

596 *Id.*, at § 11:3.

597 Hickman v. Taylor, *supra* note 562, at 511.

598 Fed. R. Civ. P. 26(b)(1).

599 Fed. R. Civ. P. 26(b)(3)(A)(ii).

600 Hickman v. Taylor, *supra* note 562, at 511.

601 Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), judgment aff'd, 400 U.S. 348 (1971), at 492.

602 Fed. R. Civ. P. 26(b)(3)(B).

603 Mattenson v. Baxter Healthcare Corp., 438 F.3d 763 (7th Cir. 2006), at 769.

604 Rothstein and Crump, *supra* note 449, at § 11:2.

605 Fed. R. Civ. P. 26(b)(3)(A).

606 Rothstein and Crump, *supra* note 449, at § 11:2.

607 Cities Service Co. v. F.T.C., 627 F. Supp. 827 (D.D.C. 1984), at 833.

party for the purpose of litigation are protected from disclosure if the expert is not expected to testify.[608]

The work product doctrine can only be invoked by the attorney or any other representative of the client who created the materials.[609] It is waived expressly or tacitly like the attorney-client privilege. However, waiving one document does not entail the waiver of all documents related to the same subject matter, unlike in the case of the attorney-client privilege.[610] Moreover, voluntary disclosure to a third party does not waive the privilege,[611] except if the materials are given to the other party to the proceedings or are likely to be.[612] This is justified by the fact that the attorney-client privilege protects the confidentiality of the attorney-client relationship while the work product promotes the adversary process.[613] Indeed, the disclosure of attorney-client communications to anyone, not just to the other party, is inconsistent with the confidential nature of the relationship.[614] The examination of Fed. R. Evid. 502 in Section 2.3.2 above applies equally to work product.

2.4.3 France

The work product privilege in French law falls within the ambit of the legal privilege. Indeed, the professional secrecy of the attorney in French law applies to the legal opinions addressed by an attorney to his client or destined to him, the communications exchanged between a client and his attorney, the communications exchanged between attorneys, the notes taken by an attorney during consultation, and more generally, to all the evidence contained in the case file, regardless of whether or not they are related to anticipated or existing litigation.[615]

2.4.4 Switzerland

There is no attorney work product *per se* in Swiss law. In fact, communications which would be protected under the attorney work product in common law jurisdictions fall within the ambit of the legal privilege in Switzerland. Indeed,

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608 Fed. R. Civ. P. 26(b)(4)(D); For further reading on facts and opinions held by experts, see Rothstein and Crump, *supra* note 449, at § 11:10.

609 Rothstein and Crump, *supra* note 449, at § 11:6.

610 *Id.*, at § 11:12.

611 U.S. v. Deloitte LLP, 610 F.3d 129 (D.C. Cir. 2010), at 139-40; Wi-Lan, Inc. v. Acer, Inc., 2010 WL 4118625 (E.D. Tex. 2010), at 5.

612 U.S. v. Deloitte LLP, *supra* note 611, at 140; Wi-Lan, Inc. v. Acer, Inc., *supra* note 611, at 5.

613 U.S. v. Deloitte LLP, *supra* note 611, at 139-40.

614 *Id.*, at 140.

615 Art. 66-5 Loi n° 71-1130 du 31 décembre 1971.

all communications created by attorneys in the course of legal representation are protected from disclosure under Article 160(1)(b) SCPC, regardless of whether or not they are related to anticipated or existing litigation.[616] Moreover, Articles 163(1)(b) SCPC and 166(1)(b) SCPC forbid attorneys to disclose secrets that have come to their knowledge in the course of their profession, including in relation to litigation.

2.5 Joint and Common Interest Privilege

The rationale of the joint and common interest privilege is to encourage the free flow of information between parties in relation to their common legal interest in order to enhance the quality of legal advice.[617] The joint and common interest privilege is an exception to the general rule that the disclosure of attorney-client or work product privileged communications to third parties waives the privilege.[618]

2.5.1 England

Under English law, the privilege is divided into two categories: the joint privilege and the common interest privilege.

The joint privilege can arise in the case of joint retainer, *i.e.* when the parties retain the same attorney, or in the case of joint interest, *i.e.* when the parties, despite not having retained the same attorney, have a joint interest in the subject matter of the privileged communication.[619] In relation to communications protected by the joint privilege, the parties cannot claim privilege against one another but can maintain privilege against third parties.[620]

Concerning the joint retainer, there exists no joint privilege in the following situations: (i) the parties separately retain a common attorney, (ii) one of the parties consults the common attorney on an individual and exclusive basis, or (iii) one of the parties retains an attorney on behalf of another (in this case, such party would be acting as an agent).[621]

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616 Frischknecht and Schmidt, *supra* note 534, at 20.

617 Schaffzin, *supra* note 61, at 51.

618 In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129, 902 F.2d 244, at 248; In re Megan-Racine Associates, Inc., 189 B.R. 562 (Bankr. N.D.N.Y. 1995), at 571.

619 Thanki, *supra* note 49, at 269; Phipson, Malek and Auburn, *supra* note 46, at 647-8.

620 *The Sagheera* [1997] 1 Lloyd's Rep 160, at 165; Thanki, *supra* note 49, at 271, 273, 275; Phipson, Malek and Auburn, *supra* note 46, at 647.

621 Thanki, *supra* note 49, at 270.

The joint privilege also arises when the parties have a joint interest in the subject matter of the communication even though they have not jointly retained the attorney, on the condition that the joint interest subsists when the communication is created.[622] Communications created after a dispute arises between the parties do not fall within the ambit of the joint privilege given that the joint interest no longer subsists.[623] Joint interest may arise, for example, between a trustee and a beneficiary, between a company and its wholly-owned subsidiaries, shareholders, or directors, or between joint venturers.[624]

The common interest privilege may arise between parties sharing a common interest.[625] The privilege was first enunciated in *Buttes Gas and Oil Co v Hammer (No 3)* where Lord Denning said:

> There is a privilege which may be called a "common interest" privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him – who have the self-same interest as he – and who have consulted lawyers on the self-same points as he – but these others have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel's opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation - because it affects each as much as it does the others.[626]

Communications may benefit from the common interest privilege only if they were privileged before being exchanged between the parties.[627] Indeed, the common interest privilege has been said to be "no more than a variety of legal professional privilege."[628] Contrary to the joint privilege, the common interest does not need to exist at the time of creation of the communication.[629] However, the common interest must exist at the time of voluntary disclosure of the communication.[630]

The common interest privilege does not give the right to a party to obtain disclosure of a privileged communication from a party sharing a common interest; communications can only be disclosed voluntarily.[631] It is aimed at

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622 *Id.*, at 273; Phipson, Malek and Auburn, *supra* note 46, at 652.

623 Thanki, *supra* note 49, at 276.

624 *Id.*, at 274-5.

625 *Id.*, at 276; Phipson, Malek and Auburn, *supra* note 46, at 648-9.

626 *Buttes Gas and Oil Co v Hammer (No 3)* [1981] QB 223, at 243.

627 Thanki, *supra* note 49, at 286.

628 *Nauru Phosphate Royalties Trust v Allen Allen & Hemsley* (1997) 13 PN 64, at 65 (Quoted in Thanki, *supra* note 49, at 286).

629 Thanki, *supra* note 49, at 278; Phipson, Malek and Auburn, *supra* note 46, at 652.

630 Thanki, *supra* note 49, at 286; Phipson, Malek and Auburn, *supra* note 46, at 652-3.

631 Thanki, *supra* note 49, at 290; Phipson, Malek and Auburn, *supra* note 46, at 653-4.

protecting privileged communication voluntarily disclosed to a party sharing a common interest from disclosure in legal proceedings.[632]

Although the categories of common interests are not circumscribed,[633] common interest may arise, for example, between a company and its wholly-owned subsidiaries, shareholders or directors, between an insurer and its client, between a company's liquidator and its creditors, or between an insurer and a reinsurer.[634] In *Buttes Gas and Oil Co v Hammer (No 3)*, Lord Denning provides two additional examples of relationships where common interest is likely to arise: between owners of adjoining houses both affected equally by nuisance, and between an author and publisher in relation to claims of libel or infringement of copyright.[635]

The joint privilege belongs to both parties and may only be waived by consent of both parties.[636] However, it is not that clear cut in regard to the common interest privilege.[637] The disclosure of privileged communications between parties sharing a joint interest or common interest does not constitute a waiver of privilege.[638]

2.5.2 United States

Although scholars and courts use different terms to address the privilege,[639] for present purposes, the privilege is considered to be divided into three categories: the joint defense privilege, the joint privilege, and the common interest privilege.

The joint defense privilege protects privileged communications exchanged as "part of an on-going and joint effort to set up a common defense strategy."[640] The joint privilege applies when multiple parties consult the same attorney.[641] The common interest privilege arises when privileged communications are shared between parties pursuing a common interest.[642]

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632 Thanki, *supra* note 49, at 278.

633 *Id.*, at 283.

634 *Id.*, at 283-4; Phipson, Malek and Auburn, *supra* note 46, at 651.

635 *Buttes Gas and Oil Co v Hammer (No 3)*, *supra* note 626, at 243.

636 *The Sagheera*, *supra* note 620, at 165-6; Thanki, *supra* note 49, at 270; Phipson, Malek and Auburn, *supra* note 46, at 647.

637 See Thanki, *supra* note 49, at 291-3.

638 *Id.*, at 272-3, 287; *The Sagheera*, *supra* note 620, at 165-6.

639 Schaffzin, *supra* note 61, at 55, 61.

640 Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir. 1985), at 787 (Quoted in In re Bevill, Bresler & Schulman Asset Management Corporation, 805 F.2d 120 (3d Cir. 1986), at 126).

641 In re Teleglobe Communications Corporation, 493 F.3d 345 (3d Cir. 2007), at 362-3.

642 In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129, *supra* note 618, at 249; U.S. v. Schwimmer, 892 F.2d 237 (2d Cir. 1989), at 243.

The joint defense privilege was first recognized in civil proceedings in 1942 in *Schmitt v. Emery*.[643] Schmitt was a passenger of a car which collided with a Northland Greyhound Lines bus in the oncoming lane while passing Emery's car. The issues of whether the bus driver failed to exercise due care to avoid the collisions and whether Emery's car had the lights on were raised during the proceedings. Immediately following the accident and upon consultation with and by direction of Northland Greyhound Lines' attorneys, the bus driver made a written statement in which he declared that Emery's car appeared to have no lights on. Northland Greyhound Lines' attorney shared this statement with Emery's attorney. Schmitt requested that such statement be produced. The Court held that the statement was privileged.[644] The Court further held that the disclosure of the statement to Emery's attorney did not waive the privilege because the statement "was furnished solely to accommodate them and thereby to enable them to make their effort and aid more effective in the common cause of excluding the statement."[645]

To assert the privilege, a party must demonstrate that: "(1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived."[646]

Only communications which are privileged from the outset can fall within the ambit of the joint defense privilege.[647] A party who receives a privileged document under the joint defense privilege "stands under the same restraints arising from the privileged character of the document as the counsel who furnished it, and consequently he has no right, and cannot be compelled, to produce or disclose its contents."[648]

Communications between co-clients and their common attorneys are protected from disclosure to third parties under the joint privilege.[649] For example, in *In re Teleglobe Communications Corporation*, the Court of Appeals for the Third Circuit held that the common interest privilege does not apply to parent companies and their subsidiaries sharing communications unless they are represented by the same legal counsel, in which case they are considered as joint clients and their communications attract the joint privilege.[650]

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643 Schmitt v. Emery, 2 N.W. 2d 413 (Minn. 1942).

644 *Id.*, at 416.

645 *Id.*

646 In re Bevill, Bresler & Schulman Asset Management Corporation, *supra* note 640, at 126.

647 In re Megan-Racine Associates, Inc., *supra* note 618, at 571.

648 Schmitt v. Emery, *supra* note 648, at 417.

649 In re Teleglobe Communications Corporation, *supra* note 641, at 363.

650 *Id.*, at 372.

In order to for communications to be protected by the common interest privilege, the parties must share a common interest about a legal matter.[651] It is not sufficient that the parties share a business or commercial common interest.[652] A legal interest can arise between, *inter alia*, companies involved in a potential acquisition[653] or co-plaintiffs in legal proceedings.[654] In *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, for instance, the Court held that Bausch & Lomb did not waive the attorney-client privilege by disclosing an attorney's opinion letter concerning a possible infringement of patent to a non-party with whom it was negotiating the sale of one of its divisions.[655]

In *Sedlacek v. Morgan Whitney Trading Group*, the Court held that the common interest privilege applies to communications exchanged between co-plaintiffs in litigation.[656] However, it is not necessary that litigation be pending or anticipated for the common interest privilege to exist.[657]

The joint and common interest privilege can only be waived with the consent of all parties sharing the privilege.[658]

Finally, the joint and common interest privilege has not been recognized by all federal courts[659] and has been applied unevenly where it has been adopted.[660]

2.6 Without Prejudice Privilege

The rationale behind the without prejudice privilege is that the parties should be encouraged to settle their disputes outside the courts without being discouraged by the knowledge that what is said in the course of those negotiations may be used to their prejudice in the legal proceedings.[661] The public interest in favor of settlement negotiations is that "[t]he ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system."[662] This rule applies

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651 U.S. v. Schwimmer, *supra* note 642, at 243.

652 D. M. Greenwald, *Protecting Confidential Legal Information* (2011), at 184, 190.

653 Hewlett-Packard Co. v. Bausch & Lomb Inc., 115 F.R.D. 208 (N.D. Cal. 1987), at 312.

654 Sedlacek v. Morgan Whitney Trading Group, Inc., 795 F.Supp. 329 (C.D. Cal. 1992), at 331.

655 Hewlett-Packard Co. v. Bausch & Lomb Inc., *supra* note 653, at 312.

656 Sedlacek v. Morgan Whitney Trading Group, Inc., *supra* note 654, at 331.

657 U.S. v. Schwimmer, *supra* note 642, at 244; In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129, *supra* note 618, at 249.

658 In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129, *supra* note 618, at 248; In re Teleglobe Communications Corporation, *supra* note 641, at 363.

659 Schaffzin, *supra* note 61, at 65-8.

660 *Id.*, at 68-9.

661 *Rush and Tompkins Ltd. v Greater London Council* (CA), *supra* note 62, at 537.

662 Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976 (6th Cir. 2003), at 980.

to everything said and written in the course of the negotiations, including the failure to reply to an offer made and the actual reply.[663] The without prejudice privilege rests on two fundamentals[664]: (i) an implicit agreement by the parties that what is said and written in the course of the settlement negotiations will not be disclosed[665] and (ii) a public policy encouraging settlement of disputes outside courts.[666]

2.6.1 England

In English law, the public policy behind the privilege was expressed by Oliver L.J. in *Cutts v Head* as follows:

> That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in Scott Paper Co. v Drayton Paper Works Ltd. (1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table. ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.[667]

In order to be protected by the privilege, the communication in question must have been created for the purpose of a genuine attempt to settle a dispute.[668] Communications between the parties in the normal course of litigation are not privileged.[669]

The without prejudice principle is often misunderstood and misused. Indeed, a document is not necessarily privileged because it is marked "without prejudice." For example, courts have admitted documents written "without

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663 *Cutts v Head* [1984] 2 WLR 349, at 306.

664 Phipson, Malek and Auburn, *supra* note 46, at 655.

665 Cook v. Yellow Freight System, Inc.,132 F.R.D. 548 (E.D. Cal. 1990), at 553.

666 Phipson, Malek and Auburn, *supra* note 46, at 655.

667 *Cutts v Head*, *supra* note 663, at 306 (Quoted in *Rush and Tompkins Ltd. v Greater London Council* [1989] AC 1280 (HL), at 1287).

668 *Rush and Tompkins Ltd. v Greater London Council* (HL), *supra* note 667, at 1295; Phipson, Malek and Auburn, *supra* note 46, at 656; Thanki, *supra* note 49, at 295.

669 Hollander, *supra* note 46, at 246.

prejudice" such as bankruptcy notices[670] because they did not meet the requirement of the without prejudice rule. Moreover, the courts have also refused to permit the phrase to be used to suppress a threat if an offer is not accepted.[671]

In 1889, Lindley J.J. in its obiter dictum in *Walker v. Wilsher*[672] defined the term "without prejudice" in the following manner:

> What is the meaning of the words 'without prejudice'? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.[673]

The Vice-Chancellor Sir Robert Megarry, recalling his years at the Bar, expressed its view that the mere failure to use the expression "without prejudice" does not make admissible in evidence documents or discussions that would otherwise be inadmissible:

> My recollection is that when I was at the Bar I never heard the words 'without prejudice' used when such discussions were taking place, so plain was it that the discussions were upon that footing. Where there is some dispute and an attempt is being made to settle it, I think that the courts should be ready indeed to draw the inference that the attempt is to be 'without prejudice'.[674]

Vice-Chancellor Megarry also noted an improper use of the without prejudice rule in the employment of the words "off the record" and "confidential".[675]

While the privilege only attaches to admissions made in the course of negotiations,[676] modern authorities favors a wider application of the without prejudice rule:

> [T]he protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions

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670 See, *e.g.*, *In re Daintrey, ex parte. Holt* [1893] 2 QB 116: The Queen's Bench Division held that a written notice sent by a debtor to one of its creditors informing him that he was suspending the payment of his debt was admissible even though it was written 'without prejudice' on the document. Indeed, the document did not fulfil the requirements of the rule beause it did not constitute an offer of terms to settle a dispute between the parties.

671 *Kitcat v Sharp* [1882] 48 LT 64.

672 *Walker v Wilsher* [1889] 23 QBD 335 (Quoted in *Rush and Tompkins Ltd. v Greater London Council* (CA), *supra* note 62, at 536).

673 *Walker v Wilsher*, *supra* note 672, at 337 (Quoted in *Rush and Tompkins Ltd. v Greater London Council* (CA), *supra* note 62, at 536).

674 *Chocoladefabriken Lindt & Sprungli AG v The Nestlé Co. Ltd.* [1978] RPC 287, at 288.

675 *Id.*, at 289.

676 *Muller v Linsley and Mortimer* [1996] PNLR 74, at 79; *Rush and Tompkins Ltd. v Greater London Council* (HL), *supra* note 667, at 1301.

> and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties … 'to speak freely about all issues in the litigation both factual and legal when seeking compromise …'.[677]

In regard to multiparty litigation, Lord Griffiths was of the opinion that "the wiser course is to protect without prejudice communications between parties to litigation from production to other parties in the same litigation."[678] Indeed, if two of the parties to the dispute knew that the communications exchanged between them in the course of settlement negotiations would be admissible in litigation with other parties to the dispute, this would "place a serious fetter on [such] negotiations."[679]

However, in *Muller v. Linsley and Mortimer*, when the Court was asked to decide whether without prejudice communications could be disclosed in order to demonstrate that the plaintiffs in multiparty litigation had, in settling the proceedings, acted reasonably in order mitigate their losses, Hoffmann L.J. declared that the public policy justification of the rule was to prevent that anything said in without prejudice negotiations be relied upon as an admission, and that this public policy justification was not concerned with the admissibility of statements which are relevant otherwise than as admissions.[680] Therefore, if the relevance of the communication lies in the fact that a statement was made, and not in the truth of any fact which it asserts or admits, this communication may be admitted as evidence as an exception to the "without prejudice" rule.[681] For this reason, the Court of Appeal allowed the disclosure of the communications that lead to the settlement on the ground that these were relevant to determine whether the plaintiffs acted reasonably in order mitigate their losses.[682] This reasoning was followed by a series of recent Court of Appeal decisions.[683]

The "without privilege save as to costs" principle, examined below, may alleviate the burden of the legal costs on the party serving an offer if the outcome of the proceedings is less favorable to the party served with the offer than what had been offered. Such offer is known as a Calderbank offer. The

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677 *Unilever Plc. v The Procter & Gamble Co.* [2000] 1 WLR 2436, at 2448-9 (Quoted in Thanki, *supra* note 49, at 301).

678 *Rush and Tompkins Ltd. v Greater London Council* (HL), *supra* note 667, at 1305.

679 *Id.*

680 *Muller v Linsley and Mortimer*, *supra* note 676, at 79.

681 *Id.* (Cited in *Unilever Plc. v The Procter & Gamble Co.*, *supra* note 677, at 2445).

682 *Muller v Linsley and Mortimer*, *supra* note 676, at 74.

683 See Phipson, Malek and Auburn, *supra* note 46, at fn. 72.

name originates from the case *Calderbank v Calderbank*[684] where the criteria were first set out.

Following the divorce of the Calderbank spouses, Mr. Calderbank applied for financial provision for himself or, alternatively, a property adjustment offer. In the course of these proceedings, Mrs. Calderbank offered to transfer to her husband the house occupied by his mother worth about £ 12,000. Mr. Calderbank refused the offer, and was subsequently awarded a lump sum payment of £ 10,000, each party supporting their own legal costs.[685]

Mrs. Calderbank appealed the decision on the grounds, *inter alia*, that since her husband was awarded a lump sum of smaller amount than the value of her offer, she was entitled to reimbursement of her legal costs as from 14 August 1974, the date on which her husband ought to have accepted the offer.[686] She alleged that the judge wrongly exercised his discretion on the question of the costs by refusing to award her the costs even though the existence of the letter containing the offer was drawn to his attention.

Mrs. Calderbank argued that the offer was made because it was not possible for her to effect a payment in court as in an ordinary action for damages. In the same vein, Cairns L.J. also noted that other types of proceedings such as proceedings before the Lands Tribunal and the Admiralty Division were affording protection to a party wanting to make a compromise when payment in court was not an appropriate method.[687] Therefore, the Court concluded that there was no reason why this practice could not be adopted in relation to the financial element of matrimonial proceedings and, as a result, awarded the costs incurred from the date of the offer to Mrs. Calderbank.

The Calderbank offer has now been regulated by English law in Civil Procedure Rules Pt 36 under the expression "Part 36 Offer".[688] We will not treat further the "Part 36 Offer" as it is our opinion that this matter relates more to settlement negotiation strategies on one side and to the allocation of costs on the other, than to privileges *per se*.

In *Unilever v Procter and Gamble*, Walker L.J. set out the principal events under which the without prejudice rule does not prevent the admission of without prejudice communications (listed below from 1 to 8):

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684 *Calderbank v Calderbank* [1976] Fam 93.

685 *Id.*, at 105.

686 *Id.*, at 94.

687 In arbitration proceedings, for example.

688 CPR Part 36.

(1) "[W]hen the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible."[689]

(2) "[T]o show that an agreement apparently concluded between the parties during the negotiation should be set aside on the grounds of misrepresentation, fraud or undue influence."[690]

Underwood v Cox[691] is a Canadian case cited by Walker L.J. as a "striking illustration"[692] of this exception to the general rule. In the course of a dispute over the father's will, the brother (the plaintiff) threatened his sister (the defendant) through a without prejudice letter to make public a family secret if she did not agree to settle the dispute. The brother was convinced that this letter would remain a secret missive not to be revealed or used against him in court. However, the Court concluded that the letter was admissible. This conclusion was expressed by Middleton L.J. in the following manner:

> When it is made to appear that the bargain was not a fair compromise of a real dispute, but a complete surrender to a groundless attack, … I am compelled to the conclusion arrived at my lord the Chancellor, that the contract sued upon is in truth a 'nefarious transaction'. …
>
> This rule, founded on public policy, cannot be used as a cloak to cover and protect a communication such as the letter in question, which contains no offer of compromise, but a dishonourable threat.[693]

(3) "[A] clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an *estoppel*."[694]

(4) "[I]f the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety".[695]

The Court of Appeal in *Unilever Plc. v The Procter & Gamble Co.* referred to "oppressive, dishonest or dishonourable"[696] behavior during settlement negotiations as an exception to the without prejudice rule.

(5) In order to explain delay or apparent acquiescence, evidence of the fact that negotiations took place may be given.[697]

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689 *Unilever Plc. v The Procter & Gamble Co.*, *supra* note 677, at 2444; See, *e.g.*, *Tomlin v. Standard Telephones and Cables, Ltd.* [1969] 1 Lloyd's Rep 309.

690 *Unilever Plc. v The Procter & Gamble Co.*, *supra* note 677, at 2444.

691 *Underwood v Cox*, (1912) 4 DLR 66 (Ont. Div. Ct.).

692 *Unilever Plc. v The Procter & Gamble Co.*, *supra* note 677, at 2444.

693 *Underwood v Cox*, *supra* note 691, at paras 56, 58.

694 *Unilever Plc. v The Procter & Gamble Co.*, *supra* note 677, at 2444.

695 *Id.*

696 *Id.*, at 2449.

697 *Id.*, at 2444-5.

Lindley L.J. in *Walker v Wilsher* ruled that the review of the negotiations conducted must be limited to "the fact that such letters have been written and the dates at which they were written,"[698] excluding thereof the "offer made and the mode in which that offer was dealt" from being given in evidence.[699] However, Walker L.J in *Unilever v Procter & Gamble* stressed that "in some cases, the material itself may be put in evidence in order to give the court a fair picture of the rights and wrongs of the delay."[700]

(6) If there is no public policy justification for protecting without prejudice communications.[701]

(7) Where the offer was expressly made "without prejudice save as to costs".[702]

The "save as to costs" exception corresponds to the Calderbank offer examined above.

(8) In matrimonial cases concerning communications received in confidence with a view to matrimonial conciliation.[703]

Finally, because the without prejudice privilege belongs to both parties to the dispute, it may only be waived by consent of both parties.[704]

2.6.2 United States

There are contradicting authorities on whether there exists a settlement privilege in American federal law.

In 2003, the United States Court of Appeal for the Sixth Circuit, in *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*,[705] was the first[706] federal court, and the only Circuit court,[707] to recognize a settlement privilege. This case concerns the purchase of rubber hoses by Chiles Power Supply Co., doing business under the name Heatway Radiant Floors and Snowmelting ("Heatway"), from Goodyear Tire & Rubber Co. Heatway incorporated those rubber hoses into a hydronic radiant heating and snowmelt system, which it

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698 *Walker v Wilsher*, *supra* note 672, at 338.

699 *Id.*

700 *Unilever Plc. v The Procter & Gamble Co.*, *supra* note 677, at 2444.

701 *Id.*, at 2445; See, *e.g.*, *Muller v Linsley and Mortimer*, *supra* note 676.

702 *Unilever Plc. v The Procter & Gamble Co.*, *supra* note 677, at 2445.

703 *Id.*

704 Thanki, *supra* note 49, at 309; Phipson, Malek and Auburn, *supra* note 46, at 655, 667.

705 Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., *supra* note 662.

706 Lauderdale, "A new Trend in the Law of Privilege: The Federal Settlement Privilege and the Proper Use of Federal Rule of Evidence 501 for the Recognition of New Privileges", 35 *U. Mem. L. Rev.* (2005) 255, at 259.

707 In re MSTG, Inc., 675 F.3d 1337 (Fed. Cir. 2012), at 1342.

sold to homeowners around Vail, Colorado. Failures on the system began to surface and Heatway was faced with claims from homeowners. As a result, Heatway set off an amount of two million dollars which it owned to Goodyear under a subsequent contract. Goodyear filed suit against Heatway in Ohio and the parties held confidential settlement negotiations under the auspices of the District Court for the Northern District of Ohio, which ultimately failed. Following the bankruptcy of Heatway, Daniel Chiles, Heatway's co-founder, gave an interview in which he mentioned the settlements offers allegedly made by Goodyear during the negotiations. In response to this interview, the Court issued a confidentiality order concerning the content of the settlement discussions. A year later, homeowners who purchased the system joined the case and petitioned the Court to permit disclosure of any statements made during the settlement negotiations. The Court, relying on the public policy favoring settlements of lawsuits embedded in Fed. R. Evid. 408, concluded that settlement discussions are always confidential.[708] An appeal was filed by the homeowners before the United States Court of Appeals for the Sixth Circuit. The Court of Appeals affirmed the District Court's ruling and declared that "[t]he ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system"[709] and that "without a privilege, parties would more often forego negotiations for the relative formality of trial."[710] Accordingly, the court concluded that "[t]here exists a strong public policy interest in favor of secrecy of matters discussed by parties during settlement negotiations."[711]

It is still unclear from *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.* what constitutes settlement negotiations and if the privilege applies to pre-litigation settlement discussions.[712]

More recently, in 2012, the United States Court of Appeals for the Federal District refused to recognize a settlement privilege in *In re MSTG, Inc.*[713] The Court of Appeals was asked to decide whether settlements negotiations held between MSTG and cell phone service providers and mobile device manufacturers in relation to royalties to be paid under patent license agreements were protected from disclosure by a settlement privilege. The Court of Appeals relied on "several factors [identified by the Supreme Court] to be considered in assessing the propriety of defining a new privilege under

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708 Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., *supra* note 662, at 979.

709 *Id.*, at 980.

710 *Id.*

711 *Id.*

712 Lauderdale, *supra* note 706, at 309-12.

713 In re MSTG, Inc., *supra* note 707.

Rule 501"[714] and concluded that "[t]hese factors do not support recognition of a settlement privilege."[715]

The first factor relates to state legislation.[716] The Court of Appeals held that given the lack of state consensus as to the existence of a settlement privilege, the denial of a federal settlement privilege would not "frustrate the purposes of any state legislation."[717]

The second factor taken into consideration was the desire of Congress to protect settlement negotiations.[718] The Court of Appeals points out that even though Congress has enacted Fed. Rev. Evid. 408 prohibiting the use of statements made in the course of settlement negotiations "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction,"[719] "Congress did not take the additional step of protecting settlement negotiations from discovery."[720] For the Court of Appeals, adopting a settlement privilege would mean going further than Congress thought necessary.[721]

This argument appears erroneous at first sight. In fact, Congress adopted Fed. R. Evid. 501, which provides that federal privileges are governed by the common law "as interpreted by United States courts in the light of reason and experience"[722] rather than the original draft of Article V, which provided for nine rules of privilege to be recognized by federal courts.[723] Therefore, one can assume that it was the desire of Congress to see privileges being developed by federal courts and that the existence of Fed. Rev. Evid. 408 should not be an argument to reject a settlement privilege. However, the Supreme Court has adopted a conservative approach to the recognition of new privileges and seems to refuse to recognize privileges which have not been mentioned in the original draft Article 5 of the Federal Rules of Evidence.[724]

In the same vein, the third factor is whether the settlement privilege was among the nine specific privileges mentioned in the original draft[725] of Article

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714 *Id.*, at 1343.

715 *Id.*

716 *Id.*; The Court of Appeals relied on Jaffee v. Redmond, *supra* note 328.

717 In re MSTG, Inc., *supra* note 707, at 1343.

718 *Id.*, at 1343-5; The Court of Appeals relied on University of Pennsylvania v. EEOC, *supra* note 329.

719 Fed. R. Evid. 408.

720 In re MSTG, Inc., *supra* note 707, at 1344.

721 *Id.*

722 Fed. R. Evid. 501.

723 Notes of Committee on the Judiciary, House Report No. 93–650.

724 For further reading, see Lauderdale, *supra* note 706, at 276-89.

725 Notes of Committee on the Judiciary, House Report No. 93–650.

V of the Federal Rules of Evidence or not.[726] The settlement privilege was not among those nine specific privileges.[727]

The fourth factor requires that it be demonstrated "that the proposed privilege will effectively advance a public good."[728] The Court of Appeals declared that "while there is clearly an important public interest in favoring the compromise and settlement of disputes, disputes are routinely settled without the assistance of a settlement privilege."[729]

The fifth factor taken into consideration relates to the exceptions to the privilege.[730] According to the Court of Appeals, the privilege would have numerous exceptions[731] and "the existence of such exceptions would distract from the effectiveness, clarity, and certainty of the privilege."[732]

Finally, the Court of Appeals opined that there exist other effective methods to limit the scope of disclosure.[733] For instance, under Fed. R. Civ. P. 26(c)(1) and Fed. R. Civ. P. 26(b)(2)(C), the court may forbid or limit disclosure for good cause or if the burden of disclosure outweighs its benefit.[734]

In conclusion, because of conflicting authorities, it is not possible to confirm whether or not there exists a federal settlement privilege, especially since most federal courts have rejected the privilege.[735] The only protection afforded by federal law to settlement negotiations is Fed. Rev. Evid. 408.[736] However, Fed. Rev. Evid. 408 is a rule of admissibility and not a rule of privilege. Hence, this rule is outside the scope of this work and will not be examined herein.

2.6.3 France

In French law, communications exchanged between attorneys, whether oral or written, and regardless of the medium, cannot be produced in court.[737]

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726 In re MSTG, Inc., *supra* note 707, at 1345; The Court of Appeals relied on Jaffee v. Redmond, *supra* note 328.

727 In re MSTG, Inc., *supra* note 707, at 1345.

728 In re Sealed Case, 148 F.3d 1073 (D.C. Cir. 1998) (Quoted in In re MSTG, Inc., *supra* note 707, at 1345).

729 In re MSTG, Inc., *supra* note 707, at 1345.

730 *Id.*, at 1345-6.

731 *Id.*, at 1345.

732 *Id.*, at 1346.

733 *Id.*

734 Fed. R. Civ. P. 26(c)(1); Fed. R. Civ. P. 26(b)(2)(C).

735 Blum and Turro, "Unsettling Observations on the Settlement Privilege" 12 *NYLitigator* (2007) 31, at 32.

736 Rothstein and Crump, *supra* note 449, at § 10:21.

737 Art. 3.1 Décision du 12 juillet 2007 portant adoption du règlement intérieur national (RIN) de la profession d'avocat; Art. 66-5 Loi n° 71-1130 du 31 décembre 1971.

Therefore, communications between attorneys in relation to settlement negotiations which would be protected under the without prejudice privilege in common law jurisdictions fall within the ambit of the legal privilege in French law. However, the privilege does not seem to apply to communications exchanged between the parties that were not created by their attorneys.

2.6.4 Switzerland

A recent decision of the Swiss Federal Tribunal confirmed that without prejudice communications (*réserves d'usage*[738]) between attorneys cannot be produced in court.[739] For the Federal Tribunal, without prejudice communications are considered as illegally obtained evidence under Article 152(2) SCPC and are not admissible.[740] Indeed, under Articles 6[741] and 26[742] of the National Rules of Professional Conduct of the Swiss Bar Association, attorneys are prohibited from informing the court of the existence of a settlement proposal and from producing evidence containing settlement proposals. A violation of these provisions is considered as a violation of Article 12(a) of the Federal Act on the Freedom of Movement for Lawyers[743] which provides that attorneys "shall exercise their profession conscientiously and with diligence."[744]

Chappuis suggests that without prejudice communications between attorneys and third parties may also benefit from the protection if all parties to the communication concluded an agreement to that effect.[745]

2.7 Mediation Privilege

Confidentiality is a fundamental principle of mediation.[746] Mediation may succeed only if the parties can hold frank and open discussions without

738 B. Chappuis, *La profession d'avocat, Tome I: Le cadre légal et les principes essentiels* (2013), at 45.

739 ATF 140 III 6; See also Chappuis, *La profession d'avocat*, *supra* note 738.

740 Art. 152(2) SCPC.

741 "*Sauf accord exprès de la partie adverse, l'avocat ne porte pas à la connaissance du Tribunal des propositions transactionnelles.*"

742 "*Il ne peut être fait état, en procédure, de documents ou du contenu de propositions transactionnelles ou de discussions confidentielles.*"

743 ATF 140 III 6; Chappuis, *La profession d'avocat*, *supra* note 738, at 44-5.

744 Art. 12(a) FAFML.

745 Chappuis, *La profession d'avocat*, *supra* note 738, at 45.

746 Bohnet, "Art. 216", in F. Bohnet et al. (eds), *Code de procédure civile commenté* (2011) 806, at 807.

fearing that the facts exchanged between themselves or with the mediator be made public or used in subsequent proceedings should the mediation fail.[747]

2.7.1 England

At present, there is no mediation privilege as such in English law. Mediation is considered as "a form of assisted without prejudice negotiation"[748] and, therefore, admissions made during mediation proceedings are protected by the without prejudice privilege.[749] Moreover, if the agreement to mediate contains any provision providing that all information and materials disclosed in the course of the mediation shall be held in confidence by the parties, this would only "bolster the without prejudice nature of what transpires in the mediation."[750]

The without prejudice privilege in relation to mediation proceedings is that of the parties and not of the mediator.[751] Therefore, it can only be waived by the parties.[752]

2.7.2 United States

Federal courts have been reluctant to adopt a federal mediation privilege[753] and its existence if far from being well established.[754]

In 1998, however, the District Court for the Central District of California recognized a federal mediation privilege in *Folb v. Motion Picture Industry Pension & Health Plans*.[755] No federal court has ever recognized a federal mediation privilege before *Folb v. Motion Picture Industry Pension & Health Plans*.[756] This case is said to "serve[] as the bedrock of the federal common law mediation privilege."[757] Scott Folb sued Motion Picture Industry Pension & Health Plans ("Motion Picture") for gender discrimination and retaliation following whistle-blowing activities. Motion Picture argued that it relied on a

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747 *Id.*, at 807-8.

