Privilege in International Arbitration: Is It Time to Recognize the Consensus?

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Privilege remains a persistent problem for parties, counsel, and arbitrators in international arbitration. It presents a challenge to which there can be no single, perfect solution in complex arbitral proceedings where the law and practice of several jurisdictions may be relevant to the selection of appropriate rules of privilege. It is, however, possible to identify a growing consensus from a close study of international arbitral practice and the considerable scholarship in this area. This article examines the key approaches which arbitral tribunals may take to resolve the issue of privilege in international arbitration, drawing upon the existing guidance of institutional and procedural rules, national laws and the theoretical bases for privilege in all legal systems. Based on this analysis and the consensus which emerges, this article tenders a definitive revision of existing procedural rules which would provide the certainty, without unnecessary prescription, that this complex area of arbitral procedure demands.

In international arbitration, different systems of privilege collide by virtue of the multi-jurisdictional profile of the parties, legal counsel, the arbitrators, and the circumstances of dispute. Claims of privilege by one or both parties are advanced under disparate regimes of privilege in order to demand production, or require protection, of certain documents. Tribunals face the challenge of refereeing these competing regimes in order to create a fair game between sides which, it has been said, are "playing by the rules of American football and English rugby at the same time." Or is it not, rather, that they are playing the same game but with different equipment? Pity the tennis player who turns up at court armed with a wooden racket—sympathetic memories of Björn Borg's short-lived comeback in 1991 come to mind.

Enough of the sporting analogies. Consider the recent private practice example of a French company, receiving advice from both English and French-qualified counsel (in-house and external) in a dispute with a Russian company advised for its part by Russian-qualified external counsel: a complex scenario but not unusually so, certainly for the client in question. Add to the mix different laws for the lex arbitri and lex causae (and perhaps an entirely separate set of overriding institutional rules) and the presiding tribunal is left with a highly complex puzzle to solve.

Complexity and variety mean interest and stimulate for counsel and arbitrators but, it must be said, are less enjoyable for the parties. There are few rules and scant authority on the application of privilege in international arbitration but there are many theories, and plenty of suggestions. As a result, arbitral tribunals generally enjoy considerable

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flexibility in shaping this aspect of arbitral procedure. However, several key theoretical approaches will tend to influence the application of privilege by tribunals and, it could be argued, a consensus has emerged—not in terms of identifying the best approach, but at least in identifying the best potential resolutions to complex privilege cases.

This article explores this difficult area of arbitral procedure, first by framing the problem, then by outlining the answers commonly advanced. After examining these possibilities, and noting along the way the guidance offered (and constraints imposed) by institutional rules and national laws, we consider where, in practice, the real mischief arises from contentious privilege scenarios in international arbitration. There can be no easy solution, and nor would it be appropriate to frame one, because a “one size fits all” solution would not succeed in this field. There is, however, room for improvement, irrespective of the sometimes overwhelming nature of the issue.

Above all, it must be asked whether the promotion of certainty in the approach of tribunals to complex questions of privilege (certainty, but not uniformity) is a better virtue in this field than the selection of a champion from competing (but equally imperfect) solutions. The impending revision of the International Bar Association Rules ("IBA Rules") presents a timely opportunity to improve a currently unsatisfactory position. We shall close by considering a concise revision to the IBA Rules of a form which might, it is suggested, assist in promoting the certainty which this article advocates.

I. A Persistent Problem

Complex privilege scenarios present difficult questions. Before getting to them, it is as well to start with a simpler proposition. Privilege has been defined in many ways; one useful formulation is as good as any: “a legally recognised right to withhold certain testimonial or documentary evidence from a legal proceeding, including the right to prevent another from disclosing such information.”

The basis of privilege is the protection and promotion of open dialogue and frank communication between professional advisers and their clients, although even at this early stage of the discussion, some commentators begin to part company and place the emphasis elsewhere. Whilst privilege is almost universally recognized as a concept, however, its application, scope and extent vary dramatically; notably between common law and civil law jurisdictions, but also, of course, between jurisdictions sharing legal systems. It is a matter of the evolution of the particular jurisdiction in each case, the extent to which professional secrecy and confidence have been codified and a reflection of the comparative values of the professional Bar and its clients.
Legal advice privilege provides a paradigm example of the contrasting approaches of different jurisdictions to privilege. Within common law regimes, legal advice privilege aims to facilitate an honest and uninhibited discussion between client and lawyer by shielding the client from extensive disclosure rights. In civil law jurisdictions, by contrast, legal advice privilege derives from overarching obligations of confidentiality. Breaches of that duty may invite disciplinary action against the lawyer, and possibly criminal sanctions. As ever, comparative studies and generalizations about common law versus civil law regimes can be superficial, and marked differences exist between particular jurisdictions in both systems. Consider, for example, the distinction between the approaches to privilege in the common law jurisdiction of England and Wales as opposed to the United States, or the varying formulations of the concept in the two civil law jurisdictions of France and Germany.

