

ICC DISPUTE RESOLUTION BULLETIN

EXTRACT | 2019 | ISSUE 2

ICC Dispute Resolution Bulletin | 2019 Issue 2

Quarterly e-journal of the International Chamber of Commerce (ICC)
Périodique numérique trimestriel de la Chambre de commerce internationale

Editors-in-Chief | Rédacteurs en chef

Julien Fouret
Samaa Haridi

Editorial Board | Comité de rédaction

Cecilia Azar
Chiann Bao
Utku Cosar
Valeria Galindez
Rémy Gerbay
Daniel Kalderimis
Tejas Karia
Swee Yen Koh
Yasmine Lahlou
Reza Mohtashami QC
Sara Nadeau-Séguin
Ziad Obeid
Ucheora Onwuamaegbu
Dámaso Riaño
Othmane Saadani
Sabina Sacco
Galina Zukova
Alberto Zuleta

Filiale à 100 % de la Chambre de commerce internationale (ICC)

SAS au capital de 305 562 euros
SIREN 313 975 237
RCS Paris B 313 975 237
Président, directeur de la publication: John Denton

Head Office
33-43 avenue du Président Wilson
75116 Paris, France

Directeur général, directeur adjoint de la publication:
Emmanuel Jolivet

Copyright © 2019
International Chamber of Commerce (ICC)

All rights reserved. No part of this work may be reproduced, distributed, transmitted, translated or adapted in any form or by any means except as permitted by law without the written permission of the ICC. Authors should request the permission of ICC prior to any reproduction or subsequent publication of an article (electronic or print). Permission can be requested from ICC through copyright.drs@iccwbo.org.

Tous droits réservés. Il est interdit de reproduire, de distribuer, de transmettre, de traduire ou d'adapter tout ou partie de cet ouvrage, sous quelque forme ou par quelque procédé que ce soit, en dehors des exceptions prévues par la loi, sans l'autorisation écrite de la Chambre de commerce internationale. Toute demande d'autorisation est à adresser à copyright.drs@iccwbo.org.

Disclaimer

Except where otherwise indicated, the views expressed and statements made herein are those of their authors and should not be construed as creating any duty, liability or obligation on the part of the ICC and its constituent bodies, including the International Court of Arbitration, the International Centre for ADR and their respective Secretariats.

Sauf indication contraire, les points de vue et les commentaires exprimés dans la présente publication sont ceux de leur(s) auteur(s) et ne sauraient créer aucun devoir, ni aucune responsabilité ou obligation à la charge de la Chambre de commerce internationale ou de ses organes, y compris la Cour internationale d'arbitrage, le Centre international d'ADR et leurs secrétariats respectifs.

Trademarks

ICC, the ICC logo, CCI, International Chamber of Commerce (including Spanish, French, Portuguese and Chinese translations), World Business Organization, International Court of Arbitration and ICC International Court of Arbitration (including Spanish, French, German, Arabic and Portuguese translations) are all trademarks of the ICC, registered in several countries.

ICC, le logo ICC, CCI, International Chamber of Commerce (y compris des traductions en espagnol, français, portugais et chinois) World Business Organization, International Court of Arbitration et ICC International Court of Arbitration (y compris des traductions en espagnol, français, allemand, arabe et portugais) sont des marques de la Chambre de commerce internationale et ont été enregistrées dans plusieurs pays.

Subscriptions/Individual issues

publications@iccwbo.org

The ICC Dispute Resolution Bulletin is available :

- ICC Store at www.storeiccwbo.org

- ICC Digital Library at <http://library.iccwbo.org/>

Dispute Resolution Services Publications

Stéphanie Torkomyan, Publications Manager
Claire Héraud, Senior Publications Assistant

Articles for publication should be sent to the Editors-in-Chief, members of the Editorial Board, or to the Publications Manager (stn@iccwbo.org). Suggestions for book reviews are also welcome.

ICC Publication No. @19BUL2
ISBN: 978-92-842-0556-1
ISSN: 2520-6052

Price | Prix

Subscription | abonnement: 180 euros (excl. VAT | hors TVA)

Per issue | par numéro: 49 euros (excl. VAT | hors TVA)

Publication date | Date de parution

August 2019 | Août 2019

Published by | Édité par

ICC Services
Wholly-owned affiliate of the International Chamber of Commerce

Dealing with Privilege Claims in International Arbitration A Pragmatic Approach

José-Miguel Júdeice

José-Miguel Júdeice is an independent arbitrator, and one of the founding partners of PLMJ. He is listed among the ICSID and the PCA Rosters of Arbitrators and various arbitration centres in Brazil, Portugal, Spain, Angola, Mozambique, British Virgin Islands and South Korea. José-Miguel acted as President of the Portuguese Bar Association (2001-2004) and was a member of the ICC International Court Arbitration (2009-2016). He is a Visiting Associate Professor at Nova University Law in Lisbon and guest lecturer at business schools.

Ana Coimbra Trigo

Ana Coimbra Trigo is Associate at PLMJ. She holds a LL.M. in European and International Law, from the China-EU School of Law, conferred by the University of Hamburg, and a law degree from the University of Coimbra. Ana is a member of various associations, including the Portuguese Arbitration Association, the ICC Young Arbitrators Forum, Moot Alumni Association, and acts as the events coordinator of the Young ICCA (International Council for Commercial Arbitration).

José-Miguel Júdeice and Ana Coimbra Trigo are members of the ICC Institute of World Business Law ('ICC Institute'). Twice a year, a selection committee within the ICC Institute Council, composed of Council members Horacio Grigera Naon, Julian Lew and Pierre Mayer, invites the Institute members to submit articles for publication in the Bulletin. The selected articles are published in the section 'From the ICC Institute'. For more information: www.iccwbo.org/icc-institute.

Legal privilege is one of the few grounds that parties can raise to object to document production. Its underlying concern is to allow clients to confide in lawyers so that lawyers may, in turn, better advise them. Although globally applied, legal privilege is regulated locally where lawyers are qualified. Different expectations might therefore arise from parties in international arbitration despite parties' equality being a key principle in evidence production. As the parties' arbitration agreement is usually silent on this issue, arbitrators must decide how to deal with privilege claims. This article explores the different ways to achieve the best possible balance between parties' expectations and procedural fairness.

Introduction

Privilege claims in arbitration have attracted much discussion, in particular with regard to the varying level of protection available in different jurisdictions. Lawyers are bound to obey the ethical rules provided by the bar association or law society in which they are registered. Legal privilege enshrines the sacred duty to protect a client's information. Of course, each jurisdiction regulates this matter differently (for example in terms of the categories of information protected, the extension of professional secrecy to non-lawyers and the means and legitimacy of a waiver), based on the evolution of the concept, the general extent of codification and the values that are comparatively considered more or less relevant.¹

If one considers that trust is a non-waivable condition of the relationship between a client and counsel, the exclusion of a certain number of documents from the outset might harm the case, just as much as excessive evidence production might overburden proceedings.² When choosing arbitration over court litigation, parties are not, in principle, waiving their right to privilege.³ The joint consideration of equality of parties and procedural fairness and efficiency, along with the variety of

1 See D. Kuitkowsky, 'The Law Applicable to Privilege Claims in International Arbitration', *Journal of International Arbitration*, Vol. 32, 2015, p. 69; M. Sindler, T. Wüstemann, 'Privilege across borders in arbitration: multi-jurisdictional nightmare or a storm in a teacup', *ASA Bulletin*, Vol. 23/4, 2005, p. 614. See also the 2017 Legal Professional Privilege Global Guide (5th ed., DLA Piper, 2015). For a detailed description of the role of lawyers in common law and civil law countries, see C. Rogers, 'Fit and

Function in Legal Ethics: Developing a Code of Conduct for International Arbitration', *Michigan Journal of International Law*, 2002, Issue 23, pp. 387-394.