748 *Brown v Rice and Patel* [2007] EWHC 625 (Ch), at paras 13, 21.

749 *Id.*, at para. 13.

750 *Id.*, at para. 28.

751 *Farm Assist Limited (in liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No.2)* [2009] EWHC 1102, at 22.

752 *Id.*

753 Lipps, "The Path Toward A Federal Mediation Privilege: Approaches Toward Creating Consistency For A Mediation Privilege In Federal Courts", 4 *Am. J. Med.* (2010) 55, at 59.

754 Molina v. Lexmark International, Inc., *supra* note 45, at 9.

755 Folb v. Motion Picture Industry Pension & Health Plans, 16 F.Supp.2d 1164 (C.D. California 1998).

756 *Id.*, at 1171.

757 Lipps, *supra* note 753, at 58.

complaint of a female colleague of Folb, Vivian Vasquez, who alleged that Folb had sexually harassed her. Vasquez and Motion Picture attended a formal mediation to settle Vasquez's potential claim for sexual harassment against Motion Picture and the parties agreed to keep the mediation confidential. The parties did not reach a settlement during the mediation but the claim was ultimately settled during subsequent settlement negotiations. In his suit against Motion Picture, Folb subpoenaed Motion Picture's and Vasquez' attorneys to obtain a copy of the mediation brief and documents related to the settlement discussions, hoping that these documents would demonstrate that she was never sexually harassed. The motion to compel was denied by a United States Magistrate Judge and Folb filed objections before the District Court for the Central District of California. The District Court held that the magistrate judge did not err in denying the motion to compel.[758] The Court adopted a federal mediation privilege by relying on the four requirements for a privilege to exist as defined in *Jaffee v. Redmond*[759]; namely (i) the need for confidence and trust, (ii) the serving of public ends, (iii) the modest evidentiary detriment, and (iv) the frustration of state privilege.[760]

First, the Court held that the "majority of courts to consider the issue appear to have concluded that the need for confidentiality and trust between participants in a mediation proceeding is sufficiently imperative to necessitate the creation of some form of privilege"[761] and that Federal Rules of Evidence 408 does not provide the protection necessary.[762]

Second, the Court concluded that "a mediation privilege would serve important public ends by promoting conciliatory relationships among parties to a dispute, by reducing litigation costs and by decreasing the size of state and federal court dockets, thereby increasing the quality of justice in those cases that do not settle voluntarily."[763]

Third, referring to *Jaffee v. Redmond*, the Court opined that a federal mediation privilege would "result[] in little evidentiary detriment where the evidence lost would simply never come into being if the privilege did not exist."[764]

Finally, the Court held that a denial of the privilege would frustrate the purposes of state legislation given that "every state in the Union, with the exception of Delaware, has adopted a mediation privilege of one type or

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758 Folb v. Motion Picture Industry Pension & Health Plans, *supra* note 755, at 1167.

759 Jaffee v. Redmond, *supra* note 328.

760 Folb v. Motion Picture Industry Pension & Health Plans, *supra* note 755, at 1171.

761 *Id.*, at 1175.

762 *Id.*, at 1171.

763 *Id.*, at 1177.

764 *Id.*, at 1178.

another"[765] and that a majority of states require that mediation proceedings be confidential.[766] *Sheldone v. Pennsylvania Turnpike Commission* is another example of a district court adopting a federal mediation privilege by relying on *Jaffee v. Redmond*.[767]

Ten years after *Folb v. Motion Picture Industry Pension & Health Plans*, the same District Court for the Central District of California refused to recognize a federal mediation privilege in *Molina v. Lexmark International, Inc.*[768] The Court examined the four factors set out in *Jaffee v. Redmond*, applied them to the facts of the case, and came to completely opposite results for each of the first three factors than it did in *Folb v. Motion Picture Industry Pension & Health Plans*.[769] The Court dismissed the fourth factor because of the lack of uniformity in the scope of the mediation privilege recognized by the various U.S. states.[770] As a result, the Court granted the motion sought based on information obtained during the mediation proceedings.[771]

In conclusion, federal courts have been inconsistent in their interpretation of the existence of the privilege[772] and, therefore, it is impossible to conclude that there exists a federal mediation privilege. Finally, the District Court in *Molina v. Lexmark International, Inc.* declared that "[e]ven if such a privilege exists … its scope and application are unclear."[773]

2.7.3 France

Both the French Code of Civil Procedure and the French Law on the Organization of Jurisdictions and Civil, Criminal and Administrative Procedure provide that mediation proceedings are confidential and that the findings of the mediator, along with the declarations made during the mediation, cannot be invoked or produced in court or arbitral proceedings without the consent of the parties[774] except if the disclosure of the existence of the mediation or of the content of the resulting settlement agreement is

765 *Id.*, at 1179.

766 *Id.*

767 Sheldone v. Pennsylvania Turnpike Commission, 104 F.Supp.2d 511 (W.D. Pa. 2000), at 512, 517.

768 Molina v. Lexmark International, Inc., *supra* note 45.

769 *Id.*, at 13-5.

770 Lipps, *supra* note 753, at 63; Molina v. Lexmark International, Inc., *supra* note 45, at 16.

771 Molina v. Lexmark International, Inc., *supra* note 45, at 25.

772 Lipps, *supra* note 753, at 55.

773 Molina v. Lexmark International, Inc., *supra* note 45, at 25.

774 Art. 21-3, Loi n° 95-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative; Art. 131-14 FCCP.

necessary to enforce such agreement.[775] The mediation privilege applies to conventional mediation[776] as well as to judicial mediation.[777]

Concerning conciliation under the French Code of Civil Procedure, the FCCP at Article 832-9 provides that:

> The findings of the conciliator and the statements that he has taken down may not be produced nor be referred to in the subsequent course of the proceeding without the consent of the parties nor, for that matter, be produced in any other proceeding.[778]

2.7.4 Switzerland

The Swiss Civil Procedure Code provides for a mediation privilege at Article 216:

> Mediation proceedings are confidential and kept separate from the conciliation authority and the court.
>
> The statements of the parties may not be used in court proceedings.[779]

The mediation privilege applies to mediations held before or after the court proceedings have commenced.[780] Under the SCPC, the parties may ask the court to suspend the proceedings at any time in order to endeavor to resolve the dispute by mediation.[781] The parties cannot waive the privilege during mediation but may nevertheless consent to the disclosure of certain facts during subsequent proceedings.[782]

The privilege protects oral and written declarations made by a party, as well as confidential documents disclosed in the course of the mediation, that were unknown to the other party and not freely accessible to that party.[783] Moreover, it also protects from disclosure the behavior of the parties during the mediation, as well as any settlement offers that may have been made by the parties.[784]

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775 Art. 21-3, Loi n° 95-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative.

776 Art. 21, Loi n° 95-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative.

777 Art. 131-14 FCCP.

778 Art. 832-9 FCCP.

779 Art. 216 SCPC.

780 Bohnet, "Art. 216", *supra* note 746, at 807.

781 Art. 214 SCPC.

782 Bohnet, "Art. 216", *supra* note 746, at 808.

783 *Id.*

784 *Id.*

Under Article 166(1)(d) SCPC, an individual who acted as mediator may refuse to testify "on facts that have come to his or her attention in the course of his or her activities."[785]

In regard to judicial conciliation, Art. 205 para. 1 SCPC provides that:

> The statements of the parties may not be recorded or used subsequently in court proceedings.[786]

2.8 Self-Critical Analysis Privilege

The self-critical analysis privilege, also known as "self-evaluation privilege," "self-examination privilege," "privilege for confidential self-evaluative analysis," "peer review privilege," and "self-audit privilege," amongst other names, draws its origins in the United States. This privilege does not exist in the other jurisdictions examined in this work. This privilege is not defined in any American Statute or in the Constitution but was developed through the common law according to Rule 501 of the Federal Rules of Evidence. Accordingly, this privilege was elaborated through a number of cases, the first being the *Bredice* case[787] in 1970. It is to be noteworthy that this privilege is not recognized by all U.S. states.

The rationale of this privilege in the corporate world is to encourage voluntary compliance with legal and regulatory requirements and the remediation of deficiencies in products or practices through a meaningful self-analysis or self-evaluation of its own practices and procedures.[788]

2.8.1 United States

This privilege has been gaining the favors of the American courts over the last three decades following the growing adoption by companies of compliance programs. Even though these compliance programs may help companies detect unlawful operations and offer an opportunity to adapt the relevant business procedures, the downside is that those reports may be used in legal proceedings against the companies who requested them. The self-critical analysis privilege is intended to encourage companies to, through compliance programs, self-analyze and self-criticize their operations to ensure that they are being conducted in accordance with the law.

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785 Art. 166(1)(d) SCPC.

786 Art. 205 para. 1 SCPC.

787 Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970).

788 D'Silva and Guthrie, *supra* note 63, at 1.

The self-critical analysis privilege has been said to be the weakest and most controversial of all privileges existing in the United States.[789] It is nevertheless interesting to examine it in this work.

Early doctrine[790] analyzed three basic principles articulated by courts during the first years of development of this privilege. The first rationale is the avoidance of the "chilling effect of disclosure."[791] If disclosure is permitted, the direct chilling effect will discourage the self-analyst institution or individual from conducting a meaningful investigation, if not discouraging it from investigating at all. Individuals who are asked to supply the information may be discouraged by the indirect "chilling effect".

The second basic tenet of this privilege is that it only protects evaluative portions of the self-analysis and not the factual ones.[792] The privilege's essential criterion is that the disclosure must restrain the flow of information or affect the quality of the information supplied.[793] Thus, if the information sought is independently replicable or verifiable, the disclosure will be permitted. However, given that self-analysis frequently contain hybrid materials, the separation of the factual from the evaluative is often difficult.[794]

The third principle is that the self-critical analysis privilege is not absolute.[795] Being developed through common law, this privilege is applied on a case-by-case basis.[796]

The self-critical analysis privilege has its origins in a medical malpractice claim, *Bredice v. Doctors Hospital*,[797] although the court did not give a name to the privilege at that time.[798] Following Mr. Bredice's death at Doctors Hospital, Mr. Bredice's descendants initiated a malpractice suit against the hospital. The plaintiffs requested the production of the following documents:

> (1) Minutes and reports of any Board or Committee of Doctors Hospital or its staff concerning the death of Frank J. Bredice on December 11, 1996.

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789 Ferenczy, "The Privilege of Internal Auditing", 61 *Internal Auditor* (2004) 75, at 75.

790 Harvard Law Review Association, "The Privilege of Self-Critical Analysis", 96 *Harv. L. Rev.* (1983) 1083.

791 *Id.*, at 1091-2.

792 *Id.*, at 1093.

793 *Id.*, at 1095.

794 *Id.*, at 1094.

795 *Id.*, at 1096.

796 Fed. R. Evid. 501.

797 Bredice v. Doctors Hospital, Inc., *supra* note 787.

798 Vandegrift, "The Privilege of Self-Critical Analysis: A survey of the Law", 60 *Alb. L. Rev.* (1996) 171, at 178.

> (2) Reports, statements, or memoranda, including reports to the malpractice carrier, reduced to writing, pertaining to the deceased or its treatment, no matter when or to whom or by whom made.[799]

The minutes and reports of the boards or committees of the Doctors Hospital were records of staff reviews by committees of doctors conducted pursuant to the requirements of the Joint Commission on Accreditation of Hospitals. The staff reviews were intended to improve the available care and treatment, as stated in the Standards of Hospital Accreditation:

> The improvement in care and treatment of hospital patients is the responsibility of the medical staff. To accomplish this, meetings of the medical staff are required to review, analyze, and evaluate the clinical work of its members.[800]

The pre-trial examiner recommended that the motion for disclosure be denied on grounds of public policy and failure to show good cause. This recommendation was upheld by the Court.[801] Indeed, the Court accepted the fact that these staff reviews were conducted by the doctors under the understanding that the entire content was to remain confidential. Allowing the minutes and reports to be subject to disclosure would create "an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit."[802]

The Court concluded that this apprehension would impede the free flow of ideas and advice and, therefore, harm the objectives of these reviews, which are the improvement of the medical procedures and the education of doctors and medical students.[803]

The objective of the self-critical analysis in the corporate setting is for a corporation to determine which areas need to be improved through internal investigations, in order to implement corrective measures.

The first application of the self-critical analysis privilege in a corporate setting was in a discrimination suit initiated by Lockheed employees in 1971: *Banks v. Lockheed-Georgia Company*.[804] Plaintiffs requested the production of reports prepared by the company's equal employment opportunity team established following the 1970 Defense Supply Agency Compliance Review.[805] The mission of this team was to determine the progress of the company's "Affirmative Action Compliance Programs," including in the field of equal

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799 Bredice v. Doctors Hospital, Inc., *supra* note 787, at 249-50.

800 Standards of Hospital Accreditation, Chapter II, Part C, ¶4 (January 1964) (Quoted in Bredice v. Doctors Hospital, Inc., *supra* note 787, at 250).

801 Bredice v. Doctors Hospital, Inc., *supra* note 787, at 250.

802 *Id.*

803 *Id.*, at 251.

804 Banks v. Lockheed-Georgia Co., 53 F.R.D. 283 (N.D. Ga. 1971).

805 *Id.*, at 284.

employment opportunity and to draft a formal report presented to the Department of Defense pursuant to Executive Order 11246.[806]

The Court did not refer to the privilege specifically but rejected the motion on the basis of public policy arguing that allowing the disclosure of these reports would discourage Lockheed, and companies in general, from making investigations aimed at promoting equal employment opportunities:

> The Court looks on this as an important issue of public policy and feels it would be contrary to that policy to discourage frank self-criticism and evaluation in the development of affirmative action programs of this kind.[807]

The self-critical analysis privilege has been invoked in a number of product liabilities suits. In *Shipes v. Bic Corporation*, after being burned by an allegedly defective BIC disposable lighter, the plaintiff sought punitive damages for "BIC's conscious indifference to the lighter's defects."[808] BIC sought a protective order to prevent the disclosure of certain documents and information, including correspondences with the Consumer Product Safety Commission, under the self-critical analysis privilege. Even though the Georgia courts had not yet decided if a common law privilege existed for self-critical analysis, the Court decided that only the documents submitted to the Consumer Product Safety Commission containing subjective evaluation of BIC products, testing, or procedures were protected from disclosure on the basis of the analogous protection afforded under Georgia's Medical Peer Review Statute.[809] Indeed, the Court was of the opinion that consumers benefited from having companies self-analyzing their own safety records in order to improve the safety of their products.

Most courts generally rely on four criteria[810] to assert the existence of the privilege:

i) the information must result from a critical self-analysis undertaken by the party seeking protection;

ii) the public must have strong interest in preserving the free flow of the type of information sought;

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806 In order to promote the equal employment opportunities within the federal government agencies and governmental contractors, Executive Order 11246 (24 September 1965) provided for the following procedure: "Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe."

807 Banks v. Lockheed-Georgia Co., *supra* note 804, at 285.

808 Shipes v. BIC Corp., 154 F.R.D. 301 (M.D. Ga. 1994), at 304.

809 *Id.*

810 See also Vandegrift, *supra* note 798, at 177.

iii) the information must be of the type whose flow would be curtailed if disclosure was allowed[811]; and

iv) the critical self-analysis must have been undertaken with the expectation that the information it contained will be kept confidential.[812]

Although the Federal Rules of Evidence manifests congressional desire to allow the courts to develop rules of privilege on case-by-case basis, a number of courts are reluctant to recognize this privilege.[813]

One of the most recent cases is *Slaughter v. National Railroad Passenger Corporation a/k/a Amtrak*,[814] where the District Court for the Eastern District of Pennsylvania considered a number of decisions and concluded that the privilege was not recognized by the common law.[815] As a result, the Court refused to apply the self-critical analysis privilege.[816]

A similar case is *Myers v. Uniroyal Chemical Co., Inc.*[817] where the Court refused to recognize a self-critical analysis privilege for an investigation report following an industrial accident on the basis that "[it was] difficult to accept that a manufacturer would be hesitant candidly and thoroughly to investigate an industrial accident because the investigative report may be discoverable [and further that c]ompanies have a considerable incentive to prevent recurring accidents and avoid additional exposure to liability which should provide a sufficient impetus to investigate the cause of and means of preventing accidents."[818]

As mentioned, the self-critical analysis has been unevenly applied by U.S. courts since the Bredice case. Indeed, neither the Supreme Court, nor the Constitution, nor the Congress has expressly recognized the self-critical analysis privilege.[819] Although the self-critical analysis privilege has been recognized in some federal cases, the courts have done so "in areas where the self-critical analysis is either compulsory or part of an effort to comply with

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811 Harvard Law Review Association, "The Privilege of Self-Critical Analysis", *supra* note 790, at 1086; Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423 (9th Cir. 1992), at 426; Vandegrift, *supra* note 798, at 177.

812 See also Dowling v. American Hawaii Cruises, Inc., *supra* note 811, at 426.

813 Myers v. Uniroyal Chemical Co., Inc., 1992 WL 97822 (E.D.Pa. 1992), at 1.

814 Slaughter v. National Railroad Passenger Corp. a/k/a Amtrak, U.S. Dist. LEXIS 21838 (E.D. Pa. Mar. 4, 2011).

815 *Id.*, at 7.

816 *Id.*, at 9.

817 Myers v. Uniroyal Chemical Co., Inc., *supra* note 813.

818 *Id.*, at 4.

819 Hodges, Jockimo and Svensson, "The Self-Critical Analysis Privilege in the Product Liability Context", 70 *Def. Couns. J.* (2003) 40, at 41; Slaughter v. National Railroad Passenger Corp. a/k/a Amtrak, *supra* note 814, at 6.

legal or regulatory requirements."[820] In state courts, the self-critical analysis privilege has been largely rejected except where state legislatures have enacted the privilege.[821]

2.9 Trade Secrets Privilege

A trade secret is defined by the Black's Law Dictionary as "a formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors."[822] A trade secret can consist of "a formula, pattern, compilation, program, device, method, technique, or process."[823] Under Article 39(2) of the TRIPS Agreement, for information to be characterized as trade secrets, such information must fulfill there conditions: (i) not be generally known to the public, (ii) have commercial value because of its secret nature, and (iii) be subject to reasonable efforts to be kept secret.[824]

The purpose of the trade secrets privilege is to encourage the owner of a trade secret to enforce its rights in court without risking public disclosure of the trade secret and to protect the property interest in a trade secret by preserving its confidentiality.[825]

2.9.1 England

There is no trade secrets privilege in English law.[826]

2.9.2 United States

The first draft of the Federal Rules of Evidence originally provided for a trade secrets privilege under Article V.[827] However, when the single rule was introduced, the provision on trade secrets was removed.[828] The trade secrets

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820 Zoom Imaging, L.P. v. St. Luke's Hospital and Health Network, et al., 513 F.Supp.2d 411 (E.D. Pa. 2007), at 416-417.

821 *Id.*, at 417.

822 B. A. Garner (ed.), *Black's Law Dictionary* (2004).

823 U.T.S.A. § 1(1).

824 Article 39(2), TRIPS, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

825 Snider and Ellins, *supra* note 64, at § 8-2.

826 *Alfred Crompton Amusement Machines Ltd v Customs & Excise Comrs (No 2)* (HL), *supra* note 43, at 416-7; Clough and McDougall, *United Kingdom* (available at http://ec.europa.eu/competition /antitrust/actionsdamages/national_reports/united_kingdom_en.pdf), at 15.

827 Notes of Committee on the Judiciary, House Report No. 93–650; Imwinkelried, *supra* note 340, at 47.

828 See Section 2.2.2.

privilege is codified under Rule 507 of the Uniform Rules of Evidence.[829] Furthermore, Federal Rules of Civil Procedure 26(c)(1)(G) provides that "[t]he court may, for good cause, issue an order ... requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way."[830] This rule was introduced in 1970 to reflect existing law at the time.[831]

In *Federal Open Market Committee of Federal Reserve System v. Merrill*, the Supreme Court declared that "[t]he federal courts have long recognized a qualified evidentiary privilege for trade secrets."[832]

In *Kewanee Oil Co. v. Bicron Corp.*, the Supreme Court defined trade secrets as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."[833] A number of elements need to be considered in order to determine whether information can qualify as trade secrets. Some of these are enumerated in *Nova Chemicals, Inc. v. Sekisui Plastics Co.*:

> [T]he extent to which it is known outside the owner's business; the extent to which it is known by employees and others within the owner's business; the extent of measures taken to guard the secrecy of the information; the value of the information to competitors; the effort or money expended to develop the information; and the ease or difficulty with which it could be properly acquired or duplicated.[834]

Finally, the trade secrets privilege is not an absolute privilege; the courts must weigh the claim to privacy against the need to disclosure.[835] The party invoking the privilege must show that the disclosure is likely to cause substantial harm to its competitive position.[836] In return, the requesting party must demonstrate that the disclosure is relevant and necessary to prepare its case or that a denial would be prejudicial or result in hardship or work an injustice.[837]

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829 "A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require." (Unif. R. Evid. 507).

830 Fed. R. Civ. P. 26(c)(1)(G).

831 Fed. R. Civ. P. 26, Notes of Advisory Committee on Rules - 1970 Amendment.

832 Federal Open Market Committee of Federal Reserve System v. Merrill, 443 U.S. 340 (1979), at 356.

833 Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974), at 474-5.

834 Nova Chemicals, Inc. v. Sekisui Plastics Co., Ltd., 579 F.3d 319 (3d Cir. 2009), at 32.

835 Federal Open Market Committee of Federal Reserve System v. Merrill, *supra* note 832, at 362; Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 257 (D. Del. 1979), at 259.

836 GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109 (9th Cir. 1994), at 1115.

837 Pennwalt Corp. v. Plough, Inc., *supra* note 835, at 259.

2.9.3 France

Prima facie, trade secrets could constitute a legitimate impediment for objecting to forced production under Art. 11 of the French Code of Civil Procedure.[838] However, there is no sufficient jurisprudence to conclude the existence of a trade secrets privilege in French law.[839]

2.9.4 Switzerland

The Swiss Civil Procedure Code at Article 156 contains provisions regarding trade secrets. This article provides that:

> The court shall take appropriate measures to ensure that taking evidence does not infringe the legitimate interests of any parties or third party, such as business secrets.[840]

The court may take a number of exceptional measures under Article 156 SCPC, including restricting the right of party to consult the case files,[841] redacting text before disclosure to the opposing party,[842] or forbidding an attorney to disclose to his client sensitive information which he discovered during the taking of evidence.[843] Such measures must be limited to the strict minimum and be proportionate.[844]

Schweizer argues that the measures to be taken cannot consist in lowering the standard of proof required in order to admit alternate evidence of a less probative value.[845] However, there is no sufficient case law at this time to determine how Swiss courts will apply Article 156 SCPC.

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838 AIPPI, *Protection of Trade Secrets through IPR and Unfair Competition Law* (March 17, 2010) (available at https://www.aippi.org/download/commitees/215/GR215france_en.pdf), at 16; Mission du Haut Responsable chargé de l'intelligence économique, *La protection du Secret des Affaires: Enjeux et propositions* (17 avril 2009) (available at http://www.claudemathon.fr/public/Secret_des_affaires_Rapport_final_17_avril_09.pdf), at 14-6.

839 For further reading, see Mission du Haut Responsable chargé de l'intelligence économique, *La protection du Secret des Affaires: Enjeux et propositions*, *supra* note 838.

840 Art. 156 SCPC.

841 Art. 53 para. 2 SCPC; Message relatif au code de procédure civile, *supra* note 560, at 6924.

842 Message relatif au code de procédure civile, *supra* note 560, at 6924.

843 Schweizer, "Art. 156", in F. Bohnet et al. (eds), *Code de procédure civile commenté* (2011) 626, at 629.

844 Message relatif au code de procédure civile, *supra* note 560, at 6924; Reymond, "Les conditions de recevabilité, la litispendance et les preuves", in S. Lukic (ed.), *Le projet de code de procédure civile fédérale* (2008) 25, at 59.

845 Schweizer, "Art. 156", *supra* note 843, at 628.

Chappuis also questions whether trade secrets could be invoked under Articles 163(2) and 166(2) SCPC.[846] These articles provide that:

> The confidants of other legally protected secrets may refuse to cooperate if they show credibly that the interest in keeping the secret outweighs the interest in establishing the truth."[847]

According to Chappuis, there does not seem to be any ground to forbid a party or third party from invoking Articles 163(2) and 166(2) SCPC to protect trade secrets.[848] In such case, the court will be required to perform a balance of interests between the interest in keeping the secret and the interest in establishing the truth.[849] The standard of proof required to show credibility that the interest in keeping the secret outweighs the interest in establishing the truth must be sufficiently low to ensure that the secret remains protected in its entirety.[850] In other words: "*La vraisemblance d'un intérêt prépondérant au maintien du secret ne doit pas être élevée au point qu'il en soit partiellement sacrifié.*"[851]

Moreover, three additional provisions come to mind in relation to trade secrets under Swiss law. First, under Article 162 of the Swiss Criminal Code, "[a]ny person who betrays a manufacturing or trade secret that he is under a statutory or contractual duty contract not to reveal"[852] commits a criminal offense. Second, Article 273 SCC provides that "any person who makes a manufacturing or trade secret available to an external official agency, a foreign organisation, a private enterprise, or the agents of any of these" commits a criminal offense.[853] Third, Article 23 of the Swiss Federal Act Against Unfair Competition prohibits unfair competition behavior and, particularly, the intentional disclosure of trade secrets under Article 6 thereof.

2.10 Privilege Against Self-Incrimination in Civil Proceedings

The privilege against self-incrimination was originally confined to criminal proceedings.[854] It is now recognized in civil proceedings in English law,

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846 Chappuis, "Les moyens de preuve collectés de façon illicite ou produits de façon irrégulière", in F. Werro and P. Pichonnaz (eds), *Le procès en responsabilité civile* (2011) 107, at 120.

847 Art. 166(2) SCPC.

848 Chappuis, *supra* note 846, at 120.

849 Art. 163(2) SCPC; Art. 166(2) SCPC.

850 Message relatif au code de procédure civile, *supra* note 560, at 6928.

851 *Id.*

852 Art. 162 SCC.

853 Art. 273 SCC.

854 Daskal, "Assertion of the Constitutional Privilege Against Self-Incrimination in Federal Civil Litigation: Rights and Remedies, 64 *Marq. L. Rev.* (1980) 243, at 246.

American law, and Swiss law (for third parties only). The modern policy of the privilege against self-incrimination in civil proceedings is to encourage witnesses to come forward with evidence by protecting them from being prosecuted as a result of doing so.[855]

2.10.1 England

The privilege against self-incrimination in civil proceedings is codified in English law under Section 14 of the Civil Evidence Act 1968. Section 14 provides, *inter alia*, that a person has the right "to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty ... under the law of any part of the United Kingdom."[856] Although CPR r.31.5(2) authorizes the court to dispense with or limit disclosure, there is no consensus in the common law on whether a court can do so in respect of offences and penalties under a foreign law.[857] The privilege must be claimed by the witness and not by his lawyer, either during examination or cross-examination, or upon being asked to disclose documents.[858] Except where limited by statute,[859] the privilege is a substantive right and cannot be denied at the discretion of the court.[860]

Corporations can also benefit from the privilege.[861]

In *O Ltd v Z*, the Court declared that the better view of the authorities is that the privilege is waived if a person answers questions or produces documents before invoking the privilege.[862]

2.10.2 United States

The Fifth Amendment of the Constitution of the United States of America provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."[863] The privilege against self-incrimination, guaranteed by the Fifth Amendment,[864] is not a federal common law

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855 Phipson, Malek and Auburn, *supra* note 46, at 669.

856 Civil Evidence Act 1968, s. 14.

857 Thanki, *supra* note 49, at 329-30.

858 *Id.*, at 317.

859 Civil Evidence Act 1968, s. 14; For examples of statutory restrictions of the privilege, see Thanki, *supra* note 49, at 345-52, Phipson, Malek and Auburn, *supra* note 46, at 679-80.

860 *O Ltd v Z* [2005] EWHC 238, at para. 70.

861 *Triplex Safety Glass Co. Ltd v Lancegaye Safety Glass (1934), Ltd* [1939] 2 K.B. 395, at 40.

862 *O Ltd v Z*, *supra* note 860, at para. 64.

863 U.S. Constitution Amend. V.

864 *Id.*

privilege,[865] but rather a constitutional privilege.[866] According to the Supreme Court, "the development of this protection [in the U.S. Constitution] was in part a response to certain historical practices, such as ecclesiastical inquisitions and the proceedings of the Star Chamber, 'which placed a premium on compelling subjects of the investigation to admit guilt from their own lips.'"[867]

The Supreme Court set forth the modern standard governing the privilege against self-incrimination claims in *Hoffman v. United States*[868]:

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. ... However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.[869]

The privilege against self-incrimination can also be claimed in civil proceedings.[870] Indeed, the privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it"[871] and "protects a mere witness as fully as it does one who is also a party defendant."[872] However, the Supreme Court held in *U.S. v. Balsys* that an individual cannot claim the privilege against self-incrimination solely based on the risk of prosecution in a foreign jurisdiction.[873]

The privilege against self-incrimination is only available to individuals; corporations cannot benefit from it.[874] For example, in *Bellis v. United States*, the Supreme Court held that "the Fifth Amendment privilege is a purely personal

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865 Rothstein and Crump, *supra* note 449, at § 1:2.

866 Daskal, *supra* note 854, at 245; Rothstein and Crump, *supra* note 449, at § 1:2.

867 Michigan v. Tucker, 417 U.S. 433 (1974), at 440 (Quoted in Andresen v. Maryland, 427 U.S. 463 (1976), at 470).

868 Daskal, *supra* note 854, at 247.

869 Hoffman v. United States, 341 U.S. 479 (1951), at 486-7.

870 Maness v. Meyers, 419 U.S. 449 (1975), at 464; McCarthy v. Arndstein, 266 U.S. 34 (1924), at 40.

871 McCarthy v. Arndstein, *supra* note 870, at 40.

872 *Id.*

873 U.S. v. Balsys, 524 U.S. 666 (1998), at 669.

874 Bellis v. United States, 417 U.S. 85 (1974), at 90; Braswell v. United States, 487 U.S. 99 (1988).

one"[875] and in *Braswell v. United States*, it declared that "it is well established that [corporations] are not protected by the Fifth Amendment."[876] Moreover, a long list of authorities have established that an individual cannot withhold from disclosure corporate books and corporate documents in his possession on the grounds of the privilege against self-incrimination in order to protect himself or the corporation from criminal prosecution.[877]

The privilege can be waived by voluntary disclosure or by failure to assert it:

> There is no question but that the privilege against self-incrimination can be waived, not only explicitly but also implicitly by failing to assert it. Thus if a witness who is compelled to testify, does, in fact, testify and during testimony reveals information instead of claiming the privilege, the witness can be said to have waived the privilege as to the information disclosed.[878]

Finally, in *Baxter v. Palmigiano*, the Supreme Court ruled "that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."[879]

2.10.3 France

There is no protection against self-incrimination in civil proceedings under French law. In fact, European law does not impose on Member States the obligation to enact legislation that would create a right for parties and third parties to refuse to testify in civil proceedings if such would expose them to criminal prosecution or civil liability.[880]

2.10.4 Switzerland

There is no protection against self-incrimination in civil proceedings for parties to the proceedings under Swiss law.[881] Indeed, parties to the proceedings are

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875 Bellis v. United States, *supra* note 874, at 90.

876 Braswell v. United States, *supra* note 874, at 102.

877 Wilson v. United States, 221 U.S. 361 (1911), at 385; Dreier v. United States, 221 U.S. 394 (1911), at 400; Andresen v. Maryland, *supra* note 867, at 477; Bellis v. United States, *supra* note 874, at 88; Braswell v. United States, *supra* note 874, at 102.

878 Day v. Boston Edison Co., 150 F.R.D. 16 (D. Mass. 1993), at 21.

879 Baxter v. Palmigiano, 425 U.S. 308 (1976), at 318.

880 S. Guinchard, F. Ferrand and C. Chainais, *Procédure civile: Droit interne et droit communautaire* (2008), at 585.

881 Jeandin, "Art. 163", in F. Bohnet et al. (eds), *Code de procédure civile commenté* (2011) 652, at 654; Message relatif au code de procédure civile, *supra* note 560, at 6926.

obliged to cooperate even if such would expose them to criminal prosecution or civil liability. The first draft of the Swiss Civil Procedure Code originally provided for the right to refuse to cooperate but the Federal Council, following public consultation, removed such right from the final draft.[882] This is justified by the fact that the court must be able to draw conclusions from the silence of a party in order to carry through the proceedings.[883] Indeed, in civil proceedings, providing for such a right would mean favoring a party at the expense of the other party by exempting the former from cooperating in the taking of evidence.[884] Parties may refuse to cooperate only if such would expose their close associates, as defined under Article 165 SCPC, to criminal prosecution or civil liability.[885]

However, third parties may refuse to cooperate if testifying would expose themselves or their close associates, as defined under Article 165 SCPC, to criminal prosecution or civil liability.[886] This is to avoid putting third parties in uncomfortable positions: to choose between their loyalty to the parties to the proceedings or to their close associates if such cooperation would be prejudicial to their close associates.[887]

2.11 State Secrets

The rationale of the state secrets privilege (public interest immunity in England and national defense secrets in France) is that it is in the public interest to preserve the confidentiality of documents for which the disclosure could harm the nation.[888] Indeed, the French Constitutional Council declared, "the existence of national defence secrets contributes to safeguarding the fundamental interests of the Nation."[889]

2.11.1 England

The public interest immunity was originally known as the "Crown privilege" in English law.[890] This expression was later disapproved given that, in reality,

882 Message relatif au code de procédure civile, *supra* note 560, at 6926.

883 *Id.*

884 Jeandin, "Art. 163", *supra* note 881, at 654.

885 Art. 163(1)(a) SCPC.

886 Art. 166(1)(a) SCPC.

887 Jeandin, "Art. 166", in F. Bohnet et al. (eds), *Code de procédure civile commenté* (2011) 664, at 667.

888 *Conway v Rimmer*, *supra* note 66, at 940.

889 Décision n° 2011-192 QPC du 10 novembre 2011.

890 Phipson, Malek and Auburn, *supra* note 46, at 683.

there exists no privilege of the Crown.[891] Public interest immunity is provided for in Rule 31.19(1) of the Civil Procedure Rules.

