Legal privilege in international arbitration

El secreto profesional en el arbitraje internacional

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Abstract: It is more and more frequent that counsels from different jurisdictions are involved in preparing legal advice as companies offer their services and products abroad. This situation creates the risk that documents exchanged between clients and lawyers in one jurisdiction could be exhibited in future proceedings in another jurisdiction. Disclosure of certain information could determine several losses to businesses from prestige to lack of compensation that an unsuccessful case may entail. This type of legal chaos could diminish when business practitioners have autonomy to select the law for solution of future disputes, including the option to agree on the procedure to be followed by the adjudicator. This article analyses choice of law governing privilege by arbitrators as international arbitration is often referred to settle international disputes. Several soft law sources from arbitral institutional rules to the well-known IBA Rules on Evidence are scrutinized. It evaluates possible methods like the least protective privilege rule or the most protective privilege rules considering equal treatment. Finally, it explores the recent Unified Patent Court Rules as a source of inspiration for international arbitration.

Keywords: Legal privilege, professional secrecy, confidentiality, international arbitration, law applicable, IBA Rules, soft law, the Unified Patent Court Rules, procedural rules, hard law.

Resumen: Cada vez resulta más frecuente que en el asesoramiento jurídico de las empresas se encuentren involucrados abogados de distintos países, dado que las empresas ofrecen sus bienes y servicios en el extranjero. Esta situación está sujeta al riesgo de que los documentos intercambiados entre clientes y abogados en un Estado pueda exhibirse en otro Estado en un procedimiento posterior. La exhibición de determinada información puede implicar diversas pérdidas para los empresarios desde el prestigio o la falta de compensación por los casos sin éxito. Este tipo de caos jurídico podría disminuir, ya que los empresarios tienen la opción de elegir la ley aplicable para la solución de sus controversias futuras, incluyendo la opción de acordar el procedimiento que seguirá el árbitro. Este artículo analiza la selección de la ley aplicable al secreto profesional por los árbitros, puesto que el arbitraje internacional suele ser elegido para resolver las controversias internacionales. Se estudian determinadas fuentes de Derecho blando desde las reglas de las instituciones arbitrales hasta las famosas Reglas de la IBA sobre la práctica de la prueba en el arbitraje internacional. También se analizan determinados métodos como

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el de la regla menos protectora o el de la más protectora, considerando el principio de igualdad de trato. Finalmente, se exploran las recientes Reglas de Procedimiento del Tribunal Unificado de Patentes como fuente de inspiración para el arbitraje internacional.

Keywords: Privilegios probatorios, Secreto profesional, confidencialidad, arbitraje internacional, ley aplicable, Reglas de la IBA, Derecho blando, Reglas del Tribunal Unificado de Patentes, normas procesales, Derecho duro.

I. Introduction

1. Globalization and internationalization of commerce has been followed by a proliferation of normative rules that business operators need to comply with[1]. Seeking for specific legal advice in a range of different areas of law such as tax law, competition or privacy is extremely necessary in complex matters. This trend will not diminish in the future. It is more and more frequent that counsels from different jurisdictions are involved in preparing legal advice as companies offer their services and products abroad. This situation creates the risk that documents exchanged between clients and lawyers in one jurisdiction could be exhibited in future proceedings in another jurisdiction. Disclosure of certain information could determine several losses to businesses from prestige to lack of compensation that an unsuccessful case may entail.

2. Arbitration is a common mean to resolve disputes between international counterparts[2]. Some traditional advantages of arbitration are the provision of a neutral forum and the parties' control over the arbitral process[3]. Arbitration proceedings are more even-handed than the alternatives because of the ability of the parties to choose a neutral arbitrator with a different nationality in comparison with the parties' nationality, for example, under the ICC Rules[4]. The parties know that they can choose the venue that they perceive as fair, and they can design the arbitration procedure without being subject to state procedural laws[5]. Therefore, flexibility gives breath to arbitration proceedings.

[1] A.L. Calvo Caravaca, J. Carrascosa González, "Lex mercatoria and Private International Arbitration", *Cuadernos de Derecho Transnacional*, Vol. 12, No.1, 2020, pp. 66-85.

[2] Queen Mary & White & Case, *2015 International Arbitration Survey: Improvements and Innovation in International arbitration* (finding 90 percent of parties to international business transactions choose arbitration), available at https://www.international-arbitration-attorney.com/wp-content/uploads/2018/11/White-Case-and-Queen-Mary-2015-survey.pdf White & Case *2021 International Arbitration Survey: Adapting arbitration to a changing world,* available at https://www.whitecase.com/publications/insight/2021-international-arbitration-survey ["International arbitration is the preferred method of resolving cross-border disputes for 90% of respondents, either on a stand-alone basis (31%) or in conjunction with ADR (59%)".]

[3] A.T. von Mehren, "Limitations on Party Choice of the Governing Law: Do They Exist for International Commercial Arbitration?", *Pakistan Law Review*, 2001, pp. 138-150. https://leappakistan.com/wp-content/uploads/2019/04/Limitations-on-Party-Choice-of-the-Governing-Law-International-Commercial-Arbitration-Arthur-Taylor-Von-Mehren-PLR-Vol-I.pdf

[4] Gary Born names arbitration as the five "e" in comparison with the alternatives. Arbitration is more efficient, expeditious, even-handed, expert, and enforceable. Seventh Harvard International Arbitration Conference, 5.03.2021 at opening remarks.

[5] W. W. Park, "Arbitrators and Accuracy", *Journal of International Disputes Settlement*, Vol. 1, No. 1, 2010, pp. 25-35,

3. Nevertheless, more involvement of arbitration has not rid of some uncertainties that come with a procedure that parties need to tailor for their own benefit. The problem with privilege in international arbitration is related to the conceptual nature of legal privilege intertwined with circumstances where privileged evidence is admitted overriding the privilege justification[6]. It is alluded to the fact that this situation contrasts with national systems that have rules. However, neither these domestic rules entangle all privilege issues in international litigation nor national court or judges reach the same solutions. Even within the same country, there are different positions that can be followed in order to determine whether to accept a legal privilege to be governed by foreign law, such as in the United States[7]. This situation contrasts with little guidance on the law applicable to privilege in continental systems like Spain or Germany.

4. The international community expressed controversial views on the creation of new arbitral rules on privilege. For example, in a 2018 survey, 48% of respondents consider that there should be arbitration rules, whether institutional or *ad hoc*, including provisions on privilege meanwhile 52% of respondents do not consider necessary to have more arbitration rules on privilege[8]. Recently some partners have raised their voice for clearer guidance on the issue because determining privilege rules can be costly and complex[9]. This view seems a minority, as the last reform on the Taking of Evidence in International Arbitration of the IBA Rules does not specify new rules on privilege.

5. It is usually said that there is a lack of rules to guide arbitrators to decide which privilege law to apply[10]. However, the true situation is that there is a lack of rules that bind arbitrators to determine the choice of law approach to follow when deciding privilege law, absent a clear choice by the parties. Is there any need of a uniform standard to guide arbitrators all over the world? Should arbitrators not be free to choose wherever law they consider? Is there any need to have a fast and hard rule when a culture of arbitration is already in place? This study tries to shed light on these questions from a critical perspective.

6. The structure of the article is the following. Section II examines terminological questions around the concepts of confidentiality, professional secrecy, and legal privilege. It dives in comparative law with a transatlantic perspective on common law and civil law jurisdictions. It tries to go to the heart of the matter explaining the functions that legal privilege serves. Section III opens a range of possibilities for the law applicable to legal privilege from parties' agreement to the selection of arbitrators. Different options are analyzed: institutional rules, the well-known IBA Rules, and advantages and shortcomings of each applicable law to consider in the closest connection test. Next, section IV explains one type of test based on equal treatment that arbitrators have used, considering the problematic questions of public policy. Section V offers the tension between clarity and flexibility dealing with the choice-of-laws in legal privilege. Afterwards, section VI studies the option to resort to a transnational approach with the foundation of a European concept of legal privilege based on the Court of Justice of the European Union jurisprudence. Moreover, section VII comments the Unified Patent Court Rules on privilege law as a model in international IP disputes. Finally, this article concludes with some remarks to consider on this complicated topic.

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p. 31: "arbitration enhances a relative measure of adjudicatory neutrality, which in turn promotes respect for shared ex ante expectations at the time of a contract or investment".

[6] J.D.M. Lew, "Document Production and Legal Privilege in International Commercial Arbitration", in D. D. Caron, et al, *Practising Virtue: Inside International Arbitration*, Oxford University Press, 2015, p. 347.

[7] *See* A. Möckesh, *Attorney-Client Privilege in International Arbitration*, Oxford University Press, 2017, pp. 165-170.

[8] Queen Mary & White & Case, *2018 International Arbitration Survey*, p. 34 http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF

[9] R. Cowley/ Y. Lilley, "Conflict of privilege rules in international arbitration, A call for clearer guidance", *International arbitration report,* Norton Rose, Issue 7. 2016, p. 29. C. Beharry, "Objections to Requests for Documents in International Arbitration: Emerging Practices from NAFTA Chapter 11", *ICSID Review,* Vol. 27, No. 1, 2012, pp. 33-64, p. 64, affirms that IBA Rules "should articulate applicable rules, as opposed to merely guiding privilege, with respect to evidentiary privileges".

[10] G. B. Born, *International Commercial Arbitration*, 3rd Ed., Kluwer Law International, 2021, p. 2550.

II. Terminology, comparative law and functions of legal privilege

1. The question of different terminology: confidentiality, professional secrecy and legal privilege

7. Confidentiality is a broader concept than privilege[11] because the former concept concerns information shown in arbitral proceedings regarding third parties[12]. Confidentiality governs whether the hearings, the briefs or the award needs to be kept secret or public towards third parties other than the arbitration procedure[13]. For instance, the Spanish Arbitration Act states that: The arbitrators, the parties and the arbitration institutions, where appropriate, are obliged to keep the confidentiality of the information they learn through arbitration proceedings [art. 24(2) Spanish Arbitration Act][14]. Therefore, confidentiality in international arbitration relates to the duty of the parties to exclude to third parties any documents created for the purpose of the hearing[15]. An arbitration is usually confidential, so the information that occurs in the arbitration proceeding is not disclosed to third parties or the public[16].

8. However, "professional secrecy" or "legal privilege" refers to a specific question of admissibility of evidence[17]. Legal privilege is confidentiality within the arbitration proceeding itself between a party and their lawyers, thus, certain communications do not come to light in the proceeding. A privilege is defined by some scholars as "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. Whether developed judicially or by statute, each privilege reflects a judgment that the social value of excluding evidence outweighs the influence such evidence may have in ascertaining truth in a particular case. Privileges therefore reflect the public policy of the legal system that grants them."[18]

9. In addition, "Professional secrecy" is used in civil law countries while "legal privilege" is preferred in common law countries. Professional secrecy of communications between lawyers and clients implies the right of a party or a third party to refuse to show documents or testify in an arbitration proceeding[19]. Professional secrecy was not invented to cover the lawyers conduct, but to guarantee that the truth can only be obtained through legal paths, respecting the presumption of innocence. First, the right to confidentiality of communications between lawyer and client is understood as a right of the client that can be invoked in the event of an undergoing inspection by regulatory authorities to protect those communications and documents prepared by their lawyers. By the same token, professional secrecy is a duty that falls on the lawyer who provides legal advice, in the sense that it is about preventing a third party or an authority from knowing documents directly related to civil proceedings.

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[11] E. Silva Romero, "De la confidencialidad del arbitraje internacional y materias aledañas", in E. Gaillard, D. Fernández Arroyo, L. Chatelain, Lucie, & R. F. Alves, *Cuestiones claves del arbitraje internacional* (1st ed., Biblioteca de derecho de la globalización-CEDEP), Bogotá, D.C: Editorial Universidad del Rosario, 2013, pp. 165-188.

[12] Spanish legislation expressly establishes confidentiality as a legal obligation (art. 24.2 Spanish Arbitration Act 2003) that grants the "right" to the parties not to reveal anything that happens in the arbitration procedure. M. Sindler & T. Wüstemann, "Privilege Across Boarders in Arbitration: Multi-Jurisdictional Nightmare or a Storm in a Teacup?", *ASA Bulletin*, Vol., 23, No. 4, 2005, pp. 610-639, pp. 613–614, p. 635. J. C. Fernández Rozas, "Trayectoria y contornos del mito de la confidencialidad en el arbitraje comercial", *Arbitraje. Revista de Arbitraje Comercial y de Inversiones,* Vol. I, No. 2, 2009, pp. 335-378, p. 336.

[13] Fernández Rozas, "Trayectoria y contornos…", *op.cit*., p. 337.

[14] Spanish Arbitration Act 60/2003, 23 December, BOE No. 309, 26.12.2003.

[15] M. Collins, "Privacy and Confidentiality in Arbitration Proceedings", *Texas International Law Journal*, vol. 30, 1995, pp. 121-134, p. 126.

[16] With more exceptions in investment arbitration.

[17] P. Heitzmann, "Confidentiality and Privileges in Cross-Border Legal Practice: The Need for a Global Standard?", *ASA Bulletin*, Vol. 26, No. 2, 2008, pp. 205-239, p. 207. A. Bravo and V. Arias, "Legal Privilege and Confidentiality in Spain", in D. Greenwald and M. Russenberger (eds.), *Privilege and Confidentiality* 2nd Ed., IBA, 2012, §15.13.

[18] R. Mosk, & T. Ginsburg, "Evidentiary Privileges in International Arbitration", *International and Comparative Law Quarterly,* vol. 50. No. 2, 2001, pp. 345-385, p. 346.

[19] Möckesch, *Attorney-Client Privilege ..., op.cit.,* pp. 13-14.

10. Moreover, the legal characterization of these two concepts is different. On the one hand, professional secrecy has a legal nature. It is a right of the attorney arising from the law. In some countries from the highest norm, for example, professional secrecy is enshrined in the 1978 Spanish Constitution, article 18 (3). By contrast, legal privilege under English and U.S. law is a client's right. On the other hand, confidentiality has a contractual nature; there is a contractual commitment between the parties but not everything that is confidential is included within privilege. However, legal privilege is confidential by nature.