2 See N. Ferreira Lousa, 'Produção de Prova em Arbitragens Internacionais: Em Especial, a Apresentação de Prova Documental em Poder da Parte Contrária', in *VII Congresso do Centro da Arbitragem da Câmara de Comércio e Indústria Portuguesa - Centro de Arbitragem Comercial Intervenções* (Almedina, 2014) p. 48.

3 G. Born, *International Commercial Arbitration* (Kluwer, 2nd ed., 2014) p. 2378; J. H. Rubinstein/B. B. Guerrina, 'The Attorney-Client Privilege and International Arbitration', *Journal of International Arbitration*, Vol. 18, Issue 6, 2001, p. 593.

standards and applicable laws regulating evidentiary privilege, raises concern and uncertainties within the arbitral community.⁴

Counsel in international arbitration is increasingly globalised. It is also not uncommon for arbitrations to be seated in a dissimilar jurisdiction to where counsel is registered to practice. The list of potential applicable laws continues to grow as we picture how international arbitral proceedings become more complex and involve stakeholders from multiple jurisdictions. However, the impact of legal privilege claims on the availability and admissibility of evidence in international commercial arbitration calls for clarification.

Party autonomy allows parties to specify the law applicable to privilege claims in their arbitration agreement, the regime to be followed by parties and the arbitral tribunal if such claims arise, and even to determine which documents or communications they wish not to disclose. Unfortunately, in practice, parties rarely clarify such matters in the arbitration agreement.

Alternatively, and in order to obtain a more predictable organization of the proceedings, parties and/or the arbitrators may choose to address these issues early in the proceedings, as suggested by the *UNCITRAL Notes on Organizing Arbitral Proceedings*.⁵

If the void remains, and a privilege claim arises, the arbitrators must decide. Pursuant to the parties' agreement to arbitrate, soft laws, such as the IBA Rules on the Taking of Evidence,⁶ and institutional rules,⁷ arbitrators have broad powers to manage the proceedings as they see fit and to determine the admissibility, relevance, materiality, and weight of

the evidence produced or to be produced. In such situations, arbitrators may have to consider how to choose the relevant applicable law.

To resolve this 'conundrum' and provide some possible pragmatic solutions, we will provide a comparative introduction of legal privilege (I), look into existing guidance available to arbitrators (II), and analyse the conflicting applicable laws (III), or direct application of standards by arbitrators (IV), and (hopefully) provide a useful set of conclusions for the international arena (V).

I. Dealing with privilege and professional secrecy

A. Common law jurisdictions

In common law jurisdictions, the right to withhold certain documents or witness testimony from legal proceedings is considered as an exception to the general and broad scope of discovery proceedings, where even unfavourable communications and documents must be disclosed to the other party.⁸ Statutes and case law specifically protect confidential communications between a lawyer and its client with regard to legal advice or judicial proceedings; legal privilege belongs to the client, who has the right to claim or waive privilege (explicitly or implicitly) before the court.⁹

In the **United States of America**, rules of professional conduct for lawyers establish the 'lawyer-client confidentiality' duties, prohibiting the revelation of information relating to client representation.¹⁰ Rules of evidence provide for 'attorney-client privilege' that protects documents and communications (but not all information) exchanged between a lawyer and a client with the aim of providing or obtaining legal advice; such privilege may also be raised when an attorney is called to testify in judicial proceedings. Furthermore, 'attorney work product' is also protected in court and

4 On the extension of communications and documents protected by professional secrecy in different legal systems, see C. Cavassin Klamas, 'Finding a Balance Between Different Standards of Privilege to Enable Predictability, Fairness and Equality in International Arbitration', *Revista Brasileira de Arbitragem*, Vol. XII/ 45, 2015, pp. 162-163, and M. Rodríguez Vargas, 'Los Privilegios Probatorios (Evidentiary Privileges) en Arbitraje Internacional, en Especial el Secreto Profesional, Privilegios Abogado-cliente y Privilegio de Negociación (Settlement Privilege)', *Spain Arbitration Review*, 2012/15, pp. 91-92, §§ 36-38.

5 See UNCITRAL Notes on Organizing Arbitral Proceedings, paras. 51 and 52 (2016) available at https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing_arbitral_proceedings).

6 Art. 9, IBA Rules on the Taking of Evidence in International Arbitration (2010), available at www.ibanet.org. Art. 19(2), UNCITRAL Model Law on International Commercial Arbitration; Art. 27(4), UNCITRAL Rules of Arbitration.

7 See for instance ICC Rules, Art. 19: 'The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration'.

8 See English Civil Procedure Rules 31(5) and (6) regarding standard disclosure and 31(19) regarding applications to withhold; in the US, Federal Rules of Civil Procedure Rule 26. *DLA Piper Legal Professional Privilege Global Guide*, supra note 1, at p. 4; Sindler, Wüstemann, supra note 1, at p. 614; Z. Shafruddin, 'Privilege in International Arbitration', *40 Under 40 International Arbitration*, C. Gonzalez-Bueno (ed.), (Dykinson S.L., 2018) p. 298.

9 Kuitkowsky, supra note 1, pp. 70-72. On the discussion whether there can be an 'inadvertent' waiver of privilege, where privileged documents have been included in the production of non-privileged documents by mistake, see p. 70.

10 See the Model Rules of Professional Conduct of the American Bar Association, Rule 1.6: '(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent (...)'.

includes the materials prepared by an attorney in the course of its contacts with third persons in preparation for litigation.¹¹

In **England and Wales** and **Australia**¹² legal professional privilege is divided into two categories: 'legal advice privilege' and 'litigation privilege'. The first category protects confidential communications between a lawyer and a client which arise when giving or obtaining legal advice. The second category protects all communications between a lawyer and a client (and a lawyer and third persons) that take place during the provision of legal advice and collection of evidence relating to existing or contemplated adversarial judicial proceedings.¹³ Third persons are typically experts (in the United Kingdom, legal communications with experts fall under the 'joint defence privilege') but increasingly involve the phenomenon of third-party funding, and any privilege arising out of contracts and documents exchanged with third party funders.¹⁴

B. Civil law jurisdictions

Civil law jurisdictions tend to approach this issue differently as (i) the duty of professional secrecy is regulated by professional ethical entities – usually regulatory bodies empowered by the state to exercise delegated public powers – and (ii) the respective breach may be sanctioned not only in disciplinary terms but also by the rules of criminal procedural law.

11 See the Federal Rules of Evidence (Rule 501) and Federal Rules of Civil Procedure, applicable in federal court, and unless the US Constitution, federal statutes or court rules provide otherwise, specifically Rule 26.5. On this topic, see Kuitkowsky, *supra* note 1, at p. 70.

12 Australian Evidence Act 1995, Part 3.10, Division 1, s. 118 and 119; see also Kuitkowsky, *supra* note 1, at pp. 70-71 and fn. 36-39.

13 *DLA Piper Legal Professional Privilege Global Guide*, *supra* note 1, at pp. 42-43; F. von Schlabrendorff, A. Sheppard, "Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution", *Global Reflections in International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, G. Aksent et al (eds.) (ICC, 2005) p. 746. See the case *Three Rivers District Council & Ors v. Governor & Company of the Bank of England* (No. 10) [2004] 3 W.L.R. 1274 (H.L.), setting the standards in English Law for litigation privilege.