International arbitration brings together parties of different nationalities who are likely to be advised by legal counsel qualified in different jurisdictions, relating to cross-border commercial contracts whose subject matter is governed by the law of one jurisdiction but performed in another. Perhaps unsurprisingly then, it can be uncertain which privilege standard a tribunal, itself often composed of arbitrators from three different jurisdictions, will apply. Again, the variety and the analytical challenge of such problems may hold considerable appeal to the arbitration practitioners in the hearing room; and although resolving privilege in arbitration requires passage over some tricky ground, the road is often familiar to experienced practitioners. This raises the question of whether the road can be shortened and the process of resolving the difficulty simplified. We will return to this enquiry later.

II. LAWS, RULES, AND GUIDELINES

Whilst institutional rules, national laws, and evidential rules or guidelines might bestow powers on arbitral tribunals to decide procedural and evidential matters for themselves, there is very limited express guidance available to arbitrators on the exercise of their discretion in the area of privilege. The determination of issues of privilege presents a specific set of complex problems and, again, there is little to draw on through "formal" sources. Shared experience and commentary must fill the gap.

It will be helpful to consider briefly some of the sources of discretion and mandate which might apply to tribunals on procedural matters. First, at the institutional level, procedural rules are most unlikely to deal expressly with the issue of privilege. The International Chamber of Commerce International Court of Arbitration Rules ("ICC Rules") confer a general discretion upon the tribunal to "settle on" rules governing the proceedings by virtue of Article 15(1) and in the absence of express provisions under the ICC Rules, "whether or not reference is thereby made to the rules of procedure of a

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national law to be applied to the arbitration.” This discretion is informed and prescribed by the general duty upon the tribunal under Article 15(2) to “act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.” The ICC Rules also permit a tribunal to “take measures for protecting trade secrets and confidential information” under Article 20(7), but that is accepted to be a reference to commercial confidence, not legal privilege.

The London Court of International Arbitration, Arbitration Rules (“LCIA Rules”) provide for a comparable general duty upon the tribunal at Article 14.1, but deal more expressly with evidence at Article 22.1(f), where the tribunal is accorded the power “to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion.” Nevertheless, although the provision deals more expressly with documentary evidence, it does not tell us more than we already know: it is plain that determining issues of privilege falls within the tribunal’s remit. It is the question of how those issues might be approached and resolved which is of interest.

Turning from institutional rules to international and national laws, the United Nations Commission on International Trade Law (UNCITRAL) Model Law is also of limited assistance, confirming only that the tribunal has a general power to conduct the proceedings as it sees fit, which includes at Article 19(2) “the power to determine the admissibility, relevance, materiality and weight of any evidence.” This is, of course, unsurprising, given the wide constituency of the Model Law and the need for transnational legal instruments to appeal broadly, focusing on the essentials rather than the “optional extras,” and the success of the Model Law is sufficient endorsement of the validity of the approach.

More parochially, however, the same principles hold true under the English Arbitration Act 1996. Section 34(1) affords tribunals seated in England a broad power to determine procedures of evidence in arbitration: “It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter,” again with the more specific power to decide “whether to apply strict rules of evidence (or any other rules) as to the admissibility … of any material (oral, written or other).” In a jurisdiction where disputes concerning document production generally, and privilege more specifically, may be more frequently encountered than in others, it is perhaps to be expected that the governing arbitration statute should address document production more directly. Section 31(2)(d) of the Arbitration Act 1996 confers the power upon the tribunal to decide “whether any and if so which documents or classes of documents should be disclosed between and produced by the parties.” Again, however, and in order to avoid over-prescription, no further guidance is provided as to how such decisions on document

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9 Arbitration Act 1996, s. 31(2)(f).
production are to be made; nor, more specifically for these purposes, as to the circum-
stances in which production might be resisted on the basis of privilege.

So much for institutional rules and national laws. Looking now to rules of evidence,
the widespread acceptance of the IBA Rules in the arbitral community is such that the
Rules themselves will require little introduction. It is a measure of their perceived success
at “bridging the gap” between common and civil law approaches to evidence, and to
finding the right balance between inadequate and burdensome document production,
that in recent times the disclosure provisions of the Rules of the Dubai International
Financial Centre Court (“DIFC Court”)\textsuperscript{10} have been modeled upon the document
production provisions of the IBA Rules,\textsuperscript{11} rather than the English Civil Procedure Rules
(CPR) upon which the Rules of the DIFC Court are otherwise based.