2. Comparative law: some substantive differences

11. In this section, some substantive differences between legal privilege and professional secrecy are analyzed. First, the issue of who can invoke legal privilege. Second, types of legal privilege under English law as English itself is the dominating language used in international contracts. Third, a need to identify who is a client to be protected by privileged law is discussed in some jurisdictions. Fourth, a personal approach in contrast with an *in rem* approach to privileged information is explained. Fifth, since professional secrecy is established as a duty in some jurisdictions, it is necessary to understand the benefits of professional secrecy. Sixth, in-house counsel privilege controversy is explained.

12. First, the lawyer invokes the legal privilege, not the client as occurs in Spain, the Netherlands[20], Germany[21] and Switzerland[22]. This lawyer's duty is also reflected in the waiver of privilege, as the consent of the client is necessary to waive privilege deliberately but not sufficient in civil law jurisdictions. The lawyer has also a right of privilege and only he can waive it[23]. This situation contrasts with English law and U.S. law where the privilege belongs to the party[24]. Eventually, a party may waive protection under privilege in common law jurisdictions. The client is the only person able to waive the privilege under English law[25]. Moreover, the definition of client has been construed very narrowly under English law[26]. For example, where corporations retain lawyers, the client is not deemed to be all company employees[27] although this narrow definition of client under the *Three Rivers* case has been criticized in other common law jurisdictions, such as Singapore[28] and Australia.

13. On the dichotomy of the privilege belonging to the client or to the lawyer[29], the International Association of Lawyers on a Collective Members' Statement on Professional Privilege declares that "legal professional privilege belongs to and protects the client" and they coined the expression

[20] V. Affourtit & F. Mattheijer, Lex Mundi Netherlands (Feb. 15, 2020) https://interactiveguides.lexmundi.com/lexmundi/lex-mundi-global-attorney-client-privilege-guide/netherlands

[21] Möckesch, *Attorney-Client Privilege ... op.cit.,* p. 96.

[22] N. Gregoire, *Evidentiary privileges in international arbitration*, Genève, Schulthess, 2016, p. 63.

[23] Bravo & Arias, "Legal Privilege and Confidentiality in Spain", *op.cit.*, §15.7.

[24] Möckesch, *Attorney-Client Privilege ... op.cit.,* p. 44. Also in Australian law, see *Baker v Campbell* (1983) 153 CLR 52 at 85 (Murphy J).

[25] *Quinn Direct Insurance Ltd v Law Society of England and Wales* [2010] EWCA Civ 805.

[26] *Three Rivers District Council and others v Governor and Company of the Bank of England* (No. 5) [2003] EWCA Civ 474 ('*Three Rivers*'). (A unit created within the bank was the "client". The unit was composed by three men). "*Three Rivers (No 5)* confines legal advice privilege to communications between lawyer and client, and the fact that an employee may be authorised to communicate with the corporation's lawyer does not constitute that employee the client or a recognised emanation of the client."

[27] *RBS Rights Issue Litigation* [2016] EWHC (Ch.) 3161,[64].

[28] Singapore Court of Appeal in *Skandanavia Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and others* [2007] 2 SLR 367, ["When a company retains solicitors for legal advice, the client must be the company. But since a company can only act through its employees, communications made by employees who are authorised to do so would be communications made 'on behalf of his client'. The only relevant issue is whether the communication is made for the purpose of obtaining legal advice, and if so, the communication falls within the privilege, provided that other requirements of the privilege are present, viz, that the communications are confidential in nature, and the purpose of the communication is for the purpose of seeking legal advice. Authorisation need not be express: it may be implied, if that function is related to or arises out of relevant employee's work."]

[29] International Association of Lawyers, *International Report on Professional Secrecy and Legal Privilege*, Nov. 2019, p. 95, available at: https://www.uianet.org/sites/default/files/international_report_professional_secrecy.pdf

"client privilege" as a "fundamental human right and lawyer's obligation to maintain" (2019)[30]. They are tilting toward a common law approach in this sense, meanwhile they declare in the introduction that "variations and nuances among jurisdictions make a 'one size fits all' definition impossible". Despite not being a study for the purposes of "harmonizing" legal privilege on an arbitration setting, the statement affirms that "it is commonly held that, in the international commercial arbitration, any matters subject to attorney-client privilege are excluded from disclosure obligations, whether they are documents or verbal statements. The IBA Rules on the Taking of Evidence in International Arbitration in 2010 also materialize this principle."[31] Therefore, it is highly remarkable that legal privilege is more a right of the client than anything else under the proposal approach of the International Association of Lawyers.

14. This view contrasts with national Attorneys' Codes of Conduct which expresses that the duty of confidentiality is also a fundamental right for lawyers[32]. For example, art. 9 of the Italian Lawyers Code of Conduct, (*Codice di Deontologia*) approved by the Central Governing Board of the Italian Bar (*Consiglio Nazionale Forsense*) on April 17, 1997, in section 1 considers that *1.- Attorneys have the duty and the fundamental right not to disclose the subject matter of the professional services provided to clients or information received from clients, or otherwise obtained in connection with the carrying out of the professional mandate*.[33]

15. The implications of "property" of legal privilege are considerable because the waiver of the privilege can only be invoked by the client (like in the UK or the United States) or the lawyer (such in the Netherlands) or neither of them (like in France).

16. Second, legal privilege is differentiated in two occasions: legal advice and intervention in judicial proceedings[34]. English 'legal professional privilege' division between 'legal advice privilege' and 'litigation privilege' presents analogues (not always perfect ones) to the American notions of 'attorney-client' privilege and the 'work product' doctrine.[35] One exception is that legal privilege does not display its effects in the event that the lawyer is acting or following instructions to commit an offense.

17. Legal Advice Privilege in England and Wales implies a substantive right to withhold production of confidential communications between a lawyer and the lawyer's client for the purpose of giving or receiving legal advice. However, communications of solicitors with third parties that are not for the purpose of preparing for the defence or bringing the action are not privileged[36].

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[30] *Ibid.*

[31] *Ibid*., p. 44.

[32] Judgment of 21 February 1975, ECtHR, *Golder v. United Kingdom*, paras. 26-40. Judgment of 26 June 2007, Case C-305/05, *Ordre des barreaux francophones and germanophones*, (EU:C:2006:788), para. 41.

[33] *See* Declaration of Franco Ferrari in Support of Guess Inc.'s Opposition to Gucci America, Inc.'s Motion for a Protective Order Against the Disclosure of the Privileged Communications of Non-Party Guccio Gucci S.P.A.'S in-House Intellectual Property Counsel Vanni Volpi) 2010 WL 10805084 (S.D.N.Y.) (Expert Report and Affidavit).

[34] *Anderson v Bank of British Columbia* (1876) 2 Ch D 644. The distinction between legal advice and litigation privilege began to emerge from three major Court of Appeal decisions later in the 19th century. *Anderson v Bank of British Columbia 1875–1876) L.R. 2 Ch. D. 644*. held that the request by the principal was not privileged, in particular an English bank's London manager for information directed to the branch manager in Oregon to find out the full facts of transactions on an account in respect of which a dispute had arisen. *Southwark and Vauxhall Water Company v Quick (1877–1878) L.R. 3 Q.B.D. 315* involved certain documents being prepared to be laid before the company's solicitor for his advice before the water company sued its former engineer but when the action was contemplated. The Court of Appeal held that they were privileged. In *Wheeler v Le Marchant (1881) L.R. 17 Ch. D. 675* It was held that while communications between the defendant and the estate's solicitors were privileged, the reports of the estate agent and surveyor were not. The Court of Appeal rejected the contention that legal advice privilege applied to other than communications between client and lawyer. Phipson *on Evidence*, 19th Ed. *Consolidated Mainwork Incorporating Second Supplement*, para. 23-68. Regarding Anderson case, Phipson writes: 'a modern view would have been that litigation in respect of the account was in reasonable prospect, the distinction between legal advice and litigation privilege was then in its infancy and the judgments proceeded on the basis that litigation privilege did not apply' citing Bingham LJ in *Ventouris v Mountain [1991] 1 W.L.R. 607* at 612; and Longmore LJ in *Three Rivers (No.5) [2003] Q.B. 1556* at [10].

[35] Park, "Arbitrators and Accuracy…", *op.cit*., pp. 47-48.

[36] According to Cotton LJ, "it is not necessary, in order to enable persons freely to communicate with their solicitors and obtain their advice" Court of Appeal in *Wheeler v Le Marchant* (1881) 17 Ch D 675.

18. Legal Advice Privilege applies to a lawyer's drafts of documents and memoranda prepared for giving legal advice without considering whether these documents are ultimately communicated to the client. This test is called Working Papers' doctrine[37]. However, this does not attach to documents prepared by the client that are not intended to be transmitted to the lawyer. For instance, interviews with employees or translations of a pool of "unprivileged" documents fall within the scope of own client documents[38].

19. The test to determine whether the lawyers' working papers, like annotation by counsel, are privileged needs to consider if the documents would "give a clue" to the trend of advice being proffered if the documents were disclosed[39]. For example, verbatim transcripts of unprivileged interviews would themselves not be privileged[40].

20. According to English doctrine, a claim for privilege is an unusual claim because "the party claiming privilege and their legal advisers are judges in their own case, subject of course to the power of the Court to inspect the documents"[41]. Therefore, the court must be very careful and a claim to privilege should be as specific as possible. A document collecting information from interviews of employees to later consider them and provide advice to a client must be distinct from a document which itself reveals that advice[42]. For example, an attendance note between two parties' solicitors which are not confidential do not attach privilege[43]. In contrast, a verbatim transcript of the conversation which discloses the questions asked by the lawyers would attract privilege under the lawyers' working papers test[44].

21. Third, in civil law countries like Belgium, Austria and the Netherlands there is not a test for the identification of the client for the purpose of establishing the confidential nature of communications or documents. The legal entity that instructed the attorney is deemed to be the client[45], because there are no general guidelines for determination of the client within the corporate structure. By contrast, under the U.S. control group restriction, courts consider whether the entity is exercising control within the corporate group or is a controlled entity. This theory has been rejected under English law because it tends to "frustrate the very purpose of the privilege" and it is unpredictable[46]. Yet, civil law authorities have not developed any theory to distinguish between a controlled entity or an entity controlling the corporate group. Therefore, any entity within a corporate structure that has communicated with the attorney may deem to be the client[47]. For example, under Danish law no distinction is made between levels of authority or employees[48]. There are two factors to discern whether the information is subject to the duty of confidentiality: the information is obtained about a client and that was received by the lawyers in the course of his duties. Thus, any person within the corporation and not only the members of the Board of Directors or the CEO can provide such information to the lawyer, so such correspondence is subject to privilege.

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[37] *Three Rivers DC v Bank of England* (No 5) [2003] EWCA Civ 474,

[38] *Sumitomo Corporation v Credit Lyonnais Rouse* [2001] EWCA Civ 1152, [71] (Court of Appeal).

[39] Eady J in *Imerman v Tchenguiz* [2009] EWHC 2902 (QB) held (at §16), cited in RBS Rights Issue Litigation [2016] EWHC (Ch.) 3161,[102].

[40] *Property Alliance Group v RBS (No 3)* [2015] EWHC 3341 (Ch) (at §24), Birss J.: "a record of a non-privileged conversation, whether in the form of a verbatim note or a transcript, cannot itself be privileged if the underlying conversation was not privileged."

[41] *West London Pipeline v Total* [2008] EWHC 1729 (Comm) *per* Beatson J (as he then was) at §86. RBS [108]. (2) The Court must be particularly careful to consider the basis on which the claim for privilege is made. (3) Evidence filed in support of a claim to privilege should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect.

[42] *Sumitomo Corporation v Credit Lyonnais Rouse* [2001] CP Rep 72. RBS Rights Issue Litigation [2016] EWHC (Ch.) 3161,[112].

[43] Court of Appeal in *Parry v News Group Newspapers* [1990] 141 NLJ 1719 (CA)(114).

[44] *RBS Rights Issue Litigation* [2016] EWHC (Ch.) 3161,[112].

[45] Belgium L. Wolters W. Kirkpatrick, Lex Mundi member firm for Belgium. (March 24, 2020).

[46] *RBS Rights Issue Litigation* [2016] EWHC (Ch.) 3161,[96].

[47] Bulgaria Penkov, Markov & Partners, Lex Mundi member firm for Bulgaria. (March 24, 2020)

[48] Denmark C. J. Hansen, K. Reumert, the Lex Mundi member firm for Denmark. (March 18, 2020)

22. Fourth, a personal approach to confidentiality means that documents are protected depending on the recipient and the originator of information. In civil law countries protection of documents is only guaranteed by virtue of the professional secrecy of lawyers. Lawyers acting in his legal capacity are entitled to claim professional secrecy and not clients. On the contrary, whether lawyers act as any citizen, his activities are not protected by professional secrecy[49]. By contrast, common law countries maintain an approach *in rem* to confidentiality, which affords protection to the content of certain legal communication disregarding if the lawyers are in-house or external[50].

23. Fifth, professional secrecy is categorized as an obligation of certain professions such as lawyers and doctors to remain silent regarding information gathered during their professional relationship. It is not necessarily that the fact is secret for the lawyer to have the obligation of non-disclosure which contrasts with the common law doctrine where protection of legal privilege is only to communications made in confidence. In continental law, the professional duty and the client right are two sides of the same coin, but it is really the lawyer who can invoke professional secrecy to exclude production of communications protected by professional secrecy. Under Spanish law, only by referring to the notion of professional duty, it can be understood that there is a violation of professional secrecy if a client records a conversation with the opposing party in the lawyer's office and with her consent to present it as evidence later[51].

24. Professional secrecy is created for the benefit of the system of justice with the professional duty of lawyers not to reveal confidential information covered by the secret. The secrecy is understood as absolute and indefinitely inviolable because it is based on public interest. Some countries maintain a strict professional secrecy regarding lawyers' partnership.[52] Chinese walls are not enough for safeguarding the respect of independence and professional secrecy of lawyers[53]. In this regard, a Dutch measure which prohibits lawyers practicing in the Netherlands to multi-partnership with professional accountants is necessary to protect independency and professional secrecy of lawyers. The CJEU held that this kind of measure is not contrary to EU law in the *Wouters* case[54]. Thus, a distinction is highlighted between confidentiality of lawyers and auditors. However, the *Wouters* judgement would be different if there were specific European rules on lawyers' professional secrecy[55]. Under the current situation, each EU Member State remains free to regulate the exercise of the legal profession within its territory. Consequently, the rules may differ substantially from one Member State to another Member State. Domestic regulations imposing stricter confidentiality are possible to foster independence of lawyers *vis-à-vis* the public authorities and third parties.