14 For an analysis regarding communications with experts and whether these are covered by privilege in the US and United Kingdom, P.D. Friedland, K. Brown de Vejar, 'Discoverability of Communications Between Counsel and Party-Appointed Experts in International Arbitration', in *Arbitration Advocacy in Changing Times*, ICCA Congress Series, Vol. 15, A. J. van den Berg (ed.) (Kluwer, 2011) pp. 160-178, and C. Gugler, K. Goldberg, 'Privilege and document production in International Arbitration: how do arbitrators deal with different legal systems' approaches?', *Revista Brasileira de Arbitragem*, Vol. XIV, Issue 53, 2017, pp. 66-67. Regarding privilege issues arising out of contracts and documents exchanged with third party funders (and whether the provision of privileged documents to a third party constitutes waiver of privilege), 'Chapter 5: Privilege and Professional Secrecy', *ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, (ICCA Reports Series, Vol. 4, 2018, pp. 117-143).

For example, pursuant to the Statutes of the **Portuguese Bar Association** (which is a law in Portugal, and not a regulatory text or guideline), all information and related documents that a lawyer obtains when performing his or her professional functions and during the provision of legal services are protected by the duty of professional secrecy. This also includes facts relating to professional matters revealed by the client or by colleagues, facts communicated by co-litigants or their representatives, and facts revealed during settlement negotiations.

Under Portuguese law, this duty also binds all employees and collaborators of the lawyer. Furthermore, a waiver may only be requested by the lawyer (and not the client or any other party to a contract) from a competent body within the bar association and will only be authorized in cases where this is absolutely necessary to uphold the client's or its lawyer's dignity, and legitimate rights and interests.¹⁵ This is for example the case where there is no other evidence to prove a point essential to a case, save for the testimony of a lawyer who attended a specific meeting where that point was discussed.¹⁶

Portuguese procedural law excuses all those bound by professional secrecy from testifying in court.¹⁷ In addition, the *Portuguese Criminal Code* sanctions the revelation of information protected by professional secrecy.¹⁸

Countries like **France**, **Spain**, and **Brazil** take similar approaches.¹⁹

C. In-house lawyers

In-house lawyers' communications with their companies are typically included in attorney-client privilege of common law jurisdictions, when these communications relate to the provision of legal advice (but not business advisory services). Case law is not unanimous regarding whether a foreign registered lawyer acting as in-house counsel is bound (and consequently protected) by the privilege rules in effect in the jurisdiction where the company is headquartered.

15 Art. 92, Portuguese Law no. 145/2015 (9 Sept.).

16 Other examples are if in a court case it is argued that the lawyer is lying when stating that the other side was aware of a specific fact; or if he/she needs to start litigation to recover unpaid fees from the client.

17 Art. 417 and 497, Portuguese Civil Procedure Code; Art.135 of the Portuguese Criminal Code.

18 Art. 195, Portuguese Criminal Code.

19 Art. 5, Ethics Code of the Spanish Bar; Art. 2, Rules of the French Bar Association and Art. 226-13 of the French Criminal Code enshrine the duty of secrecy; Chap. III, Code of Ethics and Discipline of the Brazilian Bar Association and Art. 154 of the Brazilian Criminal Code (Decree Law 2848/40). See also, on the issue of criminal sanctions, C. Cavassin Klamas, *supra* note 4, at p. 163.

Australian courts recognize that in-house counsel are bound by such privilege rules. American courts have not always followed this position: in one case involving a French-qualified lawyer acting as in-house counsel in an American company, it was held that the legal communications were protected; one more recent decision however concluded that privilege only applies if the company has a reasonable expectation of confidentiality under the foreign country's privilege laws.²⁰

Civil law jurisdictions have taken different approaches on this issue.²¹ European case law, in the course of European Commission investigations in competition and anti-trust matters, has excluded in-house lawyers from the personal scope of professional secrecy, taking into account their hierarchical integration and economic dependence on their employer-companies.²²

The Code of Conduct for European Lawyers

In the European context, the **Code of Conduct for European Lawyers** (the 'CCEL') must also be considered. Developed in the framework of the continued EU integration and increasing cross-border activities undertaken by lawyers, it is a 'statement of common rules which apply to all lawyers from the European Economic Area whatever Bar or Law Society they belong to in relation to their cross-border practice' and aims to mitigate any difficulties arising from any 'double deontology'.²³

Accordingly, the CCEL establishes that lawyers registered in the bar association of one Member state acting in another Member state may be bound to comply with the rules of the bar or law society of this host state.²⁴ This text includes provisions on

confidentiality and professional secrecy, ranking it as a 'primary and fundamental right and duty of the lawyer', and sets forth the relevance, scope, duration, and extension of said obligations – with no provision on waiver. The CCEL also, and more importantly, provides that 'the rules governing a lawyer's relations with the courts apply also to his relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis'.²⁵

It is noteworthy that these rules dictate that if communications between lawyers are not marked as confidential, they will be subject to disclosure before state courts and arbitral tribunals.²⁶ Some jurisdictions go further and do not require these formalities.²⁷ In Portugal, the confidentiality of correspondence between lawyers cannot be waived.²⁸

II. Existing guidance in arbitration-related laws and rules

A. National arbitration laws and institutional arbitration rules

Domestic bar associations and law societies usually include legal privilege in ethical codes or other general legal texts, but typically fail to include any arbitration specific rules. Similarly, legal privilege is absent from most national arbitration laws.²⁹

The *UNCITRAL Model Law on International Commercial Arbitration* (Article 19(2)) provides that, failing a determination of the applicable procedural law by the parties, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. For that purpose, the arbitral tribunal has, among others, the power to determine the admissibility, relevance, materiality, and weight of any evidence.

Similarly, Portuguese Arbitration Law also provides that the powers granted to the arbitral tribunal include determining the admissibility, convenience and weight of any evidence produced or to be produced.³⁰

20 Kuitkowsky, *supra* note 1, at pp. 71-73, fn. 40-45, quoting Australian decision *Aquila Coal Pty. Ltd. v. Bowen Central Coal Pty. Ltd.* (2013), and US decisions *Corp. v. E Remy Martin & Co. S.A.* (1992) and *Louis Vuitton Malletier v. Dooner & Bourke* (2006).

21 K.P. Berger, 'Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion', *Arbitration International*, Vol. 22/4, 2006, pp. 505-506.

22 See cases *AM&S Europe Ltd., v. European Commission* (1982) and *Akzo Nobel Chemicals Ltd. & Akros Chemicals Ltd. V. European Commission* (2010), confirmed in appeal.

23 Art. 1(3), CCEL, available at https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf.

24 Art. 2(4), CCEL. This cumulative application of ethical rules of both the Member State of Registration and the host Member State are consequence of the EU framework. More specifically, based on the Council Directive 77/249/EEC (22 March 1977) to facilitate the effective exercise by lawyers of freedom to provide services (that expressly in its Art. 4(4) mentions the rules on professional secrecy) and on the Directive 98/5/EC of the European Parliament and of the Council (16 Feb. 1998) to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, binding on all lawyers licenced in EU Member States.

25 Arts. 2(3) and 4, CCEL.

26 Art. 5(3), CCEL; see also in England RC153 and 154 in the *Barristers Handbook*, specifically regarding cross border relations.