Lord Reid, in *Conway v Rimmer*,[892] depicted the distinction between the two kinds of public interest:

> It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it. With regard to such cases it would be proper to say, as Lord Simon did, that to order production of the document in question would put the interest of the state in jeopardy. But there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved.[893]

Even though the public interest immunity is considered as a privilege in the present work, in English law there is a distinction between the concepts of privilege and public interest immunity: "privilege is an objection to production [while] [p]ublic interest immunity may be both an objection to production and to disclosure."[894] Moreover, it is considered as public law and not as a private law right in the sense that it is not a privilege of either of the parties but rather a protection of the public interest.[895]

The case *Duncan v Cammell Laird*[896] is said to be the starting point of any analysis of the public interest immunity.[897] In 1939, a submarine built by Cammell Laird and Company, Ltd., under contract with the Admiralty, sank during a trial dive. Ninety-nine men died. Relatives of the deceased instituted a number of actions against the shipbuilder, Cammell Laird and Company, Ltd. All actions were stayed until after the trial of two test actions which were consolidated. In the consolidated suit, the plaintiffs requested the production of a number of documents, including the contract for the hull and machinery of the submarine, reports as to the condition of the submarine, and plans and specifications relating to various parts of the submarine. Cammell Laird objected to the production of the documents on the grounds of Crown

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891 *Id.*, at 685.

892 *Conway v Rimmer*, *supra* note 66.

893 *Id.*, at 940.

894 CPR r.31.19(1) (Quoted in Phipson, Malek and Auburn, *supra* note 46, at 687).

895 Phipson, Malek and Auburn, *supra* note 46, at 687.

896 *Duncan v Cammell Laird & Co Ltd* [1942] A.C. 624.

897 Phipson, Malek and Auburn, *supra* note 46, at 683.

privilege. Indeed, the Treasury Solicitor in a letter to Cammell Laird gave instructions not to produce the said documents. Following this letter, the First Lord of Admiralty swore an affidavit stating, "it would be injurious to the public interest that any of the said documents should be disclosed to any person."[898]

The House of Lord ruled that "[t]he principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld"[899] and further that "[where disclosure would be injurious to public interest] and the Minister feels it is his duty to deny access to materials which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration."[900] In other words, "when objection has been duly taken, the judge should treat it as conclusive."[901]

In *Conway v Rimmer*, the House of Lords held that *Duncan v Cammell Laird* should be reconsidered,[902] that "courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice."[903] The Court further drew a distinction between claims based on classes of documents which ought not to be disclosed[904] and claims based on particular documents, for which the disclosure of their content would be against the public interest.[905] However, "class claims" are no longer made by central government departments following a position taken in 1996 by the British government to adopt a more restrictive approach to public interest immunity:

> The new emphasis on the test of serious harm means that Ministers will not, for example, claim public interest immunity to protect either internal advice or national security material merely by pointing to the general nature of the document. The only basis for claiming public interest immunity will be a belief that disclosure will cause real harm.[906]

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898 *Duncan v Cammell Laird*, *supra* note 896, at 626-7.

899 *Id.*, at 636.

900 *Id.*, at 642-3.

901 *Id.*, at 638.

902 *Conway v Rimmer*, *supra* note 66, at 916.

903 *Id.*, at 940.

904 *Id.*, at 943.

905 *Id.*

906 HL Deb 18 December 1996 vol 576 cc1507-17 (available at http://hansard.millbanksystems.com /lords/1996/dec/18/public-interest-immunity).

This position does not bind the courts and local governments still do make class claims.[907]

English courts are authorized to inspect documents to ensure that claims of public interest immunity are justified.[908] Indeed, in practice, is it rare that public interest immunity claims succeed without prior inspection by the courts.[909] However, in *Balfour v Foreign and Commonwealth Office*, the Court of Appeal declared that:

> [O]nce a certificate of a minister of state demonstrated that the disclosure of documentary evidence posed an actual or potential risk to national security, a court should not exercise its right to inspect that evidence.[910]

Hollander and Whale have listed categories of documents which may be subject to public interest immunity.[911] In relation to the subject matter of this work, the following shall be retained: national security, diplomatic relations and international comity, workings of central government, and proper functioning of the public service.[912]

2.11.2 United States

In U.S. federal law, a number of privileges relate to state secrets. These include, *inter alia*, the state and military secrets privilege, the intra- and inter- agency communications privilege, and the executive privilege.[913] These different privileges are sometimes treated a single privilege in the literature[914] and, for the purpose of this work, they will be treated as such. The state secrets privilege belongs to the government and may only be invoked or waived by the government.[915]

U.S. v. Reynolds[916] is said to be the case where the "Supreme Court first articulated the modern analytical framework of the state secrets privilege."[917] In 1948, three civilian and six crew members died in the crash of a B-29 aircraft. This aircraft was fitted with secret electronic equipment. Four civilian

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907 Phipson, Malek and Auburn, *supra* note 46, at 689-90.

908 CPR r.31.19(6).

909 Phipson, Malek and Auburn, *supra* note 46, at 700.

910 *Balfour v Foreign and Commonwealth Office* [1994] 1 W.L.R. 681, at 681.

911 Phipson, Malek and Auburn, *supra* note 46, at 700-7.

912 *Id.*, at 700-4.

913 Rothstein and Crump, *supra* note 449, at § 5:1.

914 *Id.*

915 U.S. v. Reynolds, 345 U.S. 1 (1953), at 7.

916 U.S. v. Reynolds, *supra* note 915.

917 Liu, Congressional Research Service, R40603, *The State Secrets Privilege and Other Limits on Litigation Involving Classified Information* (2009), at 2.

observers were on board along with nine crew members. The widows of the three deceased civilians brought consolidated suits against the United States. In the course of the proceedings, the widows requested production of the "Air Force's official accident investigation report and the statements of the three surviving crew members, taken in connection with the official investigation."[918] The government refused on grounds of privilege. While acknowledging that in comparison with the United Kingdom, there have only been limited cases where state secrets were claimed in the United States, the Supreme Court opined that the principles governing state secrets have nevertheless emerged from available precedents.[919] These governing principles are detailed below.

First, a formal claim of privilege must be lodged by the head of the department which has control over the matter.[920] Second, the court must determine "whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[921] In the words of the Supreme Court, "[t]he latter requirement is the one which presents real difficulty."[922] Indeed, too much inquiry would force disclosure of the secret, and not enough control would lead to abuse of privilege.[923] The Supreme Court went further by holding that courts should not insist upon examination of the evidence to avoid jeopardizing national security.[924] Third, in order to determine how far courts should probe in satisfying themselves that a claim for privilege is appropriate, the Supreme Court advocates a balancing test between security and necessity:

> Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. A fortiori, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail.[925]

In any case, in *U.S. v. Reynolds*, nothing suggested that the secret electronic equipment had anything to do with the accident.[926] Therefore, the Supreme Court ruled that these documents were protected by the state secrets privilege.

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[918] U.S. v. Reynolds, *supra* note 915, at 2.

[919] *Id.*, at 7.

[920] *Id.*, at 7-8.

[921] *Id.*, at 8.

[922] *Id.*

[923] *Id.*

[924] *Id.*, at 11.

[925] *Id.*

[926] *Id.*

In *Tenet v. Doe,* the Supreme Court held that a suit may not proceed if there is a small chance that a state secret may be disclosed.[927]

More recently, lower federal courts have been deviating from *U.S. v. Reynolds* and have accepted "blanket assertions of the privilege."[928] According to Lyons, this can be explained by the fact (i) that courts had few opportunities to examine claims of state secrets privileges and may feel that they have a lack of expertise in this regard,[929] and (ii) that the term "state secrets privilege" is perceived by courts has having very strong implications in regard to national security, much more than if the term "confidential documents privilege" was used.[930]

The state secrets privilege also covers intra- and inter- governmental agency communications related to the deliberative or policymaking process of U.S. agencies.[931] This deliberative process has three specific policy objectives:

> (1) to encourage open, frank discussions on matters of policy between subordinates and superiors;
>
> (2) to protect against premature disclosure of proposed policies before they are finally adopted; and
>
> (3) to protect against public confusion that might result from disclosure of reasons and rationale that were not in fact ultimately the grounds for an agency's action.[932]

There are two main requirements that a communication must fulfill to fall within the ambit of intra- and inter- governmental agency communications privilege.[933] First, the communication must have been created prior to the decision or adoption of a policy.[934] Second, the communication must be deliberative.[935] In other words, the communication must convey recommendations or opinions on policy matters.[936]

For the purpose of this work, further examination of the deliberative process privilege is not necessary.[937]

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927 Tenet v. Doe, 544 U.S. 1 (2005), at 1237-8.

928 Lyons, "The State Secrets Privilege: Expanding its Scope Through Government Misuse", 11 *Lewis & Clark L. Rev.* (2007) 99, at 129-31.

929 See, *e.g.*, Pacheco v. Federal Bureau of Investigation, 470 F.Supp. 1091 (D.P.R. 1979), at 1106.

930 Lyons, *supra* note 928, at 131.

931 Rothstein and Crump, *supra* note 449, at § 5:3; Greenwald, *supra* note 652, at 287.

932 Judicial Watch v. Department of the Army, 466 F.Supp.2d 112 (D.D.C. 2006), at 120.

933 *Id.*

934 *Id.*

935 *Id.*

936 *Id.*

937 For further reading on the deliberative process privilege, see Greenwald, *supra* note 652, at 286-310.

Communications between the President of the United States and his advisors for the purpose of making decisions and shaping policies are also protected from disclosure under the presidential privilege.[938] There is an absolute protection for military, diplomatic, and sensitive national security secrets.[939] This privilege is based upon "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking"[940] and is further said to be "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."[941]

2.11.3 France

French law forbids the disclosure of national defense secrets (*secrets de la défense nationale*). National defense secrets are defined by French law as "processes, objects, documents, information, computer networks, electronic data or files which are of importance to national defense and which are subject to protective orders intended to restrict their circulation or access."[942]

The protection of national defense secrets has for objective the safeguard of the fundamental interests of the nation in the defense and national security sectors, as well as the protection of French economic interests.[943] Articles 413-10 and 413-11 of the French Penal Code provide that

> Any person who, because of his position or occupation or any permanent or temporary mission, holds a process, object, document, information, computer network, electronic data or file with the status of a national defence secret or destroys, misappropriates, steals or copies such materials, or grants access to an unauthorised person or brings it to the attention of the general public or an unauthorised person shall be punished by seven years' imprisonment and a fine of €100,000.
>
> Any holder who permits such processes, objects, documents, information, computer networks, electronic data or files falling under the previous subparagraph to be accessed, destroyed, misappropriated, stolen, copied or disclosed shall be subject to the same punishment.[944]

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938 U.S. v. Nixon, 418 U.S. 683 (1974), at 708.

939 *Id.*, at 706.

940 *Id.*, at 708.

941 *Id.*

942 Art. 413-9 FPC.

943 Circulaire de la DACG n° CRIM 08-01/G1 du 3 janvier 2008 relative au secret de la défense nationale.

944 Art. 413-10 FPC.

> A punishment of five years' imprisonment and a fine of €75,000 shall apply to any person not covered by article 413-10 who:
>
> 1. acquires possession of or access to any process, object, document, information, computer network, electronic data or file of national defence secret nature;
>
> 2. destroys, misappropriates or copies in any manner whatsoever any such process, object, document, information, computer network, electronic data or file;
>
> 3. brings any such process, object, document, information, computer network, electronic data or file to the attention of the general public or an unauthorised person.[945]

In 1998, the French government enacted Law n°98-567 of 8 July 1998[946] in order to set out the conditions under which a government minister can authorize or refuse the declassification of national defense secrets when requested by French courts.[947] This law provides for the creation of a National Defense Secret Consultative Commission and its provisions are codified in Articles L2311-1 to L2312-8 of the French Defense Code.[948]

Once a French court requests "the administrative authority responsible for classification to declassify and disclose information which is protected as a national defense secret in relation to proceedings initiated before it"[949] and provides the required justifications,[950] the relevant Ministry must defer the request to the Commission who has two months to issue an opinion, which "may recommend full declassification, partial declassification or may refuse the request."[951] "The opinion shall take into account the judicial system's duty of public service, the respect for the presumption of innocence and the rights of the defense, the respect for France's international commitments as well as the need to maintain defence capabilities and staff security."[952] In any case, the Commission has only a consultative role and its opinions are non binding on the French government.[953]

Deference to the Commission only concerns requests issued from French courts.[954] Requests from foreign courts, or even from French courts acting

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945 Art. 413-11 FPC.

946 Loi n°98-567 du 8 juillet 1998 instituant une Commission consultative du secret de la défense nationale.

947 Circulaire de la DACG n° CRIM 08-01/G1, *supra* note 943.

948 *Id.*

949 Art. L2312-4 FDC.

950 *Id.*

951 Art. L2312-7 FDC.

952 *Id.*

953 Loi n°98-567 du 8 juillet 1998 instituant une Commission consultative du secret de la défense nationale.

954 Art. L2312-4 FDC.

under international letters rogatory, cannot be deferred to the Commission.[955] Moreover, ministers may only declassify national defense secrets classified by the French authorities.[956] They are not authorized to declassify national defense secrets classified by foreign governments (under bilateral security treaties for instance) or international institutions such as the North Atlantic Treaty Organization or the European Union.[957]

2.11.4 Switzerland

Although the legislators only provided the example of trade secrets in Article 156 of the Swiss Civil Procedure Code, state secrets may nevertheless be considered as legitimate interests under this provision.[958] The examination of Article 156 SCPC under Section 2.9.4 of this work applies by analogy to state secrets.

Moreover, third parties may also invoke Article 166(1)(c) SCPC to protect state secrets (*secrets de fonction*) from disclosure:

> Any third party may refuse to cooperate: ...
>
> in establishing facts that have been confided in him or her in his or her official capacity as public official as defined in Article 110 paragraph 3 SCC or as a member of a public authority, or facts that have come to his or her attention in exercising his or her office; he or she must cooperate if he or she is subject to a disclosure duty or if he or she has been authorised to testify by his or her superior authority; ...[959]

Public officials are defined in Article 110 para. 3 SCC as follows:

> Public officials are the officials and employees of a public administrative authority or of an authority for the administration of justice as well as persons who hold office temporarily or are employed temporarily by a public administrative authority or by an authority for the administration of justice or who carry out official functions temporarily.[960]

In fact, under Article 166(1)(c) SCPC, the privilege not only covers secrets confided to public officials and members of public authorities but all facts which have been confided in them as well as all facts that have come to their attention in their official capacity or in exercising their office.

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955 Circulaire de la DACG n° CRIM 08-01/G1, *supra* note 943.

956 Art. L2312-1 FDC; Circulaire de la DACG n° CRIM 08-01/G1, *supra* note 943.

957 Circulaire de la DACG n° CRIM 08-01/G1, *supra* note 943.

958 Schweizer, "Art. 156", *supra* note 843, at 627-8.

959 Art. 166(1)(c) SCPC.

960 Art. 110 para. 3 SCC.

Contrary to attorneys,[961] public officials and members of public authorities are under the obligation to cooperate in the taking of evidence if they have been authorized to do so by their superior authority.[962]

2.12 Patent Agent Privilege

The rationale of the patent agent privilege is to extend the attorney-client privilege to patent agents rendering legal advice on patent law.[963]

2.12.1 England

Communications with patent agents and trademark agents are not privileged under English law.[964]

2.12.2 United States

There is currently no consensus in American courts on whether communications with non-lawyer patent agents are privileged or not; some courts recognize a patent agent privilege while others do not.[965]

On the other hand, communications with attorneys in relation to patent matters may be protected by the attorney-client privilege if such communications are created for the purpose of obtaining legal advice.[966] However, communications with attorneys in the normal course of patent application procedures are not protected by the privilege if no legal advice is rendered.[967]

2.12.3 France

French industrial property attorneys (*conseil en propriété industrielle*) are bound by professional secrecy.[968] Article L422-11 of the French Intellectual Property Code provides as follows:

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961 Art. 166(1)(b) SCPC.

962 Art. 166(1)(c) SCPC.

963 See McCabe, *supra* note 67.

964 Thanki, *supra* note 49, at 21, fn. 143.

965 For further reading, see Rothstein and Crump, *supra* note 449, at § 2:7, fn. 24; McCabe, *supra* note 67.

966 For case law, see Rothstein and Crump, *supra* note 449, at § 2:8, fn. 39.

967 *Id.*, at § 2:8, fn. 42.

968 Art. L422-11 FIPC.

> In any matter and for all the services mentioned under Article L. 422-1, the industrial property attorney shall observe professional secrecy. Consultations addressed or intended for customers, professional correspondences exchanged with customers, fellow-members or attorneys-at-law, notes of meetings and, more generally, all documents of the file shall be subject to professional secrecy.[969]

In order for an individual to use the title *conseil en propriété industrielle* in France, this individual must figure on the registry of industrial property attorneys drawn up by the Director of the National Institute of Industrial Property.[970]

2.12.4 Switzerland

Article 160 SCPC provides that parties and third parties have a duty to cooperate in the taking of evidence as well as an obligation to produce physical records, with the exception of communications with patent attorneys.[971] Article 160(1)(b) SCPC reads as follows:

> Parties and third parties have a duty to cooperate in the taking of evidence. In particular, they have the duty: …
>
> b. to produce the physical records, with the exception of correspondence with a patent attorney as defined in Article 2 of the Patent Attorney Act of 20 March 2009.[972]

Moreover, Swiss law provides that a patent attorney, party to the proceedings or not, may refuse to cooperate in the taking of evidence if "the disclosure of a secret would be an offence under Article 321 of the Swiss Criminal Code."[973] This provision must be read in conjunction with Article 321 SCC:

> Any person who in his capacity as ... patent attorney ... or as an auxiliary to any of the foregoing persons discloses confidential information[974] that has been confided to him in his professional capacity or which has come to his knowledge in the practice of his profession shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.[975]

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969 *Id.*

970 *Id.*

971 Art. 160 SCPC.

972 Art. 160(1)(b) SCPC.

973 Art. 166(1)(b) SCPC.

974 The published translation of the SCC refers to "confidential information" while the published translation of the SCCP refers to "secret" (available at http://www.admin.ch/ch/e/rs/rs.html).

975 Art. 321(1) SCC.

There needs to be a direct relationship between the knowledge of the secret and the profession; this means that the secret must have been confided to the patent attorney by his client, by a third party, or discovered through consultation of the case file.[976]

The term patent attorney must be interpreted under the Federal Act on Patent Attorneys. Article 2 FAPA stipulates that for an individual to use the title "patent attorney," this individual must comply with a number of requirements, including being registered in the Patent Attorney Registry[977] maintained by the Swiss Federal Institute of Intellectual Property.[978]

Auxiliaries of patent attorneys, meaning any individuals assisting patent attorneys in performing their duties, have also the restricted right to refuse to cooperate.[979]

The notion of secret must interpreted as in the case of the legal privilege examined in Section 2.3.4 of this work. However, the main difference between the legal privilege and the patent attorney privilege is that the patent attorney is under the obligation to cooperate in the taking of evidence if he has been released from duty of secrecy by the owner of the secret, whereas the attorney has no such obligation[980] except where the patent attorney is not a party to the proceedings and can show credibly that the interest in keeping the secret takes precedence over the interest in finding the truth.[981]

2.13 Accountant Privilege

The rationale behind the accountant privilege is two-fold. First, it is intended to ensure that the accountant is in possession of all relevant facts and information necessary to provide professional advice and, second, that such advice is provided candidly and independently by the accountant.[982]

2.13.1 England

Save as for specific exceptions under the Taxes Management Act 1970,[983] communications with accountants are not privileged under English law.[984]

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976 Dupuis, *supra* note 550, at 1876.

977 Art. 2 let. e FAPA.

978 Art. 11 FAPA.

979 Art. 321(1) SCC.

980 Art. 163(1)(b) SCPC; Art. 166(1)(b) SCPC.

981 Art. 166(1)(b) SCPC.

982 Maples and Blissenden, *supra* note 68, at 28.

983 Thanki, *supra* note 49, at 21, fn. 145.

984 *Id.*, at 21.

This was recently confirmed in a 2013 decision of the Supreme Court of the United Kingdom.[985]

2.13.2 United States

There is no accountant privilege in federal common law.[986] However, courts have recognized a privilege for communications with an accountant when the accountant has been engaged to assist in the provision of legal advice[987] and, more frequently, if the accountant has been retained by the attorney rather than by the client.[988] Accountant materials may be protected by the trade secrets privilege if such materials fulfill the requirements of the privilege.[989]

2.13.3 France

In France, chartered accountants (*experts comptables*) are bound by professional secrecy under the terms of Art. 226-1 FPC.[990] Therefore, a chartered accountant is forbidden to disclose confidential information which has been confided to him or which he observed, discovered, or deducted in the exercise of his profession.[991]

2.13.4 Switzerland

Although auditors have an obligation of secrecy under the Swiss Code of Obligations[992] and the Swiss Criminal Code,[993] they have the obligation to cooperate in the taking of evidence in civil proceedings. Indeed, the Swiss Civil Procedure Code expressly excludes auditors from the list of professions having a restricted right to refuse to cooperate.[994]

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985 *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another* [2013] UKSC 1.

986 U.S. v. Bisanti, *supra* note 438, at 170; Rothstein and Crump, *supra* note 449, at § 10:9; Greenwald, *supra* note 652, at 35.

987 U.S. v. Bisanti, *supra* note 438, at 170, fn. 1; Greenwald, "The Attorney-Client Privilege", in D. M. Greenwald, E. F. Malone and R. R. Stauffer (eds), *Testimonial Privileges* (2012), at § 1:32.

988 Greenwald, "The Attorney-Client Privilege", *supra* note 987, at § 1:32.

989 Rothstein and Crump, *supra* note 449, at § 10:9; In re S3 Ltd., 242 B.R. 872 (Bankr. E.D. Va. 1999), at 876.

990 Art. 21 Ordonnance n° 45-2138 du 19 septembre 1945 portant institution de l'ordre des experts-comptables et réglementant le titre et la profession d'expert-comptable.

991 *Id.*; Art. 226-13 FPC; Véron, *supra* note 502, at 215; Lampert, "La responsabilité pénale de l'expert comptable", 306 *R.F.C.* (1998) 12, at 16.

992 730*b* para. 2 SCO.

993 Art. 321(1) SCC.

994 Art. 163(1)(b) SCPC; Art. 166(1)(b) SCPC.

2.14 Conclusion

This comprehensive review of the different privileges likely to be invoked in arbitration shows that there are important disparities between common law and civil law. Again, this is why privileges in arbitration is such a complex issue, particularly when the parties come from conflicting jurisdictions. However, as examined in Chapter 1, although privileges differ between jurisdictions, they have the same underlying public policy justifications.[995]

[995] Fry, *supra* note 17, at 211.

CHAPTER 3 – CHARACTERIZATION AND APPLICABLE LAW FOR PRIVILEGES IN INTERNATIONAL ARBITRATION

3.1 Introduction

Characterization is a prerequisite of legal reasoning in general.[996] It is not exclusive to private international law.[997] It consists in attributing a concept to a broader category.[998] For example, and in relation to the subject matter of this work, characterization may consist in determining whether privileges are a matter of procedural law or substantive law.[999] In other words, the characterization will determine the applicable conflict of laws rule which will, in turn, determine the applicable law.[1000] As Berger said: "A first step in any conflict of laws process is the [characterization] of the relevant issue."[1001]

Notwithstanding the above, it is important to note that if the *lex arbitri* contains a rule on the issue, the tribunal shall apply such rule without the need to characterize the matter.[1002] The same applies when the parties have agreed on the applicable rules of privilege. However, non-party witnesses (third parties) should not be bound by the agreement of the parties on matters of privilege.[1003]

In regard to the subject matter of this work, most *leges arbitri* and arbitration rules do not provide any guidance.[1004] For this reason, characterization is central to the issue of privileges in arbitration.

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996 Kaufmann-Kohler, "La qualification en arbitrage commercial international", in *Droit international privé, Années 2010-2012* (2013) 299, at 299; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 507; Y. Loussouarn, P. Bourel and P. de Vareilles-Sommières, *Droit international privé* (2013), at 250.

997 Loussouarn, Bourel and de Vareilles-Sommières, *supra* note 996, at 250.

998 Kaufmann-Kohler, "La qualification en arbitrage commercial international", *supra* note 996, at 299; P. Mayer and V. Heuzé, *Droit international privé* (2010), at 123; L. Collins et al. (eds), *Dicey, Morris and Collins on the Conflict of Laws* (2006), at 38; E. Fongaro, *La loi applicable à la preuve en droit international privé* (2004), at 7.

999 Loussouarn, Bourel and de Vareilles-Sommières, *supra* note 996, at 250; Kaufmann-Kohler, "La qualification en arbitrage commercial international", *supra* note 996, at 299.

1000 Kaufmann-Kohler, "La qualification en arbitrage commercial international", *supra* note 996, at 300; Loussouarn, Bourel and de Vareilles-Sommières, *supra* note 996, at 249; G. C. Cheshire, *Private International Law* (1952), at 637; A. Bucher and A. Bonomi, *Droit international privé* (2013), at 148.

1001 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 507.

1002 Kaufmann-Kohler, "La qualification en arbitrage commercial international", *supra* note 996, at 304.

1003 Mosk and Ginsburg, *supra* note 1, at 383; A. Redfern et al., *Law and Practice of International Commercial Arbitration* (2004), at 268-9.

1004 Sindler and Wüstemann, *supra* note 11, at 622; Alvarez, *supra* note 11, at 677; Born, *supra* note 18, at 1910; Waincymer, *supra* note 23, at 802; Meyer, *supra* note 7, at 366-7; Berger,

As the title suggests, the present chapter deals with characterization and applicable law in relation to privileges in arbitration. First, we will endeavor to determine whether privileges are matters of substantive law or procedural law in arbitration. Second, we shall examine the different conflict of laws rules applicable for each characterization.

3.2 Are Privileges Substantive or Procedural in Nature in Arbitration?

As mentioned above, the characterization of privileges as procedural or substantive will determine the applicable law.[1005] Comparative law generally considers substantive law as the law governing the existence of rights and duties and procedural law as the law dealing with the judicial enforcement of such rights and duties.[1006] The 13th century Italian jurist Jacobus Balduinus seems to have been the first to draw a distinction between the rules *ad ordinandam litem* – "the rules by which the judge conducted the proceedings"[1007] (procedural law) and those *ad decidendam litem* – "the rules by which the judge resolved the dispute before the court"[1008] (substantive law).[1009]

In the determination of the applicable law, the tribunal must characterize the issue as procedural or substantive in accordance with the *lex arbitri*.[1010] However, most *leges arbitri* remain silent on the issue of characterization.[1011]

What are the alternatives to the *lex arbitri*? A tribunal could characterize according to the *lex fori*.[1012] However, such approach is hardly justifiable as tribunals have no *lex fori* and do not apply the conflict rules of the seat.[1013] There remains the autonomous characterization by the tribunal.[1014] The difficulty with the autonomous characterization lies in the lack of consensus

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"Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 506; Tevendale and Cartwright-Finch, *supra* note 25, at 825; Kaufmann-Kohler and Bärtsch, *supra* note 25, at 19.

1005 Kaufmann-Kohler, "La qualification en arbitrage commercial international", *supra* note 996, at 300; Loussouarn, Bourel and de Vareilles-Sommières, *supra* note 996, at 249; Cheshire, *supra* note 1000, at 637; Bucher and Bonomi, *supra* note 1000, at 148.

1006 Kaufmann-Kohler, "La qualification en arbitrage commercial international", *supra* note 996, at 301-5; Fongaro, *supra* note 998, at 9.

1007 R. Garnett, *Substance and Procedure in Private International Law* (2012), at 6.

1008 *Id.*

1009 *Id.*; Lipstein, "The General Principles of Private International Law", 135 *Recueil des cours* (1972) 97, at 112.

1010 Karrer, *supra* note 146, at 15-6.

1011 *Id.*, at 16.

1012 Kaufmann-Kohler, "La qualification en arbitrage commercial international", *supra* note 996, at 305.

1013 *Id.*; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 508.

1014 Kaufmann-Kohler, "La qualification en arbitrage commercial international", *supra* note 996, at 305.

between the various national laws. This is particularly the case with privileges; they are usually considered as substantive in nature in common law jurisdictions and procedural in civil law jurisdictions.[1015] Below is an examination of the two characterizations.

3.2.1 Procedural characterization

While most arbitration laws remain silent on the issue of characterization,[1016] the admissibility of evidence in arbitration is usually governed by procedural law.[1017] For example, the Arbitration Act at Section 34(2) provides that "[p]rocedural and evidential matters include ... 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 ..."[1018] In reference to "the procedure to be followed by the tribunal in conducting the proceedings,"[1019] the UNCITRAL Model Law stipulates that the tribunal has "the power to determine the admissibility, relevance, materiality and weight of any evidence."[1020] As a final example, the tribunal in *Glamis Gold* considered "the applicability of privileges and the form of objections to such assertions" as procedural matters in international arbitration.[1021] In fact, various commentators also consider, or seem to consider, privileges as procedural in nature.[1022]

There are benefits to characterizing privileges as procedural. In fact, according to Berger, such characterization "has the beauty that a single law could be applied to the issue of evidentiary privileges immaterial of which party raises the privilege,"[1023] thus avoiding unequal treatment of the parties at the outset.[1024] This statement is not entirely true given the important

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1015 Sindler and Wüstemann, *supra* note 11, at 615-6; Alvarez, *supra* note 11, at 684; Player and Morel de Westgaver, *supra* note 26, at 103; Meyer, *supra* note 7, at 367; von Schlabrendorff and Sheppard, *supra* note 19, at 764.

1016 Karrer, *supra* note 146, at 16.

1017 Poudret and Besson, *supra* note 32, at 550; Born, *supra* note 18, at 1241; von Schlabrendorff and Sheppard, *supra* note 19, at 764; Mosk and Ginsburg, *supra* note 1, at 345, 368; Fry, *supra* note 17, at 210; B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland* (2010), at 342; Shaughnessy, *supra* note 2, at 458.

1018 Section 34(2)(f) Arbitration Act.

1019 Art. 19(1) Model Law.

1020 Art. 19(2) Model Law.

1021 Glamis Gold, Ltd. v. United States of America, Decision on Parties' Request for Production of Documents Witheld on Grounds of Privilege, *supra* note 160, at para. 19.

1022 Tevendale and Cartwright-Finch, *supra* note 25, at 830; Tawil and Lima, *supra* note 18, at 31.

1023 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 508.

1024 *Id.*; Bishop and Childs, *supra* note 296, at 3.

discretionary powers entrusted in the tribunal[1025] resulting from a lack of provisions on this subject matter in arbitration laws and rules.[1026]

3.2.2 Substantive characterization

On the other hand, for other commentators, privileges should be regarded as substantive in nature.[1027] Indeed, although privileges are governed by procedural law in various legal systems,[1028] privileges deal with public policy considerations related to certain kinds of information or communications.[1029] Thus, privileges relate to substantive rights.[1030]

For Huet, it would be wrong to conclude that a given rule of evidence is procedural in nature solely because it is codified in a code of civil procedure.[1031] In fact, to ensure their application for reasons of public interest and regardless of their characterization, rules of privilege are sometimes contained in codes of civil procedure where courts apply the *lex fori* to matters of procedure.[1032]

Under a substantive characterization, the tribunal would have to apply the conflict rules contained in the *lex arbitri*.[1033] The application of different laws with different privilege standards could mean that the parties are treated unequally.[1034]

3.2.3 Conclusion

In international arbitration, the substantive/procedural distinction is far from clear.[1035] As Judge Toulson has observed:

> Arbitration law is all about a particular method of resolving disputes. Its substance and processes are closely intertwined. The Arbitration

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1025 Lew, Mistelis and Kröll, *supra* note 33, at 553; Zuberbühler et al., *supra* note 34, at 167; Poudret and Besson, *supra* note 32, at 550.

1026 See Section 1.3.3.

1027 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 509.

1028 *Id.*; Mosk and Ginsburg, *supra* note 1, at 368.

1029 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 509; Mosk and Ginsburg, *supra* note 1, at 377; Alvarez, *supra* note 11, at 676; von Schlabrendorff and Sheppard, *supra* note 19, at 764.

1030 Mosk and Ginsburg, *supra* note 1, at 368.

1031 Huet, *supra* note 505, at 16.

1032 Fongaro, *supra* note 998, at 250.

1033 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 508.

1034 *Id.*

1035 Mosk and Ginsburg, *supra* note 1, at 368.

> Act contains various provisions which could not be readily separated into boxes labelled substantive arbitration law or procedural law, because that would be an artificial division.[1036]

This is particularly the case with privileges. For example, even the IBA Rules, which have been referred to by a commentator as "the most useful source of authority [on privileges in arbitration],"[1037] fail to characterize privileges as substantive or procedural.[1038]

Besides, evidence in general, contains both substantive and procedural characteristics:

> Parce qu'elle a vocation à établir l'existence ou, le cas échéant, l'absence d'un droit, la preuve semble intimement liée au fond du droit. Parce qu'elle a pour objet l'activité du juge, et qu'elle dépend des prérogatives de ce dernier, la preuve semble aussi relever de la procédure. … la preuve … revêt un caractère hybride.[1039]

We have been unable to draw a consensus from the various jurisdictions examined in this work on whether privileges are procedural or substantive matters. Indeed, many commentators agree that privileges contain elements of both characterizations.[1040] Tribunals faced with the difficulty of characterizing should consider conflict of laws approaches which are suitable for both characterizations. In the same vein, as it will be addressed in Chapter 4, transnational rules are beginning to emerge, making characterization unnecessary.[1041]

3.3 Privileges Characterized as Procedural in Nature

If the parties fail to agree on the procedural rules or law applicable to privileges, the tribunal shall determine the rules governing such matters.[1042]

The present section consists in an examination of the various conflict of laws approaches which could potentially be considered when privileges are characterized as procedural.

1036 *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530, at 541 (Quoted in Garnett, *supra* note 1007, at 4).

1037 Reiser, *supra* note 18, at 661.

1038 *Id.*

1039 Fongaro, *supra* note 998, at 8.

1040 von Schlabrendorff and Sheppard, *supra* note 19, at 764; Mosk and Ginsburg, *supra* note 1, at 377; Sindler and Wüstemann, *supra* note 11, at 624; Alvarez, *supra* note 11, at 683; Meyer, *supra* note 7, at 368; Kaufmann-Kohler and Bärtsch, *supra* note 25, at 19.

1041 Kaufmann-Kohler, "La qualification en arbitrage commercial international", *supra* note 996, at 306.

1042 Art. 19(2) Model Law; Section 34(1) Arbitration Act; Art. 1509 FCCP; Art. 182(2) PILA.

3.3.1 The rules of privilege of the seat

In most jurisdictions considered in this work, the doctrine pursuant to which the civil procedural law in force at the seat of arbitration is binding on the arbitrators in the absence of procedural agreements of the parties is no longer applicable.[1043] Nowadays, as Professor Kaufmann-Kohler points outs, the seat of arbitration "as a legal concept has become something of a fiction."[1044] The seat of arbitration is often unrelated to the actual physical location where the hearings are taking place.[1045] Seats are chosen for a number of practical and legal criteria.[1046] Despite this, can we assume that the parties selected a particular *situs* with the intention to apply the procedural *lex fori*?