25. Sixth, regarding in-house counsel privilege, in some jurisdictions in-house counsels enjoy legal privilege at the same level of external lawyers[56]. In this regard, Lord Denning defense of inhouse

[49] On the contrary if lawyers act as any citizen, his activities are not protected by professional secrecy. *See* STS 1431/2003, 3 March 2003.

[50] On in-house protection *see infra* in this work.

[51] STS 3583/1999, de 24 de mayo (Sala de lo Contencioso, sección 3).

[52] CJEU, C-309/99, *Wouters and others*, 19.02.2002, (ECLI:EU:C:2002:98), (professional secrecy is part of the characteristics of a lawyer that is not comparable with an auditor). Opinion of Advocate General Philippe Léger of 10 July 2001, C-309/99 *Wouters* (ECLI:EU:C:2001:390), para. 180 considers that professional secrecy together with independence and the necessity to avoid conflict of interests are the essence of the profession of a lawyer is all Member States. Professional secrecy is the base for a trust relationship between a lawyer and his client. On the one hand, the lawyer is required to not disclose the information provided by his client even after the termination of his mandate and vis-á-vis third parties. On the other hand, professional secrecy is deemed to be an essential guarantee for freedom of individuals and the good functioning of justice. For the latter reasons, professional secrecy takes part of public policy in most Member States (para. 182).

[53] Opinion of Advocate General Philippe Léger of 10 July 2001, C-309/99 *Wouters* (ECLI:EU:C:2001:390), para. 194.

[54] CJEU, C-309/99, *Wouters and others*, 19.02.2002, (ECLI:EU:C:2002:98), para. 105 (professional secrecy is part of the characteristics of a lawyer that is not comparable with an auditor) ("the Bar of the Netherlands was entitled to consider that members of the Bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional secrecy if they belonged to an organization which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those accounts.")

[55] With the exception on legal privilege in EU competition cases, *see infra* section VI.

[56] Examples of these countries are Spain or the UK. Also in Portugal, Greece, Denmark, Ireland, England, Wales and Scotland. *Lex Mundi Attorney-Client Privilege Guide*. Berger, "Evidentiary Privileges: Best Practices…", *op.cit*., 2006, p. 505.

lawyer privilege is highly persuasive: "They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges."[57]

26. However, many civil law jurisdictions reject to apply lawyer-client privilege when the communications are with in-house counsels on the justification that in-house counsels are not subject to the Attorneys' Code because they are not registered with the Bar. This situation occurs in France, Italy, Sweden, Belgium, Austria or Slovenia[58]. The EU concept on legal privilege based on CJEU jurisprudence does not afford legal professional privilege to in-house lawyers[59]. The reason to exclude legal privilege is that in-house lawyers are not independent from the firm they are hired. Moreover, in the CJEU jurisprudence the different treatment of an in-house lawyer and an independent lawyer is not considered an infringement of the principle of equal treatment. In their capacities as in-house lawyers they act in a different context, "owing, in particular, to the functional, structural and hierarchical integration of inhouse lawyers within the companies that employ them"[60]. The idea of excluding the information of in-house lawyers from confidential protection lies at the fact that they are employees, and therefore, that they do not maintain a statute of independence as an autonomous lawyer. However, it is questioned whether independence is a matter related to the salaried nature of a company, or rather the existence of a dominant client for lawyers. It must be recalled that EU law independence of legal professionals comes from specific laws to prevent money laundering within the EU[61]. The Anti-money laundering Directives (AMLD) imposes reporting suspicious financial transactions by certain professionals, including lawyers[62].

3. Functions of legal privilege

27. Despite different notions on legal privilege, no legal system can be imagined without the right to confidentiality of communications between lawyers and clients. The Edward report concluded

[57] *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102, 129 per Lord Denning MR.

[58] J. Sladič, "Professional secrecy and legal professional privilege: Slovenian perspective on arbitration and civil litigation", *Maastricht Journal of European and Comparative Law*, Vol. 25, No. 2, 2018, pp. 188-207, p. 195. The Slovenian civil procedure code and the Law on Attorneys have been rather influenced by the Austrian civil procedure code until a point that a commentator consider them adaptations of Austrian legislation. After the last reform in 2017 also there is Swiss influence.

[59] Judgment of the Court (Grand Chamber) Case C550/07 P, *Akzo Nobel Chemicals Ltd, Ltd and Akcros Chemicals Ltd v Commission* (hereinafter *Akzo II*), 14.09.2010. (ECLI:EU:C:2010:512), paras. 44-49.

Judgment of the Court of First Instance (First Chamber, Extended Composition), Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, 17.09.2007, (EU:T:2007:287), para. 174. This perspective was confirmed in *Akzo II*.

[60] Judgment Of The Court Of First Instance (First Chamber, Extended Composition) 17.09.2007, Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, (EU:T:2007:287), para. 174.

[61] But also notaries, see *John Fish Report for the Council of Bars and Law Societies in Europe* (CCBE, 2004), p. 7: "this concept of independence at Community level is to be found in the imposition on legal professionals, pursuant to the EU money laundering Directive of reporting obligations concerning suspicious financial transactions. In particular, it will be noted that the exclusion from a reporting obligation by independent legal professionals can arise in certain privileged circumstances as described in Article 6 of Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering as substituted by Council Directive 2001/97/EC".

[62] Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering as substituted by Council Directive 2001/97/EC is the first AMLD, *OJ L 344, 28/12/2001.* (No longer in force). The current framework is composed of: Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC. *OJ L 141, 5.6.2015, (AMLD IV); and* Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU , *OJ L 156, 19.6.2018, (*AMLD V).

that the differences between the laws of the different Community countries "lie more in the approach or in the method (unavoidable consequence of their different legal systems) than in the results."[63] In our opinion, confidentiality of communications between lawyers and clients must be considered a universal value under the rule of law in democratic States[64]. The most powerful argument to support the latest affirmation is that using arbitration to settle a dispute does not imply an automatic waiver of the right to legal privilege in communications between lawyers and their clients. However, substantive law on professional secrecy has been subject to various shakes by public authorities for years. This legislative policy has been shortening the perimeter of professional secrecy on money laundering, competition law and tax law in particular[65].

28. Legal privilege encourages open communications between lawyers and clients[66], satisfying parties' expectations on confidentiality. It also impacts parties' settlement opportunities, affecting counsel advice and downstream behavior concerning transnational legal advice[67]. Most important, evidence disclosure or lack of disclosure effects the adjudication process result, and consequently, the arbitral award. Therefore, legal privilege plays a critical role in the conduct of arbitral proceedings.

29. Anticipating the law applicable to legal privilege over a claim gives power to structure commercial transactions, as the parties know the privilege applicable *ex ante* (before the dispute arises). The value of potentially relevant evidence changes to prioritize the value of lawyer-client open communications to provide the best possible legal advice for contentious and non-contentious matters.

30. Domestic statutes rarely express that legal privilege is also applicable to arbitration proceedings or ADR. However, the European Mediation Directive in recital 23 clearly refers to the privilege of mediation "in any subsequent civil and commercial judicial proceedings or arbitration"[68]. In this sense, the Spanish Mediation Act provides that confidentiality of communication between parties relates to mediation privilege that refers to the exclusion of documents derived from the mediation or related to the mediation both to court and arbitral proceedings[69]. Another exception is the Arbitration Act of Kenya [s. 20(4)] that states that "Every witness giving evidence and every person appearing before an arbitral tribunal shall have at least the same privileges and immunities as witnesses and advocates in proceedings before a court."[70] Therefore, there is no reason why the scope of legal privilege should be different in arbitration[71].

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[63] Q. C. Edward, *The Professional Secret, Confidentiality and Legal Professional Privilege in Europe*, an Update on the Report by D.A.O. Edward, QC, the Council of Bars and Law Societies of Europe (CCBE), 2003, http://www.europarl.europa.eu"

[64] On the concept of universal value, *see* M. Reimann, "Are there universal values in choice of law rules? Should they be any?", in F. Ferrari, & D. P. Fernández Arroyo, (eds.), *Private International Law.* Cheltenham, UK: Edward Elgar Publishing, 2019, pp. 178-194, p. 191: ("Beyond the various particular "values," it should be an overarching premise that choice of law rules avoid fundamentally unfair results. At minimum, a result is fundamentally unfair if a party is subjected to obligations without a legitimate reason.")

[65] J. M. Alonso Puig, "Secreto profesional y abogacía de empresa: un vínculo inescindible", *Expansión Jurídico*, 16 March 2021, ("It could be said that attempts are made to objectify over and over again, reduced to a piece that is the object of apprehensive greed by the management and inspection bodies and, to a lesser extent, by the jurisdictional bodies. We obtain this negative reading from the attacks that, under the guise of organized crime, money laundering, competition law and tax law, are produced by the legislator.") own translation, available at https://web.icam.es/articulo-del-decano-jose-maria-alonso-en-expansion-juridico/

[66] Lew, "Document Production and Legal Privilege in …", *op.cit*., p. 348 (affirming this objective in the common law system).

[67] S. D. Franck, "International Arbitration and Attorney-Client Privilege - A Conflict of Laws Approach," *Arizona State Law Journal,* Vol. 51, No. 3, 2019, pp. 935-1001, p. 938.

[68] *See* recital 23, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. *OJ L 136, 24.5.2008.*

[69] Spanish Mediation Act art. 9(2). Ley 5/2012, de 6 de julio, de mediación en asuntos civiles y mercantiles. «BOE» núm. 162, de 7 de julio de 2012.

[70] P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*. Alphen aan den Rijn: Wolters Kluwer Law International, 2019.

[71] J. H. Carter, "Privilege Gets a New Framework", *International Arbitration Law Review*, Vol. 13, 2010, p. 16.

31. One the one hand, arbitral jurisprudence also states that the Lawyer-Client privilege is "recognized in public international and international commercial arbitration rules and arbitral awards."[72]

32. On the other hand, rules on legal privilege are based on social values that are external to the trial process[73]. Under common law and civil law, unreliable evidence or evidence with no probative value are excluded from the process because the goal is ascertaining the truth. Engaging in free communication and protecting communication with lawyers or settlement mediators are part of overriding social interests that prevail over relevant, probative and reliable evidence which is excluded in the trial process[74].

33. However, legal privileges reflect the public policy of a legal system that does not need to coincide with other systems. In this regard, evolution of protection of communications with in-house lawyers in Europe seems paramount. Likewise, harmonization in the process of private enforcement of competition law in relation to claim damages is a significant contribution to development on privilege laws within the EU. Since information asymmetry exists in areas of competition law litigation or consumer protection, this is the main reason to increase the right to obtain disclosure of relevant evidence to their claim, as the opposing party or third parties may be held exclusively the necessary evidence to prove a claim for damages. Making accessible to the claimant this type of evidence is deemed to be part of the principle of equality of arms[75].

34. When lawyer-client privilege is not expressly recognized, a general rule on confidentiality subject for lawyers in civil law jurisdictions provides for an equivalent protection. First, all information entrusted to a lawyer in his professional duties and all facts that has become aware by his professional capacity are confidential[76]. Second, absent rules for discovery, clients cannot be compelled to disclose documents shared with their legal representatives. The key question is in which context the relevant information was obtained by the lawyer. Everything obtained in the course of his professional duties may be under the confidentiality provisions[77]. However, professional secrecy or confidentiality under civil law jurisdictions may not be so wide as covering protection of communication with inhouse lawyers[78]. Moreover, lawyers become a kind of "policemen" for the prevention of money laundering[79].

35. Differences in legal privilege have their roots in the specific evolution of jurisdictions and the scope of professional secrecy codification like Bar Associations codes of conduct[80]. Lawyers are

[72] *First Eagle v. Bank of International Settlements*, Bank for International Settlements: Procedural Order No. 6 (Order with Respect to the Discovery of Certain Documents for Which Attorney-Client Privilege Has Been Claimed), 11 June 2002 VOLUME XXIII pp. 169-182, p. 180, *Reports Of International Arbitral Awards* available at https://legal.un.org/riaa/cases/vol_XXIII/169-182.pdf See also *Vito Gallo v Government of Canada*, NAFTA/UNCITRAL/ PCA. Procedural Order No. 3, p. 13 (8.04.2009): "the arbitral tribunal is of the view that Solicitor-Client Privilege and analogous concepts of confidentiality are widely observed in different States. Thus it cannot be dispensed with in a proceeding governed by international law on the ground that domestic law is not the governing law".

[73] H. Alvarez, "Evidentiary Privileges in International Arbitration", in Albert Jan Van den Berg (ed), *International arbitration 2006: back to basics?*, *ICCA Congress Series,* vol. 13, Kluwer Law international, 2007, pp. 663-704.

[74] *See* the acknowledgement of legal professional privilege in the 2021 ELI-UNIDROIT Model European Rules of Civil Procedure, available at https://www.unidroit.org/english/principles/civilprocedure/eli-unidroit-rules/200925-eli-unidroit-rules-e.pdf. For legal doctrine, *see* F. Gascón Inchausti, M. Stürner, "Access to information and evidence in the ELI/UNIDROIT European rules on civil procedure: some fundamental aspects", *Uniform Law Review*, Vol. 24, No. 1, 2019, pp. 14–41, pp. 23-24.

[75] Recital 15, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1, 5.12.2014.

[76] *See* for example, §9(2) of the Austrian Attorney's Code ["Rechtsanwaltsordnung"].

[77] C. Hempel, *Lex Mundi Attorney-Client Privilege Guide Austria* (March 25, 2020). But not when the attorney communicates in his capacity of director of a company, this is not "legal representation", N. Gregoire, *Evidentiary privileges…, op.cit.,* p. 64.

[78] *See supra* in this work.

[79] E. Arribas López, "Sobre los límites del secreto profesional del abogado", *Revista Jurídica de la Región de Murcia*, No. 43, 2010, pp. 15–41. P. Azaustre Ruiz, "Marco procesal del secreto profesional en la entrada y registro de despachos de abogados", *Revista de Derecho y proceso penal* No. 221, 2012, pp. 15–36.