27 Vargas, *supra* note 4, at p. 93, §43. For Spain, see Art. 5(3), *Ethics Code of the Spanish Bar* (Código Deontológico de la Abogacía Española). For France, see P. Heitzmann, 'Confidentiality and Privileges in Cross-Border Legal Practice: The Need for a Global Standard?', *ASA Bulletin*, Vol. 26(2), 2008, pp. 212-213.

28 Art. 113(2), Portuguese Law no. 145/2015 (9 Sept.).

29 Berger, *supra* note 21, at p. 506.

30 Art. 30(4), Law no. 63/2011 (14 Dec.).

Arbitration institutions' rules typically do not touch upon this issue, with some exceptions:

- > The **London Court of International Arbitration (LCIA)** introduced *General Guidelines for Parties' Legal Representatives* in an effort to ensure a level playing field for the parties.³¹ Even though the Guidelines establish in paragraph 5 the duty not to conceal evidence when a party is ordered to produce it, legal privilege is not mentioned. Sanctions are provided for the breach of these guidelines.³²
- > The International Arbitration Rules of the **International Center for Dispute Resolution (ICDR-AAA)** provide for the duty of the arbitral tribunal to admit as grounds for refusal of production of evidence any privilege protecting the communications between lawyers and clients.³³ These rules establish the 'highest level of protection' as choice of law criteria when different laws on privilege may be applicable – an approach we will analyse below (III. B).
- > The **China International Economic and Trade Arbitration Commission (CIETAC)** has also established *Guidelines on Evidence*, which provide that the tribunal may not admit evidence based on a privilege claim pursuant to the law it considers applicable. These guidelines also identify and expressly exclude from disclosure in arbitration proceedings a specific category of information: the information obtained in related mediation proceedings.³⁴

31 LCIA *General Guidelines for Parties' Legal Representatives* (para. 1): 'These general guidelines are intended to promote the good and equal conduct of the parties' legal representatives appearing by name within the arbitration. Nothing in these guidelines is intended to derogate from the Arbitration Agreement or to undermine any legal representative's primary duty of loyalty to the party represented in the arbitration or the obligation to present that party's case effectively to the Arbitral Tribunal. Nor shall these guidelines derogate from any mandatory laws, rules of law, professional rules or codes of conduct if and to the extent that any are shown to apply to a legal representative appearing in the arbitration'. See V.S. Dattilo, 'Ethics in International Arbitration: A Critical Examination of the LCIA General Guidelines for the Parties' Legal Representatives', *Georgia Journal of International & Comparative Law*, Vol. 44(3), 2016.

32 LCIA Guidelines, para. 7, and LCIA Rules, Arts.18(6),14(4)(i) and (ii).

33 Art. 22 'Privilege', ICDR-AAA Rules provide: 'The arbitral tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between a lawyer and client. 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 all parties, giving preference to the rule that provides the highest level of protection'.

34 CIETAC Guidelines on Evidence (Guideline 19): '19.1 The tribunal may, pursuant to rules on the privilege it considers appropriate, decide not to admit certain evidence, particularly confidential communications between a lawyer and his/her

This is relevant in the context of CIETAC in order to ensure the integrity of the arb-med proceedings administered pursuant to its rules.³⁵

- > The **Singapore International Arbitration Centre (SIAC)** expressly provides that the arbitral tribunal has the power to decide on any 'claim of legal or other privilege', unless parties agree otherwise or as prohibited by the mandatory rules of law applicable to the arbitration.³⁶

B. Soft law

Arbitrators can also turn to existing soft law rules, either when adopted by the parties or as guidance.

In a purported attempt to establish some middle ground or a pragmatic compromise between different legal cultures, the **IBA Rules on Taking of Evidence in International Arbitration** (2010) clearly list several grounds to object to requests for evidence production. Besides commercial or technical confidentiality, and political or institutional sensitivity, Article 9(2)(b) also provides for an objection to document production based on 'legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable'. This provision is understood to include 'attorney-client privilege, professional secrecy or the without prejudice privilege', specifically because the drafters of this soft law instrument thought it was 'important that such privileges be recognized in international arbitration'.³⁷

Article 9(3) offers additional guidance with regard to the applicable privileges under 9(2)(b), and allows the arbitral tribunal to consider 'insofar as permitted by any mandatory legal or ethical rules that are determined by [the tribunal] to be applicable', the following:

(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;

client and evidence related to settlement negotiations between the parties. 19.2 Evidence adduced and information disclosed only in the course of mediation proceedings shall not be admissible in the arbitration, and shall not be permitted to form the basis for the arbitral award'.

35 CIETAC Rules, Art. 47.

36 Rule 27, SIAC 2016 Arbitration Rules provides that '[u]nless otherwise agreed by the parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to: (...) o. determine any claim of legal or other privilege'.

37 Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, p. 25, available at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

(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.

Furthermore, sub-paragraph g) of this Article – a catch-all provision – allows the arbitral tribunal to exclude evidence based on considerations of procedural economy, proportionality, fairness, or equality of the parties. Relevant to the present analysis, the Commentary on the Rules provides:

[D]ocuments that might be considered to be privileged within one national legal system may not be considered to be privileged within another. If this situation were to create an unfairness, the arbitral tribunal may exclude production of the technically non-privileged documents pursuant to this provision.³⁸

The **IBA Guidelines on Party Representation in International Arbitration** (2013) were also drafted to promote standards of conduct for counsel appearing in international arbitration proceedings with different and potentially conflicting expectations with regard to applicable ethical standards. They regulate communications with the arbitral tribunal, witness preparation and document production, among others.³⁹ Guidelines 1 and 3 dictate that if

³⁸ Ibid. p. 26: 'Article 9.2(g) is a catch-all provision, intended to assure procedural economy, proportionality, fairness and equality in the case. For example, documents that might be considered to be privileged within one national legal system may not be considered to be privileged within another. If this situation were to create an unfairness, the arbitral tribunal may exclude production of the technically non-privileged documents pursuant to this provision. In general, it is hoped that this provision will help ensure that the arbitral tribunal provides the parties with a fair, as well as an effective and efficient, hearing.'

³⁹ On document production, the Commentary to these Guidelines explains: 'Party Representatives are often unsure whether and to what extent their respective domestic standards of professional conduct apply to the process of preserving, collecting and producing documents in international arbitration. It is common for Party Representatives in the same arbitration proceeding to apply different standards. (...) In these circumstances, the disparity in access to information

adopted by the parties, these guidelines do not purport to displace any applicable mandatory laws, or professional or disciplinary rules, and do not seek to vest arbitral tribunals with powers reserved to bars or other professional bodies. The Commentary to these Guidelines provide as follows:

Arbitral Tribunals need not, in dealing with such issues, and subject to applicable mandatory laws, be limited by a choice-of-law rule or private international law analysis to choosing among national or domestic professional conduct rules. Instead, these Guidelines offer an approach designed to account for the multi-faceted nature of international arbitral proceedings.

Legal privilege is only mentioned residually, and Guideline 15 merely establishes the duty to advise clients and assist them in taking reasonable steps to ensure that a search for documents is conducted and all non-privileged, responsive documents are produced, should they be produced.

The 2018 **Inquisitorial Rules on Taking of Evidence in International Arbitration** (the 'Prague Rules') aim to enhance the arbitrators' active role and increase efficiency in international arbitration. The Prague Rules provide that the arbitral tribunal must avoid extensive production of documents and include several requirements for document production requests and legal privilege is not addressed as a ground for refusal.