Although the application of the civil procedural rules of the seat is an easy to apply approach[1047] and would ensure equal treatment of the parties,[1048] it may not be in line with the reasonable expectations of the parties.[1049] Indeed, it is unlikely that the parties have considered issues of privilege when selecting the seat of arbitration.[1050] Parties are more likely to rely on the rules of privilege of their own jurisdiction or of that of the closest connection to the communication, as it will be examined in Section 3.5.2 below,[1051] especially since the seat of arbitration is not always identified at the creation of the communication[1052] or known to the individuals taking part in the allegedly privileged communication, as it is the case in many corporations where the individuals involved in the communication at stake are not necessarily the ones who negotiated the arbitration agreement. A situation where the seat of arbitration has little, if any, connection to the allegedly privileged evidence is when the arbitration agreement provides for different seats of arbitration

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1043 Poudret and Besson, *supra* note 32, at 463; Born, *supra* note 18, at 1854; See, *e.g.*, Art. 1464 FCCP; Webster, *supra* note 130, at 403; R. Merkin and L. Flannery, *Arbitration Act 1996* (2008), at 86, 88; Fry, *supra* note 17, at 210.

1044 Kaufmann-Kohler, *supra* note 6, at 1318.

1045 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 508-9.

1046 *Id.*, at 508; Redfern et al., *supra* note 1003, at 121; O. Chukwumerije, *Choice of Law in International Commercial Arbitration* (1994), at 76, 123; Frick, *supra* note 247, at 49; von Schlabrendorff and Sheppard, *supra* note 19, at 769.

1047 Bradford, *supra* note 69, at 937.

1048 Tawil and Lima, *supra* note 18, at 39.

1049 *Due Process in International Arbitration*, Transcripts, *supra* note 30, at 90; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 509; Kozlowska, *supra* note 11, at 130.

1050 *Due Process in International Arbitration*, Transcripts, *supra* note 30, at 90; Mosk and Ginsburg, *supra* note 1, at 383; von Schlabrendorff and Sheppard, *supra* note 19, at 769.

1051 Mosk and Ginsburg, *supra* note 1, at 383.

1052 *Id.*; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 509; Bradford, *supra* note 69, at 946.

depending on the party filing the request for arbitration.[1053] One could also imagine an arbitration agreement where the seat has not been determined.

Moreover, applying the rules of the seat of arbitration will frustrate uniformity in relation to privileged communications relevant to a number of disputes having different dispute resolution forums.[1054] Considering such approach would mean that depending on the forum, different rules of privilege would apply to a given communication.

Nevertheless, Mosk and Ginsburg rightly assert that the tribunal should not refrain from applying the rules of privilege of the forum when it is appropriate to do so.[1055] For instance, this can be the case when the privilege against self-incrimination is invoked by a witness. This would amount to applying by analogy the court practice in common law litigation where the *lex fori* is exclusively applied to the privilege against self-incrimination.[1056]

3.3.2 The rules of privilege of the jurisdiction of the law governing the merits

Where privileges are considered as procedural matter, can we presume that the contractual agreement on the governing law applies to privileges as well? Although it is possible, it is relatively rare for a tribunal to conclude that the contractual choice of law between the parties applies not only to substantive law but to the procedural law as well.[1057] In most modern arbitration laws, there is no obligation for the law governing the arbitral procedure to be the same as the one governing the merits.[1058] Moreover, allegedly privileged communications are often created outside the jurisdiction of the law governing the merits.[1059] Indeed, the law governing the merits is chosen for a number of reasons other than procedural reasons and applying such law to questions of procedure and, particularly, to privileges, will probably frustrate the parties' legitimate expectations and reliance interests.[1060]

1053 Heitzmann, *supra* note 11, at fn. 38.

1054 Bradford, *supra* note 69, at 937.

1055 Mosk and Ginsburg, *supra* note 1, at 383.

1056 Garnett, *supra* note 1007, at 244.

1057 Rubinstein and Guerrina, *supra* note 24, at 589.

1058 E. Gaillard and J. Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), at 634.

1059 Tevendale and Cartwright-Finch, *supra* note 25, at 830.

1060 *Id.*; Kozlowska, *supra* note 11, at 130.

3.4 Privileges Characterized as Substantive in Nature

In the present section, we will review the various conflict of laws approaches which could potentially be considered when privileges are characterized as substantive.

3.4.1 The law chosen by the parties to govern the merits

It is widely accepted that when the parties have agreed on the law to be applied to the merits of the dispute, the tribunal is bound by this choice of law.[1061] When privileges are considered as substantive in nature, should the substantive law chosen by the parties for the merits also govern issues of privilege?

There is consensus that the substantive law applicable to the contractual relationship is one of the most important contractual elements to be agreed upon by the parties in order to avoid arguing over complex issues should a dispute arise.[1062] Indeed, predictability is extremely important in arbitration given that the parties' behavior prior to the arbitration proceedings, and also during such proceedings, is often a result of their interpretation of the applicable law.[1063] At first sight, the law chosen by the parties to govern the merits would seem to be the most appropriate conflict of laws approach for privileges. Not only because it represents the agreement of the parties, but also because it meets the need for predictability. Moreover, it has the advantage of providing uniformity and ensuring equal treatment of the parties by applying a single law to all claims of privilege.[1064]

In spite of the party autonomy and predictability arguments presented above, the law chosen by the parties to govern the merits is not an appropriate approach for privileges.[1065] In fact, applying such law would frustrate the parties' legitimate expectations[1066] given that it is unlikely that the parties considered issues of privilege when agreeing on the substantive law.[1067] This is particularly the case with privileges not arising out of a particular contractual

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1061 Poudret and Besson, *supra* note 32, at 574.

1062 Blessing, "Choice of Substantive Law in International Arbitration", 14 *J. Int'l Arb.* (1997) 39, at 39.

1063 H. Carlquist, *Party Autonomy and the Choice of Substantive Law in International Commercial Arbitration* (2006), Master's Thesis, Göteborg University, at 19.

1064 Tawil and Lima, *supra* note 18, at 39; *Due Process in International Arbitration*, Transcripts, *supra* note 30, at 89.

1065 Fry, *supra* note 17, at 209-10; *Due Process in International Arbitration*, Transcripts, *supra* note 30, at 90; Tawil and Lima, *supra* note 18, at 35; Shaughnessy, *supra* note 2, at fn. 27; von Schlabrendorff and Sheppard, *supra* note 19, at 770.

1066 *Due Process in International Arbitration*, Transcripts, *supra* note 30, at 90.

1067 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 519; von Schlabrendorff and Sheppard, *supra* note 19, at 770.

relationship, such as the attorney-client privilege,[1068] the trade secrets privilege, or the state secrets privilege.

Moreover, because privileged communications can occur in jurisdictions different than the jurisdiction of the law chosen by the parties to govern the merits, extending the substantive law to questions of privilege could be considered as violating the parties' reliance interests.[1069] In the same vein, applying the law governing the merits to an allegedly privileged communication having taken place outside that jurisdiction and unrelated to such jurisdiction might be unfair.[1070]

The position against applying the substantive law chosen by the parties has been upheld in U.S. litigation in *Hercules, Inc. v. Martin Marietta Corp.*[1071] In this case, the United States District Court for the District of Utah held that a clause providing that "[t]he Contract shall be governed by, subject to, and construed according to the laws of the State of Colorado"[1072] only applied to the interpretation of the contract and the contractual relationships, and that such provision did "not purport to govern all relationships between the parties,"[1073] including privileges.[1074] For the District Court, applying Colorado law to privileges "is an unwarranted extension of the language of the contract provision and beyond the obvious intention of the parties."[1075]

3.4.1.1 *Dépeçage*

While there exists a "general transnational rule of law supporting the autonomy of the parties,"[1076] it may be appropriate for the tribunal to apply a different substantive law to privileges (where privileges are considered as substantive) than that of the merits. The mechanism under which this is possible is called *dépeçage*.[1077] The *dépeçage* is a solution adopted by the Rome Convention,[1078] various other international instruments,[1079] and permitted in a number of arbitration rules and laws, such as the AAA ICDR Rules,[1080] the

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1068 Tawil and Lima, *supra* note 18, at 35.

1069 Tevendale and Cartwright-Finch, *supra* note 25, at 830.

1070 Mosk and Ginsburg, *supra* note 1, at 382.

1071 Hercules, Inc. v. Martin Marietta Corp., 143 F.R.D. 266 (D. Utah 1992).

1072 *Id.*, at 268.

1073 *Id.*

1074 *Id.*

1075 *Id.*

1076 Redfern et al., *supra* note 1003, at 96.

1077 Fouchard, Gaillard, Goldman, *supra* note 1058, at 794.

1078 Art. 3(1) Rome Convention.

1079 Nygh, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort", 251 *RdC* (1995) 269, at 322.

1080 Art. 28(1) ICDR Rules.

LCIA Rules,[1081] and the UNCITRAL Model Law.[1082] This approach allows various aspects of the dispute to be separated and for each to be submitted to the substantive law which is more suitable to it, instead of the law governing the contract in general.[1083] In other words, "it can be used to avoid unwanted consequences arising out of the main choice [of law]."[1084] The rationale behind the application of *dépeçage* to privileges is that these issues are related to the taking of evidence and that under all arbitration laws examined herein, it is the responsibility of the tribunal to decide on evidentiary matters.[1085]

Nevertheless, if the parties have specified that the law applicable to the merits shall govern issues of privilege, or have chosen a substantive law to govern such issues, the tribunal is bound to follow this choice.[1086] However, such case is extremely rare in practice.[1087]

3.4.2 The law determined by the tribunal

Most arbitration laws give authority to the tribunal to determine the applicable substantive law within certain limits. Art. 187(1) PILA provides that "[t]he Arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection."[1088]

The French Code of Civil Procedure and the English Arbitration Act give complete freedom to the tribunal. At article 1496, the French Code of Civil Procedure provides as follows: "The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law it considers appropriate."[1089] The Arbitration Act at Section 46(3) states that "the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable"[1090] in the absence of choice of law by the parties.

1081 Art. 22.3 LCIA Rules.

1082 Art. 28 Model Law; Lew, Mistelis and Kröll, *supra* note 33, at 448.

1083 M. Rubino-Sammartano, *International Arbitration Law and Practice* (2001), at 435.

1084 Nygh, *supra* note 1079, at 323.

1085 Art. 19 Model Law; Section 34 Arbitration Act; Art. 1467 FCCP; Art. 184 PILA; See more generally Chapter 1 of this work; Fry argues that reference to published international arbitration rules giving to the tribunal express powers in respect of the admissibility of evidence is sufficient to conclude that the law applicable to the merits as chosen by the parties excludes the admissibility of evidence (Fry, *supra* note 17, at fn. 7).

1086 Art. 182 PILA; Section 34 Arbitration Act; Art. 19 Model Law; Art. 1509 FCCP.

1087 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 509.

1088 Art. 187(1) PILA.

1089 Art. 1511 FCCP.

1090 Section 46(3) Arbitration Act.

3.4.2.1 The law applicable to the merits as determined by the tribunal

The law applicable to the merits as determined by the tribunal is not an appropriate approach; the reasoning of Section 3.4.1 above applies by analogy to the present section.

3.4.2.2 Choice of law rules or substantive law of the seat

Historically, tribunals were regarded as bound by the procedural law of the seat, which generally included the choice of law rules.[1091] For example, prior to the enactment of the Arbitration Act, English courts and leading scholars held that tribunals seated in England were obliged to apply English conflict of laws rules.[1092] In the United States, the Second Restatement of Conflict of Laws advocated the application of the substantive law of the seat as follows:

> Provision by the parties in a contract that arbitration shall take place in a certain state may provide some evidence of an intention on their part that the local law of this state should govern the contract as a whole. This is true not only because the provision shows that the parties had this particular state in mind; it is also true because the parties must presumably have recognized that arbitrators sitting in that state would have a natural tendency to apply its local law.[1093]

Such trends were also present in civil law jurisdictions.[1094]

At present, there exists no rationale for the application of the conflict of laws rules of the seat[1095] or the substantive law of the seat and, for this reason, we cannot presume that the parties' agreement on the place of arbitration was motivated by the rules of privilege of the *lex fori*.[1096] This would frustrate the parties' legitimate expectations and reliance interest.[1097] As a matter of fact, the parties involved in an allegedly privileged communication may not even be

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1091 Born, *supra* note 18, at 2120; Chukwumerije, *supra* note 1046, at 126.

1092 Born, *supra* note 18, at 2121.

1093 Restatement (Second) of Conflict of Laws § 218 comment b (1971) (Cited in Born, *supra* note 18, at 2122); The U.S. approach did not offer any guidance in regard to which conflict of laws approach should be used but rather imposed the substantive law of the seat as the applicable law to the merits (Born, *supra* note 18, at 2122).

1094 Born, *supra* note 18, at 2121.

1095 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 508; Redfern et al., *supra* note 1003, at 123; Frick, *supra* note 247, at 49; Gaillard, "Thirty Years of *Lex Mercatoria*: Towards the Discriminating Application of Transnational Rules", in A.J. van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* (1996) 570, at 577; Frick, *supra* note 247, at 50.

1096 de Boisséson, *supra* note 12, at 713.

1097 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 508.

aware, when creating the communication, of the dispute resolution forum where privilege would be claimed.[1098]

The rationales set out in Section 3.4.1 apply by analogy to the present section.

3.4.2.3 Cumulative approach

The cumulative approach consists in applying the choice of law rules of each of the jurisdictions related to the dispute and dates back at least to the 1930s.[1099] The cumulative approach "virtually" always concludes that the different conflict rules considered point to the same substantive law.[1100] Indeed, the tribunal analyses the different conflict of laws of each of the different jurisdictions linked to the dispute and if it observes that all these conflict rules converge towards the same law, the tribunal will declare the applicability this law.[1101] This result is considered as a "false conflict". The cumulative approach may provide protection against a challenge for failure to apply the proper choice of law rules or substantive law.[1102]

A good example, although unrelated to privileges, of a false conflict in the application of the cumulative approach is the award rendered in 1989 in ICC case No. 6281.[1103] The seat of arbitration was Paris and the tribunal had to determine whether Egyptian, Yugoslav or French conflict rules applied to the merits. Egyptian conflict rules referred to the substantive law of the place where the contract was signed, Yugoslav law to the place were the seller had its headquarters at the time of reception of the order, and French law, referring to the Convention on the Law Applicable to International Sale of Goods (The Hague 1955), pointed to the seller's domicile at the time of reception of the order. All three conflict of laws finally designated Yugoslavian substantive law.

The cumulative approach may seem as an interesting conflict rule given that it gives effect to a law acknowledged as the applicable law by all of the jurisdictions involved and, practically, the decision can hardly be qualified as arbitrary.[1104] On the other hand, the cumulative approach provides only little

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1098 Bradford, *supra* note 69, at 945; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 509.

1099 Born, *supra* note 18, at 2129, fn. 103.

1100 *Id.*, at 2129.

1101 Derains, "L'application cummulative par l'arbitre des systèmes de conflit de lois intéressés au litige", *Rev. Arb.* (1972) 99, at 103.

1102 Born, *supra* note 18, at 2130.

1103 Award, ICC Arbitration case No. 6281 (1989) (Cited in J.-J. Arnaldez, Y. Derains and D. Hascher, *Collection of ICC Arbitral Awards: 1991-1995* (1997), at 409).

1104 Derains, *supra* note 1101, at 104.

guidance to the arbitrator if the different conflict of laws rules point towards two or more national laws.

In order to achieve the same results as the cumulative approach, *i.e.* the search for a substantive law which will be recognized as the applicable law by all of the jurisdictions involved, one should consider the common principles to different jurisdictions approach, also known as *tronc-commun*.[1105] While the cumulative approach relates to the application of rules of conflict, the *tronc-commun* approach applies the substantive provisions present in the laws of the jurisdictions related to the dispute. This approach will be examined below.

3.5 Privileges under Both Characterizations

The conflict of laws examined below could be, or have been in the past, considered when privileges are characterized as substantive or procedural in nature. Some of these approaches have not been applied in arbitration but their examination is nevertheless relevant for the subject matter of this work.

3.5.1 Conflict of laws approaches which have been considered in litigation

3.5.1.1 The interest analysis

The interest analysis approach,[1106] originates from the works of Professor Brainerd Currie.[1107] This method relies on the concept of governmental interest and can be simplified as follows[1108]:

[1105] Some practitioners refer to the *tronc-commun* as applying to both the substantive provisions and the rules of conflicts (See, *e.g.*, Poudret and Besson, *supra* note 32, at 584).

[1106] For a complete analysis of this approach in U.S. courts, see Bradford, *supra* note 69, at 909-932.

[1107] Bradford, *supra* note 69, at 919.

[1108] "1. When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.

2. If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.

3. If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.

4. If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.

5. If the forum is disinterested, but an unavoidable conflict exists between the interests of two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of

1) Generally, the law of the forum should be the source of the rule of decision.

2) When it is suggested that a foreign law should furnish the rule of decision, the court should first determine the governmental policy expressed by the law of the forum to acknowledge whether the forum state has an interest in the application of its law and policy.

3) If necessary, the court should determine the foreign state's interest through the same process.

4) If the forum state has no interest in the application of its law and policy and the foreign state has such interest, the court should apply the foreign law.

5) If the forum state has an interest in the application of its law and policy, even though the foreign state has an interest as well, the court shall apply the law of the forum. The same applies in cases where both states have no such interest.

A judge applying the interest analysis "approaches conflicts problems from the perspective of the sovereign's interest in regulating a given activity."[1109]

To the best of our knowledge, the interest analysis approach has never been employed by arbitral tribunals.[1110] There are indeed three major difficulties with this approach in international arbitration and, particularly, in its application to privileges, namely (i) the determination of the jurisdictions which have an interest, (ii) the true conflict situation,[1111] and (iii) the fact that its true nature goes against the general principles of arbitration. Using the example of the attorney-client privilege, Bradford affirms that the possibly interested jurisdictions are the forum, the place of deposition if different from the forum, the place of domicile of the attorney's client, the place of domicile of the other parties to the case, the place of practice of the attorney, and the place where the communication occurred.[1112] Bradford stresses that this list is

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the forum, at least if that law corresponds with the law of one of the other states. Alternatively, the court might decide the case by a candid exercise of legislative discretion, resolving the conflict as it believes it would be resolved by a supreme legislative body having power to determine which interest should be required to yield.

6. The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the court should not attempt to improvise a solution sacrificing the legitimate interest of its own state, but should leave to Congress, exercising its powers under the full faith and credit clause, the determination of which interest should be required to yield." (B. Currie, *Selected Essays on the Conflict of Laws* (1963), at 188-9).

[1109] Danilowicz, "The Choice of Applicable Law in International Arbitration", 9 *Hastings Int'l & Comp. L. Rev.* (1986) 235, at 270.

[1110] *Id.*

[1111] Bradford, *supra* note 69, at 928.

[1112] *Id.*, at 926-8.

debatable.[1113] It is important to note that having a stronger privilege does not necessary mean having a stronger interest. For example, it has been argued that the forum has an interest to apply its own law when its privilege is weaker in order to ensure the discovery of truth whereas it has no interest in applying its own law when its privilege is stronger as this would mean excluding good evidence.[1114] The place of practice of the attorney is completely different in the sense that a state would rather apply its own law when its privilege is stronger in order to increase the effectiveness of legal representation and ethical standards as the application of a weaker privilege would not contribute to the promotion and protection of its attorneys.[1115]

False conflicts where only a jurisdiction has an interest in applying its law are easily resolved.[1116] Indeed, as per Currie, "clearly the law of the interested state should be applied,"[1117] regardless of whether it is the forum jurisdiction or the foreign jurisdiction which has an interest.

A quite problematic situation with this approach is when the forum does not have an interest but two or more foreign jurisdictions do. Nowadays, privileges in international disputes have an international nature; they are usually related to multiple jurisdictions. Unfortunately, Currie is silent on the methods to be used to weight the interests between those foreign jurisdictions.

However, the most important difficulty with this approach lies in the situations where both the forum and the foreign states have interest (or not) in the application of their laws and policy. The latter situation cannot be rationally solved by this method of conflict of laws given that both interests compete. Indeed, in this case, Currie recommends applying the law of the forum. As Currie suggested himself, this approach "frankly counsels the pursuit of self-interest."[1118] It is our opinion that it is in contradiction with the principles of international arbitration. Even though a tribunal is subject to the local sovereign[1119] in regard to the *lex arbitri*, it is not part of the judiciary system of this sovereign or any other.[1120] This was also confirmed by the Canadian Supreme Court as follows: "[t]he arbitrator has no allegiance or connection to any single country"[1121] and by the United States Supreme Court: "The international arbitral tribunal owes no prior allegiance to the legal norms

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[1113] *Id.*, at 928.

[1114] *Id.*, at 922-3.

[1115] *Id.*, at 925.

[1116] *Id.*, at 927.

[1117] Currie, *supra* note 1108, at 189.

[1118] *Id.*, at 191.

[1119] Mann, "Lex Facit Arbitrum", in P. Sanders (ed.), *Liber Amicorum for Martin Domke* (1967) 157, at 162.

[1120] Frick, *supra* note 247, at 49.

[1121] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, at para. 51 (Quoted in Born, *supra* note 18, at 1247).

of particular states; hence it has no direct obligation to vindicate their statutory dictates. The tribunal … is bound to effectuate the interests of the parties …"[1122] As Currie acknowledged himself, the cumulative approach may be seen as repudiation "of the basic ideals of conflict-of-laws method: the attainment of uniformity of result and of 'justice' between the parties."[1123] And this is especially true if the seat of arbitration is in the jurisdiction of one of the parties. Indeed, one of the objectives of international arbitration is "to provide a neutral forum for dispute resolution, detached from either the parties or their respective home state governments."[1124]

For all the above reasons, the cumulative approach should not be taken into consideration for privileges in arbitration. As Mosk and Ginsburg rightly point out, if forum jurisdictions had wished that their rules of privilege applied to all arbitrations seated in their respective jurisdiction, they would have inserted provisions to that effect in their arbitration laws.[1125]

3.5.1.2 The public policy of the forum approach

In the same vein as the interest analysis, the traditional public policy approach imposes the application of the privilege law of the forum on grounds that applying the privilege law of another jurisdiction would constitute a violation of the forum's public policy.[1126]

In *Duplan Corp. v. Deering Milliken, Inc*., the U.S. District Court for the District of South Carolina was asked to determine "whether or not communications with foreign patent agents are protected by the attorney-client privilege."[1127] The court acknowledged that French and English law provide a cloak of privilege to communications between a client and a patent agent. However, communications with American patent agents were not privileged at the time under the Federal Rules of Civil Procedure and U.S. federal courts had refused to extend the attorney-client privilege to encompass such communications.[1128] The Court affirmed that the federal rules and federal case law in relation to communications with patent agents were designed to promote disclosure whereas French and English statutes restrict disclosure.[1129] As a result, the Court held that the application of French or English law to the

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[1122] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), at 636 (Quoted in Born, *supra* note 18, at 1247).

[1123] Currie, *supra* note 1108, at 189.

[1124] Born, *supra* note 18, at 72.

[1125] Mosk and Ginsburg, *supra* note 1, at 383.

[1126] Bradford, *supra* note 69, at 917-8.

[1127] Duplan Corp. v. Deering Milliken, *supra* note 446, at 1169.

[1128] See Section 2.12.2.

[1129] Duplan Corp. v. Deering Milliken, *supra* note 446, at 1169.

said communications would constitute a violation of American public policy.[1130]

Bradford is of the opinion that the public policy argument is overstated given that the courts adopting this approach have set forth no guidelines for evaluating the strength of the forum's public policy.[1131] And for this reason, the public policy approach usually results in the automatic application of the forum law.[1132] The arguments against the interest analysis approach apply by analogy to the public policy of the forum approach. Indeed, as mentioned above, the tribunal is not answerable to the sovereign but to the parties; it should choose the legal system which best serves the interests of the parties.[1133]

3.5.2 The closest connection test

The "closest connection," "most significant relationship," or "centre of gravity"[1134] consists in applying the rules of law with which the dispute or the subject matter of the dispute has the closest connection. This approach based on the "principle of proximity or centre of gravity" originates from the doctrine of the proper law of the contract[1135] and draws support from the similar approaches of the Rome Convention[1136] and the Second Restatement of Conflict of Laws.[1137]

In a number of countries such as Switzerland,[1138] Germany, Japan, Mexico, and Egypt, the *lex arbitri* prescribes the closest connection test for matters of substantive law for arbitrations having their seat in those jurisdictions.[1139]

1130 *Id.*

1131 Bradford, *supra* note 69, at 918, Currie, *supra* note 1108.

1132 Bradford, *supra* note 69, at 918.

1133 Danilowicz, *supra* note 1109, at 270.

1134 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 510.

1135 Poudret and Besson, *supra* note 32, at 586.

1136 "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country." (Art. 4(1) Rome Convention).

1137 "(1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.

(2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect." (Restatement (Second) of Conflict of Laws § 139 (1971)).

1138 Art. 187(1) PILA.

1139 Born, *supra* note 18, at 2134; Poudret and Besson, *supra* note 32, at 585 (mentioning only Switzerland, Italy and Germany).

Various tribunals not seated in these states have also applied the closest connection test.[1140] Indeed, some arbitration rules, such as the Swiss Rules, also contain provisions to the effect that the tribunal must, in the absence of agreement of the parties on the substantive law, apply the closest connection test.[1141] Earlier drafts of the ALI/UNIDROIT Principles provided that the "law of the place with the most significant relationship to the parties to the communication"[1142] was applicable for matters of privilege.

A number of commentators have concluded that the closest connection test is the most appropriate approach for privileges in arbitration.[1143]

Scholars have praised the advantages of the closest connection test, namely the flexibility and predictability.[1144] Flexibility is praised because this rule does not "force the arbitrators to apply a prefabricated set of conflict of laws rules which may be totally inappropriate to deal with complex international transactions, and which may have little or no connection to the transaction."[1145] Indeed, arbitrators are given the flexibility of finding a solution for each privilege invoked.[1146] At the same time, this may slow down the arbitral proceedings if an important number of privileges are invoked. Predictability is praised given that this rule does not give the tribunal unlimited freedom in the determination of the applicable law as it is the case in some arbitration laws or institutional rules.[1147]

It has been said that the parties' legitimate expectations at the time the allegedly privileged communication was created, as well as their reliance interests, would, in most cases, be fulfilled by applying the closest connection test to the commnication.[1148] To put it another way, according to the Second Restatement of Conflict of Laws, "if [the parties] relied on any law at all, they would have relied on the local law of the state of most significant relationship."[1149] On the other hand, "the arbitral tribunal shall attempt to

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[1140] Interim Award, ICC Arbitration case No. 5314 (1988) (Cited in Arnaldez, Derains and Hascher, *supra* note 1103, at 309).

[1141] Art. 33(1) Swiss Rules.

[1142] Principle 24, UNIDROIT 2000 Study LXXVI – Doc 2 (available at http://www.unidroit.org/english /documents/2000/study76/s-76-02-e.pdf).

[1143] Mosk and Ginsburg, *supra* note 1, at 383; Tevendale and Cartwright-Finch, *supra* note 25, at 836; Tawil and Lima, *supra* note 18, at 40; de Boisséson, *supra* note 12, at 713; von Schlabrendorff and Sheppard, *supra* note 19, at 768; O'Malley, *supra* note 11, at 285.

[1144] Frick, *supra* note 247, at 60-1.

[1145] *Id.*, at 60.

[1146] Berger and Kellerhals, *supra* note 1017, at 368; Tawil and Lima, *supra* note 18, at 40.

[1147] Frick, *supra* note 247, at 61 (Citing the ICC Rules as an example).

[1148] Mosk and Ginsburg, *supra* note 1, at 382.

[1149] Restatement (Second) of Conflict of Laws § 139 comment c (1971).

achieve an objective connection which means that it shall, in particular, not search for the presumptive or even hypothetical intention of the parties."[1150]

The closest connection test is a widely-applied approach to the determination of applicable law to privileges in arbitration[1151] and has been said to have developed into a transnational rule.[1152]

3.5.2.1 *Dépeçage* and closest connection test

In the application of the closest connection test, there is no possibility of avoiding the *dépecage* of the different communications at stake. Indeed, the determination of the connecting factor can only be applied to a particular communication, which means that the tribunal would need to perform a case by case examination. Ultimately, this means that there could be as many applicable laws as there are communications for which privilege is invoked. Another difficulty of this approach arises when there is a number of disputed communications; this approach becomes very time-consuming for both the parties who need to present their arguments on a case by case basis and for the tribunal who needs to rule on each particular communication. The application of different laws to the parties will inevitably result in the parties receiving different treatment,[1153] although different treatment does not necessarily amount to a violation of due process.[1154] The advantages and downsides of the closest connection test will be examined below.

3.5.2.2 The connecting factors

There exist an important number of connecting factors which could be considered by a tribunal applying the closest connection test. Not all possible connecting factors must be taken into consideration. In fact, some factors are "generally considered irrelevant."[1155] To name a few, these are "the place where [the contractual] negotiations were held; the place where the contract was signed[1156]; the language of the contract; the nationality of the arbitrators ..."[1157]

[1150] Berger and Kellerhals, *supra* note 1017, at 368.

[1151] Tevendale and Cartwright-Finch, *supra* note 25, at 831; de Boisséson, *supra* note 12, at 713.

[1152] Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 510; Alvarez, *supra* note 11, at 685; Player and Morel de Westgaver, *supra* note 26, at 103.

[1153] Reiser, *supra* note 18, at 673.

[1154] See Section 1.4.3.

[1155] La Spada, "The Law Governing the Merits of the Dispute and Awards *ex Aequo et Bono*", in G. Kaufmann-Kohler and B. Stucki (eds), *International Arbitration in Switzerland* (2004) 115, at 131.

[1156] See also Giuliano and Lagarde, "Report on the Convention on the Law Applicable to Contractual Obligations", Official Journal C 282, 31/10/1980 P. 0001 - 0050 (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31980Y1031%2801%29:EN:HTML).

Other connecting factors are relevant in the determination of the applicable law to the merits but are not appropriate for privileges, *e.g.* the place where the party rendering the contractual performance resides.[1158]

We identified ten connecting factors potentially relevant in the determination of the law applicable to privileges: (i) the place where the communication was created, (ii) the place from where the communication was sent, (iii) the place where the communication was received, (iv) the place where the communication is stored, (v) the place where the party (or witness) claiming the privilege resides, (vi) the place where the lawyer is admitted, (vii) the place where the lawyer has his professional domicile, (viii) the jurisdiction governing the lawyer-client relationship,[1159] (ix) the jurisdiction about which the legal advice was sought,[1160] and (x) the place where the party requesting disclosure resides. The factors numbered (vi) to (ix) only concern the attorney-client privilege or work product.

(i) The law of the place where the communication was created has been said to have "the policy goal of predictability in upholding the reasonable expectations of the parties when they're preparing the [evidence for the arbitration]."[1161] Indeed, for the purpose of privileges to be served, the parties must be able to predict with a degree of certainty whether communications will be protected or not.[1162] However, there are two weaknesses with the application of the law of the place where the communication was created. First, in an era of modern communications and international business travel, identifying the place where the communication was created may be a problem. For example, when parties located in different jurisdictions communicate by phone, email, or videoconference, what is the *situs* of that communication?[1163] Second, assuming that the place where the communication was created can be determined, if such jurisdiction is unrelated to the dispute or to the parties to the communication,[1164] one can imagine that the parties are unlikely to be familiar with the rules of privilege of such jurisdiction. Take for instance two parties holding without prejudice settlement discussions in a hotel meeting room in a jurisdiction unrelated to either of them or to the dispute, but geographically convenient for both parties. Of course they could research the privilege law of that jurisdiction prior to meeting, but they could also assume,

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1157 La Spada, *supra* note 1155, at 131.

1158 Especially if the privilege is invoked by another party than the one rendering the contractual performance. (Waincymer, *supra* note 23, at 803).

1159 McComish, *supra* note 7, at 330.

1160 *Id.*

1161 *Due Process in International Arbitration*, Transcripts, *supra* note 30, at 89.

1162 Upjohn Co. v. United States, *supra* note 59, at 393.

1163 Bradford, *supra* note 69, at 947; Redfern et al., *supra* note 1003, at 123.

1164 Reiser, *supra* note 18, at 671.

at the risk of being wrong, that such jurisdiction has the same rules of privilege as their respective home jurisdiction.[1165] As Bradford suggests, the safest strategies for these partners would be to assume that the jurisdiction where the meeting is to be held has a restrictive privilege law, thus curtailing their discussions accordingly.[1166] The Second Restatement of Conflict of Laws recommends applying the law of the place where the communication was created only where there was no prior relationship between the parties to the communication.[1167] Where there was a prior relationship between the parties centered around a certain jurisdiction and where the communication was created in another jurisdiction solely for reasons of convenience, the Second Restatement of Conflict of Laws recommends the application of the former jurisdiction.[1168] For these reasons, applying the law of the place where the communication was created would in fact lack the certainty and predictability required to serve the purpose of the privilege.[1169] Although this may be true, the place where the attorney-client communication occurred is in line with the reliance interests of parties claiming attorney-client privilege.[1170]

On the other hand, in the case of mediation where neither the mediation agreement nor the applicable mediation procedural rules provide for rules protecting the confidentiality of allegations, statements, and documents exchanged in the course of the mediation, the application of the law of the jurisdiction where the mediation is taking place may well be considered to address the need for predictability of the parties as well as their legitimate expectations. This follows the presumption that the mediator, as an experienced professional, informed the parties of the confidentiality and privilege rules applicable under the laws of the jurisdiction where the mediation is held and this prior to the commencement of the mediation. For example, under the European Code of Conduct for Mediators, the mediator shall "in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including in particular any applicable provisions relating to obligations of confidentiality on the mediator and on the parties."[1171] Standard V(C) of the Model Standards of Conduct for Mediators adopted by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution, provides that "[a] mediator shall promote understanding among the parties of the extent to which the parties will

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1165 Bradford, *supra* note 69, at 947.

1166 *Id.*

1167 Restatement (Second) of Conflict of Laws § 139 comment e (1971).

1168 *Id.*

1169 Bradford, *supra* note 69, at 947.

1170 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 512.

1171 Art. 3.1, European Code of Conduct for Mediators.

maintain confidentiality of information they obtain in a mediation"[1172] while Standard V(D) specifies that "[d]epending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address."[1173]

(ii, iii and iv) The place from where the communication was sent, the place where the communication was received, and the place where the communication is stored may not be appropriate factors because of modern technology. Indeed, nowadays, communications can be sent from, received in, or stored in multiple locations, as it is the case with emails.[1174] Even for traditional communications such as letters, the sender may have stored a copy in his files, the recipient(s) as well, and scanned copies may be archived in off-site facilities located outside the sender's and the recipient's jurisdictions. Moreover, an additional element to take into consideration is where the communication is stored within the jurisdiction. For example, in some jurisdictions, documents in possession of attorneys are protected from disclosure while documents in the possession of clients are not.[1175] Finally, the place of storage as a connecting factor is only relevant for tangible evidence.[1176] Indeed, for oral communications, unless there has been an audio or video recording, there exists no place of storage.

(v) The place where the party (or witness) claiming the privilege resides is an appropriate connecting factor for privileges.[1177] It is particularly appropriate for non-party witnesses.[1178] Indeed, not being a party to the arbitration agreement, non-party witnesses should not be bound by the rules of privilege agreed by the parties, if any.[1179] By applying to the witness' testimony the rules of privilege in force at the witness' place of residence, the tribunal will ensure that the witness' legitimate expectations are complied with.

Berger, Tawil and Lima suggest that the law of the domicile of the party invoking the privilege is an appropriate connecting factor for the attorney-client privilege, subject to ensuring that its application does not impose on the attorney an illegal or unethical conduct.[1180] That being said, applying the law

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1172 Standard V(C), Model Standards of Conduct for Mediators.