[80] For common law, *see* Hazard, G., "An Historical Perspective on the Attorney-Client Privilege", *Calif. L. Rev.* vol. 66,

obliged to keep professional secrecy and they can be sanctioned if unproperly disclose legal communications with clients[81]. In civil law countries such as Spain and France, legal privilege "is considered a matter of professional ethics rather than a rule of disclosure an (sic) evidence"[82].

36. On the other hand, under English law, Lord Hoffman considered privilege a "fundamental human right" and a "necessary corollary of the right of any person to obtain skilled advice about the law"[83]. Indeed, legal privilege is a fundamental human right protected under the European Convention of Human Rights (ECHR) article 6, despite absence of an explicit reference to the rights of parties to consult with a lawyer. The European Court of Human Rights developed the right to access to the court and encompasses the right to consult a lawyer with a view to contemplated proceedings[84].

37. Moreover, according to the Court of Justice of the European Union, "The protection of written communications between lawyer and client is an essential corollary to the full exercise of the rights of the defence"[85]. In a similar vein, under Australian case law, legal privilege "represents some protection of the citizen — particularly the weak, the unintelligent and the ill-informed citizen — against the leviathan of the modern state. Without it, there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure …"[86].

III. Resources for choosing the law applicable

1. Parties' agreement

38. An arbitration agreement creates normative expectations, and the arbitrator function is upholding such expectations. Since the parties enjoy freedom to select the law applicable to the merits and to the procedure, they can also select the law applicable to production objections, mainly due to privilege protection. Applying the law chosen by the parties is fair because the parties on their volition have decided such rule in consonance with the international principle of party autonomy. This follows a private law model that fosters efficiency[87].

39. It is usually argued in favour of legal privileges that governmental and private parties may be reluctant to submit disputes to arbitration if international arbitrators ignore important privilege rules[88]. This argument implicitly suggests that legal privilege constitute international public policy.

1978, pp. 1061 y ss., p. 1070. Radin, M. "The Privilege of Confidential Communications Between Lawyer and Client", *Calif. L. Rev*., vol. 16, 1928, p. 487 y ss., p. 188.

[81] D. Kuitkowski, "The Law Applicable to Privilege Claims in International Arbitration", *Journal of International Arbitration*, vol. 32, no. 1, 2015, pp. 65–106, p. 70.

[82] V. Camerer, Ch. G. Hioureas, "Glamis Gold, Ltd. v. United States: A Case Study on Disclosure Procedures in International Arbitration", *World Arbitration and Mediation Review* Vol. 2, No. 3, 2008, p. 33.

[83] *R. v Inland Revenue Commissioners Ex p. Morgan Grenfell & Co Ltd, R. v Special Commissioners of Income Tax Ex p. Morgan Grenfell & Co Ltd*, 2002 WL 819949 (2002) "The Taxes Management Act 1970 s.20(1) could not be construed as implying that a tax inspector could, by the issue of a notice, require the disclosure of documents which were subject to legal professional privilege."

[84] It means that the classical UK litigation privilege is included but not the legal advice privilege. C. Hollander, *Documentary Evidence*, Sweet & Maxwell, 13th Ed, 2018, para. 12-03. See the latest study of L. Bachmaier Winter, "Lawyer-client privilege en la jurisprudencia del Tribunal Europeo de Derechos Humanos", L. Bachmaier Winter, (coord.), *Investigación penal, secreto professional del abogado, empresa y nuevas tecnologías: retos y soluciones jurisprudenciales*, Cizur Menor, Aranzadi, 2022.

[85] Case 155/79, *AM & S Europe Limited v Commission* [1982] ECR 01575, paras. 18-23.

[86] *Baker v Campbell*, (1983) 153 CLR 52 para. 120 (Deane J) (investigation by regulatory authorities). Australian case law.

[87] On law models, *see* R. Michaels, "Economics of Law as Choice of Law", *Law and Contemporary Problems*, Vol. 71, 2008, pp. 73-105.

[88] Mosk & Ginsburg, "Evidentiary Privileges in…", *op.cit.*, p. 381.

40. However, parties cannot expect that arbitrators have complete knowledge of the municipal law of the parties regarding legal privilege[89]. Therefore, the burden of proof must be on the person asserting the privilege[90]. This reasoning does not seem consistent for legal privilege if the arbitrator considers that they are part of general principles of law[91], he/she could apply it without a party invoking the privilege law.

41. Moreover, if privilege law forms part of the public policy (*ordre public*) of a jurisdiction in which it is most likely that the arbitral award shall be appealed or be enforced, the privilege not invoked by the parties may still be applied *ex officio* by arbitrators.

42. Whether the parties accept to be subject to their home jurisdiction privilege law, even if this results in an unequal treatment, the arbitral tribunal will pursue that parties' choice, unless mandatory norms of the seat of arbitration prohibits that solution. In case of overriding transnational public policy on privilege, it should be clearly spelled in the legislation of the seat of arbitration or the potential and likely enforcement state law.

2. Arbitrator selection

43. In the absence of a chosen law, the arbitrator is still bound to adjudicate the dispute considering privilege law pleaded by the parties if this selection entails a fair treatment. As known, the selection of an arbitral forum does not entail a waiver of privilege law[92]. Once positive norms that the parties have made available to the arbitrator for the specific case have been identified, the lawyer's purpose is the material interest of his client. Thus, the lawyer chooses those rules which favor his client's interests and twists in its own way since his personal assessment's filter has not been overcome by the opposite rules. Only in that regard, it can be understood the accusations of perversion of legal privilege by litigators, when privilege is used as a sword instead of as a shield. This fear of perversion is significantly higher in the context of inhouse lawyers' privilege[93], where risk of abuse of privilege has been experienced sometimes[94].

44. However, arbitrators are obliged to manage parties' expectation and to avoid surprises,[95] even on topics that are such controversial as privilege rules in international litigation and not only in arbitration proceedings.

A) Arbitral institutional rules

45. Most institutional arbitral rules do not mention conflicts that arise on procedural law with respect to privilege[96]. They are at most guidelines, points of reference that the arbitrator has in his hands

[89] *Ibid.*, p. 384.

[90] Born, *International Commercial Arbitration*, 3rd Ed., *op.cit.,* p. 2555.

[91] For an example of this approach *see* Heitzmann, "Confidentiality and Privileges…", *op.cit*., p. 236.

[92] P. Ashford, *The IBA Rules on the taking of evidence in international arbitration: a guide*, Cambridge University Press, 2013, p. 158. Born, *International Commercial Arbitration*, 3rd Ed., *op.cit.,* p. 2553.

[93] E. T. Kang, "Attorney-Client Privilege and Abuse of Privilege", *The Legal Intelligencer*, April 11, 2019, https://www.law.com/thelegalintelligencer/2019/04/11/attorney-client-privilege-and-abuse-of-privilege/?slreturn=20210220165625 (at Lexisnexis or Bloomberg Law)

[94] M.V. Ciresi, R. B. Walburn, & T. D. Sutton, "Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation", *William Mitchell L. Rev*., vol. 25, 1999, p. 477 ff, pp. 499-500.

[N]. Freeman Engstrom & R. L. Rabin, "Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids", *Stan. L. Rev*., vol. 73, No. 2, 2021, pp. 285-362, p. 297. ["Defendants "stonewalled rather than answer even simple and straightforward questions, hid behind exaggerated (or wholly manufactured) claims of attorney-client privilege, and made it "extremely difficult to take any depositions of corporate personnel."]

[95] J. Hope, "Playing by the rules in international arbitration: what are the rules?", *European international arbitration review*, vol.1, pp. 155-175, p. 174.

[96] Born, *International Commercial Arbitration*, *op.cit.*, p. 2550.

thanks to the parties' autonomy. Parties in arbitration proceedings know that the arbitrator has a great margin of discretion. Therefore, his/her personal criterion as an adjudicator will be decisive, inclinations and biases included. For example, artificial intelligence may be used to predict the outcome of a dispute by an arbitrator based on his previous decisions. However, there is no evidence that selection of arbitrators is made considering privilege opinions because in any case, this is only one of the decisions that arbitrators need to take during the arbitral proceeding.

B) IBA Rules on Taking of Evidence

46. Determination of the rules governing document production could be enhanced by establishing default procedural rules, which would amount to an increase of predictability. Moreover, default procedural rules have power to shape perception of users of international arbitration. Two methods are proposed by commentators from expanding rules of international arbitration institutions to specifying guidelines[97]. The most developed rules on privilege are the International Bar Association ("IBA") Rules on the Taking of Evidence in International Arbitration (1983, 1999, 2010, 2020). Since their first version in 1983, the IBA Rules have been revised four times. The last reform was published on 17 December 2020.

47. First, Article 9 of the IBA Rules is the second most referenced provision of these Rules, approximately 13 per cent of all references[98]. As consisting with arbitration proceedings, the tribunal has no obligation to follow strict rules of evidence in contrast to a judicial court, except mandatory provisions of the seat of arbitration, both substantive and procedural. Although overriding mandatory rules are substantive by nature, the fact that there is a controversy on characterization of privileges rules as procedural or substantive makes relevant the theory of overriding mandatory rules. In practice, a tribunal does not ignore the law of the seat of arbitration and may consider the parties' expectations and their advisers, usually trained in a national jurisdiction, any parties' agreement made and the relevant institutional rules.

48. However, rules of arbitral institutions[99] and arbitrations laws of many States acknowledge the principle of freedom and discretion of the arbitral tribunal to determine the admissibility, relevance, materiality, and weight of evidence, following the UNCITRAL Arbitration Model Law[100]. Article 9(1) of the IBA Rules states that general principle as well. Therefore, the mode of conducting the arbitral proceeding is determined by the arbitral tribunal, which has the power of general discretion. General discretion of the arbitral tribunal has been ruled by national courts, including U.S. courts[101]. Nevertheless, the arbitral tribunal under the IBA Rules is subject to due process considerations, in particular, respect of each party to have a fair opportunity to present its case[102].

49. Second, "Rules" is a misnomer because the IBA Rules on the Taking of Evidence in International Arbitration are mere guidelines, and they are not straight forward[103]. On the one hand, the IBA

[97] W. W. Park, "The 2002 Freshfields Lecture -- Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion", *Arbitration International*, vol. 19, no. 3, 2003, pp. 279-301, p. 283: "the benefits of arbitrator discretion are overrated; flexibility is not an unalloyed good; and arbitration's malleability often comes at an unjustifiable cost. Serious consideration to adopting provisions with more precise procedural protocols to serve as default settings for the way arbitrations should actually be conducted. These directives would explicitly address questions such as documentary discovery, privilege, witness statements, order of memorials, allocation of hearing time, burden of proof and the extent of oral testimony."

[98] R. Khodykin and C. Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, Oxford University Press, 2019, second only to Article 3, (s. 12.2).

[99] For example, By-laws of the Spanish Bar Association, Estatutos ICAM, art. 29.3: "Corresponde a los árbitros decidir, mediante orden procesal, sobre la admisión, pertinencia y utilidad de las pruebas propuestas o acordadas de oficio"

[100] Art. 19 (2) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Viena, accessible at uncitral.un.org

[101] G. B. Born, *International Commercial Arbitration*, 2nd. ed., Kluwer Law Arbitration, 2014, pp. 2146-49.

[102] *See* Preamble 1 and 3 IBA Rules.

[103] K. P. Berger, "Evidentiary Privileges Under the Revised IBA Rules on the Taking of Evidence in International Arbitration", *Int. A. L. Rev*, Vol. 13, No. 5, 2010, pp. 171-179, p. 171: "Such conflict would have been inconsistent with the soft-law

Rules have developed into a commonly accepted standard in international arbitration proceedings[104] that reflect a "compromise among the approaches of different legal systems"[105]. On the other hand, they have been accused of constituting a misguided combination of various aspects of different traditions[106]. Article 9(2)(b) of the IBA Rules specifically mentions legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.

50. Article 9(4) (a) IBA Rules refers to attorney client privilege. Article 9(4)(b) IBA Rules is about settlement privilege. Article 9(4)(c) IBA Rules mentions expectations of parties and their advisors at the time the privilege is said to have arisen. Article 9(4) (d) IBA Rules refers to any possible waiver of any applicable privilege. Finally, Article 9(4)(e) IBA Rules expresses the need to maintain fairness and equality between the parties, particularly if they are subject to different legal or ethical rules[107]. All of these consist of substantive guidelines, but they do not resolve the conflict of values that arise when dealing with the IBA Rules. The language of the IBA Rules [Article 9(4)] is clear in using "may" and not "should" or "must", when providing arbitral tribunals some light on deciding the standard for attorney-client privilege. Therefore, the tribunal may consider "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 legal advice" [Article 9(4) IBA Rules). There is not any legal obligation to consider that need and the broad discretion of the arbitral tribunal could potentially justify a wide range of approaches. What happens when a solution is compatible with parties' expectations at the time the privilege has arisen [Article 9(4) (c) IBA Rules], but the solution is in contradiction with maintaining equality between the parties [Article 9(4) (e) IBA Rules]? Are these factors that the tribunal may consider ordered hierarchically? It seems that the values are of horizontal nature[108]. Thus, there is not priority among them. Should all the values be considered for a fair choice of law by an arbitrator?

51. Moreover, the IBA Rules are flexible enough to permit a practical approach as disclosure of documents may be allowed subject to suitable confidentiality protections [art. 9(5) IBA Rules]. Therefore, an *in camera* review by the arbitral tribunal could be an option[109].

52. If these rules are not compulsory, their application may not be expected. But even if these rules are chosen by the parties, their application is a mere guide for the arbitrator, so domestic conflict-of-laws of the seat of the arbitration could complement and advise the arbitration. Again, if this choice is a mere suggestion, arbitrators are not bound, and any predictable outcome is not possible to anticipate. Therefore, parties should be as concrete as possible to choose the privilege law. However, practical matters in real life deserve more attention when dealing with an international transaction. Thus, the parties' focus on choice of law to privilege can only reasonable be approachable when an arbitral proceeding is about to start.

53. According to a 2016 Report of the International Bar Association Subcommittee, "The prevailing sentiment among the respondents from Asia Pacific, Europe and North America was that the

nature of the IBA rules, which constitute a restatement of best practice standards but cannot and do not intend to override applicable domestic law of a mandatory nature. That essential principle is manifest in art. 1(1) of the IBA Rules".