Although seldom accepted unreservedly by parties to govern the evidential aspects
of their proceedings, the IBA Rules continue to be applied very widely in arbitral pro-
ceedings throughout the world, usually (if not invariably) on the more limited basis that
they will provide “guidance” to the tribunal when dealing with issues of evidence. As a
short digression, it must be seldom in any form of contentious proceeding that rules
which are so infrequently accepted as being of mandatory application are found, upon
subsequent review, to have had precisely that effect in the conduct of the proceedings.

Turning back to the text of the IBA Rules (and finally) we find an express reference
to privilege. Article 9(1) confers the usual power upon the tribunal to “determine the
admissibility, relevance, materiality and weight of evidence.” Article 9(2)(b), however,
further informs that discretion by expressly permitting the tribunal to exclude any evidence
on the grounds of “legal impediment or privilege under the legal or ethical rules deter-
mimed by the Arbitral Tribunal to be applicable.”

The IBA Rules provide no further express assistance to tribunals on how to determine
which particular “legal or ethical rules” should apply to inform the scope and extent of
the privilege. As with the pointed silence of the ICC Rules on another vexed question
in arbitration—confidentiality—the lack of prescription is unquestionably deliberate.
As a result, tribunals will possess broad discretion in determining the admissibility of
evidence under the IBA Rules and, in particular, when deciding which rules of privilege
might be applied.

This is far from an exhaustive survey. It is not intended to be. It should, however,
suffice to demonstrate that although institutional rules, national arbitral laws, and evidential
rules hint at the significance of privilege in the arbitral process, there is little appetite to
define the scope and application of the different formulations of privilege which might
arise. Again, this is hardly an accident: flexibility is not the main reason why parties
choose to arbitrate, but it is unquestionably a consideration, usually a material one, and
sometimes an important factor. There are numerous contexts in arbitration where the

\textsuperscript{11} Part 28 (Production of Documents) is largely based upon art. 3 of the IBA Rules.
difficulty of formulating an answer, or the danger of prescribing one, has precluded the attempt.

The question which arises, however, is whether current practice has led to a position where the formulation of an answer to this question (or better, the presentation of some cogent options which might give an answer) may be advanced with confidence? If so, what type of formulation might be suitable, and by which vehicle might it be advanced?

### III. RATIONALE FOR PROTECTION

Before considering the means by which tribunals may seek to maintain privilege, it is instructive to consider the rationale for their doing so. What is it that tribunals are seeking to protect? There are clear reasons why a tribunal might exercise its discretion in this area, all of which are, in part, philosophical in outlook, but which also bear real practical implications for the parties.

#### A. Legitimate Expectation

The first consideration is legitimate expectation. Parties expect that privilege will continue to apply if a communication was privileged when it was first made. They also expect that the same rules of privilege will apply to them regardless of the type of dispute resolution procedure to which they submit their disputes. If those expectations are not met, it may be argued by the party in question that (to take two simple examples) the party would have expressed itself less candidly, or not sought legal advice at all; and there are public policy reasons why such behaviors should be encouraged, or at least not discouraged.

It has been argued that these assumptions are elevated to the level of “legitimate expectation” through the application of the core arbitral principles of equal treatment and fair or reasonable opportunity for each party to present its case. To put it higher, it has been contended that a refusal to respect such legitimate expectations would constitute a breach of a general principle of private international law. It may be questioned whether leveling breach arguments against tribunals is an appropriate direction for the debate to take, particularly given the obvious difficulty in identifying and evaluating legitimate expectations of the users of international arbitration. However, it is certainly right that parties would prefer to avoid unpleasant surprises, which largely arise because they have agreed to put themselves before a tribunal rather than a national court. After all, it would be unjust to deprive the parties of the standards of privilege they expect to enjoy “merely because they find themselves haled into unexpected forums.”

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B. RELIANCE INTEREST

Related to the concept of legitimate expectation is the protection of a party’s reliance interest with respect to privilege. It would be preferable for arbitrators to avoid surprising parties with subsequent directions on privilege where those parties have relied on certain minimum procedural protection standards. A “trial by ambush”\textsuperscript{15} can arise through the directions of the tribunal as well as from the actions of the other side.