1173 *Id.*

1174 von Schlabrendorff and Sheppard, *supra* note 19, at 770.

1175 Rubinstein and Guerrina, *supra* note 24, at 596.

1176 Reiser, *supra* note 18, at 671.

1177 von Schlabrendorff and Sheppard, *supra* note 19, at 770.

1178 Mosk and Ginsburg, *supra* note 1, at 381; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 512.

1179 Mosk and Ginsburg, *supra* note 1, at 383.

1180 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 512; Tawil and Lima, *supra* note 18, at 48.

of the jurisdiction where the attorney is admitted may be more appropriate for the attorney-client privilege for the reasons explained below.

(vi) As just mentioned, the place where the lawyer is admitted is an appropriate connecting factor for the attorney-client privilege.[1181] This is supported by a number of reasons. First, it is because of the involvement of the lawyer that the privilege comes into effect.[1182] Second, the lawyer should be aware of the scope of the privilege which applies to the communication.[1183] Third, the lawyer will advise his client in accordance with the privilege applying to such communication.[1184] Finally, because privileges are often contained in rules of professional ethics which the lawyer is bound to comply with.[1185] Although this connecting factor could open doors to forum shopping of lawyers,[1186] this is very unlikely to happen.[1187] Indeed, lawyers are usually selected in consideration of more relevant factors such as "skills, expertise, knowledge of the industry affected, reliability and acquaintance with the applicable law."[1188]

At the same time, this connecting factor raises a few issues. For example, what if the attorney is admitted in more than one jurisdiction?[1189] This is especially relevant in the United States where many attorneys are admitted to practice in different states having different privilege rules.[1190] What if the attorney renders legal advice on a jurisdiction where he is not admitted?[1191] Which law is applicable when a party is represented by, or sought legal advice from, a variety of in-house or external counsel admitted in different jurisdictions?[1192] When the tribunal is faced with such situation, Born suggests applying "the privilege law of the state in which the senior external lawyer

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1181 Tevendale and Cartwright-Finch, *supra* note 25, at 831; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 511; de Boisséson, *supra* note 12, at 713; von Schlabrendorff and Sheppard, *supra* note 19, at 771.

1182 Tevendale and Cartwright-Finch, *supra* note 25, at 831.

1183 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 511; Bradford, *supra* note 69, at 948; Born, *supra* note 18, at 1914.

1184 Tevendale and Cartwright-Finch, *supra* note 25, at 831; Reiser, *supra* note 18, at 670; Born, *supra* note 18, at 1914.

1185 de Boisséson, *supra* note 12, at 713; Reiser, *supra* note 18, at 670; von Schlabrendorff and Sheppard, *supra* note 19, at 771.

1186 Tevendale and Cartwright-Finch, *supra* note 25, at 832.

1187 Bradford, *supra* note 69, at 951.

1188 Tawil and Lima, *supra* note 18, at 43.

1189 Sindler and Wüstemann, *supra* note 11, at 619; McComish, *supra* note 7, at 335.

1190 McComish, *supra* note 7, at 335.

1191 Garnett, *supra* note 1007, at 242.

1192 Sindler and Wüstemann, *supra* note 11, at 624; Reiser, *supra* note 18, at 671; Bradford, *supra* note 69, at 952; McComish, *supra* note 7, at 335.

involved in the communications is qualified."[1193] This suggestion is not convincing but we are not able to provide a better alternative.

(vii) The place where the attorney practices is not an appropriate connecting factor. Indeed, in-house counsel in multinationals and arbitration practitioners regularly practice outside their jurisdiction of admission.

(viii) An attorney-client relationship is governed by a contract which has its own proper law.[1194] Therefore, it has been suggested that the law governing the attorney retainer agreement could govern the privilege arising from such relationship.[1195] Although this connecting factor seems to be in line with the parties' legitimate expectations, it has two drawbacks.[1196] First, the attorney retainer agreement may not provide for any applicable law and determining the law applicable to a multi-jurisdictional attorney-client relationship may be a quite complex exercise.[1197] Second, the law applicable to the attorney retainer agreement may be unrelated to the legal advice rendered.[1198] For example, the retainer agreement may have been executed between the London headquarters of a multinational company and the London office of an international law firm under English law but the legal advice subject of the privilege claim is rendered on Swiss law by the law firm's Geneva office to the French subsidiary of the multinational. Even though the legal advice was rendered under a retainer agreement governed by English law, English law has no connection whatsoever with the said legal advice.

(ix) The jurisdiction about which the legal advice was sought as a connecting factor for the legal advice privilege was suggested by McComish.[1199] However, this connecting factor is found unsatisfactory by McComish himself for two reasons.[1200] First, "it seems surprising and unsatisfactory"[1201] that a London solicitor giving advice about the laws of Singapore have his advice governed by Singaporean law. Second, this connecting factor would not be applicable in the case of advice given on multiple laws.[1202]

(x) Finally, the place where the party requesting disclosure resides is not an appropriate factor given that there may be no connection between the allegedly privileged evidence to be disclosed and such location. However,

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[1193] Born, *supra* note 18, at 1914.
[1194] McComish, *supra* note 7, at 333.
[1195] *Id.*, at 334.
[1196] *Id.*
[1197] *Id.*
[1198] *Id.*
[1199] *Id.*, at 331.
[1200] *Id.*
[1201] *Id.*
[1202] *Id.*

such place may be taken into consideration when applying the most favorable or the least favorable privilege rules, as examined in Sections 3.5.5 and 3.5.6 below.

3.5.2.3 Predictability

Predictability is essential for privileges. Indeed, as mentioned various times throughout this work, for the purpose of privileges to be served, the parties must be able to predict with a degree of certainty whether particular communications will be protected.[1203] Berger asserts that the closest connection test "provides at least a minimum degree of predictability and certainty."[1204] In the same vein, Blessing affirms that the closest connection test bears predictability in the sense that the tribunal "will not have a carte blanche to just determine any kind of law which it might fancy[, r]ather, the law or rules of law to be looked at should be that (those) which appears (appear) to be most connected to the contractual relationship."[1205] For Tevendale and Cartwright-Finch, this approach also has the benefit of taking into account the reliance interests and legitimate expectations of the parties.[1206]

On the other hand, Poudret and Besson argue that even though this rule obliges arbitrators to adopt an objective approach, because the arbitrators are left with great latitude in weighing up the different connecting factors available, one is entitled to wonder if it is "not a paradox to recognize that this solution has the essential merit of foreseeability."[1207]

The determination of the closest connection has been said to be very subjective.[1208] Indeed, the closest connection test does not provide any guidance on how connecting factors should be weighed.

Finally, it has been argued that, in some cases, the closest connection test may be inconsistent with the IBA Rules of Evidence. An example is *Drop* v. *Centioni*, an arbitration between a Dutch party and an Italian party held in 2007 under the Netherlands Arbitration Institute Rules.[1209] In these proceedings, the Dutch party produced a document generated by the Italian party in the course of settlement discussions and the Italian party objected on grounds that it was

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[1203] Upjohn Co. v. United States, *supra* note 59, at 393.

[1204] Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 511.

[1205] Blessing, *supra* note 1062, at 53.

[1206] Tevendale and Cartwright-Finch, *supra* note 25, at 831.

[1207] Poudret and Besson, *supra* note 32, at 586.

[1208] Presnell and Beakes, *Chapter Ten: The Application of Conflict of Laws to Evidentiary Privileges* (available at http://presnellonprivileges.files.wordpress.com/2012/09/conflicts-of-laws.pdf), at 164.

[1209] *Drop v. Centioni*, NAI, 28 February 2007, *TvA* (2008) 5 (Cited in O'Malley, *The 2010 IBA Rules of Evidence: Selected Issues* (available at http://tinyurl.com/cqzkkq6), at 14).

produced in bad faith.[1210] The tribunal applying the closest connection test, and relying on the connecting factor of the place where the attorneys involved in the exchange of the document where located, concluded that because the document was sent by the Dutch co-counsel of the Italian party to the Dutch counsel of the Dutch party, Dutch law applied.[1211] Dutch law on the settlement privilege provided that such document was admissible.[1212] The tribunal nevertheless indicated that if such document would have been sent by the Italian counsel rather than the Dutch co-counsel, the result might have been different:

> The Tribunal understands that Respondent clearly submitted the sales figures and the corresponding royalties figures in the context of the settlement negotiations and, although that information was not privileged because sent by co-counsel to Respondent and not by Italian Counsel ...[1213]

This brings two observations. First, the closest connection test is not always appropriate for the without prejudice privilege. Whether the document at stake was sent by the Dutch co-counsel or the Italian counsel should be irrelevant. The document could have even been sent by the Italian party itself directly to the Dutch party without having any influence on the privilege. The applicable law for the without prejudice privilege should not be decided solely on the means of transmission of the document. Applying the reasoning of the tribunal in *Drop v. Centioni*[1214] could mean that anything said by the parties in settlement discussions physically held in London would be privileged[1215] under the without prejudice privilege but that any document generated as a result of these settlement discussions, such as the minutes of the settlement discussions sent from the Italian party through its Dutch co-counsel to the Dutch counsel of the Dutch party, would not be privileged. This is nonsense.

Second, the tribunal's decision to apply Dutch law is inconsistent with the IBA Rules.[1216] Indeed, Art. 9(3)(b) IBA Rules stipulates that the tribunal "may take into account ... any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations."[1217] Applying rules which do not offer protection to communications made for the purpose of settlement negotiation

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1210 *Id.*
1211 *Id.*
1212 *Id.*
1213 *Id.*
1214 *Id.*
1215 See Section 2.6.1.
1216 O'Malley, *The 2010 IBA Rules of Evidence*, *supra* note 1209, at 14.
1217 Art. 9(3)(b) IBA Rules.

is not in line with the IBA Rules. Of course, this is only true in arbitrations where the IBA Rules are applicable.

3.5.3 Direct application of the rules determined by the tribunal without conflicts analysis

The direct application of rules of law without conflicts analysis is known as the *voie directe*. Under this method, the tribunal is free to determine the applicable law or rules of law without applying conflict of laws rules. The tribunal is under no obligation to apply a system of law to the issue; it may apply only the rules of law which it considers appropriate.[1218]

This approach is frequently used by arbitrators for non-complex claims of privilege where the arbitrators rely on unchallenged assumptions, probably based on the rules of privilege applicable in the jurisdictions where they are admitted.[1219]

However, as noted by Blessing, even when operating the *voie directe*, "the arbitrator will certainly apply some notion of private international law, at least for his internal thinking process, even though … he will be under no obligation to provide a reasoning to explain on what legal grounds the applicable law or rules of law had/have been determined."[1220] Any justification would be "nothing but a choice of law rule."[1221]

Fry is of the opinion that rules normally applying to international arbitration do not provide satisfactory guidance and, therefore, in the absence of agreement of the parties on such matters, the tribunal should rule on claims of privilege without any reference to rules of national law.[1222] In his article, Fry only provides the example of without prejudice communications. He presents three possible approaches for without prejudice communications.[1223] These are summarized below.

The first approach is for the tribunal to maintain the confidentiality of without prejudice communications by taking the view that, as a matter of public policy or trade practice, parties should attempt to settle disputes without the fear that what has been said during such endeavors be disclosed in

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[1218] Redfern et al., *supra* note 1003, at 123.

[1219] Burn and Skelton, *supra* note 200, at 126.

[1220] Blessing, *supra* note 1062, at 54.

[1221] K. P. Berger, *International Economic Arbitration* (1993), at 502.

[1222] Fry, *supra* note 17, at 212.

[1223] *Id.*

arbitral proceedings.[1224] This approach was applied by the tribunal in ICC Case No. 6653 of 1993.[1225] The tribunal declared:

> The arbitral tribunal also considers that it is customary, not only in French law – where the custom is equally a rule of professional conduct for *avocats* – but also in the field of international commerce, that exchanges of proposals between parties with a view to reaching an agreement aimed at resolving a dispute submitted to a tribunal – arbitral or not – are and must remain confidential. If the parties have tried in good faith to reconcile their positions, one of them cannot, in the event that the negotiations fail, use to its benefit the proposals of the other in order to deduce an alleged admission of liability.[1226]

The second approach is for the tribunal to admit the evidence but only giving it little weight.[1227] Under this approach, the tribunal considers that although the parties usually make concessions in the context of the negotiations, their legal positions are not unsound.[1228] Shaughnessy criticizes this approach:

> [A] privilege cannot be allowed into the room and then be put into a corner and ignored. In other words, the issue cannot be avoided by admitting the contested evidence and then not giving it much evidentiary weight. If evidence is subject to a privilege then a party should not be forced to reveal the evidence and the arbitrators should not order that it be produced and thus allow for it to be admitted. It is not possible to turn the heated question into a more innocuous one of determining the evidentiary value of the evidence.[1229]

Under the third approach, the tribunal maintains the confidentiality of the communications on the grounds that the parties have entered into settlement discussions under the assumption that what would be said in the course of such negotiations would not be disclosed in arbitral proceedings.[1230] This approach is similar to the presumed intention of the parties in Section 3.5.7.

3.5.3.1 Transnational rules

Transnational rules of privilege in arbitration may be considered by tribunals when no other law governs matters of privilege.[1231] For example, in an

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[1224] *Id.*

[1225] Award, ICC Arbitration case No. 6653 (1993) (Quoted in Fry, *supra* note 17, at fn. 22).

[1226] *Id.*

[1227] Fry, *supra* note 17, at 212.

[1228] *Id.*

[1229] Shaughnessy, *supra* note 2, at 464.

[1230] Fry, *supra* note 17, at 212.

[1231] Alvarez, *supra* note 11, at 686.

Austrian Federal Economic Chamber arbitration, the tribunal, faced with a claim of attorney-client privilege, described its approach as follows:

> Rather than applying any countries' specific law(s) to the question at hand, the Arbitral Tribunal will address the issue in accordance with general principles developed by civil law and in civil law arbitrations, general procedural rules on disclosure and due process and general standards of fairness applicable in international arbitration proceedings.[1232]

An advantage of this approach is that characterization becomes unnecessary.[1233] However, to be on the safe side, the tribunal should nevertheless characterize the issue as procedural to ensure greater flexibility in the determination of the applicable rules. The application of transnational rules of privilege will be examined in Chapter 4.

3.5.3.2 International law

International law may be considered by tribunals when no other law governs matters of privilege or when the parties have agreed so.[1234] However, given the controversies in identifying the scope and content of general principles of international law,[1235] it has not yet been determined whether certain privileges can be considered as such.[1236] The fact that some privileges are widespread throughout the different legal systems and that privileges are protected under the Hague Convention are arguments in favor of their recognition under international law.[1237] This approach has the advantage of offering a neutral standard which does not reflect the public policy of any particular jurisdiction[1238] and ensures equal treatment of the parties.

The *Bank for International Settlements*[1239] arbitration, further examined in Section 4.4.1.3, is an example of a case where the tribunal applied international law to a claim of privilege. In this case, the tribunal was required to decide on whether the Bank for International Settlements (BIS) could invoke the attorney-client privilege against its own shareholders. First Eagle, a private shareholder, objected to the BIS' refusal to produce documents on the grounds

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1232 O'Malley, *The 2010 IBA Rules of Evidence*, *supra* note 1209, at 16.

1233 Kaufmann-Kohler, "La qualification en arbitrage commercial international", *supra* note 996, at 306.

1234 Mosk and Ginsburg, *supra* note 1, at 378; Sindler and Wüstemann, *supra* note 11, at 623.

1235 Chukwumerije, *supra* note 1046, at 112.

1236 Mosk and Ginsburg, *supra* note 1, at 378.

1237 *Id.*, at 379; Sindler and Wüstemann, *supra* note 11, at 623.

1238 Alvarez, *supra* note 11, at 686.

1239 *Dr. Horst Reineccius, et al. v. Bank for International Settlements*, Final Award on the Claims for Compensation for the Shares Formerly Held by the Claimants, Interest Due Thereon and Costs of the Arbitration and on the Counterclaim of the Bank Against First Eagle Sogen Funds, Inc. (19 September 2003).

of attorney-client privilege. Both parties argued under international law.[1240] First Eagle contended that the shareholders owned the legal advice that the corporation secured. On the opposite, the BIS contended that under international law, a corporation and its shareholders have distinct legal personalities and that this was especially true when they find themselves in disputes, each having "separate legal advisers, representing their separate and adverse interests."[1241] The tribunal declared that "international law, like domestic systems, recognizes the separate legal personality of a corporate entity and the International Court of Justice has upheld this principle,"[1242] and ruled in favor of the BIS.

In the NAFTA arbitration *Gallo v. Canada*, the tribunal also decided that international law applied to matters of privilege but nevertheless acknowledged that "domestic legal concepts of solicitor-client privilege are recognized and protected by international law."[1243] As a result, the tribunal chose to take into consideration Canadian law in respect of claims of solicitor-client privilege and politically or institutionally sensitive documents to the extent that Canadian law conforms to international practice.[1244]

3.5.4 Common principles to the different jurisdictions connected to the dispute (*tronc-commun*)

When the privilege invoked is common to all the legal systems relevant to the dispute, the tribunal should recognize such privilege.[1245] However, very often, privileges vary sufficiently from a legal system to another as to require that the tribunal decides which law governs the issue of privileges.[1246] The "*tronc-commun*" or "survey"[1247] approach allows the tribunal to apply the rules of

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[1240] *Bank for International Settlements*, Procedural Order No. 6, *supra* note 271, at 9.

[1241] *Id.*

[1242] *Id.*, at 11. The arbitral tribunal relied in part on *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, *ICJ Reports* (1970) 3. The relevant issue to the present work was that the Belgian Government claimed reparation for damages allegedly sustained by Belgian nationals, shareholders of the Barcelona Traction, Light and Power Company, Limited, as a result of acts committed by the Spanish state against Barcelona Traction, which acts were said to be contrary to international law. The court held that Barcelona Traction and its shareholders constituted separate legal entities: "Municipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them. Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights." (*Case Concerning the Barcelona Traction, Light and Power Company, Limited*, at 34).

[1243] Gallo v. Canada, Procedural Order No. 3, *supra* note 239, at para. 41.

[1244] *Id.*

[1245] Mosk and Ginsburg, *supra* note 1, at 368; Alvarez, *supra* note 11, at 685.

[1246] Mosk and Ginsburg, *supra* note 1, at 368.

[1247] O'Malley, *supra* note 11, at 288.

privilege which are common to the different legal systems relevant to the dispute without having to select a particular governing law. This approach takes into consideration the legitimate expectations of the parties by applying the rules common to all potential applicable laws in order to attain a result acceptable to all parties.[1248] Moreover, it ensures that a rule considered as "an anomaly to accepted practice"[1249] will not be applied. However, this approach may only be successful when a given privilege, although having varied scope, is recognized in all the jurisdictions considered by the tribunal.

The *Glamis Gold* case is a good example of the application of the *tronc-commun* approach by a tribunal. Glamis Gold, a publicly held Canadian corporation, with headquarters in Reno, USA, initiated arbitration proceedings against the United States under the UNCITRAL Arbitration Rules for allegedly having "denied Glamis Imperial the minimum standard of treatment under international law (including full protection and security and fair and equitable treatment of its investment) guaranteed by Article 1105 and [having] expropriated Glamis Imperial's valuable mining property interests without providing prompt and effective compensation as guaranteed by Article 1110."[1250] The parties agreed that the arbitration would be administered by ICSID and that the seat would be Washington, USA.[1251] The tribunal was constituted under Chapter 11 of the North American Free Trade Agreement.

The examination of the UNCITRAL Arbitration Rules by the tribunal led to the conclusion that although Article 24 made clear that the tribunal is empowered to order the production of documents, it "[provides] only skeletal guidance as to the exercise of that authority."[1252] Indeed, under Article 15(1), the UNCITRAL Arbitration Rules merely state that the tribunal may conduct the arbitration in such manner that it considers appropriate provided that the tribunal respects the requirements of due process.[1253] Consequently, although asserting that the IBA Rules of Evidence were not directly applicable to this arbitration, the tribunal decided that it was appropriate to consult the IBA Rules of Evidence for guidance on document production issues.[1254] The parties also cited the IBA Rules in their submissions as a source of guidance for the tribunal.[1255]

[1248] Burn and Skelton, *supra* note 200, at 129.

[1249] O'Malley, *supra* note 11, at 288.

[1250] Glamis Gold, Ltd. v. The United States of America, Award (8 June 2009), at para. 185.

[1251] *Id.*, at para. 187.

[1252] Glamis Gold, Ltd. v. The United States of America, Decision on Objections to Document Production (20 July 2005), at para. 8.

[1253] Art. 17(1) UNCITRAL Rules.

[1254] Glamis Gold, Ltd. v. United States of America, Decision on Objections to Document Production, *supra* note 1252, at para. 9.

[1255] Glamis Gold, Ltd. v. United States of America, Decision on Parties' Request for Production of Documents Witheld on Grounds of Privilege, *supra* note 160, at para. 18.

The tribunal concluded that, in their submissions and at the hearings, the parties appeared to have agreed that the privilege law of the United States should be looked into by the tribunal for guidance in the arbitration, even though the parties disagreed as to which jurisdiction of the United States reference should be made.[1256] As a result, the tribunal decided to review case law of various jurisdiction of the United States, including the District of Columbia where the seat of arbitration was located[1257] and California where the alleged expropriation took place.[1258] This in order to identify general consensus between these jurisdictions.[1259] Following such review, the tribunal defined the standards to be applied to claims of privilege.[1260]

The *tronc-commun* approach has also been applied to privileges outside arbitration proceedings. For instance, by the Court of Justice of the European Union in *Akzo Nobel Chemicals Ltd*.[1261] The Court of Justice of the European Union held that emails exchanged between the director general of Akzo Nobel and an in-house legal counsel admitted as an attorney to the Netherlands Bar were not privileged on the grounds that "no predominant trend towards protection under legal professional privilege of communications within a company or group with in-house lawyers may be discerned in the legal systems of the 27 Member States of the European Union."[1262]

3.5.5 The "most favorable" privilege rule

The most favorable privilege rule,[1263] or "most favored nation rule,"[1264] is said to be "consistent with the international practice recommended by leading arbitrators."[1265] This approach calls for the application of the law of the home jurisdiction of the party which affords the broadest protection to privileges.[1266] This means that a party will not be required to disclose evidence that is privileged under its own law and that such party will also benefit from the

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1256 *Id.*, at para. 19.

1257 Glamis Gold, Ltd. v. United States of America, Award, *supra* note 1250, at para. 187.

1258 *Id.*, at para. 1.

1259 Glamis Gold, Ltd. v. United States of America, Decision on Parties' Request for Production of Documents Witheld on Grounds of Privilege, *supra* note 160, at para. 20.

1260 *Id.*

1261 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, *supra* note 400.

1262 *Id.*, at para. 74.

1263 Sometimes referred to as the cumulative approach (Meyer, *supra* note 7, at 371).

1264 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 518; Tawil and Lima, *supra* note 18, at 41.

1265 Gusy, Hosking and Schwarz, *supra* note 168, at 201.

1266 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 518; Rubinstein and Guerrina, *supra* note 24, at 598; Alvarez, *supra* note 11, at 686.

protection afforded under the law of the opposing party, if such protection is broader.

3.5.5.1 In existing conventions and rules

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters contains the following rule:

> In the execution of a Letter of Request 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 specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.[1267]

Moreover, the rule is also recognized by the Inter-American Convention on the Taking of Evidence Abroad.[1268] As well as in Council Regulation (EC) No 1206/2001 of 28 May 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters which provides as follows:

> 1. 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.[1269]

The rule is also the advocated by the ICDR in its Guidelines:

> The tribunal should respect applicable rules of privilege or professional ethics and other legal impediments. When the parties, their counsel or their documents would be subject under applicable law to different rules, the tribunal should to the extent possible apply the same rule to both sides, giving preference to the rule that provides the highest level of protection.[1270]

[1267] Art. 11 Hague Convention.

[1268] Tawil and Lima, *supra* note 18, at 42.

[1269] Art. 14.1 Council Regulation (EC) No 1206/2001 of 28 May 2001.

[1270] Section 7 ICDR Guidelines.

3.5.5.2 Legitimate expectations and equal treatment

The most favorable privilege rule may be considered when, following a conflict of laws approach, the tribunal concludes that different rules of privilege apply to different parties.[1271] Indeed, this approach is intended to ensure that the parties' legitimate expectations are fulfilled and that the equal treatment of the parties principle is respected.[1272] However, it will only meet the legitimate expectations of the parties from the jurisdiction which has the highest privilege standard. Indeed, the most favorable privilege rule may be conflicting with the "the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen"[1273] when the parties are afforded wider or different privileges than what they were expecting.[1274] The party with the highest privilege standard will not be required to produce evidence which is privileged in its home jurisdiction whereas the party with the lowest privilege standard never expected that evidence in its possession not otherwise privileged in its jurisdiction would be protected from disclosure.[1275]

3.5.5.3 Limitations

This approach has a few limits. First, it could be considered as unfair and amount to a violation of the right to be heard if, as a result of the application of the law affording the broadest protection, most if not all relevant evidence is in the possession of one party and become privileged from disclosure.[1276]

Second, if at least one of the jurisdictions taken into consideration has broad privilege standards, this means that the fact-finding process may be harder than if all the jurisdictions examined had narrower privilege standards.[1277] In other words, the parties may need to prove their cases through other means of evidence than the ones that they expected to use.[1278] Relevant and important evidence to the case may be excluded.[1279]

1271 de Boisséson, *supra* note 12, at 713.

1272 Heitzmann, *supra* note 11, at 223; Tevendale and Cartwright-Finch, *supra* note 25, at 834; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 518; Tawil and Lima, *supra* note 18, at 41; de Boisséson, *supra* note 12, at 714; von Schlabrendorff and Sheppard, *supra* note 19, at 773.

1273 Art. 9(3)(c) IBA Rules.

1274 O'Malley, *The 2010 IBA Rules of Evidence*, *supra* note 1209, at 15; O'Malley, *supra* note 11, at 293.

1275 Tevendale and Cartwright-Finch, *supra* note 25, at 834.

1276 *Due Process in International Arbitration*, Transcripts, *supra* note 30, at 92-4.

1277 Tawil and Lima, *supra* note 18, at 43; Shaughnessy, *supra* note 2, at 467; von Schlabrendorff and Sheppard, *supra* note 19, at 774.

1278 Tawil and Lima, *supra* note 18, at 43.

1279 Reiser, *supra* note 18, at 674; Meyer, *supra* note 7, at 371.

3.5.5.4 Practical considerations

An issue which was raised by commentators is the waiver of privilege by subsequent conduct by a party who had no expectation of privilege.[1280] To put it differently, because a party never expected the privilege to apply to certain communications, this party may have already disclosed the privileged communications during, or outside of, the proceedings.[1281] Should this party be nonetheless able to rely on the privilege?

Von Schlabrendorff and Sheppard propose that the most favorable privilege rule apply on the results of the closest connection test.[1282] In other words, the tribunal should apply the closest connection test to all privileges invoked and allow each of the parties to benefit from the privileges available to the other parties.[1283]

Kaufmann-Kohler and Bärtsch propose a hybrid solution between the cumulative approach[1284] and the most favorable privilege rule.[1285] Owing to the fact that many commentators agree that privileges encompass elements of both substantive and procedural characterizations, they suggest applying both "the law of the arbitration and ... the law of the closest relationship to the evidence."[1286] In case of conflict, the most protective privilege law between the two would apply.[1287] This approach is only worthy where the arbitration law contains provisions regarding privileges. This is presently not the case in most jurisdictions examined herein.[1288]

Finally, it is noteworthy that the most favorable privilege rule is considered as TransLex principle for privileges in arbitration.[1289]

3.5.6 The "least favorable" privilege rule

The least favorable privilege rule, or "least favored nation rule,"[1290] commands the application of the lowest privilege standard.[1291] In other words, it advocates production of evidence over protection.

1280 Reiser, *supra* note 18, at 674.

1281 *Id.*, at 674-5.

1282 von Schlabrendorff and Sheppard, *supra* note 19, at 773.

1283 *Id.*

1284 See Section 3.4.2.3.

1285 Kaufmann-Kohler and Bärtsch, *supra* note 25, at 19.

1286 *Id.*

1287 *Id.*

1288 See Section 1.3.3.

1289 TransLex No. XII.7 - Most favoured nation treatment in case of unequal privilege protection (available at http://www.trans-lex.org/968650).

Although this approach treats the parties with equality,[1292] it will frustrate the legitimate expectations of the party from the jurisdiction having the highest privilege standard. However, it is in complete accordance with the legitimate expectations of the party from the jurisdiction having the lowest privilege standard. For this reason, the application of the least favorable privilege rule may ultimately be considered as unfair to the parties.[1293]

Moreover, a counsel admitted in a jurisdiction having a broader privilege standard than that of the least favorable jurisdiction may find himself in a position where he would need to choose between complying with the disclosure order, thus committing a violation of the rules of professional conduct to which he is bound (and even criminal law in some jurisdictions), or disobeying the production order[1294] hence risking that his client be subject to adverse inferences.[1295]

3.5.7 Presumed intention of the parties and the law upon which the party to the communication relies on

The determination of the presumed intention of the parties is a mechanism which is intended to meet the reasonable expectations of the parties and is completely in accordance with the principle of party autonomy.[1296]

According to Nygh, the presumed intention of the parties may be inferred in three situations: (a) the parties have expressed their choice; (b) the parties have not expressed their choice but it can be deducted with reasonable certainty (implicit choice); (c) the parties have not expressed their choice and probably never thought about it, but the court imputes an intention to the parties (imputed intention).[1297]

First, where the parties have expressed their choice, the tribunal is bound by the agreement of the parties. This was examined in this work numerous times. In our opinion, this situation does not fall within the ambit of the presumed intention of the parties approach, as an express choice by the parties does not amount to a presumption of their intention. The tribunal shall presume the intention only when the choice is not expressed clearly. Second,

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1290 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 519.

1291 *Id.*

1292 *Id.*; Tevendale and Cartwright-Finch, *supra* note 25, at 834; Tawil and Lima, *supra* note 18, at 44.

1293 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 519.

1294 Tawil and Lima, *supra* note 18, at 44.

1295 *Id.*

1296 Nygh, *supra* note 1079, at 328, 330.

1297 *Id.*, at 328.

the implicit choice is, as noted by Nygh, "simply an extension of the principle of autonomy."[1298] Third, the difficulty is with the imputed intention. Indeed, imputing an intention to the parties is a highly artificial exercise and this approach is no longer used.[1299]

An alternative to the presumed intention of the parties is the law upon which the party to the communication relies on.[1300] This approach was advocated by Albert Ehrenzweig.[1301] However, this theory has more difficulties than benefits. First, it can be complicated to determine the law on which a party relies. Second, this approach ignores the true reasons why a party relies on a given law.[1302] For example, a party may rely on a given law because it is the law of its home jurisdiction, or the law of the place where its lawyer is admitted, or even the law about which it sought advice.[1303] Therefore, it is most likely that one will arrive to the same results by applying the closest connection test.[1304]

For these reasons, the imputed intention and the law upon which the party to the communication relies on are not suitable approaches for privileges in arbitration.

3.5.8 Scope of privilege proportional to the scope of disclosure

Yanos proposes that the scope of privilege (more specifically the attorney-client privilege) be proportional to the scope of disclosure.[1305] For Yanos, "it is impossible to separate the concept of the Attorney-Client Privilege from the discovery system in which it is embedded."[1306] In other words, extensive disclosure will permit a broad doctrine of privileges while limited disclosure will lead to a narrower definition of privileges.[1307]

Although it did not specifically refer to this particular approach, the tribunal in *Glamis Gold* informed the parties that, in crafting the standards applicable to claims of privilege, it took into consideration, amongst other elements, the differences between court and arbitral proceedings and particularly the fact that "parties choose arbitration ... to avoid the relatively

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1298 *Id.*, at 330.

1299 For further reading, see Nygh, *supra* note 1079, at 328-31.

1300 McComish, *supra* note 7, at 332.

1301 *Id.*

1302 *Id.*, at 333.

1303 *Id.*

1304 *Id.*

1305 Yanos, *supra* note 7.

1306 *Id.*

1307 Tawil and Lima, *supra* note 18, at 44.

extensive document production practices of courts generally and United States courts in particular."[1308]

This approach has three drawbacks. First, it does not take into consideration the fact that the parties may come from jurisdictions where the extent of disclosure is diametrically opposed. Therefore, in such case, whether the tribunal will order extensive disclosure or not, it will be impossible not to upset the legitimate expectations of at least one of the parties.[1309]

Second, the parties are unable to anticipate how the tribunal will rule on the requests for disclosure,[1310] especially at the creation of the communication, which can occur years before the dispute.[1311] As a result, there is the possibility that the tribunal will upset the legitimate expectations of both parties.

Finally, U.S. style broad discovery has been said to be inappropriate in international arbitration,[1312] in part because of its "time-consuming, wasteful, expensive and intrusive"[1313] nature. As a consequence, disclosure in arbitration tends to lean towards a combination of common law and civil law practices.[1314] In other words, there seems to be a consensus emerging on the scope of disclosure, particularly following the adoption of the IBA Rules,[1315] thus making Yanos' approach less appealing.

On a positive note, as noted by Yanos, this approach has the advantage of ensuring equal treatment of the parties.[1316] However, in our opinion, this approach is not desirable.

3.6 Conclusion

A number of approaches have been examined in the present chapter. The closest connection test and the most favorable privilege rule are probably the most appropriate conflict of laws approaches for privileges in arbitration for the reasons explained herein.

Tribunals may also elect to disregard conflict of laws rules and apply transnational rules of privilege. This will be treated in the next chapter.

[1308] Glamis Gold, Ltd. v. United States of America, Decision on Parties' Request for Production of Documents Witheld on Grounds of Privilege, *supra* note 160, at fn. 1.

[1309] Yanos, *supra* note 7; Tawil and Lima, *supra* note 18, at 45.

[1310] Poudret and Besson, *supra* note 32, at 556.

[1311] Tawil and Lima, *supra* note 18, at 45.

[1312] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, *supra* note 186, at 7.

[1313] Smit, "Towards Greater Efficiency in Document Production Before Arbitral Tribunals – A North American Viewpoint", in ICC International Court of Arbitration Buletin, *Document Production in International Arbitration* (2006) 93, at 94.

[1314] Tawil and Lima, *supra* note 18, at 46.

[1315] Poudret and Besson, *supra* note 32, at 556.

[1316] Yanos, *supra* note 7.

CHAPTER 4 - TRANSNATIONAL RULES, PRACTICAL CONSIDERATIONS AND PROPOSALS

4.1 Introduction

As seen in Chapter 3, the difficulty with privileges in arbitration first lies in the characterization.[1317] Indeed, the tribunal must characterize privileges before it can maneuver between the multitudes of available conflict of laws.[1318] Second, once characterization is determined, choice of law analysis is unpredictable,[1319] particularly in relation to privileges.[1320] The reason is that most *leges arbitri* and arbitration rules do not provide any guidance in this regard.[1321]

At the same time, arbitral practice denotes a trend towards the elaboration of transnational rules, hence making characterization[1322] and traditional conflict of laws[1323] unnecessary. Do transnational rules of privilege exist in arbitration and are they the answer to the issues raised in this work?

4.2 Definition and Formation of Transnational Rules in Arbitration

The term transnational rule is often used "to cover a wide spectrum of subjects."[1324] Moreover, transnational rules are sometimes referred to as general principles of law,[1325] or as *lex mercatoria*.[1326] In fact, various

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[1317] See Section 3.2.

[1318] *Id.*

[1319] K. P. Berger, *The Creeping Codification of the New Lex Mercatoria* (2010), at 21.