[104] D. Kühner, "The Revised IBA Rules on the Taking of Evidence in International Arbitration", *Journal of International Arbitration*, Vol. 27, No. 6, 2010, pp. 667–677, p. 667.

[105] *Ibid*.

[106] L. Shore, "Three Evidentiary Problems in International Arbitration: Producing the Adverse Document, Listening to the Document that Does Not Speak for Itself, and Seeing the Witness Through her Written Statement", *SchiedsVZ* 76, 2004.

[107] IBA Rules 2020. *Vid*. Article 9(3) IBA Rules 2010.

[108] R. Michaels, "Private international law and the question of universal values", in F. Ferrari, F., & D.P. Fernández Arroyo (eds.), *Private International Law*. Cheltenham, UK: Edward Elgar Publishing, 2019, pp. 148-177, p. 154: "Private international law has a horizontal nature; it is in principle opposed to a hierarchy of norms or values. How can private international law create compatibility between values? Does it do so through transcending values altogether?"

[109] *See*, for example, Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland (Chagos Marine Protected Area Arbitration), PCA Case. No. 2011-03, Ad Hoc Award (18/03/2015).

Rules on Evidence are still unclear on the issue of privilege. Whereas Articles 9.2(b) and 9.3 recognise privilege as a ground for exclusion of documents and testimony from evidence, they fail to describe the applicable standard."[110] It is truly noteworthy that neither the recent reformed 2020 LCIA Rules (on October 20, 2020) make changes with respect to privileges, nor do the 2020 IBA Rules optimize a way to solve the issues of privilege. Lack of amendments of the IBA privilege Rules may be due to the affirmation that there is no need to amend the Rules on Evidence[111]. Yet, the last revision of the IBA Rules can be seen a miss opportunity to clarify the applicable law process to determine privilege law[112].

C) Possible applicable laws to legal privilege

54. There are at least three possibilities to characterize privileges[113]. On the one hand, some authors are very convinced that privileges are matters of substantive law, not procedure[114]. On the other hand, other authors consider that attorney-client privilege is procedural on the basis that our understanding of protection of communications between lawyer and client makes the justice system works better[115]. Even in common law systems where claims of "substance" nature are often raised, courts apply the *lex fori* to resolve any conflict of attorney legal privilege, implicitly characterizing legal privilege as a question of procedure[116]. Applying *lex fori* is the traditional approach at least from continental civil law countries that may not have very developed rules on privilege[117]. Moreover, interpreting "rules of procedure" under article III of the New York Convention in their narrower and broader understandings include matters of privilege[118]. The third opinion is that neither the substantive nor the procedural characterization is satisfactory[119]. Therefore, no consensus exists as to whether privilege falls within the procedural or the substantive category.

55. However, in international litigation the application of *lex fori* may be considered the only one that does not violate its own public policy[120]. On the other hand, applying the privilege law of the forum

[110] The IBA Arbitration Guidelines and Rules Subcommittee*, Report on the reception of the IBA arbitration soft law products* (September 2016), p. 29. D. Thomson, "White & Case Partner Calls for Privilege Rethink", *Global Arbitration Review* (28 Apr. 2017).

[111] The IBA Arbitration Guidelines and Rules Subcommittee*, Report on the reception of the IBA arbitration soft law products* (September 2016), p. 84.

[112] *See* Report of Cleary Gottlieb, "2020 Revision of the IBA Rules on the Taking of Evidence in International Arbitration", 17.02.2021, p. 9, available at https://www.clearygottlieb.com/-/media/files/alert-memos-2021/2020-revision-of-the-iba-rules-on-the-taking-of-evidence-in-international-arbitration.pdf [For example, by amending Article 9.4(c) to require "legitimate" expectations on the part of Parties and their advisors who seek to invoke legal impediment or privilege.]

[113] The problem of characterization in international arbitrations does not arise only surrounding privilege law, another issue that implies different characterization regarding the jurisdiction is default interest, *see* B.S. Jiménez-Gómez, "Régimen jurídico aplicable a los intereses de demora en el arbitraje comercial internacional: propuestas de armonización", *Revista Electrónica de Estudios Internationales*, No. 42, 2021, pp. 1-37, pp. 18-19.

[114] G. B. Born, *International Commercial Arbitration*, 3rd Ed., Kluwer Law International, 2021, footnote 317 ("For choice-of-law purposes, there should be little question but that privileges are matters of substantive law, not procedure"), K. P. Berger, "Evidentiary Privileges: Best Practice Standards Versus/and Arbitral Discretion", *Arbitration International*, vol. 22, 2006, pp. 501-520, p. 519.

[115] S. Bradford, "Conflict of Laws and the Attorney–Client Privilege: A Territorial Solution", *U. Pitt. L. Rev*., vol. 52, 1991, pp. 909-953, p. 917.

[116] *Union Planters Nat'l Bank v. ABC Records, Inc*. 82 F.R.D 472 (W.D. Tenn. 1979) (applying Tennese law to the attorney-client privilege because it was considered a question of evidence, this was the *lex fori*, disregarding that the communications took place in California and the defendant was a New York corporation). *Duttle v. Blandler & Kass*, 127 F.R.D. 46, 52 (S.D.N.Y. 1989) (applying federal law); *Drimmer v. Appleton*, 628 F. Supp. 1249, 1250 (S.D.N.Y. 1986) (applying New York conflicts law).

[117] Most German doctrine is in favour of *lex fori*, A. Möckesch, *Attorney-Client Privilege ... op.cit.,* p. 174.

[118] G. Bermann, "Procedures for the Enforcement of New York Convention Awards", in F. Ferrari & F. J. Rosenfeld (eds.), *Autonomous Versus Domestic Concepts under the New York Convention*, International Arbitration Law Library, Volume 61, Kluwer Law International 2021, pp. 55 -78, p. 56.

[119] O. Meyer, "Time to Take a Closer Look: Privilege in International Arbitration", *Journal of International Arbitration*, Vol. 24, No.2, pp. 365 et seq., p. 367.

[120] *Vid*. *Duplan Corp. v. Deering Milliken, Inc*., 397 F. Supp. 1146, 1169 (D.S.C. 1974) (considers that French and British

involves the risk that it has no restriction as any rule on privilege different from the *lex fori* could be considered a violation of the *lex fori* public policy and therefore, never applied. The public policy argument has been criticized because it produces the same result that a characterization of legal privilege as evidence[121].

56. Characterization of an evidentiary issue as procedural or substantive has ramifications on challenges of the award in validity and enforcement proceedings[122]. If the issue is treated as substantive, the arbitral tribunal is required to apply the law applicable to the merits of the dispute. If the parties have not selected the law applicable in the arbitration agreement, the arbitral tribunal can resort to conflict of laws (*voie indirecte*) or to apply directly the law it considers appropriate (*voie directe*)[123]. In general, under the New York Convention, an error in applying the substantive law is not determinative to refuse enforcement of the award[124].

57. However, if the issue is treated as procedural the arbitral powers are wider, it enjoys much discretion. Under article 19 (2) of the UNCITRAL Arbitration Model Law, the tribunal can conduct the proceedings in a manner it considers appropriate, including the power to determine the admissibility, relevance, materiality and weight of any evidence, absent any party agreement. Institutional arbitration rules also give discretion to the arbitral tribunal if the parties have not agreed on the procedure. Arbitral tribunals do not have an obligation to apply the rules of procedure of the seat of arbitration. Nevertheless, questions of confidentiality of communications in a mediation would arise in a subsequent arbitration in the context of admissibility of evidence in that arbitration, particularly if the arbitration is held in a different jurisdiction of the mediation process. Confidentiality of mediation as an evidential matter should be governed by the procedural law governing the arbitration[125]. In this case, the *lex arbitri* is the established default rule. In the next paragraphs, advantages and shortcomings of different options are discussed.

a) Lex arbitri

58. Legal literature claims that arbitrators do not have *lex fori*[126]. However, *lex arbitri* could be considered the reference framework for arbitrators as *lex arbitri* plays a similar function in arbitration proceedings as *lex fori* plays in civil litigation. Risks of annulment proceedings at the seat of arbitration is determined by *lex arbitri*. Therefore, arbitrators must be prudent when dealing with mandatory norms of the seat. The most radical implications are balance of due process and equality of the parties during the whole arbitration proceedings.

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law violated U.S. law in such terms: "the public policy of the United States as enunciated in the Federal Rules of Civil Procedure and the federal court decisions relating thereto. The federal rules are designed to promote discovery whereas these two foreign statutes necessarily restrict discovery. It is thoroughly established that comity will not be extended to foreign law or rights based thereon if it opposes settled public policy of the forum"). *See* also *RBS* (UK).

[121] Bradford, "Conflict of Laws …", *loc.cit*., p. 918.

[122] S. A. Pauker, "Substance and Procedure in International Arbitration", *Arbitration International*, Vol. 36, No.1, 2020, pp. 3–66. For this author privilege is an issue more related to the conduct of the proceedings, so procedural discretion applies, and soft law sources can guide the arbitrator, but the law most closely connected to the privilege should apply. *Contra* F. Rosenfeld, "The law applicable to legal privilege in international commercial arbitration", in F. Ferrari & S. Kröll (eds.), *Conflicts of Laws in International Commercial Arbitration*, Juris, New York, 2019, pp. 223-224.

[123] L. Silberman, F. Ferrari, "Getting the law applicable to the merits in international arbitration and the consequences of getting it wrong," in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration*, Sellier, 2011, pp. 257-323, 278-305.

[124] *See* Abu Dhabi in Authority v. Citigroup Inc. No. 12 Civ.283, (GBD) 2013, 789642 at 8, SDNY 4 March 2013 (a tribunal's judgment with respect to privilege stating that is a legal judgement, which is not reviewable by the Court for error-even if that error is serious).

[125] M. Pryles, "Commentary on Issues of Confidentiality", in A. J. Van Den Berg, *New Horizons in international Commercial Arbitration and Beyond*, Kluwer Law International, 2005, pp. 497-522, pp. 521-522.

[126] G. Bermann, "Private International Law in International Arbitration", in F. Ferrari, & D. P. Fernández Arroyo, (eds.), *Private International Law.* Cheltenham, UK: Edward Elgar Publishing 2019, p. 477.

59. It is suggested that in searching for coherence in every international arbitration, foremost the law selected by the parties shall be adopted and it will not necessarily be related to the law of the seat of arbitration. However, when the parties did not specify its intention regarding the law of privilege under the arbitration agreement, there is not a clear contradiction between the choice of the parties and the law of the seat. Thus, if we consider that the process in arbitration is instrumental for the objective pursued, which is nothing more than to resolve a dispute between the parties, and if we assume that the law of the seat is the place with the closest and most real relationship of the arbitration agreement; then, the law of the seat of arbitration would also be adequate to determine evidentiary privileges, absent a choice by the parties.

60. Applying the law of the seat [127] takes into consideration rules and principles of the seat State to protect validity and effectiveness of both the procedure and the arbitration award. This situation is in line with a procedural concept of legal privilege. Moreover, a clear advantage is that the same law is applied to both parties, avoiding any unequal treatment. However, some disadvantages are superior because the seat is usually chosen by its neutrality and parties do not intend to choose their rules for privilege. Therefore, *lex arbitri* could undermine legitimate parties' expectations. Despite being a rule consistent with international litigation as a transplant of *lex fori*, the specificities of international arbitration as a neutral forum goes against the general application of *lex arbitri*[128]. This approach may not be consistent with a substantive understanding of legal privilege under their home jurisdiction of the parties and there would be no link between the relevant confidential communications and the seat of arbitration.

b) The law governing the merits of the dispute

61. The law governing the merits of the dispute could be extended to cover privilege issues, which *prima facie* seems a simple solution. This law provides equal treatment to both parties.

62. However, in case of various contracts between the parties subject to different laws, applying one *lex causae* over the other would imply a range of preference. Considering that the *lex causae* could also be chosen by arbitrators, this law is not predictable when the communication takes place. Moreover, applying the *lex cause*, even if chosen by the parties, contravenes the parties' legitimate expectations when they sought and received the legal advice[129]. This approach is also not consistent with a procedural characterization of privilege.

c) The place where the communication took place

63. The law of the place where the communication took place appears a suitable option when the communication is given or received in person, which affords predictability[130]. This approach is in accordance with the U.S. Second Restatement[131].

[127] D. Chan and T. J. Yang, "Ascertaining the Proper Law of an Arbitration Agreement: The Artificiality of Inferring Intention When There is None", in M. Scherer (ed), *Journal of International Arbitration*, Vol. 37, No. 5, 2020, pp. 635 – 648. (The common law choice of law principles for determining the proper law of an arbitration agreement. "In the absence of a clear and real intent, arbitrators and state signatories to the New York Convention ought to apply the law of the seat as the default choice of law rule in the New York Convention"). F. Ferrari, "Plures leges faciunt arbitrum", *Arbitration International*, 2021, pp. 1-19.

[128] For more reasons, *see* F. Rosenfeld, "The law applicable to legal privilege …", *op.cit*., pp. 229-230.

[129] Möckesch, *Attorney-Client Privilege ..., op.cit.,* p. 233.

[130] R. Cuesta and T. C. White, "Chapter 23. Representing European Companies in U.S. Litigation", *Successful Partnering Between Inside and Outside Counsel*, § 23:23. April 2021. ["With respect to litigation in the United States, a more solid basis for determining whether communications with the European company›s in-house counsel are protected by the attorney-client privilege is the national laws of the country in which European inside counsel is located or where the communications took place".]

[131] The U.S. Second Restatement, Article 139.

64. Nevertheless, if the place is incidental and not related to the subject matter of the dispute, the parties or their lawyers in question, the place of the communication loses its relevance[132]. For example, communications in means of transport.

d) *Lex situs* of the document supporting the communication

65. The *lex situs* of documents is an uncertain factor because it bifurcates in two options: the place where the document is stored and the place where the document was created or received. Spread of technology facilitates that more than one copy is stored at different places, also different from location of the lawyer or his client. This rule of storage could encourage lawyers and their clients to manipulate where to store their communications, selecting a country with advantageous privilege rules.