Outside the arbitration landscape, other soft law instruments may be considered for guidance:

- > The *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (1970), seeks to improve mutual judicial co-operation between signatories. When addressing the refusal to adduce evidence pursuant to the execution of a letter of request issued from a competent authority from one state to another, one of the grounds that can be invoked by the person concerned is privilege, be it under the law of the state of execution or under the law of the state of origin.⁴⁰

or evidence may undermine the integrity and fairness of the arbitral proceedings. The Guidelines are intended to address these difficulties by suggesting standards of conduct in international arbitration'. The Guidelines and Commentary are available at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

⁴⁰ Art. 11, the Convention is available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=82>. See also C. Cavassin Klamas, *supra* note 4, at pp. 166-167.

- > The *Inter-American Convention on the Taking of Evidence Abroad* (1975), which was negotiated by Inter-American states to establish procedures for taking evidence in one state Party for use in civil or commercial litigation in another state Party, provides for a similar provision.⁴¹
- > The *Council Regulation (EC) No 1206/2001 (28 May 2001) on Cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*, which provides for similar provisions but regarding the execution of a hearing of a person that argues to have the right to refuse to provide evidence.⁴²
- > The *American Law Institute / UNIDROIT Principles of Transnational Civil Procedure* (2004)⁴³ expressly provide that effect should be given to privilege and similar protections of a party or non-party concerning disclosure of evidence, including 'confidentiality of professional communication', as clarified by the commentary.⁴⁴
- > The *Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals* (2010)⁴⁵ also propose general principles of conduct (in general and towards the client) for counsel appearing in proceedings before international courts and tribunals, including when one or more parties is a state. These Principles also address specific elements

such as conflicts of interest, relations with the court and others, and presentation of evidence. These standards should be complied with cumulatively with the national ethical rules of the place of registration of counsel. However, no reference is made to legal privilege.

III. Conflicting applicable rules

A. Choice of law tests

Qualification in international arbitration has been widely discussed. One controversial issue is whether arbitrators should seek qualification by reference to the *lex fori* or another law applicable to the arbitration proceedings.⁴⁶

Several commentators argue that, depending on the degree of transnationality of the arbitration, more or less deference should be afforded to the law of the seat.⁴⁷ One position is to disconnect arbitration from any seat (and thus from its conflict of rules).⁴⁸ It can indeed be argued that arbitrators in international arbitration need not be particularly connected to the seat or knowledgeable of its law.⁴⁹ Even if one considers that the courts of the seat will be competent to hear any potential annulment proceedings and that parties have agreed on the seat beforehand – thereby in theory enhancing the predictability of the arbitral proceedings – this is illusory, since parties in fact rarely choose a seat for the respective legislative approach to privilege.⁵⁰ This solution is further unsatisfactory as some parties fail to elect the seat, and the arbitral tribunal or the arbitration institution then take on that role.⁵¹

41 Art. 12 of the 1975 Inter-American Convention on the Taking of Evidence Abroad, available at <http://www.oas.org/juridico/english/treaties/b-37.html>.

42 Arts. 11 and 14 of Council Regulation (EC) No 1206/2001 (28 May 2001) on Cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, available at <https://eur-lex.europa.eu/eli/reg/2001/1206/2008-12-04>; see also commentary by Heitzmann, *supra* note 27, at pp. 221-223.

43 In 2004, the Governing Council of UNIDROIT adopted the Principles of Transnational Civil Procedure prepared by a joint American Law Institute/UNIDROIT Study Group. The Principles, consisting of 31 provisions, aim at reconciling differences among various national rules of civil procedure, taking into account the peculiarities of transnational disputes as compared to purely domestic ones. They may serve not only as guidelines for code projects in countries without long procedural traditions but may also initiate law reforms even in countries with long and high-quality procedural traditions; they may also be applied by analogy in international commercial arbitration. The Principles are available at <https://www.unidroit.org/transnational-civil-procedure-overview>.

44 Comment P-18A. Arguing that this is a lost opportunity to harmonise the law applicable to privilege claims in a flexible manner and based on universally accepted standards, O. Meyer, 'Time to Take a Closer Look: Privilege in International Arbitration', *Journal of International Arbitration*, Vol. 24(4) (Kluwer, 2007), p. 373.

45 Document prepared by the *Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals* (27 Sept. 2010), available at https://www.ucl.ac.uk/international-courts/sites/international-courts/files/hague_sept2010.pdf.

46 V. Heiskanen, 'And/Or: The Problem of Qualification in International Arbitration', *Arbitration International*, Vol. 26(4), 2010, pp. 456-457.

47 *Ibid.* at pp. 449-450, arguing that the arbitral tribunal has a limited link with the seat and that the distinction domestic/foreign law is not relevant in the same way to arbitral tribunals and local courts, and concluding that it is accepted that arbitrators are not bound by the conflict rules of the seat of arbitration. See also Vargas, *supra* note 4, at p. 86, §19 arguing for a tendency to minimize the influence of the procedural law of the seat.

48 Berger, *supra* note 21, at p. 508.

49 C. Cavassin Klamas, *supra* note 4, at p. 171.

50 *Ibid.* at pp. 171-172.

51 Kuitkowsky, *supra* note 1, at p. 84.

Another issue is whether, instead of applying a traditional qualification method and considering the underlying policy concerns through a comparative approach,⁵² legal privilege may be characterized as an issue of substantive or procedural nature, and how this qualification may then determine the applicable law.⁵³

It is to be noted that there are many potentially conflicting applicable rules as there are relevant connecting factors to consider.

Arbitrators can employ a '*voie directe*' to choose the applicable law within their discretion. This direct choice of law method is made with no reference to any specific conflict of law rule,⁵⁴ as opposed to an indirect choice of law method where arbitrators apply such rule.

This is the approach taken with regard to the rules governing the proceedings in the *ICC 2017 Rules of Arbitration* (Article 19), where arbitrators may apply 'any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration'.

The **IBA Rules on the Taking of Evidence**, which provide further guidance to ensure fairness and equality between the parties, do not take an express position on the matter.⁵⁵

It is advisable that even without making any specific reference to conflict of law rules, arbitrators clarify their analytical basis for deciding upon the application of any law, as a matter of justice. This may require looking at national conflict rules or soft law instruments, as the ones previously mentioned.

Since 'arbitrators, in determining the applicable law, do not operate in a legal vacuum or have limitless discretion without any normative underpinning',⁵⁶ it is suggested that, in order to at least convince the losing party, arbitrators should use their discretion and identify and apply the law with the '*closest connection*' to the legal relationship in question, taking into account the existing territorial or functional connecting factors.⁵⁷

This approach is frequently followed in domestic laws,⁵⁸ and it can be argued that support is found in Article 28(2) of the UNCITRAL Model Law, which provides that '[f]ailing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable'. Connecting factors such as (i) where the communication was created, sent, or is stored; (ii) where the lawyer is registered to practice; or (iii) where the client resides are relevant to selecting the applicable conflict of law rules.⁵⁹

Some commentators have argued that applying the law of the place of registration of the lawyer with whom the communication took place is:

- > in line with the parties' legitimate expectations;
- > more appropriate than choosing the law of the place of issuance of the communication or information – which, besides leading to a potentially random choice, may lead to the application of numerous laws of jurisdictions where the relevant documents were created, sent or stored;⁶⁰

52 Berger, supra note 21, at pp. 509-510, citing Ernst Rabel; R.M. Mosk, T. Ginsburg, 'Evidentiary Privileges in International Arbitration', *International and Comparative Law Quarterly*, 50, 2001, p. 377.