[1320] Bradford, *supra* note 69, at 936; Cohen, *supra* note 197, at 437.

[1321] Sindler and Wüstemann, *supra* note 11, at 622; Alvarez, *supra* note 11, at 677; Born, *supra* note 18, at 1910; Waincymer, *supra* note 23, at 802; Meyer, *supra* note 7, at 366-7; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 506; Tevendale and Cartwright-Finch, *supra* note 25, at 825; Kaufmann-Kohler and Bärtsch, *supra* note 25, at 19.

[1322] Kaufmann-Kohler, "La qualification en arbitrage commercial international", *supra* note 996, at 306.

[1323] Berger, *supra* note 1319, at 50, 54.

[1324] Bamodu, "Extra-national Legal Principles in the Global Village: A Conceptual Examination of Transnational Law", 4 *Int. A.L.R.* (2001) 6, at 6; See also Berger, *supra* note 1319, at 58.

[1325] Goldman, "La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives", 106 *JDI* (1979) 475, at 485-6; Gaillard, "Transnational Law: A Legal System or a Method of Decision-Making?", in K. P. Berger (ed.), *The Practice of Transnational Law* (2001) 53, at 53; Gaillard, "General Principles of Law in International Commercial Arbitration - Challenging the Myths" 5 *WAMR* (2011) 161, at 162; Mistelis, "General Principles of Law and Transnational Rules in International Arbitration: An English Perspective", 5 *WAMR* (2011) 201, at 237; Fouchard, Gaillard, Goldman, *supra* note 1058, at 805.

[1326] Fouchard, Gaillard, Goldman, *supra* note 1058, at 801; Goldman, "La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives", *supra* note 1325, at 476.

terminologies are used in reference to those rules[1327] and this creates confusion.[1328]

The difficulty in applying transnational rules is to determine the contents of such rules.[1329] Indeed, there exists a diversity of approaches.[1330] For the purposes of this work, we have elected the "functional approach" advocated by Professor Gaillard.[1331] To put it differently, the application of transnational rules results from the understanding and implementation of a method rather than drawing up a list of general principles.[1332] It is a "dynamic process and cannot be reduced to a definitive list of rules."[1333] In the words of Henry:

> In his very capacity of arbitrating, the arbitrator creates law. Therefore, the legitimacy of his solutions should not come from a positivist application of a transnational rule identified beforehand, but from the unique fact of his decision, which alone participates in the creative legal process.[1334]

Professor Berger, on the other hand, rejects the functional approach.[1335] He is of the opinion that this approach "underestimates the considerable problems that are related to the determination of the contents of the [transnational rules]"[1336] and that "the idea of codifying [transnational rules] through either the drafting of lists or the functional comparative methodology does not constitute two antagonistic approaches to the same problem."[1337] Although this may be true, attempts to codify transnational rules have been unsuccessful[1338]:

> Despite the creativity and the wide knowledge of its principal advocates, the results of this approach have ultimately proved to be disappointing.[1339]

1327 Goldman, "La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives", *supra* note 1325, at 486; Mistelis, *supra* note 1325, at 204-5.

1328 Fouchard, Gaillard, Goldman, *supra* note 1058, at 805; Mistelis, *supra* note 1325, at 230; Berger, *supra* note 1319, at 58-9.

1329 Fouchard, Gaillard, Goldman, *supra* note 1058, at 813; Gaillard, "Trente ans de Lex Mercatoria: Pour une application sélective de la méthode des principes généraux du droit", 122 *JDI* (1995) 5, at 21; Mosk and Ginsburg, *supra* note 1, at 378.

1330 Lew, Mistelis and Kröll, *supra* note 33, at 451-2.

1331 N. Blackaby et al., *Redfern and Hunter on International Arbitration* (2009), at 219.

1332 Fouchard, Gaillard, Goldman, *supra* note 1058, at 813; Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 22.

1333 Lew, Mistelis and Kröll, *supra* note 33, at 460; Mistelis, *supra* note 1325, at 212.

1334 Henry, "The Contribution of Arbitral Case Law and National Laws", in E. Gaillard et al. (eds), *Towards a Uniform International Arbitration Law?* (2005) 39, at 60.

1335 Berger, *supra* note 1319, at 268.

1336 *Id.*

1337 *Id.*

1338 *Id.*, at 250, 254.

1339 Poudret and Besson, *supra* note 32, at 598.

> In spite of these manifold and diverse attempts to codify transnational commercial law, this development has – for decades – only been of minor interest to international legal practice.[1340]

Recognizing such failure, the functional method should be given as much consideration as the "creeping codification" advocated by Professor Berger. Second, as Professor Berger acknowledges himself, "[a] danger may also arise if parties to an international arbitration base their transnational legal arguments on different lists,"[1341] particularly if those lists are conflicting.[1342] Another difference is that sometimes the codification will not provide for a solution for a particular problem while the functional approach will find an answer for every case.[1343] However, the ever-evolving nature of the TransLex principles reduces this risk.[1344] This will be examined below.

Moreover, the functional approach will allow the arbitrator to take into consideration the factors particular to a given case,[1345] such as the jurisdictions of the parties, or apply regional transnational rules when an opportunity presents itself.[1346] If the parties have agreed on the method to draw the transnational rules applicable, the tribunal must follow such method.[1347] Regional transnational rules could consist of laws originating from the same geographical region or "legal families,"[1348] such as "the common principles of English and French law" and, more unusual,[1349] "the general principles of laws applicable in Northern Europe."[1350] Given that the parties rarely foresee the question of privileges in arbitration,[1351] it will be uncommon for the tribunal to apply the method agreed by the parties.

The *Gallo v. Canada*[1352] case, between Canada and a U.S. citizen, is a practical example of a NAFTA arbitral tribunal applying laws from the same legal family. In determining whether inadvertent disclosure of privileged information constituted a waiver of privilege, the tribunal decided that, in

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1340 Berger, *supra* note 1319, at 14.

1341 *Id.*, at 258.

1342 Gaillard, "Transnational Law: A Legal System or a Method of Decision-Making?", *supra* note 1325, at 58.

1343 Berger, *supra* note 1319, at 257.

1344 *Id.*, at 283.

1345 Meyer, *supra* note 7, at 374.

1346 Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 29.

1347 *Id.*, at 22; Fouchard, Gaillard, Goldman, *supra* note 1058, at 814; Gaillard, "Transnational Law: A Legal System or a Method of Decision-Making?", *supra* note 1325, at 57.

1348 Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 29.

1349 *Id.*, at fn. 70.

1350 *Id.*, at 22-3.

1351 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 509.

1352 Vito G. Gallo v. Government of Canada, Procedural Order No. 4 (21 December 2009), at paras 43-4.

addition to Canadian legal authorities, it had to take into consideration those of other common law jurisdictions, such as Australia, England, and the United States.[1353] The tribunal ultimately relied on an English Court of Appeal decision.[1354]

The arbitrators can also elect to draw transnational rules of privilege solely from the jurisdictions connected to the dispute.[1355] This approach is found legitimate and in accordance with the legitimate expectations of the parties.[1356] However, if all laws connected to the disputes provide for the same result, a traditional conflict of laws approach would have sufficed, without the need to perform a complex exercise.[1357]

4.2.1 Sources of transnational rules

Transnational rules are drawn from various sources. Goldman listed the principal sources as follows:

> [P]rincipes généraux du droit international public ou privé, ou spécifiquement économique; conventions internationales; lois étatiques nationales ou uniformes, règlements d'arbitrage, codifications professionnelles, contrats-types, règles coutumières ou usages non codifiés, jurisprudence étatique ou arbitrale.[1358]

For the purpose of this work, in the determination of transnational rules of privilege, the above sources will be divided in three categories: (i) comparative law, (ii) international instruments, and (iii) international case law.[1359]

First, comparative law is said to be "a fundamental sources of transnational rules"[1360] and "of paramount importance in determining transnational rules."[1361] As mentioned above, transnational rules are drawn from various legal systems.[1362] However, this does not mean that the rule be must found in every single legal system.[1363] It must be demonstrated that the national laws

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[1353] *Id.*, at para. 43.

[1354] *Id.*, at para. 44.

[1355] Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 29.

[1356] Fouchard, Gaillard, Goldman, *supra* note 1058, at 806.

[1357] Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 29.

[1358] Goldman, "Nouvelles réflexions sur la *Lex Mercatoria*", in C. Dominicé, R. Patry and C. Reymond, *Études de droit international en l'honneur de Pierre Lalive* (1993) 241, at 242.

[1359] Fouchard, Gaillard, Goldman, *supra* note 1058, at 816.

[1360] *Id.*

[1361] Mistelis, *supra* note 1325, at 209.

[1362] Fouchard, Gaillard, Goldman, *supra* note 1058, at 816; Henry, *supra* note 1334, at 54; Mosk and Ginsburg, *supra* note 1, at 379.

[1363] Meyer, *supra* note 7, at 374; Mosk and Ginsburg, *supra* note 1, at 379; Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 26; Fouchard, Gaillard, Goldman, *supra* note 1058, at 816.

converge towards a common solution.[1364] To quote Goldman, transnational rules should not be a kaleidoscope of scattered practices.[1365]

Requiring a rule to exist in all legal systems would mean that the lowest denominator would have precedence over the generally admitted rule, and this is contrary to the philosophy of transnational rules.[1366] The same could be said if a rule needed to be present in the principal legal systems.[1367] Indeed, this would question the neutrality of the method by giving a right of veto to certain legal systems, supposedly being the most advanced systems.[1368]

Second, international instruments, particularly international treaties, also provide guidance in the determination of transnational rules.[1369] Indeed, these reflect the position of a number of states on a given issue.[1370] Those international instruments have been portrayed as the "clearest example of conscious and deliberate elaboration of transnational law."[1371]

Third, international case law may also assist in the determination of transnational rules.[1372] These can consist of arbitral awards[1373] or international courts decisions.[1374] The contribution of international case law to transnational rules is two-fold; it contributes to the creation of transnational rules and embodies their existence.[1375] Indeed, as pointed out by Henry: "The role of arbitral case law should not limit itself to measuring its contribution in the application of transnational rules. One must clearly acknowledge its everyday role in the creation of law."[1376] However, case law by itself is not sufficient to draw transnational rules.[1377]

1364 "*Il incombe aux conseils des parties et aux arbitres, dans le respect du contradictoire, de montrer que, sur telle ou telle question en litige, les droits étatiques convergent vers une solution déterminée, de sorte que cette solution peut être retenue au titre des règles transnationales.*" (Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 24).

1365 Goldman, "Nouvelles réflexions sur la *Lex Mercatoria*", *supra* note 1358, at 248.

1366 Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 28.

1367 *Id.*, at 27.

1368 *Id.*

1369 Mistelis, *supra* note 1325, at 209; Fouchard, Gaillard, Goldman, *supra* note 1058, at 816.

1370 Fouchard, Gaillard, Goldman, *supra* note 1058, at 816; Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 25.

1371 Bamodu, *supra* note 1324, at 13.

1372 Fouchard, Gaillard, Goldman, *supra* note 1058, at 817; Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 24.

1373 Goldman, "La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives", *supra* note 1325, at 480.

1374 Fouchard, Gaillard, Goldman, *supra* note 1058, at 818.

1375 Henry, *supra* note 1334, at 41.

1376 *Id.*, at 60.

1377 Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 24.

In addition to the three said categories, treatises on comparative law are quite useful, particularly if they attempt to draw transnational rules.[1378] Moreover, the principles contained in these treatises are not exhaustive.[1379] Treatises are intended to provide guidance rather than solutions to all situations.[1380] A notable example is the TransLex principles.

Semi-official[1381] or "soft law"[1382] texts such as the UNIDROIT Principles are also quite influential.[1383]

In relation to privileges, we refer to the ALI/UNIDROIT Principles of Transnational Civil Procedure rather than to the UNIDROIT Principles. The ALI/UNIDROIT Principles were the first attempt by the American Law Institute to harmonize law at an international level.[1384] In fact, civil procedure is said to be the most difficult field of law for worldwide harmonization.[1385] However, given their limited scope, some commentators doubt whether the ALI/UNIDROIT Principles will have any influence in court or arbitration proceedings.[1386] In the field of privileges, for example, the relevant principle is extremely vague and is not of any help with the present work.[1387]

Finally, arbitration rules can also be a source of transnational law.[1388] These include the UNCITRAL Rules as well as institutional arbitration rules.[1389] In relation to the subject matter of this work, this also includes the IBA Rules. The IBA Rules were drafted by a committee of experts in arbitration[1390] and are said to be "a true codification of generally recognised principles on the taking of evidence in international arbitration."[1391] Moreover, they clearly state in the preamble that they are intended to be applied, in particular, in arbitrations

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1378 *Id.*, at 25.

1379 Fouchard, Gaillard, Goldman, *supra* note 1058, at 819; Lew, Mistelis and Kröll, *supra* note 33, at 456.

1380 Jagusch, "Recent Codification Efforts: An Assessment", in E. Gaillard et al. (eds), *Towards a Uniform International Arbitration Law?* (2005) 63, at 85.

1381 Horn, "The Use of Transnational Law in the Contract Law of International Trade and Finance", in K. P. Berger (ed.), *The Practice of Transnational Law* (2001) 67, at 67.

1382 Fouchard, "Une procédure civile transnationale: quelle fin et quels moyens?", 6 *Unif. L. Rev.* (2001) 669, at 781.

1383 Fouchard, Gaillard, Goldman, *supra* note 1058, at 817; Bamodu, *supra* note 1324, at 13; Mistelis, *supra* note 1325, at 216.

1384 Zekoll, "Comparative Civil Procedure", in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006) 1327, at 1345.

1385 *Id.*

1386 *Id.*, at 1347.

1387 Principle 18, ALI/UNIDROIT Principles.

1388 Horn, *supra* note 1381, at 78.

1389 *Id.*

1390 Gunter, "Transnational Rules on the Taking of Evidence", in E. Gaillard et al. (eds), *Towards a Uniform International Arbitration Law?* (2005) 129, at 142.

1391 Poudret and Besson, *supra* note 32, at 552.

"between Parties from different legal traditions."[1392] The IBA Rules haven been drafted by international practitioners who, contrary to their predecessors, are less committed to the legal culture in which they were educated, are practicing on various continents, and have become advocates of an emerging transnational legal regime.[1393]

4.2.2 Comparative law approach

The arbitrator may be faced with conflict of sources when attempting to define transnational rules.[1394] Indeed, the different sources identified above may be conflicting with each other or be ambiguous.[1395]

Professor Berger elected to apply the functional comparative methodology in the determination of the TransLex principles.[1396] The functional comparative methodology has been praised by commentators in the determination of transnational rules.[1397] The functional comparative methodology uses the functional legal comparison approach, which is said to be "strictly problem-oriented."[1398] The approach can be described as follows:

> The analytical process of this method starts with the practical problem, collects and selects the solutions to be found in various major jurisdictions and presents a solution that is based on a synthesis of the various domestic laws.[1399]

Indeed, the objective is to identify possible convergence of the legal systems compared towards a solution.[1400] Functional legal comparison has two different objectives: consolidation or codification.[1401] Consolidation means that a common core will be determined from the legal systems compared, while codification, which is a step further, implies the drafting of rules which often lead to solutions more adapted to the legal problem.[1402] However, codification simply means that a list of principles is formulated; it does not refer to codification by national legislatures.[1403]

1392 Preamble IBA Rules; See also Gunter, *supra* note 1390, at 142.

1393 Zekoll, *supra* note 1384, at 1350.

1394 Gaillard, "Transnational Law: A Legal System or a Method of Decision-Making?", *supra* note 1325, at 58.

1395 *Id.*, at 58-9.

1396 Berger, *supra* note 1319, at 270.

1397 H. A. Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration* (1992), at 35.

1398 Berger, *supra* note 1319, at 66.

1399 *Id.*, at 67.

1400 *Id.*, at 71.

1401 *Id.*, at 69.

1402 *Id.*

1403 *Id.*, at 281-2.

As Jansen observed:

> For a long time comparative lawyers have regarded it as their methodological problem to be gaining knowledge of another system and understand its way of reasoning: in applying concepts, rules or precedents, and, more basically, in knowing the relevant sources of knowledge. Here, the well-known epistemological problem of comparative law arises: it may be difficult to understand a foreign legal system, because legal rules and legal texts are deeply rooted within a specific economic, political, moral, and cultural background, which can often only be explained from a historical perspective. Thus, the comparative lawyer, as some have put it, must be 'culturally fluent' in another legal language. This is necessary not only for understanding foreign norms and legal texts, but also for identifying parallel rules or parts of the law. What is more, even if a foreign proposition is perfectly understood, it may prove difficult to translate it into one's own language. This is especially the case with law, which constitutes a partly autonomous reality created by the norms, doctrine, and concepts of a legal system that do not necessarily find exact counterparts in another.[1404]

The functional legal comparison "focuses not on rules but on their effects."[1405] Moreover, "its objects are often judicial decisions as responses to real life situations, and legal systems are compared by considering their various judicial responses to similar situations."[1406] Although different legal systems may contain identical rules, this does not mean that they will be applied in a similar manner by the courts.[1407]

The functional legal comparison is a pragmatic approach, which means that the tribunal must "look behind the black-letter of law of ... legal systems and find common general principles of law that underlie provisions of completely different wording and dogmatic qualification."[1408] This is exactly why the functional legal comparison is particularly appropriate for privileges in arbitration. Indeed, as examined in Section 3.2 above, rules of privilege are considered procedural in nature in certain jurisdictions and substantive in others. The functional legal comparison will ignore the characterization under national law. Additionally, provisions on privilege may be found, *inter alia*, in the common law, codes of civil procedure, penal codes, and regulations applicable to professional bodies, to name a few.

[1404] Jansen, "Comparative Law and Comparative Knowledge", in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006) 305, at 306-7.

[1405] Michaels, "The Functional Method of Comparative Law", in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006) 339, at 342.

[1406] *Id.*

[1407] De Vos and Rechberger, "Transnational Litigation and the Evolution of the Law of Evidence", in I. Andolina, *Trans-National Aspects of Procedural Law* (1998) 685, at 714.

[1408] Berger, *supra* note 1319, at 68.

4.3 Is the Development of Transnational Rules of Privilege Desirable in Arbitration?

4.3.1 Legitimate expectations

In the field of privileges, reference is often made to the legitimate expectations of the parties.[1409] They are mentioned as a guiding principle in the IBA Rules:

> In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account ... the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen ...[1410]

It is said that the application of transnational rules is "less likely to upset the parties' expectations"[1411] in comparison with traditional choice of law methods because the tribunal will, through comparative law analysis, identify "the most generally accepted rule as opposed to a possibly idiosyncratic or outdated provision."[1412] Such "idiosyncratic or outdated provision" could also result from the ever-changing nature of national laws.[1413] In other words, transnational rules are said to "give prevalence to widely recognized rules over very peculiar ones which might disappoint the parties' expectations."[1414] This ensures legal certainty when the parties have not considered the question of the applicable law to privileges.[1415]

4.3.2 Predictability and certainty

Predictability is one of the most desirable facets of arbitral procedure,[1416] particularly in matters of privilege because parties rely on privileges.[1417]

[1409] See, *e.g.*, Tevendale and Cartwright-Finch, *supra* note 25, at 830; *Due Process in International Arbitration*, Transcripts, *supra* note 30, at 88; von Schlabrendorff and Sheppard, *supra* note 19, at 765; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 502; Camerer and Hioureas, "*Glamis Gold v. United States of America:* A Case Study on Document Production and Privilege in International Arbitration", 2 *WAMR* (2008) 33, at 43; Reiser, *supra* note 18, at 662; Berger, "The Settlement Privilege", *supra* note 321, at 275.

[1410] Art. 9(3)(c) IBA Rules.

[1411] Gaillard, "General Principles of Law in International Commercial Arbitration", *supra* note 1325, at 167.

[1412] *Id.*, at 168; See also Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 8.

[1413] Lew, Mistelis and Kröll, *supra* note 33, at 449.

[1414] Poudret and Besson, *supra* note 32, at 606.

[1415] Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 27.

[1416] Uff, *The Predictability Factor in International Arbitration* (reference unknown), at 2; Voser, "Harmonization by Promulgating Rules of Best International Practice in International Arbitration",

Predictability allows counsel to prepare their clients and avoid surprises.[1418] In fact, the current situation with privileges brings uncertainties in both the day-to-day business communications potentially privileged and the preparation of the arbitral case.[1419] Indeed, generally, and most particularly in relation to privileges, "choice-of-law analysis is inherently unpredictable."[1420]

The parties' decision to participate in a privileged communication often depends on their ability to predict whether the communication will be protected or not. The various underlying principles of privilege will encourage the communication only if all parties to the communication know at the time of the communication whether the privilege will apply. And if there is uncertainty at the time of the communication, the communication will be chilled and the purpose of the privilege will be entirely defeated.[1421] In regard to the attorney-client privilege, in *Upjohn*, the U.S. Supreme Court recognized that:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.[1422]

Likewise, in relation to the mediation privilege in United States courts, a commentator once said: "[t]he courts' inconsistent application of a mediation privilege will likely chill a party's candidness in mediation, and discourage mediation."[1423]

When parties enter into an arbitration agreement, they expect that the arbitration will produce the outcome as they predicted. And this also applies to privileges. As stressed by Barraclough and Waincymer, "Much of the success of any commercial dispute resolution mechanism depends on its availability to provide consistent outcomes."[1424] The reason is that consistent

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Schieds VZ (2005) 113, at 114; Barraclough and Waincymer, "Mandatory Rules of Law in International Commercial Arbitration", 6 *Melb. J. Int'l L.* (2005) 205, at 212.

1417 Zuberbühler et al., *supra* note 34, at 172.

1418 Rubinstein and Guerrina, *supra* note 24, at 597.

1419 Poudret and Besson, *supra* note 32, at 556.

1420 Cohen, *supra* note 197, at 437; See also Bradford, *supra* note 69, at 936; Berger, *supra* note 1319, at 21.

1421 Bradford, *supra* note 69, at 943; Glynn, *supra* note 21, at 74; Rubinstein and Guerrina, *supra* note 24, at 597.

1422 Upjohn Co. v. United States, *supra* note 59 (Cited in Bradford, *supra* note 69, at 943).

1423 Lipps, *supra* note 753, at 59.

1424 Barraclough and Waincymer, *supra* note 1416, at 212.

outcomes generate predictability. If arbitration does not produce predictable outcomes, it risks its own extinction.[1425]

On the other hand, transnational rules are also said to lack certainty and predictability given that they are difficult to ascertain with precision.[1426] Moreover, they are not capable of being exhaustively codified.[1427] Finally, Goldman, in his well-known 1979 article, also stressed the constantly evolving nature of transnational rules (referring at that time to the *lex mercatoria*):

> Celle-ci s'enrichit, en effet, de nouveaux principes généraux, que la jurisprudence international antérieure n'avait pas dégagés; de figures et structures nouvelles au moyen de combinaisons contractuelles qui finissent par être des modèles régulièrement reproduits; de solutions «ponctuelles» enfin, propres au commerce international et qui sont susceptibles, grâce à leur adéquation aux besoins spécifiques de celui-ci, de prendre progressivement figure de règles.[1428]

Generally speaking, complete certainty can only be acquired through universally applicable legislation.[1429] Universal applicability means that privileges would be recognized regardless of the forum.[1430] In any case, as Glynn correctly argued, universal applicability does not guarantee complete certainty given that courts and tribunals may erroneously interpret or apply these rules of privilege.[1431] Nevertheless, transnational rules are definitely more desirable than the *status quo* in terms of certainty for privileges. In addition, transnational rules "represent the first step towards a self-contained, uniform system"[1432] which would, as noted above, address the lack of predictability and certainty.

4.3.3 Flexibility

Flexibility is both an advantage and an obstacle in arbitration. Transnational privileges require flexibility that national laws may not be able to provide but could be obtained through the application transnational rules.[1433] Flexibility means that a tribunal will be able to apply the most appropriate solution to a

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1425 *Id.*

1426 Bishop and Childs, *supra* note 296, at 4.

1427 Fouchard, Gaillard, Goldman, *supra* note 1058, at 819; Jagusch, *supra* note 1380, at 70; La Spada, *supra* note 1155, at 124.

1428 Goldman, "La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives", *supra* note 1325, at 487.

1429 Glynn, *supra* note 21, at 148.

1430 *Id.*

1431 *Id.*, at 150.

1432 Meyer, *supra* note 7, at 378.

1433 Gaillard, "Transnational Law: A Legal System or a Method of Decision-Making?", *supra* note 1325, at 55.

given case.[1434] It also means that a tribunal may avoid outdated rules of evidence not appropriate for international business.[1435]

On the other hand, the flexibility given to the tribunal may be seen as an impediment to predictability and certainty.[1436]

4.3.4 Cultural aspects

International arbitration, by definition, is international in nature. That means that the arbitrators, the parties, and their counsel may come from different countries, and that the seat of the arbitration may be unrelated to the parties or the arbitrators.[1437] With this in mind, it is normal to expect a tribunal to apply transnational rules rather than rules of law from a single legal system.[1438] This reflects the "transnational" nature of international arbitration.

On the other hand, arbitrators and counsel are often influenced by their own legal backgrounds.[1439] Professor Park provides the example of an *ad hoc* arbitration held in London between an American claimant and a British respondent where the chairman, an Englishman, announced that English Civil Procedure Rules would apply to matters of evidence and document production, without this being requested by the parties or a requirement of the English *lex arbitri*.[1440] This to the delight of the British party.[1441] Applying transnational rules may overcome such situation where a party may feel "profoundly misled by the much-touted procedural neutrality of international arbitration"[1442] because of "the arbitrator's *excès de zèle* for his hometown form of justice."[1443]

1434 *Id.*; Heitzmann, *supra* note 11, at 228.

1435 Gaillard, "Transnational Law: A Legal System or a Method of Decision-Making?", *supra* note 1325, at 55.

1436 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 513; Tawil and Lima, *supra* note 18, at 46; Sindler and Wüstemann, *supra* note 11, at 638.

1437 Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 8.

1438 *Id.*

1439 Hanotiau, "Document Production in International Arbitration: A Tentative Definition of 'Best Practices'", in ICC International Court of Arbitration Buletin, *Document Production in International Arbitration* (2006) 113, at 113; Uff, *supra* note 1416, at 5; Born, *supra* note 18, at 1787.

1440 Park, "Procedural Default Rules Revisited", in J. D. M. Lew and L. A. Mistelis (eds), *Arbitration Insights* (2007) 360, at 363.

1441 Park, "Procedural Default Rules Revisited", *supra* note 1440, at 363.

1442 *Id.*

1443 *Id.*

4.3.5 Structured character of national legislations and rules of professional conduct

National laws and rules of professional conduct live side by side in a structured system. This structured system can be illustrated as follows:

> A legal system is an organized set of rules, with various levels of generality and close ties between rules belonging to those various levels. This structure is key to understand the logic and values of the system as a whole, and to interpreting any given rule in that system.[1444]

In other words, the rules of evidence of a given jurisdiction are not conflicting with the rules of professional conduct applicable to attorneys and other regulated professions in that jurisdiction. However, this is not always the case in arbitration where professionals are bound by the rules of professional conduct of the jurisdiction where they are admitted, although the rules applicable in the arbitral proceedings may differ.

The fact that national laws and rules of professional conduct are embedded in a structured system is an argument against the application of transnational rules of privilege. Indeed, the tribunal may apply transnational rules which are conflicting with the rules of professional conduct applicable to the attorney or the professional required to provide evidence. Such conflict will become more common as codes of professional conduct have become increasingly diverse, and since the attorney-client confidentiality is said to be "[o]ne of the most glaring examples of conflict"[1445] between codes of professional ethics.[1446]

At the same time, one could argue that transnational rules of privilege are desirable because the tribunal will apply the most generally accepted rule,[1447] the one which is the most likely to comply with the rules of professional conduct applicable to the parties, their witnesses, and their counsel.

4.3.6 Equal treatment of the parties

Equal treatment of the parties has been treated in Section 1.4.3 above. Transnational rules of privilege constitute a proper answer to concerns of equal treatment by ensuring that all of the parties' communications are subject

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[1444] Gaillard, "Transnational Law: A Legal System or a Method of Decision-Making?", *supra* note 1325, at 60.

[1445] Felleman, "Ethical Dilemmas and the Multistate Lawyer: A Proposed Amendment to the Choice-Of-Law Rule in the Model Rules of the Professional Conduct", 95 *Colum. L. Rev.* (1995) 1500, at 1507.

[1446] *Id.*, at 1504.

[1447] Gaillard, "General Principles of Law in International Commercial Arbitration", *supra* note 1325, at 167-8; Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 8.

to the same privilege rules. More practically, the application of transnational rules of privilege in arbitration has the advantage of providing a solution when the parties do not agree on a single law applicable to matters of privilege because of the perceived advantage that each party would gain from the application of its own law.[1448]

Moreover, transnational rules would ensure that claims of privilege do not appear to be arbitrary, or in the words of Professor Park: "*à la tête du client*".[1449]

4.3.7 Whether a tribunal will apply transnational rules

The tribunal has an important role in ensuring that transnational rules are used in a wise manner and for the benefit of the parties. Professor Berger is of the opinion that the development of transnational rules of privilege is not realistic at this time for the following reasons[1450]:

> The potential arbitrariness arising out of the application of different domestic laws is substituted by the uncertainty related to the question whether a tribunal will in fact accept a certain rule as being part of transnational law, how it will formulate the rule and its scope and where it sees its limits.[1451]

4.4 Do Transnational Rules of Privilege Currently Exist in Arbitration?

The objective of the present section is to identify a preponderance of practice in relation to privileges by examining the following sources: (i) English, American (federal privileges), French and Swiss law, (ii) international rules, and (iii) international cases.

4.4.1 The attorney-client privilege and work product doctrine

Because in certain jurisdictions, such as France[1452] and Switzerland,[1453] the work product doctrine falls within the ambit of the attorney-client privilege,

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[1448] Gaillard, "Transnational Law: A Legal System or a Method of Decision-Making?", *supra* note 1325, at 65.

[1449] Park, "The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion", 19 *Arb. Int.* (2003) 279, at 293.

[1450] Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 514.

[1451] *Id.*

[1452] Section 2.4.3.

[1453] Section 2.4.4.

for the purpose of the present section, the notion of attorney-client privilege will encompass both the attorney-client privilege (the legal advice privilege) and the work product doctrine (the litigation privilege). Nonetheless, we realize that by including the work product doctrine in the scope of the attorney-client privilege, we are contributing to the current confusion between the legal advice privilege and the litigation privilege in English law.[1454]

The attorney-client privilege is recognized in most jurisdictions,[1455] and is considered as a transnational rule of privilege by a various commentators[1456] and tribunals.[1457] In *Three Rivers 6*, Baroness Hale of Richmond stressed that "the [legal advice] privilege is too well established in the common law for its existence to be doubted now."[1458] Moreover, the right to invoke the attorney-client privilege has even been said to be a fundamental right by a NAFTA tribunal.[1459]

At the same time, whether the privilege applies to in-house counsel remains one of the most controversial issues on this subject matter.[1460] In fact, the attorney-client privilege has been said to present the most difficult challenges of all privileges.[1461] Meyer, more optimistic, asserts that "[o]wing to the increasing interconnection of markets it is probably only a matter of time before a uniform solution is found [for in-house counsel]."[1462]

4.4.1.1 National laws

All four jurisdictions examined in this work recognize the attorney-client privilege.

In English law, the attorney-client privilege applies to communications between a lawyer and his client.[1463] The lawyer can practice independently, within a law firm, or as an in-house counsel.[1464] However, he must be admitted as a solicitor, barrister, or to a foreign bar association.[1465] In regard to

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1454 Thanki, *supra* note 49, at 7; See, *e.g.*, *Three Rivers (No 6)* (CA), *supra* note 384; Phipson, Malek and Auburn, *supra* note 46, at 602; See also Section 2.4.1.

1455 Gallo v. Canada, Procedural Order No. 3, *supra* note 239, at para. 46; *Bank for International Settlements*, Procedural Order No. 6, *supra* note 271, at 10; von Schlabrendorff and Sheppard, *supra* note 19, at 763; Mosk and Ginsburg, *supra* note 1, at 351.

1456 Camerer and Hioureas, *supra* note 1409, at 43; O'Malley, *supra* note 11, at 278-9.

1457 *Bank for International Settlements*, Procedural Order No. 6, *supra* note 271, at 10.

1458 *Three Rivers (No 6)* (HL), *supra* note 73, at 1294.

1459 Gallo v. Canada, Procedural Order No. 3, *supra* note 239, at para. 46.

1460 Sindler and Wüstemann, *supra* note 11, at 627.

1461 Cohen, *supra* note 197, at 440.

1462 Meyer, *supra* note 7, at 376.

1463 Section 2.3.1.

1464 *Id.*

1465 *Id.*

communications created for the purpose of litigation (under the litigation privilege), the privilege also applies to communications between an attorney and third parties.[1466] The communication must relate to legal advice and must have been made in confidence, with the intent to be kept confidential.[1467] The protection is afforded only to the communication itself, not the facts communicated.[1468] Finally, the privilege is absolute and cannot be overridden by public policies consideration.[1469]

Similar provisions are found in U.S. federal law, both when litigation is contemplated or existing or not.[1470] The only major difference is that U.S. federal law grants protection to communications created in anticipation of litigation or trial by the party itself and its representatives, such as its attorney, consultant, surety, indemnitor, insurer, and agent,[1471] whereas the English litigation privilege requires that an attorney be a party to the communication.[1472]

French law recognizes the attorney-client privilege for communications between attorneys and their clients.[1473] The attorney must be registered to the bar association and practice as a sole practitioner or within a law firm.[1474] In-house counsel are therefore excluded.[1475] All communications exchanged between an attorney and his client, and all information and secrets confided to an attorney, in the course of the provision of legal advice or legal representation, whether by his client or third parties, and whether in the course of litigation or not, are privileged from disclosure.[1476]

Swiss law contains similar provisions. However, the privilege is not absolute in Swiss law in the sense that, although not obliged to, the attorney may disclose a privileged communication with the consent of his client.[1477]

4.4.1.2 International rules

The attorney-client privilege is mentioned in the IBA Rules as a ground to exclude evidence from production.[1478]

1466 Section 2.4.1.
1467 Sections 2.3.1 and 2.4.1.
1468 *Id.*
1469 Section 2.3.1.
1470 Sections 2.3.2 and 2.4.2.
1471 Fed. R. Civ. P. 26(b)(3)(A).
1472 Section 2.4.1.
1473 Section 2.3.3.
1474 *Id.*
1475 *Id.*
1476 *Id.*
1477 Section 2.3.4.

The ICDR Rules provide that in the determination of "the admissibility, relevance, materiality and weight of the evidence,"[1479] "[t]he tribunal shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client."[1480] This provision is also contained in the AAA Commercial Rules.[1481]

The International Institute for Conflict Prevention and Resolution Rules for Non-Administered Arbitration provide that "[t]he Tribunal is not required to apply the rules of evidence used in judicial proceedings, provided, however, that the Tribunal shall apply the lawyer-client privilege and the work product immunity."[1482]

Earlier drafts of the ALI/UNIDROIT Principles mentioned the legal professional privilege.[1483]

Finally, the attorney-client privilege is a TransLex principle of transnational law[1484] defined as follows:

> Any communication between a client and his attorney which is made in the course of or in anticipation of legal proceedings or which relates to the giving of legal advice, i.e. the seeking of advice as to legal rights and obligations as opposed to general business matters, and which originates in a confidence that it will not be disclosed, is privileged and may not be introduced as evidence in court or arbitration proceedings.[1485]

4.4.1.3 International cases

The case *Bank for International Settlements* under the auspices of the Permanent Court of Arbitration is a good example of a tribunal applying the attorney-client privilege on the grounds that it "has been recognized in public international and international commercial arbitration rules and arbitral awards."[1486]

In 2001, the Board of Directors of the Bank for International Settlements called for an Extraordinary Meeting to amend the Statutes of the Bank to exclude private shareholders against the payment of a compensation to those shareholders. Following the amendment of the Statutes, three claimants, (i) Dr

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1478 Art. 9(3)(a) IBA Rules.