66. Relevance is given to refuse disclosure of information located abroad when it undermines important interests of the United States under the U.S. Restatement (third) of Foreign Relations. Additionally, interests of the State where the information is located must also be considered[133]. In the latter case, when compliance of production of information located abroad, arbitrators must consider if it would undermine "important" interests of the State where the relevant information is located.

e) Location of the lawyer

67. Determination of location of the lawyer involved in the privileged communication could be the place of the Bar admission of the lawyer[134] or the place of practice of the lawyer[135] or the professional domicile of the attorney[136]. For example, art. 7 of the General Statute of the Spanish Legal Profession, hereinafter 2021 Spanish By-laws[137] presumes that the main address is the place where the main or sole professional office is located in Spanish territory or, failing that, the personal address of the lawyer in Spain[138]. Under Spanish law, a lawyer can only be a resident lawyer in one Bar Association, although it may be registered in more than one Bar Association[139]. This privilege law follows the origin rule, and it is in consonance with the EU freedoms of establishment[140].

68. However, the rule is unclear where more than one lawyer is involved in the communication. Though in case of more than one lawyer advising the client and involved in the communication, it is recommended to choose the place where the senior external lawyer is qualified[141].

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[132] Möckesch, *Attorney-Client Privilege ..., op.cit.,* p. 235.

[133] *Restatement (third) of Foreign Relations*, §442 (1) c): In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important Interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

[134] N. D. O'Malley, *Rules of Evidence in International Arbitration, An Annotated Guide*, 2nd ed., London, Routledge, 2019.

[135] F. von Schlabrendorff & A. Sheppard, "Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution", in *Global Reflections in International Law, Commerce And Dispute Resolution: Liber Amicorum In Honour Of Robert Briner,* 2005, p. 743 ff, p. 765. O'Malley, *Rules of Evidence in International Arbitration …*, *op.cit*. p. 299.

[136] M. De Boisséson, "Evidentiary privileges in international arbitration", in A. J. Van berg (ed.), *International Arbitration 2006: Back To Basics?, ICCA Congress Series,* vol. 13, Kluwer Law international, 2007, pp. 705-716 .

[137] Royal Decree 135/2021, of 2 March 2021, adopting the general statute of the Spanish Legal Profession, BOE núm. 71, 24.03.2021.

[138] Spanish By-laws, Art. 7 (1).

[139] Spanish By-laws, Art. 7(2).

[140] M. Wolf, "Abbau prozessualer Schranken im europäischen Binnenmarkt" in Grunsky, et al (eds), *Wege zu einem europäischen Zivilprozeßrecht—Tübinger Symposium zum 80. Geburtstag von Fritz Baur*, J.C.B Mohr, Paul Siebeck, 1992, p. 35, p. 62. This solution was argued for tax accountants, auditors, and bankers.

[141] Born, *International Commercial Arbitration*, 3rd Ed., Kluwer Law International, 2021, p. 2560.

69. It can be highlighted that in-house lawyers are pushing a change in the legislation to be covered by the legal privilege in certain Member States[142]. Could this legal change be a reason to choose the lawyer's location as a decisive factor that determines which law applies to the privilege protection?

70. The law of the place where the lawyer is qualified offers some advantages.

71. First, this approach prevents any sanctions on lawyers who do not follow the professional code of ethics of their jurisdiction. For instance, the Council of Bars and Law Societies (hereinafter CCBE) Code of Conduct for European Lawyers and other documents stipulates legal professional privilege among the core values of the European legal profession[143]. Application of codes of professional conduct follows the lawyer when he performs legal service abroad since ethical standards are not restricted to the country in which a lawyer is qualified.

72. Second, this rule satisfies the legitimate expectations of the parties as they will be treated according to the known rules of their legal counsel practice[144]. The lawyer is rendering the characteristic performance of the consultancy agreement as well[145].

73. Third, predictability is enhanced as lawyers can prepare a better defense because privilege rules are familiar to their domestic practice and lawyers know them in advance.

74. Fourth, both parties will be treated the same, according to the lawyers' qualification. If parties come from jurisdictions with a similar legal culture, applying the law of their lawyers' qualification seems a reasonable approach. Some exceptions would be considered in several cases, for instance, when several lawyers advice the client. In this case, the senior lawyer subjected to a rule could be a solution[146]. This guideline is practical, but it does not consider the more significant connection with other countries. Some situations often arise when the communication that is alleged to be privileged occurred in a place different from the lawyer seat or when the communication occurred online or when the client resides in a different jurisdiction of his lawyer. Thus, other connecting factors could be relevant to assess the claim of a privilege rule distinct from the lawyer State of qualification. An escape clause seems necessary to solve cases that do not fit well against a fixed rule.

75. One reasoning against the focus on the lawyers' seat is the risk of forum shopping. Yet, this reason is quite controversial because lawyers, particularly in international arbitration, are usually chosen in accordance with skills and expertise on a matter, rather than considering the jurisdiction of their exercise. Some commentators think that State legislators are unlikely to change domestic privilege rules thinking in arbitration but rather they think in domestic civil law proceedings[147]. However, as international business transactions are also attractive from an economic perspective, the law may change to accommodate to its users. A good legislator will consider international litigation and side effects in arbitration when legal reform takes place. This seems to be the movement in countries, such as France and Switzerland, which traditionally rejected in-house legal privilege, but it was discussed the inclusion of it in their domestic laws[148].

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[142] Eg. Switzerland and France.

[143] Model Code of Conduct for European Lawyers (2021) for its members Bar to adopt provisions voluntarily. See also the CCBE Charter of Core Principles of the European Legal Profession.

[144] R. Marghitola, *Document Production in International Arbitration*, Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2015, p. 77.

[145] B. F. Meyer-Hauser, P. Sieber, "Attorney Secrecy v. Attorney-Client Privilege in International Commercial Arbitration", *Arbitration*, vol. 73, 2007, pp. 148-188, p. 185.

[146] Born, *International Commercial Arbitration*, 3rd Ed., Kluwer Law International, 2021, p. 2560.

[147] Möckesch, *Attorney-Client Privilege …, op.cit.,* p. 328, para. 8.138.

[148] *See* R. Gauvin, *Rétablir la souveraineté de la France et de l'Europe et protéger nos entreprises des lois et mesures à portée extraterritoriale*, 26.06.2019, pp. 56-63, available at: https://www.dalloz-actualite.fr/ S. Rudolf von Rohr, "Mehr Schutz für Unternehmensjuristen stärkt unseren Standort", available at: https://www.economiesuisse.ch/de/artikel/mehr-schutz-fuer-unternehmensjuristen-staerkt-unseren-standort (Jan. 20, 2021).

76. Another counterargument for the law of the lawyer State of practice is that the rule could be interpreted in a reverse way. Parties from different jurisdictions with lawyers coming from diverse traditions are going to be treated according to their different traditions, so parties may not be treated equally. In case of an action against rendering award recognition, courts may consider that a basic principle of arbitration has not been respected after following privileges according to the law of lawyers' practice. Therefore, fairness and counterpoise of different legal privilege rules seems to favor a common approach for both parties when the laws of the lawyers' seat reach a substantial different treatment.

77. Furthermore, when the lawyer is not a party in the arbitral proceedings, he/she does not have an interest in applying his/her privilege law[149]. Besides, a lawyer can always refuse to submit certain evidence as arbitral tribunals do not enjoy coercive powers, so cost of not disclosing is assumed by one party[150].

f) Location of the party claiming privilege

78. Location of the party claiming legal privilege could be the domicile of the party claiming privilege[151] or the place of business of the party claiming privilege[152]. Some commentators favor the law of the jurisdiction where the party has its seat because it respects the party's reliance interest at the time the legal advice was rendered[153]. It matches with the substantive opinion that professional secrecy cannot be the property of lawyers but rather, that it should be regarded as the privilege of the client[154]. This solution is in line with the Restatement (Third) of Foreign Relations Law of the United States[155].

79. However, the main problem with this solution is that it could lead to unequal treatment of the parties when the law for claimant and respondent are different, being against the IBA Rules article 9(2)(g). Another problematic issue emerges in case of multinational companies if advice is given to a subsidiary controlled by a parent-company[156]. This approach can also be considered too client-friendly[157] although it prevents the risk of forum shopping[158].

g) The law of the State of enforcement

80. Article V(2)(b) of the New York Convention provides public policy of the law of the enforcing country as a ground to refuse enforcement of awards. The situation could arise when a document is privileged under the law of the enforcing State, but it is not privileged under the law that the arbitral tribunal choose to apply.

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[149] Rosenfeld, "The law applicable to legal privilege …", *loc.cit*., p. 232.

[150] *Ibid*., p. 232.

[151] J. Rubinstein & B. Guerrina, "The Attorney-Client Privilege and International Arbitration", *Journal of International Arbitration,* vol. 18, No.6, 2001, pp. 587-602.

[152] K.P. Berger, "Evidentiary privileges: Best practice standards versus/and arbitral discretion", *Arbitration International,* vol. 22, No. 4, 2006, pp. 501-520. K.P. Berger, "Evidentiary Privileges Under the Revised IBA Rules on the Taking of Evidence in International Arbitration", *International Arbitration Law Review*, vol. 13, No. 5, 2010, pp. 171-179.

[153] Rosenfeld, "The law applicable to legal privilege …", *op.cit*. p. 232. Möckesch, *Attorney-Client Privilege ..., op.cit*, p. 240 and p. 262. Berger, "Evidentiary privileges: Best practice standards versus/and arbitral discretion…", *op.cit*., p. 512.

[154] *See* Opinion Of Advocate General Poiares Maduro delivered on 14 December 2006 Case 305/05, *Ordre des barreaux francophones et germanophones*, (ECLI:EU:C:2006:788), para. 54.

[155] Section 442 provides "a communication privileged where made – for instance, confidential testimony given to a foreign government investigation under assurance of privilege – is not subject to discovery in a United States court, in the absence of waiver by those entitled to the privilege". But Section 130 of the Restatement of Conflicts reaches the opposite result, applying U.S. law on privilege in virtually all cases.

[156] P. Rosher, "The application and Scope of Attorney-Client Privilege in International Arbitration", *Stockholm International Arbitration Review*, vol. 1, 2007, p.19.

[157] Meyer-Hauser, P. Sieber, "Attorney Secrecy v. Attorney-Client Privilege in…", *op.cit.*, p. 185.

[158] Rosenfeld, "The law applicable to legal privilege …", *op.cit*., p. 233.

D) The closest connection test

81. The closest connection test is a transnational rule of conflict of laws[159]. Several authors consider that the closest connection can be useful in international arbitration and legal privilege[160]. However, despite having a conflict of laws test, results are not uniform, in part because many authors do not consider one connecting factor more important than the rest or at least, there is not a relation of superiority between connecting factors[161]. The law of the jurisdiction where the lawyer resides or the law of the jurisdiction where the party has its place of business at the moment the relevant communication took place could be justified as most connected to the case[162]. Any approach could be adequate for a specific case.

IV. Equal treatment reasoning

1. The lowest level of protection

82. The lowest level of protection consists in applying the common denominator to documents of both parties if documents are privileged under the domestic laws of the parties. The tribunal applies the same standard, so it seems that parties are treated equally. However, it might be unexpected for the parties, at least for one party, that receives less protection of documents according to privilege rules in domestic proceedings[163]. This is considered unfair[164].

83. Nevertheless, it is not clear why the parties expect the same privilege rules as in a domestic civil proceeding if they have agreed to arbitrate their disputes. Moreover, they could manifest the arbitral tribunal which privilege rules they choose at the beginning of the arbitral proceeding. Absent such choice, the parties concede the arbitrator power to decide the privilege rule at their discretion.

2. The highest level of protection

84. Adoption of the most-favoured privilege means that a party may request and be granted application of any privilege rule available to any other party. This approach has been qualified as the most prudent approach[165] because of two reasons that are related. The first reason is that the likelihood to result in an award that satisfies the principle of equal treatment increases[166]. The second reason is that by respecting the legitimate expectations of both parties in the dispute, challenges to the award would diminish[167]. It is also a "common-sense approach"[168] as protection of confidentiality of communications

[159] Berger, "Evidentiary privileges: Best practice standards versus/and arbitral discretion…", *op.cit*., p. 510.

[160] Mosk & Ginsburg, "Evidentiary Privileges…", *op.cit.*, p. 281, von Schlabrendorff & A. Sheppard, "Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution", 2005, *op.cit.*, p. 768, Rubinstein and Guerrina, p. 598., Meyer-Hauser & Sieber, "Attorney Secrecy v. Attorney-Client Privilege in…", *op.cit.*, p. 195.

[161] Mosk & Ginsburg, "Evidentiary Privileges…", *op.cit.*, Meyer-Hauser & P. Sieber, "Attorney Secrecy v. Attorney-Client Privilege in…", *op.cit.* Heitzmann, "Confidentiality and Privileges…", *op.cit*., Rosher, "The application…", *op.cit*. G. S. Tawil & I. J. Mirorini Lima, "Privilege-Related Issues in International Arbitration", in T. Giovannini & A. Mourre (eds.), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, 6 Dossiers of the ICC Institute of World Business Law 29, 2009, pp. 43–44. R. Reiser, "Applying Privilege In International Arbitration: The Case For A Uniform Rule", *Cardozo Journal of Conflict Resolution,* vol.13, 2012, pp. 653-713.

[162] Möckesh, *Attorney-Client Privilege…*, p. 262. This author thinks that the closest connection test is presumed to exist with the domicile of the party claiming privilege. And that the presumption may be overcome if the facts of the case so required.

[163] Rosher, "The application…", *op.cit*., p. 20. Berger, "Evidentiary privileges: Best practice standards versus/and arbitral discretion…", *op.cit*., p. 519.

[164] Rosher.

[165] Alvarez, "Evidentiary Privileges…", *op.cit*., p. 686.

[166] Alvarez, "Evidentiary Privileges…", *op.cit*., p. 686.

[167] *Ibid.*, p. 686.

[168] Boisséson, "Evidentiary Privileges in International Arbitration", *op.cit*., p. 714.

between lawyers and clients is generally respected. Moreover, extending the same privilege rules to both parties is in line with having the same discovery rules.

85. The arbitral tribunal could apply the most favoured privilege on its own motion or at the request of a party, but in neither case the arbitral tribunal is bound to apply the most favoured privilege[169]. The choice of the most favoured privilege is between national laws of one of the parties' or their advisors' home jurisdictions[170].