53 Mosk, Ginsburg, supra note 52, at pp. 367-369, 376-377; Berger, supra note 21, at pp. 508-510; Meyer, supra note 44, at p. 366-370; C. Cavassin Klamas, supra note 4, at pp. 162-166, 171-172; Kuitkowsky, supra note 1, at pp. 81-85; von Schlabrendorff, Sheppard, supra note 13, at pp. 762-764. Under English law: *Three Rivers District Council & Ors v. Governor & Company of the Bank of England*, supra note 13, at §26, the House of Lords acknowledged that this was both a procedural and substantive issue. In the Portuguese context, since legal privilege is enshrined in statute and protected by criminal law, there is no doubt that it is inherently substantive in nature, considering the public policy underlying these regimes

54 Heiskanen, supra note 46, at p. 451.

55 Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, p. 26.

56 K.P. Berger, *International Economic Arbitration* (Deventer, 1993) p. 501; and P. Shaughnessy, 'Dealing with Privileges in International Commercial Arbitration', in *Scandinavian Studies in Law*, Vol. 51 (Stockholm Institute for Scandinavian Law, 2007), p. 459; Kuitkowsky, supra note 1, p. 88.

57 Berger, supra note 56, at p. 501. Also on 'transnational' conflict of laws faced by tribunals, see Heiskanen, supra note 46, at pp. 452-454.

58 For example, Rome I Regulation (EU), Article 4; German Arbitration Act, § 1051(2); and Swiss Private International Law Act, Article 187(1), and American Law Institute Second Restatement of Conflict of Laws applied in US Courts, providing for the law of the state with the most significant relationship with the communication. Notably, US Courts face a more complex choice of law analysis, as they must first deal with 'vertical choice of law', between Federal and State law, and then a 'horizontal choice of law', between different States' laws. This has not been decided consistently over time, as analysed by von Schlabrendorff, Sheppard, supra note 13, at pp. 748-750. See more in M. Reimann, 'Savigny's Triumph? Choice of Law in Contract Cases at the Close of the Twentieth Century', *Virginia Journal of International Law*, 39, 1999, pp. 578-588.

59 Sindler, Wüstemann, supra note 1, at p. 624; C. Tevendale, U. Cartwright-Finch, 'Privilege in International Arbitration: Is It Time to Recognize the Consensus?', *Journal of International Arbitration*, Vol. 26(6), 2009, p. 831.

60 N. Ferreira Lousa, supra note 2, pp. 45-46, describing an arbitration where, out of 18 million documents, 890,000 were analysed. Additionally, it would be relevant to determine the law applicable to a document prepared electronically.

- > more appropriate than choosing the law of the jurisdiction where the party claiming the privilege resides.⁶¹

Disadvantages of this method are the high number of potentially applicable laws, depending on the level of internationalization of the client or its counsel, and the consequent application of conflicting privilege standards in the same proceedings.⁶² Commentators argue that there is a risk that parties who perceive they are being treated differently might seek to later challenge the arbitral award based on unequal treatment.⁶³

Naturally, tribunals should defer to parties, who have the burden of arguing which national law applies to the invoked privilege claim, provided this is done in good faith.⁶⁴ Additional rules to supplement this method and ensure procedural equality have also been suggested:

- (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.⁶⁵

B. Levelling the playing field

In relation to varying standards of privilege, one test to be considered is the *most favourable privilege test*. In this scenario, the arbitral tribunal will consider the different levels of protection afforded by the competing applicable laws, select the law that is most protective of the refusal to produce evidence based on legal privilege, and apply it to both parties. Analogous to the 'most favourable nation' concept of investment

arbitration, this aims to create a level playing field by generating an equal standard applicable to all parties in the same way.⁶⁶

The *ICDR International Arbitration Rules* (2014) adopt this criterion in its Article 22:

(...) 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 all parties, giving preference to the rule that provides the highest level of protection.

The *ICDR Guidelines for Arbitrators Concerning Exchanges of Information* also provide:

Privileges and Professional Ethics.

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.

The *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (1970) is also deemed to mean that the law which is most protective to the confidential information, either that of the state of execution or of the state of origin, will apply.⁶⁷ This test is commonly praised, as it necessarily satisfies parties' legitimate expectations in the proceedings, guarantees party equality, and avoids issues with recognition and enforcement of an award.⁶⁸ However, some commentators consider this method inadequate and unfeasible, due to the complexity of the comparative law analysis required and the difficulty in determining which law is in fact more protective with regard to legal privilege,⁶⁹ and the non-alignment of these considerations with the document production rules of the specific case.

⁶¹ See Kuitkowsky, supra note 1, at pp. 91-92; Berger, supra note 21, at p. 511.

⁶² H.C. Alvarez, 'Evidentiary Privileges in International Arbitration', in *International Arbitration 2006: Back to Basics?*, Vol. 13, ICCA Congress Series, A. J. van den Berg (ed.) (Kluwer, 2007) p. 685; arguing that this would lead to unfairness, D. Bishop, I. Fernandez de la Cuesta, 'A Defense of the IBA Guidelines on Party Representation', in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, A.W. Rovine (ed.), at pp.119-120.

⁶³ Von Schlabrendorff, Sheppard, supra note 13, at p. 772.

⁶⁴ Shaughnessy, supra note 56, at p. 467; C. Tevendale, U. Cartwright-Finch, supra note 59, at pp. 832-833, citing Mosk, Ginsburg, supra note 52, p. 384.

⁶⁵ G. Santiago Tawil, I.J. Minorini Lima, 'Privilege-Related Issues in International Arbitration', in *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, 29, (Dossier of the ICC Institute of World Business Law, 2009) p. 49.

⁶⁶ Berger, supra note 21, at p. 518; Born, *International Arbitration: Law and Practice* (Kluwer, 2015, 2nd ed.) §9.01.D.5, §21; and R. Levin, 'Privilege and International Arbitration', *Kluwer Arbitration Blog* (14 Aug. 2017).

⁶⁷ See Art. 11 of the Convention; see of this opinion, C. Cavassin Klamas, supra note 4, at p. 166.

⁶⁸ In favour of this criteria: C. Cavassin Klamas, supra note 4, at p. 178; Shafruddin, supra note 8, at p. 311; Levin, supra note 66; Gugler, Goldberg, supra note 14, at p. 70; M. Hunter, G. Travaini, 'Electronically Stored Information and Privilege in International Arbitration', in *Liber Amicorum Bernardo Cremades*, M. Á. Fernández-Ballesteros, D. Arias (eds.), 2010, p. 623.

⁶⁹ See von Schlabrendorff, Sheppard, supra note 13, at p. 772, 'The scope of the privilege, related standards of professional

Other issues to consider are the dissatisfaction of the party that suffers from the possibly illegitimate application of a more demanding privilege standard,⁷⁰ and the resulting removal of potentially relevant evidence from the proceedings.⁷¹ Finally, some authors mention that this method is rarely employed in practice.⁷²

In contrast with the above, the *least favourable privilege test* requires that the arbitral tribunal assess the different levels of protection to legal privilege afforded by the possible applicable laws and choose the least protective standard.⁷³

Naturally, such test favours the production of evidence in arbitration and in jurisdictions where privilege may be waived by the client, this approach allows even greater flexibility. However, as can be ascertained from our previous remarks, this test may hurt the expectations of a party that believes certain information to be protected under a certain jurisdiction, to find out that this will not be the case in arbitral proceedings.⁷⁴

Furthermore, complying with an order to produce a legal communication may amount to a breach of the lawyer's ethical rules, i.e. those in effect at the place of his/her registration,⁷⁵ and trigger criminal and disciplinary liability as in civil law countries. Some commentators also warn that if the rules that regulate legal privilege are considered part of public policy, they cannot be derogated from.⁷⁶ As a matter of fact, this may lead to 'ethical dumping' that might jeopardize the rules of legal privilege.