C. PROCEDURAL FAIRNESS

A third rationale for protection is that of procedural fairness—another concept which bears different meanings to different audiences, and one which is explicitly raised in procedural contexts more frequently than legitimate expectation or reliance interest. Certainly, it is likely to be more clearly in the tribunal’s mind when making decisions on questions of privilege. As with the exercise of any discretion, the potential impact of its decisions on the enforceability of its award will play a key part in the tribunal’s decision-making process.

As ever, a tribunal will be mindful of potential challenges to its award and at pains to avoid them, most obviously in this context on the grounds of procedural irregularity\textsuperscript{16} or on account of a breach of the tribunal’s general duty to act fairly and afford the parties a reasonable opportunity to present their case.\textsuperscript{17} And then on subsequent enforcement, a complaint might resurface under Article V of the New York Convention\textsuperscript{18} on the basis that the tribunal failed to observe the requirements of due process, whether on the basis that the parties were not treated equally and/or that the complainant was denied a fair and equal opportunity to present its case.

The application of different standards of privilege to each party in a dispute may therefore risk subjecting the tribunal’s final award and its enforcement to challenges (meritorious or otherwise) under national arbitration laws and reciprocal enforcement regimes. It will be unusual for such neat examples of “different treatment” to arise, but the point may still be taken where only one party has had cause to raise privilege and an inequality can be identified. The tribunal must always tread the line of fair and even-handed treatment between parties, and in practical terms, must weigh the delicate balance between protecting material said to be privileged and the imperative to facilitate the presentation and scrutiny of evidence.

An increasingly common method of being “seen to be fair” in deciding privilege challenges, and not exposing the tribunal to privileged material which might, arguably,
influence its view of the merits, is through the appointment of a “neutral expert.” This solution provides a mechanism by which tribunals may be insulated from the material in question.

For example, if a tribunal does not wish to risk being influenced by the content of potentially privileged material, it may entrust the review of documents to a neutral third party expert or adviser. 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. A separate process such as this allows the arbitral proceedings to continue without interruption while the expert considers the potential privilege issue independently. It is particularly helpful in circumstances where the nature of the dispute means that the volume of allegedly privileged material is substantial.

IV. APPROACHES TO PRIVILEGE PROBLEMS: THEORETICAL RIGOUR VS. FAIR DEALING

Seated rather uneasily upon the philosophical foundations outlined above, we can discern a number of potential approaches to the problems arising from questions of privilege in international arbitration. These approaches vary in the favor of tribunals, counsel, and commentators, mainly because there is not one of the available variant options which can be said to offer an entirely satisfactory solution. In particular, it will be seen that these approaches tend to involve an element of “trade-off” between their theoretical rigour, efficacy, and considerations of fair dealing.

A. CONFLICT OF LAWS APPROACH

It would be pleasing were tribunals able to approach questions of privilege upon the basis of a strict application of conflict of laws rules. The difficulty with this approach is that a strict application of those rules is unlikely to take a tribunal very far. Conflict of laws rules compel arbitral tribunals to respect any choice the parties make in relation to their dispute. However, “choice of governing law” clauses almost never cover procedural law in the broad sense, far less specific evidentiary issues such as privilege. Rather, the governing law clause is taken to stipulate the substantive law governing the parties’ rights and obligations under their agreement, and, unless it dovetails with the procedural law of the seat of the arbitration, is generally put to one side for the purposes of privilege questions.

Moreover, in international arbitration, communications to which claims of privilege relate are often made in jurisdictions other than that specified as the law governing the dispute. For these and other cogent reasons, extending a parties’ choice of substantive governing law to procedural questions, and particularly evidential matters such as privilege, is generally no answer. If a philosophical objection is required for this conclusion, it might be said to violate the parties’ reliance interests. Given that the parties will usually have agreed to the governing law for entirely different reasons, it could hardly be said to be in sympathy with their legitimate expectations either.
B. “Closest connection” test

In the absence of express agreement (actual or deemed), a tribunal must establish an objective connection between a particular law and the privilege claimed. The problem with this approach is that there are a multitude of possible laws to be navigated in the context of most international arbitrations. The rival candidates would include the law of the jurisdictions in which the parties’ legal counsel are qualified, in which the parties are domiciled, where the relevant communication was made and/or received, where the dispute arose, as well as the governing law and the law of the arbitral seat.

The “closest connection” or “centre of gravity” test is a widely-applied approach to the resolution of privilege issues in arbitration. It has the advantage of recognizing, and giving effect to, the parties’ reliance interests and legitimate expectations. It also has the benefit of being based upon legal principles from other legal contexts which will be familiar to many international lawyers.