86. A soft law instrument that develops the highest level of protection is the Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (2009) by the International Institute for Conflict Prevention and Resolution (CPR)[171]. Section 1 (b) specifies that "the arbitrators should apply the provisions of applicable law that afford the greatest protection of attorney client communications and work product documents." The CPR Protocol explicitly refers to Attorney-Client Privilege and Attorney-Work-Product Protection, considering that inadvertent disclosure of documents related to these privileges should not be introduced in arbitration, unless the party holding the privilege or work product protection waives such privilege. The language of the CPR Protocol restricts the unfettered discretion of arbitrators and points to a duty to apply the highest level of protection for attorney client communications.

87. However, the most-favoured privilege approach may grant more privilege than the parties expected, at least one party. The concept of legitimate expectations does not mean that the broadest protection will always apply, but that a party would have access the same type of documents from the other party in the event of an arbitration[172]. Therefore, meeting parties' expectations would not be the main reason for adopting the most favoured privilege.

88. In addition, the most favoured privilege may create a "super privilege", providing higher protection than the relevant national laws in the context of international litigation.[173] An important shortcoming of applying the most-favoured privilege rule would be the exclusion of relevant evidence because it creates an over-inclusiveness problem. A good suggestion is to adopt some degree of skepticism when dealing with privilege claims[174].

89. Moreover, it may be hard to determine which is the most favourable rule[175]. It requires a complex conflict of laws analysis in two steps[176]. First, the arbitral tribunal will research the substantive applicable laws, including possible waivers and inferences to be drawn from the exercise of the privilege right. Second, the tribunal needs to decide between them which the most favoured law is[177]. At first sight,

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[169] Marghitola, *Document Production in International Arbitration,* Kluwer Law International, 2015, p. 166. Marghitola, "Document Production: New Findings on an Old Issue", *ASA Bulletin*, vol. 34, 2016, pp. 78ff, p. 89.

[170] Marghitola, *Document Production in International Arbitration, op.cit.* p.166.

[171] Available at: https://www.cpradr.org/resource-center/protocols-guidelines/protocol-on-disclosure-of-documents-presentation-of-witnesses-in-commercial-arbitration

'(b) Attorney-Client Privilege and Attorney-Work-Product Protection

"No documents obtained through inadvertent disclosure of documents covered by the attorney-client privilege or attorney work-product protection may be introduced in evidence and any documents so obtained must upon request of the party holding the privilege or work product protection, be returned forthwith, unless such party expressly waives the privilege or work product protection. The arbitrators should apply the provisions of applicable law that afford the greatest protection of attorney client communications and work product documents."

[172] Von Schlabrendorff & Sheppard, "Conflict of Legal Privileges in International Arbitration…", *op.cit.,* p. 773.

[173] R. Magnus, "Der Schutz der Vertraulichkeit bei grenzüberschreitender Anwaltstätigkeit", *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* vol. 77, No.1, 2013, pp. 111-130, p. 129.

[174] Alvarez, "Evidentiary Privileges…", *op.cit*., p. 686.

[175] von Schlabrendorff & A. Sheppard, "Conflict of Legal Privileges in International Arbitration …", *op.cit.*, p. 773.

[176] I. Shehata, "Attorney-client privilege & international arbitration", *Cardozo Journal of Conflict Resolution*, vol. 20, 2019, pp. 363-415, p. 382.

[177] Boisséson, "Evidentiary Privileges in International Arbitration", *op.cit.*, p. 713.

it may seem that the concept of legal privilege is reduced in civil law jurisdictions in comparison with common law jurisdictions[178]. Nevertheless, when navigating the strict differences between jurisdictions, distinctions among civil law jurisdictions reveal[179].

90. Another disadvantage is that the most protective approach does not seem to refer to document disclosure rules of the specific case. Choice between national rules on privilege clashes with an international arbitration procedure which is a manifestation of the principle of party autonomy and does not necessarily follow a national procedural law. In a dispute between a Swiss and a German party with lawyers of the same nationality if the arbitral tribunal would follow the IBA Rules and apply the most favoured law, the result could end up being unfair for both parties[180]. This is because in both jurisdictions in-house counsel communications are not protected, so the tribunal will accept evidence and communication with in-house counsel even though the sphere of document disclosure is not so expansive in the parties' procedural culture.

91. It is also believed that the most favoured national rule avoids any conflict with public policy, "since granting more protection than is required by the applicable legal standards will not be regarded as a violation of the *ordre public* in cases where the relevant privilege provisions form part of it"[181]. However, the conflict between not granting privilege and public policy will depend on the notion of "public policy" that the competent judicial court will consider when examining the final award in enforcement or annulment proceedings. For example, discovery rules are considered part of public policy in the United States as enunciated in the open discovery rules set forth in the Federal Rules of Civil Procedure and in the decisions of the federal courts. In consequence, a British statute that claims privilege patent-agent and clients is incompatible with the public policy of the United States[182].

92. Despite the disadvantages of the most favorable approach, Article 22 of the ICDR International Arbitration Rules provides that duty for the arbitral tribunal[183]: "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."

93. Article 22 has been added with the 2012 amendments to the ICDR International Rules. The origin of article 22 is a transposition of Guideline 7 of the ICDR Guidelines for Arbitrators Concerning Exchanges of Information[184]. These guidelines are effective since May 31, 2008. The preamble of ICDR guidelines emphasizes that migration of national procedural mechanisms only adds costs, delay and com-

[178] Shehata, "Attorney-client privilege…", *op.cit*., p. 382.

[179] For example, in-house lawyer are covered by legal privilege in Spain, but not in France or Germany.

[180] Shehata, "Attorney-client privilege…", *op.cit*., p. 382.

[181] Berger, "Evidentiary Privileges Under the Revised IBA…", *op.cit*., p. 176.

[182] *Odone v. Croda Intern. PLC*, 950 F. Supp. 10 (D.D.C. 1997), "Furthermore, the British statute contravenes the public policy of the United States as enunciated in the open discovery rules set forth in the Federal Rules of Civil Procedure and in the decisions of the federal courts." This case justified its decision in different U.S. case law.

[183] International Centre for Dispute Resolution International Arbitration Rules, (Rules amended and effective 1 June 2014). Article 1: Scope of these rules: "Where parties have agreed to arbitrate disputes under these International Arbitration Rules ("Rules"), or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution (ICDR) or the American Arbitration Association (AAA) without designating particular rules, the arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing. The ICDR is the Administrator of these Rules." (available at: https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf)

[184] Guideline 7 states that "The tribunal should respect applicable rules of privilege or professional ethics and other legal impediments. When the parties, their counsel or their documents would be subject under applicable law to different rules, the tribunal should to the extent possible apply the same rule to both sides, giving preference to the rule that provides the highest level of protection." (available at https://wcart.files.wordpress.com/2012/07/icdr-guidelines-for-arbitrators-concerning-exchanges-of-information.pdf)

plexity to arbitration, making diffuse the difference between arbitration and litigation[185]. The ICDR guidelines which are incorporated in the ICDR Rules consider national privilege rules and professional ethics at the same level to limit discovery. However, the guidelines enhance parties' equality, advising the same rule to both sides and in case of conflict, a preference for the most favoured nation approach is established. The ICDR Rules advantage is that the language is not prescriptive as "to the extent possible" implies margin of maneuver to canvass any applicable law. The highest level of protection of privilege may be end up in applying common law, in particular U.S. law when a U.S. party is involved[186]. However, flexibility is possible under the specific circumstances of the case and U.S. law should not be the default rule.

94. The principle of equality is the *charta magna* of procedural law in any modern system of justice and the highest level of protection is consistent with the IBA Rules on Taking of Evidence on "the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules"[187]. However, the checklist of article 9(4) of the IBA Rules is flexible because "it does not interfere with the substance of domestic privilege rules or with the complex conflict of laws issues"[188]. Thus, to apply the highest level of protection rule could be the best way to maintain fairness and equality as between the parties as required by art. 9(4)(e) of the IBA Rules[189].

95. Moreover, the same concept appears in two international instruments: the Hague Convention on the Taking of Evidence Abroad (1970) and the Inter-American Convention on the Taking of Evidence Abroad (1975)[190]. Article 11 of the 1970 Hague Convention provides that "in the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence (a) under the law of the State of execution; or (b) under the law of the State of origin." Article 12 of the Inter-American Convention indicates that "a person called to give evidence in the State of destination pursuant to a letter rogatory may refuse to do so when he invokes impediment, exception or duty to refuse to testify: (1) under the law of the State of destination; or (2) under the law of the State of origin."

3. Public policy and equal treatment

96. If legal privilege rules do not form part of mandatory public policy[191], there should be neither risk of challenges at the annulment proceeding nor at the recognition or enforcement phase of awards based on public policy under the New York Convention. However, whether legal privilege are not mandatory rules in every system is not so clear. The fact that no award has been annulled on violation of privilege rules does not necessarily mean that legal privileges are not part of fundamental rights. International public policy remains prioritizing domestic legal values to international transactions[192] and a truly international public policy does not really exist because the basis of public policy is always in reference to a domestic system. That is why the law of the seat of arbitration is not only necessary but crucial to decide the annulment of an award. For example, the settlement privilege is under the coverage of duty

[185] Introduction, "One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation."

[186] F. Gusy and J. Milton Hosking, *A Guide to the ICDR International Arbitration Rules*, 2nd edition, Oxford University Press, 2019, pp. 226 – 228, p. 228, §22.09.

[187] 2020 IBA Rules, article 9 (4)(e).

[188] Berger, "Evidentiary Privileges Under the Revised IBA Rules …", *op.cit.*, p. 176.

[189] R. Marghitola, "Interpretation of the IBA Rules", in *Document Production in International Arbitration,* Kluwer Law International, The Hague, 2015, pp. 77-79.

[190] https://www.oas.org/juridico/english/sigs/b-37.html

[191] Möckesch, *Attorney-Client Privilege …, op.cit.,*p. 209.

[192] G. Cordero-Moss, "Limits on Party Autonomy in International Commercial Arbitration", *Penn State Journal of Law & International Affairs*, Vol. 4, No. 1, 2015, pp. 186-212, p. 190. ["national law defines (…)when an award is deemed to conflict with public policy, (…), what mandatory rules of procedure apply, and, when an award is valid"].

of confidentiality or professional secrecy under the Spanish Mediation Law. This duty encompasses the mediator who is not necessarily a lawyer. But in the case of lawyers intervening in a mediation, professional secrecy displays with a greater intensity for being the first defenders during the mediation process. Lawyers have a duty to preserve security and trust of their client and any successful or failed settlement should not be produced to the court. Reporting settlement agreements that were not finally concluded before a civil court is sanctioned by a fine[193]. Therefore, it would be consistent with Spanish law to order not to disclose the settlement agreement offered during a mediation that was not successful when the parties decide to start arbitration proceedings in Spain. It must be added that the settlement privilege has been considered the only transnational privilege[194].

97. The theory of public policy exception consists of not applying a foreign rule because it is incompatible with the seat or the enforcement state legal order[195]. Possible scenarios are at least two: that the seat State considers legal privileges essential, and therefore, any foreign applicable law that does not establish the attorney-client privilege would infringe the privilege law that can be considered public policy of the forum. Arbitrators would refer to the privilege law to gain an enforceable award. But if the parties are domiciled in different States with different legal cultures, could legal privilege be considered a transnational public policy? Legal privilege protects individuals, businesses, and governments by limiting the spread of confidential and sensitive information. In any case, the right to equal treatment must be respected. It is argued that equal treatment does not have only a procedural dimension but also a material dimension[196]. Without this material dimension, fair treatment is reached when applying a domestic privilege rule that each party expects, even if the rule is different for claimant and respondent[197]. However, fair treatment needs the same rule for both parties to ensure equality of arms between the parties to assert their rights in the proceedings[198]. But parties' expectations can be different. Or is the equal treatment principle a higher value than parties' expectations in international arbitration?

V. Clarity versus flexibility

98. In court proceedings rules of evidence are prescriptive, so domestic parties know in advance which type of communications are discoverable or privileged. Rules afford predictability and efficiency in advising because lawyers can foresee a result in domestic litigation.

99. Having a clear hard and fast rule like the law of the lawyer residence would avoid arbitrators need to review doctrinal articles on applicable law approaches to legal privilege[199]. However, application of any domestic law would be contrary to substantive neutrality, that is why transnational standards need to be developed for arbitration[200].

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[193] Judgment SAP of Barcelona 500/2020, of September 19, imposes a fine on a lawyer who breaks the duty of confidentiality. The party reported the pre-agreements dealt with in the mediation, providing documents prepared in the mediation, although it considered that they had no legal validity.

[194] Berger, "Evidentiary Privileges…", *op.cit.*, 2006, pp. 514-515.

[195] Y. Derains, "Public Policy and the Law Applicable to the Dispute in International Arbitration" in P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration ICCA Congress Series* No. 3, 1987, p. 227. P. Lalive, "Transnational (or Truly International) Public Policy and International Arbitration" in P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration ICCA Congress Series* No. 3, 1987, pp. 258-318, p. 286.

[196] Rosenfeld, "The law applicable to legal privilege in international commercial arbitration", *op.cit*., p. 234

[197] Born, *International Commercial Arbitration*, 3rd Ed., Kluwer Law International, 2021, p. 2561.

[198] Rosenfeld, "The law applicable…", *op.cit*., p. 234: "this material dimension of the right to equal treatment requires arbitrators to ensure the equality of arms among the parties who in reality need to have equal opportunities to assert their rights in the proceedings"

[199] Berger, "Evidentiary Privileges Under the Revised IBA Rules …", (2010), *op.cit*., p. 176.

[200] G. Kaufmann-Kohlter & P. Bärtsch, "Discovery in International Arbitration: How Much is Too Much", *SchiedsVZ : Zeitschrift für Schiedsverfahren = German Arbitration Journal*, 2004, vol. 1, pp. 13-21. Berger, "Evidentiary privileges: Best practice standards versus/and arbitral discretion…", *op.cit*., (2006), p. 513.

100. Overall, the arbitral tribunal should not be restricted in their discretion to accept or reject privileged documents based on substantive characterization. Parties implicitly accept a neutral procedure that does not need to be like their home procedure. By the same token, domestic privileges may not be interpreted the same in arbitration proceedings with different legal background. Parties are exposed to general principles if they exist, and arbitral determination is just the result of lack of previous agreement on choice of law for privilege issues. Likewise, this kind of agreement by the parties is very rare. According to Carter, "all too frequently, tribunal and counsel will not be aware that conflicting privilege will be an issue until document production had begun and one party has taken a position regarding particular documents that the other party challenge"[201].