1479 Art. 20(6) ICDR Rules.

1480 *Id.*

1481 R-34(c) AAA Commercial Rules.

1482 Art. 12.2 CPR Non-Administered Rules.

1483 Principle 24, UNIDROIT 2000 Study LXXVI – Doc 2, *supra* note 1142.

1484 TransLex No. XII.6 - Attorney-Client Privilege (available at http://www.trans-lex.org/968600).

1485 *Id.*

1486 *Bank for International Settlements*, Procedural Order No. 6, *supra* note 271, at 10.

Horst Reineccius, residing in Germany, (ii) First Eagle DoGen Funds, Inc., a U.S. registered mutual fund company, and (iii) Mr. Pierre Mathieu and la Société Hippique de La Châtre, respectively a French resident and a French non-profit association, initiated arbitration proceedings. The first two claimants argued that the compensation paid for their shares in the BIS were less than the value to which they were entitled. The third claimant claimed that the forcible repurchase of the shares was unlawful.

The Tribunal Concerning the Bank for International Settlements was constituted pursuant to Article XV of the Agreement regarding the Complete and Final Settlement of the Question of Reparations signed at The Hague on 20 January 1930. On 23 March 2001, the tribunal adopted the Rules for Arbitration between the Bank for International Settlements and Private Parties.[1487] These rules provide, *inter alia*, that the tribunal is empowered to request from the parties any documents which it believes to be desirable,[1488] and that it shall apply "the instruments relevant to the case as well as other relevant principles of law."[1489] These rules are silent on the question of privileges.

Following the submission of an application for production of documents, the tribunal issued Procedural Order No. 3, granting various requests of First Eagle for disclosure from the BIS. This procedural order was subsequently followed by Procedural Order No. 5, which set out the procedure to resolve objections based upon assertions of attorney-client privilege or other reasons set forth in Article 19(2) of the IBA Rules (1999).[1490] The procedure was as follows: first, the BIS was asked to list the documents withheld or redacted and the reasons and basis for such non-production or redaction; second, First Eagle was then invited to submit any objections to these justifications; and, finally, the tribunal requested that its Secretary try to resolve the objections raised in consultation with the Parties.[1491] Any remaining issues would be addressed to the tribunal.[1492] Ultimately, there remained 17 documents which were partially redacted or withheld on grounds of attorney-client privilege. Although the parties seemed to agree that these documents fulfilled the attorney-client privilege *ratione materiae* requirements,[1493] they disagreed on the *ratione personae* requirements.

1487 *Dr. Horst Reineccius, et al. v. Bank for International Settlements*, Partial Award on the Lawfulness of the Recall of the Privately Held Shares on 8 January 2001 and the Applicable Standards for Valuation of Those Shares (22 November 2002), at para. 14.

1488 BIS Arbitration Rules, Article 19(3).

1489 BIS Arbitration Rules, Article 26.

1490 *Dr. Horst Reineccius, et al. v. Bank for International Settlements*, Procedural Order No. 5 (3 May 2002).

1491 *Id.*, at 1-2.

1492 *Id.*, at 2.

1493 *Bank for International Settlements*, Procedural Order No. 6, *supra* note 271, at 9.

To determine which procedural standards would apply to the question of privileges, the tribunal relied on the sources cited by the parties, namely the IBA Rules (1999), international law, and United States jurisprudence. The tribunal concluded that the attorney-client privilege "has been recognized in public international and international commercial arbitration rules and arbitral awards,"[1494] and that such privilege applied to individual, corporate entities with respect to decision-makers, and international organizations.[1495] The tribunal further set forth the *ratione materiae* and *ratione personae* requirements of the application of the attorney-client privilege in the following manner:

> *Ratione materiae*, the legal communications which are entitled to an attorney-client privilege must be related to making a decision that is in or is in contemplation of legal contention; *ratione personae*, the legal communications must be between an attorney (whether in-house or outside) and those who are afforded his or her professional advice for purpose of making or in contemplation of that decision.[1496]

It is interesting to note that the tribunal emphasized that communications must be protected regardless of whether they are made between a corporation and an external counsel, or between a corporation and an in-house counsel.[1497] This goes against the Swiss rules of privilege; Switzerland being the jurisdiction where the headquarters of the BIS are situated.[1498]

In *Gallo v. Canada*, the tribunal described the *ratione personae* requirements as follows:

> The document has to be drafted by a lawyer acting in his or her capacity as lawyer;
>
> A solicitor-client relationship based on trust must exist as between the lawyer (in-house or external legal advisor) and the client.[1499]

And the *ratione materiae* requirements as follows:

> The document has to be elaborated for the purpose of obtaining or giving legal advice;
>
> The lawyer and the client, when giving and obtain legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation.[1500]

1494 *Id.*, at 10.

1495 *Id.*, at 11.

1496 *Id.*, at 10.

1497 *Id.*

1498 Statutes of the Bank for International Settlements (of 20 January 1930; text as amended on 27 June 2005), at Art. 2.

1499 Gallo v. Canada, Procedural Order No. 3, *supra* note 239, at para. 47.

1500 *Id.*

These *ratione personae* requirements also appear in *CME Czech Republic B.V. v. Czech Republic*.[1501] In this case, the tribunal, applying the IBA Rules (1999),[1502] held that the legal privilege applied to documents originating from both in-house and external legal advisors.[1503]

Although it does not concern arbitration proceedings, for completeness, it should be noted that the European Court of Justice held in *A. M. & S. Europe Ltd.* that communications with in-house counsel were not privileged for the purpose of antitrust investigations initiated by the European Commission.[1504] Only communications exchanged with "an independent lawyer, that is to say one who is not bound to his client by a relationship of employment,"[1505] are privileged. The European Court of Justice declared that:

> [I]t should be stated that the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose. Such a conception reflects the legal traditions common to the member states and is also to be found in legal order of the Community ...[1506]

In *Akzo Nobel Chemicals*, the Court of Justice of the European Union (Grand Chamber) followed *A. M. & S. Europe Ltd*[1507] and concluded that the communication at stake must be exchanged with an independent lawyer, not bound by a relationship of employment, in order to be protected by the privilege in the course of an antitrust investigation initiated by the European Commission.[1508] This conclusion is based on the reasoning that the in-house counsel, both from his economic dependence and the close ties with his employer, does not enjoy a level of professional independence comparable to that of an external lawyer.[1509] It is noteworthy that Akzo's in-house counsel

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1501 CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Final Award (14 March 2003).

1502 *Id.*, at para. 43.

1503 *Id.*, at para. 64.

1504 *A. M. & S. Europe Ltd. v Commission of the European Communities*, *supra* note 525, at 951.

1505 *Id.*

1506 *Id.*, at 950.

1507 *A. M. & S. Europe Ltd. v Commission of the European Communities*, *supra* note 525.

1508 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, *supra* note 400, at paras 41, 50.

1509 *Id.*, at para. 49.

was, at the time, admitted to the Netherlands Bar[1510] and that the work contract between him and Akzo "provided that the company was to respect the lawyer's freedom to perform his functions independently and to refrain from any act which might affect his task."[1511]

Finally, an ICSID tribunal referred to the attorney-client privilege as one of the "principles which lie at the very heart of the ICSID arbitral process."[1512]

4.4.1.4 The transnational rule

Through examination of the various sources mentioned in the preamble of the present section, there appears to be a preponderance of practice suggesting that the attorney-client privilege could develop into a transnational rule. If we were to formulate a transnational rule for the attorney-client privilege, it would be as follows:

> Any communication, in any form whatsoever, between an attorney and a client, or between an attorney and a third party, that fulfils the following requirements, shall be excluded from evidence or production in arbitration:
>
> i) the attorney must be admitted to a bar association regardless of whether the attorney practices independently, within a law firm, or is employed by a corporation as an in-house counsel;
>
> ii) the client can be an individual, a government, a company, or any other legal entity;
>
> iii) the communication must relate to the provision of legal advice or legal representation;
>
> iv) the communication may also consist of any document created by an attorney for the purpose of providing legal advice or legal representation, such as memoranda and personal notes;
>
> v) whether litigation is contemplated or existing or not, is irrelevant; and
>
> vi) the communication must be made in confidence and intended to remain confidential.

The cumulative nature of points i) and iii) above has the objective of combining both the concept of the attorney-client privilege in common law, where the content of the communication prevails over the author or recipient

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[1510] *Id.*, at para. 14.

[1511] *Id.*, at para. 35.

[1512] Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8, Decision on Preliminary Issues (23 June 2008), at para. 78.

(*in rem* approach), and the professional secrecy in civil law, where the parties to the communication prevail over the content (*in personam* approach).[1513]

Critics bring forward arguments both in favor and against extending the attorney-client privilege to in-house counsel. The two principal arguments against are the lack of independent professional judgment and the legal nature of the communications.[1514]

First, the lack of independence was the principal reason to exclude communications with in-house counsel in *Akzo Nobel Chemicals Ltd* and *A. M. & S. Europe Ltd*.[1515] It is often said that the employment relationship between a company and its in-house counsel may give rise to conflicts of interest.[1516] Indeed, an in-house counsel may face a situation where maintaining his independent judgment as a legal advisor will conflict with the interests of his employer, the corporation.[1517] In the words of Hill: "The concern expressed by critics of an extension of privilege is that the attorneys will be more concerned with loyalty to their client and keeping their jobs than fulfilling their responsibilities as lawyers."[1518]

Second, in order to attract protection, the communication must contain legal advice. Because in-house counsel are involved in the corporation's legal and commercial affairs, it may be difficult to distinguish communications created for legal advice purposes from commercial and operational communications.[1519] Indeed, in-house counsel are perceived to serve both a legal and business function.[1520] Presnell calls it the "two-hat theory".[1521]

In contrast, Hill listed four arguments in favor of extending the protection to in-house counsel.[1522] First, because in-house counsel are involved in the day-to-day affairs of the company and have developed a relationship with the officers and directors of the company, they may be in a better position to influence the company to refrain from illegal practices than external lawyers hired for specific mandates.[1523]

1513 Baudesson and Rosher, *supra* note 5, at 38; El Ahdab and Bouchenaki, *supra* note 9, at 104.

1514 Hill, *supra* note 459, at 182-3.

1515 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, *supra* note 400, at para. 49; *A. M. & S. Europe Ltd. v Commission of the European Communities*, *supra* note 525, at 950.

1516 Hill, *supra* note 459, at 183.

1517 *Id.*

1518 *Id.*

1519 *Id.*, at 185.

1520 Presnell, "In-House Counsel Beware: Conflicts of Law May Spoil Your Privileges", 23 *In-House Litigator* (2009) 1, at 5.

1521 *Id.*

1522 Hill, *supra* note 459, at 186-94.

1523 *Id.*, at 186-7.

Second, external lawyers are not necessarily more independent than in-house counsel.[1524] Some external lawyers work with very few clients and may be willing to do anything in order to keep a major client.[1525]

Third, in-house counsel admitted to the bar and bound by the same rules of professional conduct as external lawyers should be treated the same as external lawyers.[1526] There should be no discrimination as these in-house counsel may also be disciplined for breaches of their codes of professional conduct.[1527]

The fourth and final argument invoked by Hill does not apply to transnational rules of privilege in arbitration but rather applies in the context of European Member States companies dealing with non-member states companies.[1528] Without going into details, we shall just mention that Hill is concerned that companies may be deprived of useful legal advice because European Union Member States cannot reciprocate the protection afforded to communications with in-house counsel in non-member states.[1529] In other words, companies will have to turn to external counsel when their in-house counsel could have provided cheaper and more efficient legal advice.[1530] Hill concludes his article by stressing that "[i]t seems unnecessary and even unjust to penalize a corporation for choosing to have lawyers on the payroll, rather than employing them through an independent firm."[1531]

Finally, having in mind the principle of equal treatment of the parties, we are of the opinion that the attorney-client privilege should be extended to in-house counsel, provided that they are admitted to a bar association. The contrary would only defeat the principle of equal treatment by affording less protection to parties who obtained legal advice from their in-house counsel rather than from an external counsel. Likewise, in-house counsel representing their employer in arbitration should also benefit from the same protection afforded to external counsel.

1524 *Id.*, at 189.

1525 *Id.*, at 190.

1526 *Id.*, at 190-1; Bastin, "Should 'Independence' of In-House Counsel be a Condition Precedent to a Claim of Legal Professional Privilege in Respect of Communications Between Them and Their Employer Clients?", 30 *C.J.Q.* (2011) 33, at 47.

1527 Hill, *supra* note 459, at 191.

1528 *Id.*, at 192.

1529 *Id.*, at 192-3.

1530 *Id.*, at 193; Bastin, *supra* note 1526, at 46.

1531 Hill, *supra* note 459, at 194.

4.4.2 The without prejudice privilege and mediation privilege

Given that mediation is a form of settlement negotiation with the presence of a third party facilitator and that some arbitration rules and laws do not distinguish the mediation privilege from the without prejudice privilege, both privileges will be addressed together in this section.

In current arbitral practice, without prejudice communications are generally inadmissible.[1532] Indeed, for Professor Berger, "[t]here is thus a transnational settlement privilege which applies equally to settlement negotiations with or without the presence of a third neutral."[1533]

4.4.2.1 National laws

The without prejudice privilege is known as the settlement privilege in English law. English law grants protection to communications created for the purpose of a genuine attempt to settle a dispute.[1534] There is no separate head of privilege in English law for admissions and statements made in the course of mediation.[1535] These fall within the ambit of the settlement privilege.[1536]

It is unclear whether there exists a settlement privilege or a mediation privilege in U.S. federal law.[1537]

In French law, communications exchanged between attorneys for the purpose of settling disputes fall within the ambit of the attorney-client privilege.[1538] However, communications exchanged between the parties in this regard are not protected.[1539] Mediation proceedings are privileged from disclosure in both conventional and judicial mediation.[1540] The mediation privilege applies to the findings of the mediator as well as to the declarations made during such proceedings.[1541]

Swiss law contains similar provisions as French law.[1542]

1532 O'Malley, *supra* note 11, at 283; de Boisséson, *supra* note 12, at fn. 94; Pietrowski, "Evidence in International Arbitration", 22 *Arb. Int.* (2006) 373, at 403; O'Malley, *The 2010 IBA Rules of Evidence*, *supra* note 1209, at 15; Mosk and Ginsburg, *supra* note 1, at 384; Born, *supra* note 18, at 1915; Waincymer, *supra* note 23, at 813.

1533 Berger, "The Settlement Privilege", *supra* note 321, at 271.

1534 Section 2.6.1.

1535 Section 2.7.1.

1536 *Id.*

1537 Sections 2.6.2 and 2.7.2.

1538 Section 2.6.3.

1539 *Id.*

1540 Section 2.7.3.

1541 *Id.*

1542 Sections 2.6.4 and 2.7.4.

4.4.2.2 International rules

The IBA Rules recognize the settlement privilege and the mediation privilege[1543] as follows:

> In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account: ...
>
> (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations; ...[1544]

The ICC Mediation Rules contain the following provisions in relation to the mediation privilege:

> Unless required to do so by applicable law and in the absence of any agreement of the parties to the contrary, a party shall not in any manner produce as evidence in any judicial, arbitral or similar proceedings:
>
> a) any documents, statements or communications which are submitted by another party or by the Mediator in or for the Proceedings, unless they can be obtained independently by the party seeking to produce them in the judicial, arbitral or similar proceedings;
>
> b) any views expressed or suggestions made by any party within the Proceedings with regard to the dispute or the possible settlement of the dispute;
>
> c) any admissions made by another party within the Proceedings;
>
> d) any views or proposals put forward by the Mediator within the Proceedings; or
>
> e) the fact that any party indicated within the Proceedings that it was ready to accept a proposal for a settlement.[1545]

The CEDR Settlement Rules adopted by the Centre for Effective Dispute Resolution, a London-based independent alternative dispute resolution services provider,[1546] state that:

> Nothing said or done by any Party or its counsel in the course of any settlement discussions, or in the course of any other steps taken by the Arbitral Tribunal to facilitate settlement, shall be used against a Party

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1543 O'Malley, *supra* note 11.

1544 Art. 9(3)(b) IBA Rules.

1545 Art. 9(2) ICC Mediation Rules.

1546 http://www.cedr.com.

> in the event that the arbitration resumes (save as regards the allocation of costs in accordance with Article 6 of these Rules).[1547]

The reference to Article 6 of the CEDR Settlement Rules relates to the "without prejudice save as to costs principle," also known as the "Calderbank offer" in English law. In other words, the CEDR Settlement Rules provide that a settlement offer may, exceptionally and solely for allocation of costs purposes, be disclosed to the tribunal (i) to demonstrate that a party has received from the opposing party a settlement offer which was superior to what it was awarded by the tribunal,[1548] (ii) to refute the allegation that a party has refused to take advantage of a mediation window requested by the parties, or (iii) to refute the allegation that a party has failed to mediate or negotiate if such was a requirement under the arbitration agreement.[1549]

Furthermore, the CEDR Settlement Rules provide as follows:

> The Arbitral Tribunal shall not take into account for the purpose of making an award, any substantive matters discussed in settlement meetings or communications, unless such matter has already been introduced in the arbitration. Further, the Arbitral Tribunal shall not judge the credibility of any witness on the basis of either the witness having been a party representative during settlement discussions, or anything said by or about, or attributed to, the witness during settlement discussions.[1550]

The UNCITRAL Conciliation Rules also forbid the disclosure of evidence generated from the conciliation:

> The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings;
>
> (a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
>
> (b) Admissions made by the other party in the course of the conciliation proceedings;
>
> (c) Proposals made by the conciliator;
>
> (d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.[1551]

The UNCITRAL Model Law on International Commercial Conciliation contains similar wording:

[1547] Art. 3(4) CEDR Settlement Rules.

[1548] This principle was briefly examined in Section 2.6.1.

[1549] Art. 6 CEDR Settlement Rules.

[1550] Art. 3(5) CEDR Settlement Rules.

[1551] Art. 20 UNCITRAL Conciliation Rules.

> 1. A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:
>
> (a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;
>
> (b) Views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute;
>
> (c) Statements or admissions made by a party in the course of the conciliation proceedings;
>
> (d) Proposals made by the conciliator;
>
> (e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator;
>
> (f) A document prepared solely for purposes of the conciliation proceedings.
>
> 2. Paragraph 1 of this article applies irrespective of the form of the information or evidence referred to therein.
>
> 3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.
>
> 4. The provisions of paragraphs 1, 2 and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings.
>
> 5. Subject to the limitations of paragraph 1 of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a conciliation.[1552]

Earlier drafts of the ALI/UNIDROIT Principles protected "[c]ommunications between counsel in settlement negotiation"[1553] from disclosure.

[1552] Art. 10 UNCITRAL Model Law on International Commercial Conciliation.

[1553] Principle 24, UNIDROIT 2000 Study LXXVI – Doc 2, *supra* note 1142.

Finally, the without prejudice privilege and the mediation privilege are TransLex principles of transnational law[1554] defined as follows:

> (a) Privileged information is inadmissible as evidence in subsequent arbitration or court proceedings between the same parties, provided that the privilege objection
>
> i) is raised in the arbitration or court proceedings in good faith, and
>
> ii) does not relate to facts which one side would have been able to prove had there been no settlement negotiations between the parties.
>
> (b) Privileged information relates to
>
> i) statements, views, admissions, proposals, suggestions, indications of readiness to accept a certain proposal for settlement, whether written or oral, submitted by a party during settlement negotiations, mediation/ conciliation or any other ADR proceedings, or
>
> ii) statements made or views expressed by a third neutral involved in such proceedings, or
>
> iii) any document, witness statement or expert report submitted in or prepared by a party solely for these negotiations, mediation/conciliation or any other ADR process between the parties.[1555]

4.4.2.3 International cases

In ICC Case No. 6653 of 1993, the tribunal recognized a transnational rule of privilege for settlement negotiations:

> The arbitral tribunal also considers that it is customary, not only in French law – where the custom is equally a rule of professional conduct for *avocats* – but also in the field of international commerce, that exchanges of proposals between parties with a view to reaching an agreement aimed at resolving a dispute submitted to a tribunal – arbitral or not – are and must remain confidential. If the parties have tried in good faith to reconcile their positions, one of them cannot, in the event that the negotiations fail, use to its benefit the proposals of the other in order to deduce an alleged admission of liability.[1556]

An ICC tribunal went even further by refusing to admit documents exchanged during mediation between two third parties to the arbitration proceedings:

> The Tribunal considers that protecting the confidentiality of mediation proceedings is justified by public policy. In the tribunal['s]

[1554] TransLex No. XII.5 - Settlement Privilege (available at http://www.trans-lex.org/968500).

[1555] *Id.*

[1556] Award, ICC Arbitration case No. 6653 (1993) (Quoted in Fry, *supra* note 17, at fn. 22).

> view, ordering the discovery of documents exchanged in the course of a mediation between two third parties implies a self-evident risk of jeopardizing mediation as an institution ... This is similar to the well established international legal principle applied by the ICJ precluding the admittance of evidence of earlier efforts to settle the dispute.[1557]

In the *Case Concerning the Factory at Chorzów*, the Permanent Court of International Justice (the former International Court of Justice) ruled that "it [could] not take account of declarations, admissions or proposals which the Parties may have made in the course of direct negotiations which have taken place between them."[1558]

The International Court of Justice in the *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)* has even referred to the without prejudice privilege as "a rule of customary international law."[1559] Furthermore, it acknowledged that "the Court [could] not take account of declarations, admissions or proposals which the parties may have made in the course of direct negotiations when the negotiations in question have not led to an agreement between the parties."[1560]

The Iran–US Claims Tribunal has also recognized the without prejudice privilege in various decisions.[1561] This is particularly important by the fact that the Iran–US Claims Tribunal case law has been consistent in regard to the without prejudice privilege for two decades although the arbitrators were from different legal backgrounds.[1562]

In *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, the WTO dispute settlement panel recognized the confidential nature of settlement offers made to Costa Rica by the United States during bilateral negotiations.[1563] Although the settlement offers were submitted to the panel by Costa Rica, the panel refused to take them into consideration.[1564]

1557 Procedural Order No. 2, ICC Arbitration case No. 11258 (2003), at 6 (Quoted in O'Malley, *supra* note 11, at 284).

1558 *Case Concerning the Factory at Chorzów*, *PCIJ Series A – No. 9* (1927) 3, at 19.

1559 *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, *ICJ Reports* (1994) 112, at 125.

1560 *Id.*, at 126.

1561 For a list of decisions, see O'Malley, *supra* note 11, at 283, fn. 50; Berger, "The Settlement Privilege", *supra* note 321, at 270.

1562 Berger, "The Settlement Privilege", *supra* note 321, at 270.

1563 *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R, at para. 7.27; Grando, *supra* note 31, at 292.

1564 *Id.*

4.4.2.4 The transnational rule

Through examination of the various sources mentioned in the preamble of the present section, there appears to be a preponderance of practice suggesting that the settlement privilege could develop into a transnational rule. If we were to formulate a transnational rule for the settlement privilege, it would be as follows:

> Any communication, in any form whatsoever (including documents, notes, views, suggestions, and proposals), between two or more parties to a dispute that fulfils the following requirements, shall be excluded from evidence or production in arbitration:
>
> i) the communication must be created in connection with and for the sole purpose of a genuine attempt to settle a dispute;
>
> ii) the communication must have been made in good faith and not only for the purpose of being protected from subsequent disclosure;
>
> iii) the communication may be created in the presence of a third neutral or not;
>
> iv) whether the parties' legal counsel are party to the communication or not, is irrelevant;
>
> v) the communication must be made in confidence and intended to remain confidential; and
>
> vi) if a dispute concerns the scope or enforcement of a settlement agreement, related settlement communications may be disclosed.

Berger argues that a party could introduce as evidence its own views, statements, and concessions made in settlement negotiations, unless a tribunal could infer the opposing party's settlement posture from such.[1565] We do not share this view. All communications created for the purpose of settlement negotiations should be disclosed only upon the agreement of all parties to the dispute. This ensures fairness and equal treatment of the parties. A party could take advantage of the fact that it discloses its views, statements, and concessions made, with full knowledge that the opposing party wishes not to disclose its own. This could amount to a violation of the right to be heard as the opposing party is not able to respond to the evidence produced unless it discloses its own settlement posture.

4.4.3 State secrets privilege

The state secrets privilege is widely accepted in arbitration.[1566]

[1565] Berger, "The Settlement Privilege", *supra* note 321, at 273.

[1566] Mosk and Ginsburg, *supra* note 1, at 384.

4.4.3.1 National laws

The state secrets privilege is known as the public interest immunity in English law and is provided for in the English Civil Procedure Rules.[1567] The following categories of documents are covered by the privilege: national security, diplomatic relations and international comity, workings of central government, and proper functioning of the public service.[1568] Moreover, it is considered as a matter of public law rather than private law in the sense that it is not a privilege owned by either party to the proceedings but rather a protection of the public interest.[1569]

Contrary to English law, the state secrets privilege in U.S. federal law belongs to the U.S. government and can be waived by the government.[1570] The privilege includes, but is not limited to, the following sub-heads of privilege: the state and military secrets privilege, the intra- and inter- agency communications privilege, and the executive privilege.[1571] More generally, the privilege applies to communications related to the deliberative and policymaking process, as well as to military, diplomatic, and national security secrets.[1572]

State secrets are referred to as national defense secrets in France.[1573] National defense secrets can only be disclosed upon being declassified by a government minister in accordance with French law.[1574] The purpose of this protection is the safeguard of the defense and national security sectors, as well as French economic interests.[1575]

All information confided to public officials and members of public authorities, as well as facts that have come to their attention in their official capacity, are protected from disclosure under Swiss law.[1576] Such information and facts may nevertheless be disclosed upon obtaining the authorization from the public official's superior authority.[1577]

[1567] CPR r.31.19(1); See also Section 2.11.1.
[1568] Section 2.11.1.
[1569] *Id.*
[1570] Section 2.11.2.
[1571] *Id.*
[1572] *Id.*
[1573] Section 2.11.3.
[1574] *Id.*
[1575] *Id.*
[1576] Section 2.11.4.
[1577] *Id.*

4.4.3.2 International rules

Under the IBA Rules:

> 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: ...
>
> (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; ...[1578]

Earlier drafts of the ALI/UNIDROIT Principles indicated that information related to "national defense and security"[1579] was privileged from disclosure.

4.4.3.3 International cases

International tribunals have been inconsistent with the application of state secrets.[1580]

In *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, the ICSID tribunal concluded that the doctrine of public interest immunity "is not a general principle of law as understood for the purposes of article 38 (1)(c)[1581] of the Statute of the International Court of Justice."[1582] Furthermore, it found that the public interest immunity is not "identified as a matter of public of international law, or as part of the ICSID regime."[1583] In this case, Tanzania refused to disclose documents which were protected from disclosure under the Tanzanian Constitution and the Tanzanian Evidence Act, namely information relating to advice received or to be received by the President from the Cabinet as well as unpublished official records and communications received by a public officer.[1584]

The tribunal's decision to reject the public interest immunity exception invoked by Tanzania is based on the following assertions. First, ICSID proceedings are different from court proceedings.[1585] The purpose of ICSID

[1578] Art. 9(2)(f) IBA Rules.

[1579] Principle 24, UNIDROIT 2000 Study LXXVI – Doc 2, *supra* note 1142.

[1580] For examples of cases, see Pietrowski, *supra* note 1532, at 405-6.

[1581] "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: … c. the general principles of law recognized by civilized nations; …" (Article 38(1)(c) Statute of the ICJ).

[1582] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 2 (24 May 2006), at 8.

[1583] *Id.*

[1584] *Id.*

[1585] *Id.*

proceedings is to determine whether a state has breached an international treaty and its customary international obligations.[1586] To allow a state to invoke domestic privileges to avoid disclosure of evidence relevant for such determination is unconceivable.[1587]

Second, the state has an obligation in ICSID arbitration to disclose documents requested by the tribunal.[1588] Failure to do so on grounds of rules of domestic privileges "would undermine the well established rule that no state may have recourse to its own internal law as a means of avoiding its international responsibilities."[1589]

Finally, applying the privilege invoked by Tanzania would constitute a breach of the principle of equal treatment of parties by creating an imbalance between the parties.[1590] This argument was also raised in NAFTA arbitration in reference to states invoking the state secrets privilege without any justification as to why the evidence deserved protection apart from a simple assertion to that effect.[1591] This will be further examined below.

Nonetheless, citing *Pope & Talbot, Inc. v. Canada*[1592] and the IBA Rules, the tribunal acknowledged the existence of a privilege for "politically sensitive information, including State secrets."[1593]

In *Pope & Talbot, Inc. v. Canada*, the NAFTA arbitral tribunal declared that "[i]t is not in dispute that a ground that may justify refusal of a party to produce documents to an international arbitral tribunal may be the protection of state secrets."[1594]

In *The Corfu Channel Case*, the United Kingdom was successful in invoking naval secrecy as a ground to withhold naval orders from production.[1595] Although the International Court of Justice did not expressly recognize the privilege invoked, it did not draw any adverse inferences from the failure of the United Kingdom to disclose the naval orders requested.[1596]

One of the issues raised in relation to state secrets in arbitration is the following:

1586 *Id.*

1587 *Id.*

1588 *Id.*

1589 *Id.*

1590 *Id.*, at 9.

1591 See, *e.g.*, Pope & Talbot, Inc. v. The Government of Canada, Decision by Tribunal (6 September 2000), at para. 1.5; Merrill & Ring v. Canada, Decision of the Tribunal on Production of Documents, *supra* note 300, at para. 21.

1592 Pope & Talbot, Inc. v. Canada, Decision by Tribunal, *supra* note 1591.

1593 Biwater Gauff v. Tanzania, Procedural Order No. 2, *supra* note 1582, at 9.

1594 Pope & Talbot, Inc. v. Canada, Decision by Tribunal, *supra* note 1591, at para. 1.4.

1595 *The Corfu Channel Case*, ICJ Reports (1949) 4, at 32; Marossi, *supra* note 255, at 523.

1596 *The Corfu Channel Case*, *supra* note 1595, at 32.

> [P]ermitting a party to exclude from the proceedings information which it has self-designated as confidential discourages good faith cooperation as parties may abuse or be perceived as abusing their power to designate information as confidential.[1597]

In the same vein, the WTO panel in *Canada – Measures Affecting the Export of Civilian Aircraft* expressed concerns on the state secrets privilege:

> With regard to cabinet privilege, we note that in certain circumstances, such as national security, a Member may consider itself justified in withholding certain information from a panel. However, in such circumstances, we would expect that Member to explain clearly the basis for the need to protect that information. In the present case, Canada has invoked cabinet privilege for the purpose of protecting documents ... Canada has failed to explain why such information needs to be protected. In the absence of any such explanation, we are not at all convinced of the merits of Canada's reliance on cabinet privilege in the present case.[1598]

This is in line with the comments made by various tribunals. For instance, the tribunal in *Pope & Talbot, Inc. v. Canada*, in relation to state secrets, opined that:

> [A]ny reasonable evaluation of the quality of that justification [the protection of state secrets] must depend in large part on having some idea of what those documents are. A determination by a Tribunal that documents sufficiently identified deserve protection is very a different matter from acquiescence to a simple assertion, without any identification, that they deserve protection.[1599]

In *Merrill & Ring Forestry L.P. v. Canada,* the tribunal followed *Pope & Talbot, Inc. v. Canada*[1600] and *Canada – Measures Affecting the Export of Civilian Aircraft*[1601]:

> The Tribunal is also persuaded, however, that the privilege, as held in Pope & Talbot and the Canada-Aircraft decisions invoked by the Investor, can only be asserted in respect of sufficiently identified documents together with a clear explanation about the reasons for claiming such privilege. The parties would need such information in order to assess whether they agree or disagree about a refusal on these grounds, just as the Tribunal needs it to decide in case of disagreement between the parties.[1602]

[1597] Grando, *supra* note 31, at 279.

[1598] *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, at fn. 633.

[1599] Pope & Talbot, Inc. v. Canada, Decision by Tribunal, *supra* note 1591, at para. 1.4.

[1600] Pope & Talbot, Inc. v. Canada, Decision by Tribunal, *supra* note 1591.

[1601] *Canada – Measures Affecting the Export of Civilian Aircraft*, *supra* note 1598.

[1602] Merrill & Ring v. Canada, Decision of the Tribunal on Production of Documents, *supra* note 300, at para. 19.

In the same vein, earlier drafts of the ALI/UNDROIT Principles provided that "[a] claim of privilege made with respect to a document shall describe the document in detail sufficient to enable another party to challenge the claim of privilege."[1603]

4.4.3.4 The transnational rule

Through examination of the various sources mentioned in the preamble of the present section, there appears to be a preponderance of practice suggesting that the state secrets privilege could develop into a transnational rule. If we were to formulate a transnational rule for the state secrets privilege, it would be as follows:

> Any communication, in any form whatsoever, that fulfils the following requirements, shall be excluded from evidence or production in arbitration:
>
> i) the communication must contain information of political, diplomatic, or military sensitivity, which disclosure may harm the state;
>
> ii) the communication for which the privilege is claimed must be identified; and
>
> ii) the reasons for invoking the privilege must be explained.

4.5 How to Protect Allegedly Privileged Materials and Other Considerations

4.5.1 Agreement of the parties on privileges

All arbitration laws examined in this work recognize the freedom of the parties to agree on the procedure to be followed by the tribunal in the taking of evidence.[1604] The parties may determine the procedure before or after the dispute has arisen.[1605] The parties may also agree on matters related to the confidentiality of the arbitral proceedings[1606] and, particularly, on matters of privilege. However, the parties' agreement on a "fully functioning system of

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[1603] Principle 24, UNIDROIT 2000 Study LXXVI – Doc 2, *supra* note 1142.

[1604] Art. 19(1) Model Law; Section 34(1) Arbitration Act; Art. 1509 FCCP; Art. 182(1) PILA; See Section 1.3.1.

[1605] Poudret and Besson, *supra* note 32, at 459.

[1606] Born, *supra* note 18, at 2255-6; Derains and Schwartz, *supra* note 211, at 286.

privileged standards, independent of tribunal intervention"[1607] is said to be an ambitious objective.[1608]

It is preferable that the parties agree on the rules applicable to privileges before such matters arise in the proceedings.[1609] This can be done in the arbitration agreement, for instance, in order to "render the course of any future arbitration proceedings more predictable."[1610] Because most arbitration rules follow an *ex post* approach rather than an *ex ante* approach,[1611] the parties should take this issue into their hands at the outset. Indeed, the *ex post* determination creates uncertainty and ambiguity.[1612]

Some commentators take a different stance. O'Malley, for example, argues that an agreement of the parties on issues of privilege before the dispute arises means that a privileged communication may be governed by rules taken from a jurisdiction to which the communication in question has no connection at all.[1613] Moreover, in his words: "there is also the chance that settling upon a rule of privilege hailing from a particular jurisdiction in advance, will mean that unanticipated oddities of a domestic rule may be transposed onto the arbitration, leading to unintended surprise."[1614]

Williams observed that "[m]ost due process problems arise because at some stage of the proceedings one or other party believes that the procedure is something both unanticipated and unacceptable."[1615] Consulting with the parties at the outset of the arbitration in order to understand their different procedural expectations may prevent such situation.[1616] For example, the U.S. Court of Appeals for the Tenth Circuit declared the following when asked to decide on whether the repeated submission to the tribunal of a settlement offer constituted failure to receive a fundamentally fair hearing for the party who made the settlement offer:

> The result of this opinion may well be to encourage counsel to communicate settlement offers to arbitrators. This opinion might also encourage counsel to communicate other evidence to arbitrators which a court would regard as highly improper. This is for the parties to arbitration to decide and control as arbitration is possible only if the parties agree to arbitrate and how to arbitrate. A court can set

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1607 Tevendale and Cartwright-Finch, *supra* note 25, at 835.