The most or least favourable privilege tests mentioned above have a potential for *counsel shopping*, whereby clients will look to select legal advisors based in jurisdictions with the broader or narrower protection

ethics, conditions of (partial or complete) waiver, possible inferences to be drawn from the exercise of the privilege right, and other elements need to be considered'.

70 Berger, *supra* note 21, at p. 519. See also the concerns of Rogers, *supra* note 1, at pp. 399-400.

71 Shaughnessy, *supra* note 56, at pp. 466-467.

72 I.M. Nour Shehata, 'The Standard of Attorney-Client Privilege in International Arbitration: Is The "Most Protective Law" The Right Answer?', *Kluwer Arbitration Blog* (18 May 2018).

73 Berger, *supra* note 21, at p. 519.

74 Berger, *supra* note 21, at p. 520; Levin, *supra* note 67; C. Tevendale, U. Cartwright-Finch, *supra* note 59, at p. 834.

75 Kuitkowsky, *supra* note 1, at p. 97.

76 C. Cavassin Klamas, *supra* note 4, at p. 161-164. This author understands internal public policy as mandatory rules and highlights that, in some jurisdictions, criminal laws sanctioning violations of privilege are mandatory rules based on public policy; regarding potential consequences in enforcement. See also von Schlabrendorff, Sheppard, *supra* note 13, at pp. 766-767; Mosk, Ginsburg, *supra* note 52, at pp. 380-381; and Alvarez, *supra* note 62, at pp. 694-696.

afforded to privilege by the respective ethical rules, as they may consider more convenient. We argue that, for sophisticated parties/counsel, this can be seen as a tool to level the playing field, as the parties will know, from the get-go, what to expect with regard to privilege.

IV. Application of standards

In some circumstances, arbitral tribunals have applied the IBA Rules on Taking of Evidence as a stand-alone standard, without regard to national laws on legal privilege:

- > In *Tidewater et al. v. Venezuela*,⁷⁷ the claimant objected to produce documents relating to the incorporation of a company of the Tidewater structure and the transfer of shares on the basis of legal privilege. The claimant argued that all communications between a lawyer and a client were protected, even when such communications included business considerations, which the respondent denied. The arbitral tribunal adopted the criteria embedded in the IBA Rules, Article 9(3)(a) ('made in connection with and for the purpose of providing or obtaining legal advice') and requested the parties to continue their document production procedure, highlighting the case-by-case analysis to be conducted for each document sought.
- > In *Apotex v. United States of America*,⁷⁸ the arbitral tribunal specifically decided that it would not consider privilege 'as a matter of any applicable national law or rules of law, but rather as one or more factors falling within Article 9(2) of the IBA Rules', applicable pursuant to the parties' arbitration agreement and the ICSID Arbitration (Additional Facility) Rules – both granting the arbitral tribunal full discretionary powers regarding document production.⁷⁹ During the proceedings, the

77 *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Procedural Order No. 1 on Production of Documents (29 March 2011) §§26-35 (available at <https://www.italaw.com/sites/default/files/case-documents/ita0861.pdf>).

78 *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on Privileged Document Production (5 July 2013), pp. 4-5, §14 (available at <https://www.italaw.com/sites/default/files/case-documents/italaw1575.pdf>).

79 Art. 41(1) and 41(2) of the ICSID Arbitration (Additional Facility) Rules provide: '(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value. (2) The Tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts.'

respondent requested that the claimant produce documents relating to communications with its legal advisers and consultants. The arbitral tribunal noted that the parties did not dispute that both ‘attorney-client privilege’ and ‘work product privilege’ were protected categories of documents under the IBA Rules and that the parties’ allegations were largely based on US law. The tribunal considered this an element relevant to ascertaining the parties’ expectations (even though Apotex was a Canadian company, both of its legal advisers and consultants were based in the US) but reinforced that it was only relevant to the extent of maintaining fairness and equality of the parties in the proceedings. The arbitral tribunal’s decision with regard to work product privilege considered the claimant’s expectations at the time the relevant documents were issued (such documents had been specifically produced by the consultants to assist the claimant’s legal advisers regarding a regulatory claim filed by an agency of the respondent).

- > In *Glamis Gold v. United States of America*,⁸⁰ the arbitral tribunal adopted the so-called ‘conceptual analysis’ method.⁸¹ The parties agreed that US law was of guidance for the tribunal to decide on the privilege claims but disagreed as to which jurisdiction’s standards should apply. The claimant argued for D.C. Circuit or federal common law standards, grounding this choice on the parties’ expectations, whereas the respondent defended the application of general principles common to both jurisdictions. The arbitral tribunal in this case recognized that US law was not directly applicable to the arbitration, as it was subject to the UNCITRAL Arbitration Rules, and assessed what were to be considered ‘party expectations’ according to NAFTA-related US case law. On this basis, the arbitral tribunal crafted legal standards applicable to the documents at issue: the party invoking attorney-client and/or work product privileges would have to justify why each document was to be

considered protected by privilege, and the other party would present its rebuttal arguments for the tribunal to decide.⁸²

In some cases, other approaches were applied to privilege claims, for instance:

- > Following a party’s refusal to produce legal advice provided by a French lawyer on contract negotiation, an arbitral tribunal seated in New York decided to analyse a document *in camera* and then ordered the production of a redacted version of the document in the proceedings.
- > In a case where all players were from civil law countries except the lawyers of one of the parties (who were from common law jurisdictions), an arbitral tribunal seated in Austria applied general principles developed in civil law countries on disclosure and due process. The arbitral tribunal allowed the production of an allegedly confidential letter exchanged between a party and its lawyer, after pondering both the interest of keeping attorney-client communications confidential and procedural truth and administration of justice.⁸³

Some commentators further suggest that in order to avoid a choice of law method altogether, arbitrators exercise their full discretion to determine *transnational ad hoc substantive standards* on legal privilege.⁸⁴ However, this may result in high unpredictability for the parties, especially if the standard applied does not take into account principles of equal standing of the parties, fairness, and parties’ legitimate expectations.

V. Pragmatic proposals ‘*ad usum delphini*’

Striking a balance between parties’ expectations, i.e. which law parties think would apply to privilege claims, and the equitable/fair treatment of the parties in the arbitral proceeding is at the core of the issue. Some

80 *Glamis Gold, Ltd. v. The United States of America* (under Chap. 11 of NAFTA, in accordance with the UNCITRAL Arbitration Rules, and administered by ICSID). This case relates to the alleged expropriation of a company and its rights over a gold mine in California. See Decision on Parties’ Requests for Production of Documents Withheld on Grounds of Privilege (17 Nov. 2005), p. 3 (available at <https://www.italaw.com/cases/487>).