101. In favor of flexibility, it can be said that avoiding giving a complete answer to privilege questions is a good thing[202]. However, for the same commentator "the only way that the arbitral tribunal can treat the parties equally and still give credit to their prior expectations is to apply the most-favoured nation rule"[203]. After it was stated that the closest connection test was the most used in practice[204], it appears that only the most favoured nation rule, which is the one that applies the most expansive privilege law can comply with the list of considerations within the IBA Rules[205]. It is quite paradoxical that on the one hand, arbitrator's flexibility is the desired protected value, but afterwards only one solution could be compatible with all considerations in the 2020 IBA Rules Article 9(4).[206]

VI. A transnational approach in consonance with the European concept of legal privilege

102. The common market is a clear economic concept. Nonetheless, the CJEU acknowledges that EU law stemmed from the "legal interpenetration" of the Members States, including the common concepts and principles in national laws like respect of lawyer-client confidentiality as regards their communications[207]. The legal profession consists of giving independent advice to all those in need of it. The CJEU rightly notices that any person has the right to address a lawyer without restrictions on the confidentiality of their communications[208].

103. Cooperation on the observance of the law requires confidentiality of written communications between lawyer and client, being the nature of the legal profession. The two grounds for creating an autonomous concept of privilege are maintaining of the rule of law and respect for the rights of the defense[209].

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[201] Carter, "Privilege Gets a New Framework", *op.cit.*, p. 177.

[202] *Ibid*., p. 177.

[203] *Ibid*., p. 179.

[204] *Ibid.*, p. 178.

[205] *See* section IV. B.

[206] Carter, "Privilege Gets a New Framework", *op.cit*., p. 179: "The 2010 IBA Rules have filled the void of authority on privilege in international arbitration by establishing a governing set of privileges." For this author the considerations of Article 9(3) of the 2010 IBA are "principles". Note that Article 9(3) of the 2010 IBA Rules corresponds with Article 9(4) of the 2020 IBA Rules.

[207] CJEU, Case 155/79 *AM & S Europe Limited v Commission* [1982] ECR 01575, (ECLI:EU:C:1982:157), para. 18. ("That confidentiality serves the requirements, the importance of which is recognized in all of the Member States, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it.")

[208] *Ibid.*

[209] Case 155/79 *AM & S,* para. 20. According to the CJEU, for a second group of Member States the rights of the defence is the clearest justification of confidentiality in lawyer-client communication ("Whilst in some of the Member States the protection against disclosure afforded to written communications between lawyer and client is based principally on a recognition of the very nature of the legal profession, inasmuch as it contributes towards the maintenance of the rule of law, in other Member States the same protection is justified by the more specific requirement (which, moreover, is also recognized in the first-mentioned States) that the rights of the defence must be respected.")

104. The CJEU goes beyond domestic law and outlines how the protection of communications between lawyers and clients should be, given that there are common criteria among the Member States. It limits the legal privilege protection to two conditions[210]: a) the correspondence must be within the framework and in the interest of the client's defense rights and b) it must be related to independent lawyers. Therefore, lawyers must be separated from their client without an employment relationship. Following European jurisprudence, in-house lawyers created new sections at the Bar of some member States[211]. For example, the Madrid Bar Association declared that "it is essential for in-house lawyers a differentiated protection of professional secrecy and confidentiality of their communications, as well as that independence is preserved in the conformation of the lawyer's own criteria in matters of his technical competence, and in compliance of their duties to collaborate with the justice and regulatory bodies"[212] . A decade after, article 39 of the Spanish Lawyers General Statute enshrined that in-house lawyers will be protected by professional secrecy[213].

VII. The Unified Patent Court Rules: a substantive solution

105. The Unified Patent Court Rules could be a new source of guidance for arbitrators. Article 48 (5) of the Unified Patent Court Agreement set the rules that "representatives of the parties shall enjoy the rights and immunities necessary for the independent exercise of their duties, including the privilege from disclosure in proceedings before the Court in respect of communications between a representative and the party or any other person, under the conditions laid down in the Rules of Procedure, unless such privilege is expressly waived by the party concerned"[214]. Two limitations are: express waiver of privilege and development of the rules of Procedure.

106. The UPC Rules of Procedure[215] dedicate three sections to privileges. Rule 287 on attorney-client privilege, Rule 288 on litigation privilege and Rule 289 on privileges, immunities and facilities during court proceedings. Rule 287 establishes the scope of the attorney-client privilege in the following terms: "Where a client seeks advice from a lawyer or a patent attorney he has instructed in a professional capacity, whether in connection with proceedings before the Court or otherwise, then any confidential communication (whether written or oral) between them relating to the seeking or the provision of that advice is privileged from disclosure, whilst it remains confidential, in any proceedings before the Court or in arbitration or mediation proceedings before the Centre."

107. There are two definitions of a lawyer which complicates the interpretation of who enjoy legal privileges under UPC Rules. The first definition is based on Directive 98/5/EC[216]. The UPC Rule 286 (1)

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[210] Case 155/79 *AM & S,* para. 21.

[211] See, for example, Colegio de Abogados de Madrid*, Declaración relativa a los Abogados de empresa de 20 de julio de 2010*, "Como dice en su artículo 1.1 el Código de Deontología de los Abogados en la Unión Europea, definiendo la función del abogado en la sociedad: "*En una sociedad basada en el respeto al Estado de Derecho, el Abogado cumple un papel esencial. Sus obligaciones no se limitan al fiel cumplimiento de lo encomendado, en el ámbito de la legislación aplicable. Un Abogado debe servir los intereses de la Justicia, así como los derechos y libertades que se le han confiado para defenderlos y hacerlos valer*". La definición es, claro está, plenamente aplicable al abogado de empresa y hay que extraer de ella todas sus consecuencias." https://web.icam.es/bucket/DeclaracionInstitucionalrelativaabogadosempresa.pdf

[212] Colegio de Abogados de Madrid*, Declaración relativa a los Abogados de empresa de 20 de julio de 2010,* para. 4 (own translation).

[213] Carta abierta del Decano del Colegio, José María Alonso, sobre la salvaguarda del secreto profesional, March 3, 2021, https://web.icam.es/comunicado-del-decano-del-colegio-jose-maria-alonso-a-los-abogados-as-de-empresa-sobre-la-salvaguarda-del-secreto-profesional/

[214] Unified Patent Court Agreement, OJEU, C 175/1, 20.6.2013, https://www.unified-patent-court.org/sites/default/files/upc-agreement.pdf . The new system will enter into force on the 1st of June, 2023 for seventeen of the twenty-seven Member States. https://www.epo.org/law-practice/unitary/unitary-patent/start.htm

[215] Rules of Procedure of the Unified Patent Court as adopted by decision of the Administrative Committee on 8 July 2022.

[216] Directive 98/5/EC of the European Parliament and of the Council of 16 February 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, OJ L 77, 14.3.1998.

defines a lawyer as "a person who is authorized to pursue professional activities under a title referred to in Article 1 of Directive 98/5/EC and by way of exception a person with equivalent legal professional qualifications who, owing to national rules, is permitted to practice in patent infringement and invalidity litigation but not under such title." The "equivalent legal professional qualifications" implies patent attorneys in some Member States who cannot use the title of "lawyer". Article 1 of Directive 98/5/EC covers in-house counsel insofar as the Member States law permits them to use the tile of "lawyer"[217]. Despite article 8 of Directive 98/5/EC includes salaried lawyers in the employ of another lawyer, an association or firm of lawyers, or a public or private enterprise, to the extent that some Member States law reserve the title of lawyers for self-employed lawyers, in-house lawyers are not covered by privilege under the UPC Rule 287 (6) first part.

108. The second definition of lawyer is a person who is qualified to practice as a lawyer and is qualified to give legal advice under the law of the state where he practises and who is professionally instructed to give such advice [UPC Rule 287 (6) (a)]. This definition of lawyer should be interpreted to give the broadest scope for legal privilege. If the second definition is not read as an alternative definition to cover the widest range of privilege, there is no distinction between rule 287(1) and 287(2). Rule 287(2) expressly consider that a lawyer is "employed" by a client instead of a lawyer "instructed" by a client.

109. Litigation privilege under UPC Rule 288 has the same extend as attorney-client privilege defined in UPC Rule 287 and protects the confidential communications between a client or their lawyer or patent attorney and third parties for the purposes of obtaining information or evidence of any nature for the purpose of or for use in any proceedings, including proceedings before the European Patent Office.

110. UPC Rule 287 (3) lays down the extension of the attorney-client privilege. The privilege covers the work product of the lawyer or patent attorney, encompasses communications between lawyers and/or patent attorneys employed in the same firm or entity or between lawyers and/or patent attorneys employed by the same client and any record of a privileged communication. UPC Rule 287 (4) sets that the lawyer or patent attorney cannot be questioned about the contents or nature of their communications. Finally, the privilege can be waived by the client expressly under UPC Rule 287 (5).

VIII. Concluding remarks

111. The habitual residence of the lawyer advising the client should prevail disregarding any forward of the communication to any foreign lawyer outside the first jurisdiction. There is a first contradiction that must be overcome in international arbitration. Lawyers from a legal system are regulated by ethical codes, however, these codes do not usually establish the lawyer's role[218]. Even when they establish some type of guidance, this is always in apparent contradiction because the role of the lawyer in the system is embedded in intrinsic beliefs and assumptions from users of the legal system.

112. On the one hand, lawyers must abide the law and as agents in the process of justice, they must detect any wrongdoing committed or intend to commit by their client (compliance programs). On the other hand, lawyers must serve the interest of their client, that is why confidentiality of communications with clients represents a principle of the legal profession[219].

[217] Avocat, Rechtsantwalt, Abogado, Avvocato, etc.

[218] Exception, Spanish Legal Code of the Legal Profession, which clearly sees the lawyer as a collaborator of justice.

[219] C.A. Rogers, "Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration", *Michigan Journal of International Law*, vol. 23, No. 2, 2002, pp. 341-423, p. 383: "ethical codes do not establish the role of a professional. They guide and facilitate performance of an already-established professional role. The starting point for any ethical regime, therefore, is to define the role of the agent. In the case of lawyers, the role of the advocate rests on an inherent contradiction. On the one hand, advocates occupy a quasi-official role as agents in the process of justice. This role imposes on them certain obligations to courts, the legal profession, and the public at large. On the other hand, 201 they are retained by one party to ensure victory over the other. In this capacity, advocates owe to their clients duties that may well be at odds with their other obligations to courts, the profession, and the public."

113. The best defence is only possible to be granted when the lawyer is fully informed by the client in a similar manner the lawyer's mind strategy should not be disclosed during the proceedings because it helps the client's interests. This paranoia of roles of the lawyer makes the adjudicative process difficult because they may have different obligations that are exacerbated in international arbitration. That is why the place of practice of the lawyer should be the connecting factor more prevalent, with the option to make concessions to a fair treatment of the parties when necessary[220]. As Professor Park states, "no one should be surprised that arbitration implicates goals other than accuracy, or that these aims require limits on testimony and discovery requests. Nothing new resides in balancing truth-seeking against values that further public goals rather than adjudicatory precision"[221].

114. The IBA Rules may not be satisfactory in international arbitration due to their lack of predictability. The most appropriate approach would be to establish a rigid norm that establishes the lawyer's place of practice as the main connecting factor for the rule of privilege in the IBA Rules. However, this can be considered a territorial approach that produces unequal treatment. Therefore, failing the law of the lawyer's place of practice, the reasonableness of the particular case made by the arbitrators could create a fair result, but it has the disadvantage that it is not predictable *ex ante*, like the proposed rule.

115. Finally, the attorney-client privilege rules used in the proceedings before the UPC and the Patent Mediation and Arbitration Center could serve in international arbitration, mainly for two reasons.

116. First, even though it is a regional project, the UPC procedural rules had to consider different legal cultures, since the common law culture, especially the English one, was very relevant in the elaboration of the UPC Rules.

117. Second, the UPC Rules are designed for both judicial procedure and arbitration before specially created bodies, the UPC and the Patent Mediation and Arbitration Center. They have a broad definition of lawyer (if we understand including in-house counsel) for the protection of "privileged information" and even the patent-attorney who is not required to have passed an examination for or be a member of any national or European patent bar[222]. Yet, neither an in-house counsel can represent their employer before the UPC, nor the patent attorney can represent a party before the UPC without a justification showing that he has appropriate qualifications. Thus, privilege rules do not affect other functions of the in-house counsel or patent-attorney.

118. In the CJEU jurisprudence the different treatment of an in-house lawyer and an independent lawyer is not considered an infringement of the principle of equal treatment[223]. The idea of excluding the information of in-house lawyers from confidential protection lies at the fact that they are employees, and do not maintain a statute of independence as an autonomous lawyer[224]. However, it is questioned whether independence is a matter related to the salaried nature of a company, or rather the existence of a dominant client for lawyers.

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[220] *Cf.*, Marghitola, *Document Production in International ...op.cit*., p. 138, "The arbitral tribunal should have the possibility of using the IBA Rules as guidelines in this case. Such a solution would not unduly favour the party experienced in international arbitration. Both parties must accept that the arbitral tribunal may apply international standards if the parties have different expectations on the extent of document production. This example demonstrates that a mandatory compromise would be too strict. As a result, an arbitral tribunal does not have the duty to find a compromise between different procedural expectations of the parties."

[221] Park, "Arbitrators and Accuracy…", *op.cit*., pp. 32-33. He continues: "Classic trade-offs include professional secrecy, evidentiary exclusion rules, and the civil jury system."

[222] *See* J.-D. Lindemans, "Unified Patent Court: Confidentiality and Legal Privilege" (16.02.2016) , Section 6, *Crowell blog*, available at: https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Unified-Patent-Court-Confidentiality-and-Legal-Privilege

[223] Judgment of the Court (Grand Chamber) Case C550/07 P, *Akzo Nobel Chemicals Ltd, Ltd and Akcros Chemicals Ltd v Commission* (hereinafter *Akzo II*), 14.09.2010. (ECLI:EU:C:2010:512), paras. 44-49.

[224] Judgment of the Court of First Instance (First Chamber, Extended Composition), Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, 17.09.2007, (EU:T:2007:287), para. 174. This perspective was confirmed in *Akzo II*.