In particular, there is a resonance between the “closest connection” concept and the “principle of proximity” which forms the foundation of the current approach to the conflict of laws. In the context of disputes involving a foreign element, this principle holds that the law of the state having the closest connection with the transaction and the parties should apply to the dispute. This rule is applied in most European jurisdictions by virtue of the “closest connection” test articulated in Article 4(1) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, and is similarly reflected in the “most significant relationship” test applied by the U.S. courts under the American Law Institute’s Restatement (Second) of Conflict of Laws.

In a privilege context, the “closest connection” test requires a tribunal to apply the law of the jurisdiction with which the document or communication has the closest link. In reaching this decision, the tribunal might consider several factors, including the nature of the evidence, where the particular document was created or the relevant communication occurred, and whether the parties expected that a particular rule of privilege would apply to that communication.

Ultimately, in the case of legal advice privilege, this analysis typically leads to the application of the law of the jurisdiction in which the client-lawyer relationship was established. Where the client and lawyer reside in different jurisdictions, it is often argued that the rules of the lawyer’s jurisdiction should apply, since it is their involvement in the communication which gives rise to the privilege; the lawyer who will have been aware of the scope of the relevant privilege; and the lawyer who will advise the client accordingly. This raises the possibility of “forum shopping” in a novel form. In the same

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way that U.S. attorneys and English barristers instructed in the same arbitration in a neutral jurisdiction would take rather different approaches to the preparation of a witness for an arbitral hearing, different standards of privilege protection might be available to the client depending upon which legal professional is instructed.

Can it be right that very different outcomes should be reached depending upon which lawyer the client chooses, assuming that all other considerations of client, documents, and “venue” for the advice remain the same? It would be far-fetched to suggest that clients will go out of their way to instruct lawyers from specific jurisdictions because of a keen appreciation that their Bar privilege rules are particularly strong. This is unlikely to be an important factor at the moment of instruction. The consideration does, however, give cause to question whether the basis for such an approach to privilege can be sound if it leads to such a result.

Putting that general problem to one side, a key difficulty with a purist “closest connection” approach is that a case-by-case examination will obviously be unwieldy and cause practical difficulty unless the number of disputed documents is very small. There is, after all, usually a great deal to be said for a pragmatic, simple, and predictable approach, rather than one which seeks to examine the issue on a case-by-case (or communication-by-communication) basis and which might produce different results in marginally different situations.

There is a further significant drawback to this approach, which is that, by seeking to identify the “closest connection” for each communication or relationship, it need not follow that the same analysis will apply to the communications or relationships of the other party to the proceedings. This drawback exists regardless of whether the determination is decided on a broad-brush basis and/or on the basis that one determination will apply to all communications for that party. Indeed, it is likely that there will be a number of different “closest connections” for the other party to the dispute. There is, therefore, a risk that this approach may result in the application of different standards of privilege between the parties.

It may well be said that different treatment for parties does not mean that they have received unequal treatment from the tribunal. A complete identity of approach to two parties in very different circumstances may, if anything, be said to favor unfairly the party which (if the “rules” were applied correctly) would enjoy lesser privilege protections than its counterpart. That may well be true, but in practical terms and for reasons previously stated, the mischief of an inequality of treatment (or at least the perception of it) is likely to be an enhanced risk of a challenge to the award or its enforcement under domestic arbitration legislation or reciprocal enforcement regimes. Before reaching that stage, of course, any inequality is likely to cause disquiet for all concerned in a process where fair treatment is usually treated as a cardinal principle.

C. Deference

The “closest connection” test is pragmatic by nature and it lends itself to further pragmatism. Mosk and Ginsburg develop the approach further by promoting a deferential
approach to parties’ claims of privilege. Provided such claims are made in good faith, they argue, tribunals should generally defer to them: “international arbitrators normally should accede to a claim of privilege valid under the municipal law of the jurisdiction with the closest relationship with the allegedly privileged evidence.”22

The argument in favor of this approach is to the effect that arbitrators should be especially mindful of parties’ legitimate expectations since they have no overriding local policy interests to promote or advance themselves. Such a deferential stance would respect the reliance interests of the parties, as well as being in harmony with the public policy interests of individual states.