81 C. Cavassin Klamas, *supra* note 4, at p. 177.

82 See *Glamis Gold, Ltd. v. The United States of America*, *supra* note 80, at pp. 3-9. At para. 23: ‘The Tribunal notes that the party asserting the privilege has the burden of proving that such privilege applies to each document but, after that showing is made, the burden shifts to the other party to contest the privilege’. The claimant raised issues such as the applicability of privilege to lawyers acting as attorneys for government agencies and whether the documents circulated to third parties (other agencies) were still considered privileged; it also criticized the fact that some documents that were withheld had not been prepared in anticipation of litigation, but rather in the ordinary course of business. The respondent raised issues such as the double role of a person acting as general counsel and executive.

83 Heitzmann, *supra* note 27, at pp. 228-238, and Vargas, *supra* note 4, at pp. 94-102.

84 Nour Shehata, *supra* note 72.

suggestions towards achieving this balance when there is more than one potentially applicable law are presented below.

A. Preventive advocacy

Lawyers are naturally the first to deal with legal privilege at a pre-arbitral phase. In this respect, we advocate for what is called 'preventive advocacy'. Teams of lawyers that have studied and are registered all over the world is not only an increasing fact but is rather quite often considered as a manifest necessity from the clients' point of view. Lawyers with mixed backgrounds can better understand the risks that may potentially arise from the negotiation and conclusion of contracts and consequent document production, and thus how to mitigate them. It has even been said that 'no counsel should expect that his or her ethics rules will be imposed on the opposing side or even be known by the arbitral tribunal'.⁸⁵ This is a strategic consideration to have in mind when advising and representing clients from different jurisdictions, who operate internationally and might have different expectations.

Preventing uncertainties with regard to privilege claims might be addressed by including contractual rules that address these issues and guide or impose rules to tribunals. This would at least avoid unnecessary surprises, and strategic or guerrilla-like tactics. Another advantage arising from these transnational teams would be the possibility to inform clients of potential conducts and be aware, as counsel, of conduct of their own that would be considered as waivers of privilege in the eyes of an arbitral tribunal.

B. Avoid 'ethical dumping'

From counsel's perspective, the best way to protect a client is to prevent a lower level of legal privilege. However, irrespective of the anticipation of the future, the risk of ethical dumping is to be taken seriously. When there is a clash of standards, the lowest common standard tends to prevail. The case of the 'plombier polonais' in trade dumping is illustrative: Polish plumbers were hired in France, instead of French professionals, because the wages of the former were considerably lower.

As happens with trade dumping, an 'ethical dumping' would be a threat to the legal profession and/or international arbitration. Legal privilege arises from concerns relating to a client's trust and ability to confide in their legal representative (with a more

substantive or procedural connotation depending on where the lawyer operates) resulting in better-quality legal advice across jurisdictions. As a matter of fact, legal privilege exists as a client's right, and a right and duty of the lawyer, which should equally apply before arbitral tribunals and state courts. By agreeing to arbitration, the parties voluntarily waive the right to a court, which cannot be tantamount to the waiver of legal privilege.

C. *Bon courage*, Arbitral Tribunal

If a privilege claim arises, arbitrators must courageously ask the parties what standards or law they would like to see applied to this issue. Party autonomy again plays a key role in the arbitral procedure, by limiting any arbitrary decisions by the tribunal, and ensuring legal predictability.

If the parties fail to choose or reach a joint decision, then the most protective privilege law/standard should apply. This metric will establish a maximum level common denominator between the parties. Ideally, no party that reasonably expects to see a specific piece of information protected at the time the document was issued will have to reveal it during arbitral proceedings. This will ensure a balanced interplay between protecting parties' reasonable expectations and procedural equality and fairness, which ultimately must prevail.⁸⁶ Even if a party expects a document to be produced, which will subsequently not be the case, this could be considered the lesser of all evils when considering both opposite scenarios. On the contrary, the first scenario is inherently tied to the risk of parties filing set aside actions against the award, or objecting to its recognition and enforcement, on the ground of breach of public policy and due process, which usually encompasses the principles of fair and equal treatment of the parties.⁸⁷

⁸⁵ S. Adell, 'Cross-Currents? How National Ethics Rules Affect International Arbitration', in *40 Under 40 International Arbitration*, C. Gonzalez-Bueno (ed.) (Dykinson, S.L., 2018) pp. 411-422.

⁸⁶ Alvarez, *supra* note 62, at p. 698, arguing that difficult cases must be solved with arbitration's inherent flexibility, through 'the exercise of arbitral discretion guided by the principle of equal and fair treatment of the parties'.

⁸⁷ Art. 34(2)(a)(ii) and (iv) and (b)(ii) of the UNCITRAL Model Law; Art. V(1)(2)(b) and (d), and (2)(b) of the New York Convention are relevant for these purposes. The Portuguese Arbitration Law establishes similar grounds in Art. 46(3)(ii) and (v) and Art. 48(1). Some authors are of the position that if the arbitral award is not set aside nor refused recognition and enforcement on the first two mentioned grounds, then public policy may also not operate, see Shaughnessy, *supra* note 56, at pp. 459-462. Differently, C. Cavassin Klamas, *supra* note 4, at p. 179.

Conclusion

While lawyers are bound by their law of registration, different expectations might arise from the parties with regard to the application of legal privilege in international arbitration. As the parties' arbitration agreement is usually silent on this issue, arbitrators must decide how to deal with privilege claims, taking into account that equality between the parties is of the essence in international arbitration.

The arbitrators' discretion in deciding on the applicable law or standard might at first appear as allowing flexibility to the arbitrators to decide legal privilege on a case by case basis, but *in fine* adds to the confusion and unpredictability of legal privilege claims in international arbitration.

Arbitral tribunals should therefore seek guidance from any rules applicable to the proceedings, such as national arbitration laws, institutional rules, and relevant soft law, and consider applying the most favourable legal privilege test when determining the relevant applicable law to legal privilege claims.

Since 'tribunals must seek to grapple with conflict of privileges with cultural sensitivity and common sense',⁸⁸ we believe the proposed solutions are pragmatic and serve the arbitral community. Some authors have further proposed addressing legal privilege in international arbitration in an optional text,⁸⁹ regulating counsel ethics in a broader sense through arbitral institutions, international organizations (such as the PCA, ICSID or UNCITRAL),⁹⁰ or even a 'Global Arbitration Ethics Council' created for this purpose.⁹¹

Although the reinforcement of predictability and trust in the applicable rules is the only way to increase in the long run the global level of satisfaction with the system of companies in need of settling disputes, a regulatory approach and attempted 'legal transplant' of foreign rules and practice may be counterproductive and risk isolating a legal concept from its cultural background, with its specificities and complexities.

88 von Schlabrendorff, Sheppard, *supra* note 13; at p. 773.

89 Kuitkowsky, *supra* note 1, at pp. 100-101. This author argues that this ensures both predictability and flexibility and that these rules could be included in the text of the IBA Rules on Taking of Evidence.

90 S. Schill, 'The Case for Public Regulation of Professional Ethics for Counsel in International Arbitration', *Kluwer Arbitration Blog* (7 July 2017); Charles B. Rosenberg, M. Imad Khan, 'Who Should Regulate Counsel Conduct in International Arbitration?', *Kluwer Arbitration Blog* (18 April 2016); D. Baizeau, 'The IBA Guidelines on Party Representation in International Arbitration: A Plea for Caution', *BCDR International Arbitration Review*, Vol. 2, 2015, at pp. 354-355; Rogers, *supra* note 1, at pp. 346-394, and Dattilo, *supra* note 31, at p. 645.

91 In favour, Born, *supra* note 66, §14.03.B, §15; against, Kuitkowsky, *supra* note 1, at pp. 99-100.