1608 *Id.*

1609 *Id.*

1610 Uff, *supra* note 1416, at 12.

1611 Park, "The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion", *supra* note 1449, at 294.

1612 Rubinstein and Guerrina, *supra* note 24, at 590.

1613 O'Malley, *supra* note 11, at 293.

1614 *Id.*

1615 *Due Process in International Arbitration*, Transcripts, *supra* note 30, at 77.

1616 *Id.*, at 78.

> aside an arbitration award only if one of the statutory or judicial grounds for vacation have been proven. The record shows proof of neither.[1617]

If the parties had agreed during the settlement negotiations, or in the terms of reference (if any), or in the case management conference (if any), that settlement offers were protected from disclosure, such situation would probably not have occurred.

On the other hand, Meyer-Hauser and Sieber argue that if the parties agree on a single law applicable to matters of privilege, they are most likely to do so on the law of a third country that the parties are unfamiliar with,[1618] thus increasing confusion rather than eliminating it.[1619]

O'Malley provides a very good example of an agreement of the parties on the law of a third country. In ICC Case No. 16249 of 2010, the parties agreed in the terms of reference that English law would be applicable to issues of privilege even though none of the parties or their respective counsel were English and that the applicable substantive law was that of a Middle Eastern country.[1620] The underlying rationale in the choice of law was to ensure the broadest protection to privileges.[1621]

In the case *Bank for International Settlements*, the tribunal appointed its secretary to review the documents for which the attorney-client privilege was claimed and to resolve, in consultation with the parties, the objections raised.[1622] Indeed, the IBA Rules allows the parties to agree on privileges once an objection to production is raised.[1623]

In reference to the *Glamis Gold case*, Camerer and Hioureas argued that "[i]deally, the [Arbitral] Tribunal would have established the procedures at the initial procedural meeting had it known the myriad of privilege issues that would arise."[1624] Instead, the tribunal formulated a set of procedures following the first request for production of documents.[1625] The *Glamis Gold* tribunal also recognized that "the consequences of the objection for the production of

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[1617] Bowles Financial Group, Inc. v. Stifel, Nicolaus & Company, Inc., 22 F.3d 1010 (10th Cir. 1994), at 1014.

[1618] Meyer-Hauser and Sieber, *supra* note 23, at 183-4.

[1619] *Id.*, at 184.

[1620] Terms of Reference, ICC Arbitration case No. 16249 (2010) (unpublished) (Cited in O'Malley, *supra* note 11, at 293).

[1621] O'Malley, *supra* note 11, at 293.

[1622] *Bank for International Settlements*, Procedural Order No. 5, *supra* note 1490, at 2.

[1623] Art. 3(6) IBA Rules.

[1624] Camerer and Hioureas, *supra* note 1409, at 47.

[1625] *Id.*

documents may not be apparent until the scheduled final date for exchange of documents."[1626]

Notwithstanding the above, it is extremely rare in practice that the parties anticipate the question of privileges when they draft the arbitration agreement.[1627] More often than not, any discussion between the parties will only occur at the disclosure stage.[1628] The parties might not have agreed on rules applicable to privileges beforehand either because they did not anticipate such questions, or simply because they have not agreed on the applicable rules. For Park, it is in part because business managers rarely wish to enter into discussions about dispute resolution technicalities during contract negotiation and because arbitration clauses are drafted by transactional lawyers who have little interest in matters of evidence and are ill-informed about the procedural issues raised in the ensuing arbitral proceedings.[1629]

For Meyer, discussing during contract negotiations the rules applicable to privileges in relation to a "hypothetical future dispute"[1630] "would only cloud the atmosphere at negotiations and jeopardise or at least delay agreement."[1631] In other words: "Negotiating parties seek business success, not legal disputes."[1632]

4.5.2 *In camera* review

Tribunals may wish to examine the allegedly privileged evidence before deciding on the admissibility. For this purpose, one can imagine that a party discloses evidence solely to the tribunal, or to its chairman, for it or him to review *in camera* beforehand.[1633]

However, this practice may be considered as a violation of the right to be heard and, more generally, due process.[1634] For this reason, it should only be

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1626 Glamis Gold, Ltd. v. The United States of America, Procedural Order No. 3 (21 June 2005), at para. 9.

1627 Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 509; Waincymer, *supra* note 23, at 802; Meyer-Hauser and Sieber, *supra* note 23, at 183; Tawil and Lima, *supra* note 18, at 37; de Boisséson, *supra* note 12, at 713; Rubinstein and Guerrina, *supra* note 24, at 598; Burn and Skelton, *supra* note 200, at 129; O'Malley, *supra* note 11, at 293.

1628 Player and Morel de Westgaver, *supra* note 26, at 105.

1629 Park, "The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion", *supra* note 1449, at 295-6.

1630 Meyer, *supra* note 7, at 369.

1631 *Id.*

1632 Tawil and Lima, *supra* note 18, at 36.

1633 Poudret and Besson, *supra* note 32, at 557; Sindler and Wüstemann, *supra* note 11, at 626; Waincymer, *supra* note 23, at 877.

1634 Poudret and Besson, *supra* note 32, at 557; Fouchard, Gaillard, Goldman, *supra* note 1058, at 693.

done by agreement of the parties.[1635] Even with the agreement of the parties, examination *in camera* may still give rise to a challenge of the award.[1636]

Due process arguments aside, *in camera* review does not protect the interests of the party invoking the privilege as the tribunal will have seen the evidence in question and may be influenced by it even if it ultimately declares it to be privileged.[1637]

Although the WTO dispute settlement rules forbid *ex parte* communications between the parties and the panel or Appellate Body,[1638] some parties have offered to submit confidential information exclusively to the panels.[1639] All panels have refused to consider such information submitted *ex parte*.

Notwithstanding the above arguments related to potential violations of due process, *in camera* review is not appropriate for matters of state secrets in arbitration.[1640] Although some jurisdictions may provide for such possibility in their civil procedural codes, where national judges have security clearances or the equivalent, this procedure is impracticable or unlikely in arbitration.[1641]

An alternative to examination *in camera* may be the appointment of a third party unrelated to the proceedings to review the allegedly privileged evidence.

4.5.3 Review by a neutral third party

Tribunals have the power to appoint neutral third party experts in order to assist them in reaching their conclusions,[1642] and have done so.[1643] For example, in *Metal-Tech Ltd. v. Republic of Uzbekistan*, the parties agreed to the proposed appointment of an independent confidentiality advisor whose task was to review unredacted copies of certain documents in order to protect sensitive information relating to third parties.[1644]

In matters of privilege, the tribunal may wish to appoint a neutral third party to review allegedly privileged evidence to avoid being influenced by

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1635 *Id.*; Zuberbühler et al., *supra* note 34, at 69.

1636 Fouchard, Gaillard, Goldman, *supra* note 1058, at 693.

1637 Kaufmann-Kohler and Bärtsch, *supra* note 25, at 20; Waincymer, *supra* note 23, at 814.

1638 Art. 18(1) DSU.

1639 Grando, *supra* note 31, at 286, fn. 246.

1640 Mosk and Ginsburg, *supra* note 1, at 363.

1641 *Id.*

1642 Blackaby et al., *supra* note 1331, at 407; Cato, *supra* note 273, at 859.

1643 Webster, *supra* note 130, at 402, fn. 21.

1644 Metal-Tech Ltd. v. The Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award (4 October 2013), at para. 80.

such.[1645] In the words of Tevendale and Cartwright-Finch, this is to ensure that the tribunal is "insulated from the material in question".[1646]

Indeed, the exclusion of privileged materials is said to be a "Catch 22" situation.[1647] In order to assess whether evidence if privileged or not, the tribunal must review such evidence.[1648] In *Pope & Talbot v. Canada*, the tribunal highlighted this issue in the following terms:

> It is not in dispute that a ground that may justify refusal of a party to produce documents to an international arbitral tribunal may be the protection of state secrets. But any reasonable evaluation of the quality of that justification must depend in large part on having some idea of what those documents are. A determination by a Tribunal that documents sufficiently identified deserve protection is a very different matter from acquiescence to a simple assertion, without any identification, that they deserve protection.[1649]

Once a document is read, the arbitrators are unlikely to erase the document from their memories and forget its content.[1650] For this reason, the appointment of a third party neutral is a preferred alternative to an *in camera* review by the tribunal.

The expert must be independent and impartial.[1651] Although Tevendale and Cartwright-Finch seem to suggest that the expert's decision will be binding on the tribunal,[1652] it is important to note that a tribunal may only delegate the authority to rule on questions of privilege to a third party when authorized to do so by the terms of its appointment.[1653] Therefore, although the tribunal may blindly abide by the recommendation of the expert given that it has not seen the allegedly privilege evidence, the tribunal should make it clear that it remains the authority who ultimately decides on such matters.[1654]

1645 Tevendale and Cartwright-Finch, *supra* note 25, at 830; Bühler, *supra* note 255, at 88.

1646 Tevendale and Cartwright-Finch, *supra* note 25, at 830.

1647 van Houtte, "The Use of an Expert to Handle Document Production: IBA Rules on the Taking of Evidence", in A.J. van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (2007) 622, at 624; van Houtte, "The Document Production Master and the Experts' Facilitator: Two Possible Aides for an Efficient Arbitration", in M. Á. Fernández-Ballesteros and D. Arias (eds), *Liber Amicorum Bernardo Cremades* (2010) 1147, at 1149.

1648 van Houtte, "The Use of an Expert to Handle Document Production", *supra* note 1647, at 624; Zuberbühler et al., *supra* note 34, at 68; van Houtte, "The Document Production Master and the Experts' Facilitator", *supra* note 1647, at 1149.

1649 Pope & Talbot, Inc. v. Canada, Decision by Tribunal, *supra* note 1591.

1650 van Houtte, "The Use of an Expert to Handle Document Production", *supra* note 1647, at 624.

1651 van Houtte, "The Document Production Master and the Experts' Facilitator", *supra* note 1647, at 1153.

1652 "The neutral expert would then issue an independent but enforceable decision on privilege, applying the same principles and adopting the same approaches an arbitral tribunal might apply when making its decision." (Tevendale and Cartwright-Finch, *supra* note 25, at 830).

1653 van Houtte, "The Use of an Expert to Handle Document Production", *supra* note 1647, at 627.

1654 Waincymer, *supra* note 23, at 878.

The tribunal may appoint an expert without the consent of the parties but the mission of the expert must be limited to a consultative role and not a decisional one.[1655] Only when all of the parties refuse such appointment will the tribunal lack the power to appoint an expert.[1656] The expert can also act as mediator between parties when the parties disagree on the production of allegedly privileged documents.[1657] Finally, it shall be noted that it would be impractical to allow cross-examination of the expert by the parties, as this would defeat the purpose of the appointment.[1658]

The IBA Rules state that:

> In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.[1659]

The WIPO Rules provides for the appointment of a confidentiality advisor whose task will be to review the allegedly privileged materials and determine whether the materials deserve protection. In fact, under the WIPO Rules, the confidentiality advisor will determine whether the information is confidential, not if it is privileged:

> In exceptional circumstances, in lieu of itself determining whether the information is to be classified as confidential and of such nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality, the Tribunal may, at the request of a party or on its own motion and after consultation with the parties, designate a confidentiality advisor who will determine whether the information is to be so classified, and, if so, decide under which conditions and to whom it may in part or in whole be disclosed. Any such

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[1655] van Houtte, "The Use of an Expert to Handle Document Production", *supra* note 1647, at 628; Waincymer, *supra* note 23, at 878; van Houtte, "The Document Production Master and the Experts' Facilitator", *supra* note 1647, at 1153.

[1656] van Houtte, "The Document Production Master and the Experts' Facilitator", *supra* note 1647, at 1153.

[1657] *Id.*, at 1150; van Houtte, "The Use of an Expert to Handle Document Production", *supra* note 1647, at 625.

[1658] Waincymer, *supra* note 23, at 878; van Houtte, "The Document Production Master and the Experts' Facilitator", *supra* note 1647, at 1154.

[1659] Art. 3(8) IBA Rules.

> confidentiality advisor shall be required to sign an appropriate confidentiality undertaking.[1660]

The wording of Article 52(d) WIPO Rules appears to preclude the tribunal from ruling against the confidentiality advisor's decision.[1661] Indeed, contrary to the IBA Rules, which provides that the expert advises the tribunal, the WIPO confidentiality advisor has the power and authority to decide by himself on issues of confidentiality.[1662] As Smit suggests, and in line with our above comments when referring to Tevendale and Cartwright-Finch's position, the tribunal should retain those powers for itself upon the appointment of the confidentiality advisor.[1663] On the other hand, if the conclusions of the confidentiality expert are too easily overturned by the tribunal, the purpose of appointing a neutral third party will be defeated.[1664] The authority and power of confidentiality experts remains unsettled and controversial.[1665]

The WIPO Rules even go further; they authorize the tribunal to appoint the confidentiality advisor as an expert to report on some issues requested by the tribunal and contained in the privileged materials examined, without disclosing such materials:

> The Tribunal may also, at the request of a party or on its own motion, appoint the confidentiality advisor as an expert in accordance with Article 55 in order to report to it, on the basis of the confidential information, on specific issues designated by the Tribunal without disclosing the confidential information either to the party from whom the confidential information does not originate or to the Tribunal.[1666]

Following his experience as an independent expert in the *Guyana v. Suriname* case,[1667] Professor van Houtte published an article in which he advocates the appointment by tribunals of "document production masters" to handle objections raised by the parties.[1668] The term "master" is inspired by the "special masters" solving discovery issues in U.S. courts.[1669] Professor van

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[1660] Art. 52(d) WIPO Rules.

[1661] Smit, "Disclosure of Trade Secrets and Other Confidential Information", *supra* note 215, at 179.

[1662] van Houtte, "The Document Production Master and the Experts' Facilitator", *supra* note 1647, at 1149.

[1663] Smit, "Disclosure of Trade Secrets and Other Confidential Information", *supra* note 215, at 179.

[1664] van Houtte, "The Document Production Master and the Experts' Facilitator", *supra* note 1647, at 1155.

[1665] For further reading, see van Houtte, "The Document Production Master and the Experts' Facilitator", *supra* note 1647.

[1666] Art. 52(e) WIPO Rules.

[1667] van Houtte, "The Document Production Master and the Experts' Facilitator", *supra* note 1647, at 1150.

[1668] *Id.*, at 1148.

[1669] *Id.*, at 1148-9.

Houtte stresses that document production masters are only an aide to the tribunal and shall in no way be delegated the tribunal's authority to decide.[1670]

4.5.4 Redaction of privileged information

When a document contains both information relevant to the case and privileged information, the tribunal may authorize the disclosing party to redact the passages which are privileged.[1671] Indeed, various international tribunals have admitted redacted documents. For example, the WTO panel in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*,[1672] admitted documents from which confidential business information of private third parties were redacted.[1673]

The issue with redacted documents is that the information contained in a redacted document may be taken out of the context. In other words, documents are sometimes indivisible. In fact, redacted documents only provide part of the truth, as two commentators point out: "*Une vérité partiellement révélée n'est pas la vérité.*"[1674]

In *Gallo v. Canada* for example, the tribunal accepted that Canada redact part of the documents but specifically requested that such redaction not mislead the reader.[1675] Ultimately, Gallo objected to the redaction done by Canada on the basis that the exhibits produced "have been so heavily redacted that the understanding of the documents becomes burdensome."[1676]

In addition, a document redacted may be useless in the taking of evidence. For example, in *Canada – Measures Affecting the Export of Civilian Aircraft*, the panel noted, "the material submitted by Canada has been redacted to such an extent that it is simply of no value to the Panel."[1677]

1670 *Id.*, at 1149.

1671 Poudret and Besson, *supra* note 32, at 557.

1672 *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R.

1673 Arend, "Article 18 DSU", in Wolfrum, Stoll and Kaiser (eds), *WTO – Institutions and Dispute Settlement* (2006) 473, at 479.

1674 Matray and Matray, *supra* note 304, at 37.

1675 Gallo v. Canada, Procedural Order No. 4, *supra* note 1352, at para. 62; Gallo v. Canada, Procedural Order No. 3, *supra* note 239, at para. 62.

1676 Gallo v. Canada, Procedural Order No. 4, *supra* note 1352, at para. 65.

1677 *Canada – Measures Affecting the Export of Civilian Aircraft*, *supra* note 1598, at para. 9.345; Grando, *supra* note 31, at 288.

4.5.5 Protective orders and confidentiality undertakings

If the disclosure of the allegedly privileged materials is inevitable, the tribunal may issue a protective order to safeguard the confidentiality of the materials.[1678] Although some arbitration laws already provide for a certain level of confidentiality regarding the documents disclosed in arbitral proceedings, confidentiality orders are an additional layer of protection.[1679] More than forbidding the disclosure to third parties, those orders can also restrict the consultation of the evidence to certain individuals, solely to counsel for example, or even to a given location with no or limited rights to photocopy.[1680] Although the disclosure of evidence exclusively to the opposing party's counsel would ensure confidentiality, it can be argued that the right to challenge evidence is violated because the client itself is unable to review it.[1681] Moreover, confidentiality undertakings by counsel in arbitration may face enforcement issues.[1682] The objective of ensuring confidentiality will also be defeated where a party is represented by its in-house counsel.[1683]

In *Pope & Talbot v. Canada*, the tribunal issued a procedural order limiting disclosure of documents for which business confidentiality was claimed[1684]:

> Protected Documents identified by the parties and information recorded in those Protected Documents may be used only in these proceedings between Pope & Talbot, Inc. and the Government of Canada and may be disclosed only for such purposes to and among:
>
> (1) counsel whose involvement in the reparation or conduct of these proceedings is reasonably necessary;
>
> (2) officials or employees of the parties whose involvement in the preparation or conduct of these proceedings is reasonably necessary;
>
> (3) independent experts or consultants retained or consulted by the parties in connection with these proceedings; and
>
> (4) witnesses who in good faith are reasonably expected to offer evidence in these proceedings and only to the extent material to their expected testimony.[1685]

1678 Born, *supra* note 18, at 1917; Bühler, *supra* note 255, at 88; Waincymer, *supra* note 23, at 879.

1679 Born, *supra* note 18, at 1917.

1680 *Id.*; Baldwin, "Protecting Confidential and Proprietary Commercial Information in International Arbitration", 31 *Tex. Int'l L.J.* (1996) 451; Waincymer, *supra* note 23, at 877.

1681 Waincymer, *supra* note 23, at 877.

1682 *Id.*

1683 *Id.*

1684 Pope & Talbot, Inc. v. The Government of Canada, Procedural Order on Confidentiality No. 5 (17 December 1999), at para. 4.

1685 *Id.*, at para. 9; See also Vito G. Gallo v. Government of Canada, Confidentiality Order (4 June 2008), at para. 7.

Moreover, for the avoidance of doubt, the procedural order provided as follows:

> This Order is without prejudice to any assertion of privilege. If the Tribunal orders production of a document for which privilege is claimed, the party asserting privilege may claim the protection available under this Order.[1686]

The return or destruction of the confidential information once the arbitral proceedings are concluded can also be requested.[1687] This is particularly the case for trade secrets and state secrets, where the "absence of control over the number and background of individuals who have access to the [privileged information] may not give the relevant parties confidence that the information will not end up in the hands of persons who may disclose it to the public or derive and advantage for themselves from the information."[1688] A party could request, for example, that allegedly privileged documents be only disclosed to the opposing party, the tribunal, or the arbitral institution, once they have executed a confidentiality agreement.[1689] This circle of persons having access to confidential information is sometimes referred to as a "confidentiality club".[1690]

For example, in *Pope & Talbot v. Canada*, the protective order provided as follows:

> It shall be the responsibility of the party disclosing Protected Documents, Third Party Protected Documents or the information therein to any person in accordance with this Order to ensure that such person executes a Confidentiality Agreement in the form attached as Appendix 'A' before gaining access to such document.[1691]

The confidentiality order in *Gallo v. Canada* contained similar wording.[1692]

Protective orders may be issued at the request of one party or by agreement of all parties.[1693] In *Gallo v. Canada*, Canada specifically requested that the tribunal issue a protective order to ensure that any information

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[1686] Pope & Talbot, Inc. v. Canada, Procedural Order on Confidentiality No. 5, *supra* note 1684, at para. 15.

[1687] Kaster, "Confidentiality During and After Proceedings", in T. D. Halket (ed.), *Arbitration of International Intellectual Property Disputes* (2012) 271, at 324; Baldwin, *supra* note 1680, at 459-60.

[1688] Grando, *supra* note 31, at 282.

[1689] Fouchard, Gaillard, Goldman, *supra* note 1058, at 693.

[1690] Jolles, Stark-Traber and Canals de Cediel, "Confidentiality", in E. Geisinger and N. Voser (eds), *International Arbitration in Switzerland* (2013) 131, at 151.

[1691] Pope & Talbot, Inc. v. Canada, Procedural Order on Confidentiality No. 5, *supra* note 1684, at para. 13; Bühler, *supra* note 255, at 88.

[1692] Vito G. Gallo v. Canada, Confidentiality Order, *supra* note 1685, at para. 7.

[1693] See, *e.g.*, *Dr. Horst Reineccius, et al. v. Bank for International Settlements*, Procedural Order No. 1 (17 October 2001), at 3.

contained in the Cabinet decisions be kept confidential and be redacted from the publicly available versions of the submissions, decisions, and awards.[1694]

The IBA Rules grant to the tribunal the power to issue protective orders:

> Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.[1695]

The WIPO Rules also contain similar provisions:

> The Tribunal shall determine whether the information is to be classified as confidential and of such a nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality. If the Tribunal so determines, it shall decide under which conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom the confidential information is to be disclosed to sign an appropriate confidentiality undertaking.[1696]

In the WTO dispute settlement mechanism, a panel has the authority to adopt special additional procedures to protect business confidential information.[1697] In *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*,[1698] the panel adopted special additional procedures pursuant to which only persons who filed a declaration of non-disclosure could have access to the business confidential information.[1699] Moreover, such procedures also provided that the panel was under the obligation not to disclose business confidential information in its reports, although it could draw conclusions from the information.[1700]

1694 Vito G. Gallo v. Government of Canada, Requests for Protective Order and Time Extension (30 December 2009), at para. 1.

1695 Art. 3(13) IBA Rules.

1696 Art. 52(c) WIPO Rules.

1697 Art. 12(1) DSU; Arend, *supra* note 1673, at 474.

1698 *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R.

1699 Arend, *supra* note 1673, at 478.

1700 *Id.*

WTO panels have also afforded protection to state secrets (known as government confidential information[1701]) by refraining to disclose the information in their reports and by returning the government confidential information to the disclosing party after circulation of the report.[1702]

As Derains and Schwartz noted, although forcing compliance with protective orders issued by tribunals may be difficult, in some jurisdictions, those orders may be subject of judicial enforcement and serve as a basis to award damages.[1703]

4.5.6 Adverse inferences

Sometimes, parties prefer not to produce allegedly privileged evidence and suffer the consequence of their non-compliance, if it is less costly than the damage that the disclosure of the materials to the opposing party would cause.[1704] Although it is widely accepted,[1705] and permitted under the IBA Rules,[1706] that a tribunal draws adverse inferences from a party's failure to comply with an order for production, there remain disagreements on whether a tribunal can draw adverse inferences from a failure to comply with an order for production on grounds of privilege, when invoked in good faith.

More generally, adverse inferences are said to be "an inappropriate response to a good faith invocation of a privilege."[1707] Indeed, as Shaughnessy rightly noted: "The threat of a negative inference would have the effect of forcing a party to choose between the lesser of two evils – to reveal privileged communications or to suffer negative inferences that may not actually reflect the truth."[1708]

For example, Comment P-18C of the ALI/UNIDROIT Principles states that "[a] court has discretionary authority to impose indirect sanctions [including adverse inferences] on a party claiming a privilege, but a court ordinarily should not impose direct sanctions on a party or nonparty who refuses to disclose information protected by a privilege."[1709] What is the objective of

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1701 *Id.*, at 480.

1702 *Id.*

1703 Derains and Schwartz, *supra* note 211, at 286.

1704 Grando, *supra* note 31, at 280.

1705 Kaufmann-Kohler and Bärtsch, *supra* note 25, at 21; Fouchard, Gaillard, Goldman, *supra* note 1058, at 698; Born, *supra* note 18, at 1919; Petrochilos, *supra* note 231, at 221; Blackaby et al., *supra* note 1331, at 399; El Ahdab and Bouchenaki, *supra* note 9, at 105.

1706 Art. 9(5) IBA Rules.

1707 Shaughnessy, *supra* note 2, at 454.

1708 *Id.*, at 468.

1709 Comment P-18C, ALI/UNIDROIT Principles.

drawing adverse inferences in such case?[1710] The evidence for which privilege is claimed is not necessarily adverse to the case and it would be inappropriate to presume otherwise.[1711] Indeed, a party may wish to avoid revealing privileged information because it could amount to a waiver of the privilege, or simply because that party is not the holder of the secrecy right and the holder of the secrecy right has not waived its right. In the case of the trade secrets privilege, for instance, the holder of the trade secret may be a third party to the proceedings.

Drawing adverse inferences is questionable when evidence is not disclosed by a witness or a counsel to avoid putting himself in breach of rules of professional ethics or criminal law. For some authors, it is hard to imagine penalizing a party because its attorney is legally bound not to disclose the document or information requested.[1712] It is more acceptable to draw adverse inferences when a party, as the holder of a secrecy right, refuses to waive such right.[1713]

Mosk and Ginsburg argue that when states do not produce requested documents on grounds of state secrets privilege and do not even confirm the existence of such documents, drawing adverse inferences is difficult given that the nature, and even the existence, of the requested documents are unknown to the tribunal.[1714] This was indeed the case in the *Corfu Channel* case where the International Court of Justice refused to draw adverse inferences from the refusal of the United Kingdom to produce naval orders on the ground of naval secrecy given that it was impossible for the International Court of Justice to know the content of such orders.[1715]

Finally, in relation to state secrets, Kazazi opined that:

> Adverse inferences shall be drawn against a party which has not produced documents in its possession without providing any justification. Thus, explanations provided by a party as reasons for not producing the requested documents should be weighed by the tribunal and taken into account before drawing any adverse inference. For instance, governments might have difficulties arising from their laws or national security concerns. An international tribunal would be more cautious in drawing negative inferences against government.[1716]

[1710] Tevendale and Cartwright-Finch, *supra* note 25, at 835.

[1711] van Houtte, "Adverse Inferences in International Arbitration", in T. Giovannini and A. Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (2009) 195, at 202-3.

[1712] Rubinstein and Guerrina, *supra* note 24, at fn. 46.

[1713] Sindler and Wüstemann, *supra* note 11, at 636.

[1714] Mosk and Ginsburg, *supra* note 1, at 367.

[1715] *The Corfu Channel Case*, *supra* note 1595, at 32.

[1716] M. Kazazi, *Burden of Proof and Related Issues – A Study of Evidence Before International Tribunals* (1996), at 321-2 (Quoted in United Parcel Service of America, Inc. v. Canada, Reply of the

4.6 Conclusion

In the present chapter, we identified a preponderance of practice suggesting that the attorney-client privilege and the work product doctrine, the without prejudice privilege and the mediation privilege, and the state secrets privilege could develop into transnational rules.

However, for some commentators, no transnational rules of privilege exist.[1717] Others, such as Heitzmann, are critics of transnational rules of privilege:

> [T]he concept of transnational rules in the area of legal privilege does not seem adapted to the needs of international arbitration practice, since it would inevitably lead to the setting of lower or higher standards of legal privilege and confidentiality in comparison to standards applicable before national courts.[1718]

This is a critic that we do not share as the tribunal will apply the most generally accepted rule,[1719] the one which is the most likely to comply with the expectations of the parties.

Government of Canada to the Investor's Motion on Canada's Assertions of Cabinet Privilege (13 August 2004), at para. 65).

[1717] Kozlowska, *supra* note 11, at 137.

[1718] Heitzmann, *supra* note 11, at 217.

[1719] Gaillard, "General Principles of Law in International Commercial Arbitration", *supra* note 1325, at 167-8; Gaillard, "Trente ans de Lex Mercatoria", *supra* note 1329, at 8.

CONCLUSION

As set out in the introduction, the purpose of this work was (i) to perform a comprehensive examination of the various privileges existing under English, American, French and Swiss law that are the most likely to be invoked in international arbitration, (ii) to determine which conflict of laws are the most appropriate for privileges in arbitration, and (iii) to determine whether there exists a preponderance of practice suggesting that certain privileges could develop into transnational rules in international arbitration.

As mentioned earlier, at this time, no published work contains such a comprehensive consolidated analysis of privileges under English, American, French and Swiss law, as does Chapter 2. We trust that the reader will find Chapter 2 useful when dealing with privileges in practice.

This thesis argues that the most appropriate rules of conflict of laws for privileges in arbitration are the closest connection test and the most favorable privilege rule.

The closest connection test consists of applying the rules of law of the jurisdiction with which the privilege invoked has the closest connection. This approach has the advantage of fulfilling the legitimate expectations of the parties and ensuring predictability.[1720] At the same time, it gives sufficient flexibility to the tribunal to find an appropriate solution for each of the privileges invoked.[1721] On the other hand, the closest connection test may result in unequal treatment of the parties since the test is applied on a case by case basis to each and every privilege invoked by the parties.[1722] That means that different rules of privilege may apply to each of the parties. The closest-connection test has been said to have developed into a transnational rule.[1723]

The most favorable privilege rule is the application of the rules of privilege of the jurisdiction which affords the broadest protection to privileges. The jurisdictions to be taken into consideration are, depending of the tribunal's interpretation of such rule,[1724] the jurisdictions of the parties or the jurisdictions identified by the closest connection test. This approach ensures that the parties' legitimate expectations are fulfilled and that equal treatment is respected.[1725] The downside, however, is that the fact finding process can be

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[1720] Section 3.5.2.

[1721] *Id.*

[1722] *Id.*

[1723] Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 510; Alvarez, *supra* note 11, at 685; Player and Morel de Westgaver, *supra* note 26, at 103.

[1724] Section 3.5.5.

[1725] *Id.*

more dificult if one of the jurisdictions taken into consideration has very broad privilege standards.[1726]

This thesis also argues that there exists a preponderance of practice suggesting that the attorney-client privilege (including the work product doctrine), the settlement privilege (including the mediation privilege), and the state secrets privilege could develop into transnational rules in international arbitration. We refer to Chapter 3 for a full analysis.

Privileges in arbitration remain a complex issue.[1727] It has been suggested that uniform rules of privilege would foster predictability and efficiency and reduce uncertainty.[1728] Indeed, presently, tribunals "possess almost unlimited discretion"[1729] in matters of privilege. Moreover, "predicting which privileges will be recognized and which will be rejected is as daunting as it is fruitless."[1730]

On the other hand, the drafting of uniform rules of privilege in arbitration has been said by commentators to be an extremely difficult task,[1731] not feasible in the short term, in part because privileges "are too embedded in national legal systems and policy."[1732] Indeed, the difficulty resides in finding harmonized practices from the diversity of rules and approaches existing in the various legal systems.[1733] Moreover, one commentator even considers it to be "a Herculean task to prepare specific but concise rules which could ever hope to cater for all the possibilities."[1734] For some scholars, preferred approaches are already emerging amongst experienced counsel and arbitrators and are widely recognized, such as the closest-connection test and the most favorable privilege rule.[1735] They are suggesting that a consensus must be recognized but not through prescriptive formulation.[1736] Indeed, mentioning these concepts in uniform rules may not be meaningful to everyone and any explanation may turn into a treatise on privileges.[1737]

1726 *Id.*

1727 Tevendale and Cartwright-Finch, *supra* note 25, at 839; Kozlowska, *supra* note 11, at 136.

1728 Tevendale and Cartwright-Finch, *supra* note 25, at 837; Voser, *supra* note 1416, at 114; von Schlabrendorff and Sheppard, *supra* note 19, at 774; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 599; Camerer and Hioureas, *supra* note 1409, at 34, 56.

1729 Reiser, *supra* note 18, at 653.

1730 *Id.*

1731 von Schlabrendorff and Sheppard, *supra* note 19, at 774; Tawil and Lima, *supra* note 18, at 48.

1732 Alvarez, *supra* note 11, at 696; See also Alvarez, *supra* note 11, at 697; Rubinstein and Guerrina, *supra* note 24, at 601.

1733 Sindler and Wüstemann, *supra* note 11, at 637.

1734 Tevendale and Cartwright-Finch, *supra* note 25, at 837.

1735 *Id.*, at 836; Tawil and Lima, *supra* note 18, at 48.

1736 Tevendale and Cartwright-Finch, *supra* note 25, at 839.

1737 *Id.*, at 838.

Finally, the need for flexibility in arbitral proceedings also discourages the adoption of uniform rules of privilege.[1738] Tribunals need discretion and flexibility to apply the rules which are the most appropriate in order to ensure a fair outcome in any given case.[1739] In the same vein, flexibility and party autonomy are key elements of arbitration[1740] and the parties will not necessarily wish to abide by harmonized rules of privilege.

In other words, the arbitration community has a need for certain guidance[1741] in order to provide the parties with a maximum degree of predictability and, at the same time, to ensure sufficient flexibility for tribunals to solve complicated choice of law issues in complex transnational transactions.[1742]

The IBA Rules, although not perfect,[1743] are probably the closest to a uniform set of rules of privilege that the arbitration community is ready to accept.[1744]

All things considered, there is no universal rule or "secret formula" that can be applied to all situations.[1745] In fact, because of a growth in international business transactions and, consequentially, cross-border disputes, conflicts of privilege will only increase and become more complex.[1746] Nonetheless, as mentioned before, there is a "general harmonization trend of arbitration procedure"[1747] and this may lead to the development of a uniform transnational practice which would benefit the subject matter of this work.[1748]

[1738] *Id.*, at 837; Reiser, *supra* note 18, at 678; Tawil and Lima, *supra* note 18, at 48; Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 520.

[1739] *Due Process in International Arbitration*, Transcripts, *supra* note 30, at 94; Alvarez, *supra* note 11, at 696-7.

[1740] Gallagher, *supra* note 18, at 49.

[1741] Tevendale and Cartwright-Finch, *supra* note 25, at 837.

[1742] Berger, *International Economic Arbitration*, *supra* note 1221, at 499.

[1743] See Section 1.3.2.6.

[1744] Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", *supra* note 18, at 520.

[1745] *Due Process in International Arbitration*, Transcripts, *supra* note 30, at 94; Sindler and Wüstemann, *supra* note 11, at 638; Alvarez, *supra* note 11, at 697.

[1746] Sindler and Wüstemann, *supra* note 11, at 638; Cohen, *supra* note 197, at 442.

[1747] Kaufmann-Kohler and Bärtsch, *supra* note 25, at 21.

[1748] *Id.*; Tawil and Lima, *supra* note 18, at 49; Cohen, *supra* note 197, at 442; Camerer and Hioureas, *supra* note 1409, at 45; Meyer, *supra* note 7, at 377-8.

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