An application of this approach may be found in Ireland v United Kingdom,23 an arbitration under the OSPAR Convention,24 where the tribunal was asked to determine whether documents relating to the U.K. Government’s authorization of a MOX plant could be refused on grounds of commercial confidentiality. The tribunal applied the deferential principle to this question, noting that:

[T]he tribunal need only satisfy itself that the privilege exists and is invoked in good faith, it can avoid complex balancing inquiries that slow down the process and impede consistency. Furthermore, as the party asserting the privilege is generally required to prove its existence, the tribunal will not need to conduct its own inquiry other than evaluating the evidence and law on the issue brought before it. Of course the arbitrators must assess whether the privilege asserted is properly applied. This assessment requires a determination of the scope of the privilege and considerations of exceptions and waivers.25

It can be readily understood that the deferential approach also minimizes the risk of conflict, at least between the tribunal and a party which might otherwise be ordered to produce allegedly privileged material against its will.

D. PRactical considerations

Having considered the virtues of a “safety first” approach where the parties and tribunal are content not to probe assertions of privilege too closely, at the other end of the spectrum lies the less cosy situation where one party unilaterally produces material over which its opponent might have a claim to privilege. In particular, it is not unusual for parties to present privileged evidence of “without prejudice” discussions as part of its case, sometimes inadvertently but often for deliberate tactical advantage to cast its counterpart in an adverse light or demonstrate the perceived strength of its position. Those counsel who approach the issue with less caution (or, perhaps, with calculated risk) are wont to adduce material in witness statements and cite it in legal submissions without raising the issue first, on the basis that it is better to put the allegedly privileged material before the

22 Supra note 3. Emphasis added.
23 Available at <www.pca-cpa.org/showpage.asp?pag_id=1158>.
25 Supra note 3. Emphasis added.
tribunal first and argue admissibility later. It is not easy to "undo" an impression, even if it is ultimately decreed that the impression should never have been made.

E. Equal treatment and equality of arms: "most-favored-nation" and the lowest common denominator

The principal alternative approach to the "closest connection" method is the application of equal treatment, alternatively styled as the provision of "equality of arms" to both sides. This approach requires the tribunal to assess the different standards of privilege being asserted by the parties and to select either the most, or the least, protective standard and apply that to both parties equally. By that method, the parties either jointly enjoy the best standard or jointly suffer the "lowest common denominator" standard.

The main advantage of this "equality of arms" approach is that it fulfils the tribunal's overriding duty to treat both parties equally and fairly,26 which will, of course, be at the forefront of the tribunal's mind. Indeed, irrespective of the approach the tribunal adopts to select the most appropriate standard of privilege, it is likely to modify the approach to apply the same standard to both parties.

The "most-favored-nation" (MFN) method (advocated by Rubinstein and Guerrina,27 amongst others) benefits from the assured protection of parties' reliance interests and legitimate expectations: if a tribunal applies the highest privilege standard in efforts to "level the playing field," a party can be certain that it will not be asked to produce a document which would be privileged under its own laws. Against that, it might be said that a party from a jurisdiction with very low (or no) protections can hardly be said to have had legitimate expectations that its documents would be protected in a way which it could not have envisaged. It might be more accurate to talk about "reasonable aspirations" rather than "legitimate expectations" for such a party.

The alternative is the "lowest common denominator" approach. This is considerably less popular, for reasons which will be immediately clear. In any context, and particularly one such as arbitration where cooperation and goodwill play some part in procedural affairs, if it really must be that "everyone is the same," it is easier to "mark up" rather than "mark down." Parties are more likely to object to their not being accorded their customary privilege standard than they are to complain that they have been given more robust protection than they might have anticipated. It is not simply a problem for the parties. Counsel may also be required to grapple with their own Bar ethics issues if they are asked to participate in a process where they are not protecting that which they are bound to protect.

26 See, by way of limited example, ICC Rules, art. 15(2), Arbitration Act 1996, s. 33(1)(a), and IBA Rules, art. 9(2)(g).
F. Remedies

Even the broadest protection does not, of course, amount to absolute protection, nor does it preclude one party from withholding material on the basis of entirely spurious defenses of privilege, and maintaining that position notwithstanding an order from the tribunal for production. Such scenarios invite the question of what realistic remedies there might be for one party’s failure to provide material.

If one party refuses to cooperate with a valid request (or order) for document production, it is well-established that the tribunal may draw adverse inferences about the contents of the withheld information for the party’s case.\(^{28}\) Inferences are, however, difficult things in international arbitration. It is easy enough to draw them—but what use are they then? The perennial problem lies in doing something useful with them. It is sometimes possible to detect in an award that the tribunal has taken a “dim view” of one party and reached its views accordingly; it is less possible to determine when, if ever, one party refusing to comply with its document production obligations, and more specifically in relation to privilege, has proved to be a material contributor to the tribunal reaching that “dim view.”

G. Party agreement

The final “answer” requires no choice between competing principles at all. It is, very simply, the solution of party agreement: the nomination of one particular set of privilege rules by parties, which may (or may not) approximate closely to what the “answer” might properly have been on a stricter analysis. Naturally, issues arise in relation to privilege only where parties object to a specific claim of privilege. The risk of such disputes occurring may be avoided, or at least reduced significantly, if the parties agree, ahead of time (or, less frequently, subsequently), the particular rules they wish to apply to this aspect of the arbitral procedure.

That ideal is, of course, easier said than achieved. Explicit agreement on such issues is rare in practice. After all, where there is an inequality of arms in an adversarial process, it is rare that the better-equipped party chooses to lay down its arms. Agreement is likely to be difficult to achieve in such circumstances. And even where the parties are cooperative when conferring on procedural matters, there is a natural reluctance to agree to be “bound” in advance by one particular approach where, typically, it will not yet be entirely clear to each party which documents they may wish to protect (or request from their opponent). The establishment by the parties of a fully-functioning system of privilege standards, independent of tribunal intervention, would be a laudable expression of party autonomy, but would appear to be an ambitious objective.

\(^{28}\) See, e.g., the power conferred upon tribunals by IBA Rules, art. 9(4), which states that if a party fails to produce any document requested by a party or by the tribunal, “the Tribunal may infer that such document would be adverse to the interests of that Party.”
V. Movement Towards a Consensus?

It would appear from all sources (albeit commentaries, articles, and “war stories” rather than published cases or other “official” evidence) that it is possible to speak of a consensus about effective approaches to privilege in international arbitration. Even if the evidence is largely unofficial or anecdotal, experienced counsel and arbitrators tend to be familiar with the common approaches—their upsides and downsides, their scope and their limitations.

Preferred approaches are emerging. It may fairly be said that the two broad approaches of the “closest connection” test and the application of equal treatment to both parties (particularly in the MFN variant) are widely recognized, and generally accepted by tribunals. There are, as noted above, advantages and disadvantages to each approach. In broad terms, the “closest connection” test has been argued to be more satisfactory as a matter of principle, and in the absence of any suggestion of bad faith, tribunals are likely to adopt a deferential approach towards a party’s claim of privilege if it is valid under the jurisdiction with the closest connection to the document. On the other hand, equal treatment by reference to a MFN standard has the appeal to the parties of simplicity, pragmatism, and fairness.

There is, as we have seen, no complete answer. But this type of distinction does raise the question of whether the mischief in this area lies not in the “dubious” but pragmatic solution which does not bear close intellectual scrutiny, but rather in the intellectually “pure” approach which may be unworkable in practice and, at worst, lead to unequal treatment. After all, the good lies not in the perfect answer which is not available, but rather in an effective and certain one. What, then, could be done better? If the solutions themselves cannot be easily improved (but only compared), is there, in fact, anything that can be done?

A. An opportunity to recognize the consensus

The lack of real authority in this area can lead to parties “reinventing the wheel” when disputed questions of privilege arise. The nature of privilege in arbitration means that written advocacy concerning such questions will often read more like an academic essay than a legal submission; often drafted at the expense of research, time, and cost which is expended simply to take the tribunal to an option, or a conclusion, which it could have had in mind in any event. Does not the real mischief exist in the time and expense wasted by the parties in getting to waypoints which are often very familiar to an experienced tribunal, perhaps less so to some counsel, and probably much less familiar (or not at all familiar) to the parties themselves?

If so, and given that there is a form of consensus about the options available to tribunals, there is an opportunity to state more clearly what those options might be.

29 See supra note 15.
30 See supra notes 4, 20 (Berger), and 27.
The objective is not to be prescriptive as to which option should be taken by the tribunal: it is right that the tribunal must have discretion to decide its approach in a difficult area with almost countless permutations of complexity. It would be wrong to be too prescriptive in this of all procedural areas, and in any event it would be a Herculean task to prepare specific but concise rules which could ever hope to cater for all the possibilities. It should, however, at least be possible to identify the best options that are commonly agreed to be available.

There should be value—and economy—in advising the tribunal of the tools available to them in advance. It is certainly more efficient than waiting until the problem arises and then asking the parties to take blank paper on every occasion, start from scratch, and draw the same (or similar) tools for the tribunal. Such an approach would reduce uncertainty. It would prescribe a non-exhaustive list of possible options, without being directive about the option the tribunal should take. This would be an improvement on the current uncertainty; a modest, non-binding improvement all the same, which makes it more likely to be accepted. This is an area where any guidance would be welcome to parties, and it is submitted that some guidance is long overdue.

B. How to recognize the consensus?

The question then arises as to which vehicle might be used for such an approach. Given their pre-eminent position as almost standard rules of evidence in international arbitral practice, the IBA Rules are the obvious choice. The IBA Rules are currently under review. A number of welcome proposals were considered on a provisional basis in an open forum at the IBA Annual Conference in Madrid in October 2009, with the IBA Rules of Evidence Subcommittee reporting on proposed revisions shortly thereafter. The process is expected to conclude in early 2010 with the adoption of revised IBA Rules. It is therefore a particularly timely moment to consider any revisions to the IBA Rules that might improve on the unsatisfactory current position.

As noted above, Article 9(2)(b) of the IBA Rules already addresses privilege, conferring upon the tribunal the power to exclude evidence on grounds of “legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.” This is a useful starting point. It would be even more helpful were the IBA Rules to take a further step, not towards prescription, but towards certainty whilst promoting the tribunal’s freedom of action. A new Article 9(3) along the following lines would supplement the existing Article 9(2)(b) in order to achieve this goal:

Article 9(2)
The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons: …

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.
Article 9(3)
The Arbitral Tribunal may apply the following principles in determining the privilege standard applicable to the exercise of its power under Article 9(2)(b):

(a) a “closest connection” approach;
(b) a “most favoured nation” approach; or
(c) any other principle that the Arbitral Tribunal considers to be appropriate.

A short, simple, and non-exhaustive clarification of this nature would suffice to guide parties, counsel, and tribunals as to the possible approaches the tribunal might adopt on questions of privilege. It would lift the burden off the parties of providing submissions to develop the discussion from a blank page to this basic starting point. As we have seen above, in reality this starting point simply reflects the existing position of consensus. On an aggregate basis, it would save considerable time and effort were this consensus to be recognized explicitly.

C. Arguments in favor of the status quo

There is, of course, a reason why privilege is dealt with so briefly in the current version of the IBA Rules, and why it is barely dealt with at all in institutional rules and national laws. It goes against the grain for arbitration practitioners to seek to prescribe the discretion of the tribunal on procedural matters: it is generally considered more advantageous to stay silent, and rely upon the flexibility of the procedure and the case management skill of the tribunal. Given that the additional guidance which is proposed would not be binding, that criticism can be easily dispelled here.

It could also be argued that there is no assistance gained by mentioning concepts such as “closest connection” or “most-favoured-nation” in the IBA Rules because uncertain definitions are not helpful, or they are too vague, or they will mean different things to different lawyers, and nothing at all to some; in order to be meaningful they would need to be explained, and it is not right that short form rules of evidence should be turned into a treatise on privilege. However, whilst these terms may not mean something to everyone, it is submitted that there is an unspoken form of consensus on privilege in place amongst many practitioners. These terms are likely to bear significant meaning to many of the tribunals and counsel dealing with the types of case in which issues of privilege will arise. This is not to promote any form of “closed shop” or perpetuate “private dictionaries” amongst a self-selecting community. The language proposed is hardly impenetrable, and even on the unlikely assumption of a starting base of zero knowledge, there is enough literature easily available to provide any reader with a clear idea of what these concepts mean.31

Moreover, given that they are provided only as non-exhaustive examples of the possible approaches to be taken, rather than as fixed options which preclude other variants or approaches, there is little risk in their not being defined at greater length.

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31 See supra notes 3 (“closest relationship”), 15 (“closest connection” and “most favourable privilege”), 20 (Berger: “closest connection test” and “most favoured nation rule”), 21 (Heitzmann: “closest connection” and “most favourable privilege rule”) and 27 (“closest connection” and “most favoured nation rule”).
Aside from its recognition within the literature on privilege, MFN is a widely-used acronym in other much-studied legal contexts, notably international trade law and investment treaties, and is frequently deemed to be sufficiently clear and recognizable without further explanation. Similarly, at least a basic familiarity with the concept of “closest connection” is to be expected amongst arbitration practitioners, given its prominence as a central principle in resolving other pervasive conflict of laws issues.

VI. Conclusion

Privilege in international arbitration is complex. It cannot sensibly be suggested otherwise. The understanding of that complex position is, however, considerably more advanced than current national laws, institutional rules, and rules of evidence might tend to indicate. There is, in reality, a consensus as to the principal alternative approaches which are available to tribunals. It is time that this consensus was recognized, through a formulation which is not prescriptive, but which promotes certainty without limiting the tribunal’s discretion in this important area.
Guide to Authors

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