

Privilege across borders in arbitration: multi-jurisdictional nightmare or a storm in a teacup?

Michelle Sindler/Tina Wüstemann*

Spotlight on Privilege

The scope of privilege limiting the obligation to disclose certain documents and information has been the subject of considerable scrutiny in recent times. The question is very topical at the moment largely because after decades of relative stability, the ambit of privilege or similar protections is now in a state of flux following significant increases in challenges to assertions of privilege¹. The drive on the part of competition authorities to route out cartel cases, and the ongoing discussion in the EU about whether legal privilege should be extended to in-house counsel in the context of investigations by the European Commission, have also fuelled the debate.

With various courts around the world reconsidering the principles underlying the law relating to privilege, the pressure of new corporate governance and new whistle-blowing requirements², and the implementation of new anti-competition and regulatory rules which seemingly weaken privilege rights³, lawyers have become increasingly concerned at the erosion of the fundamental tradition of legal privilege and potential statutory intrusions into their professional obligations.

This spotlight on privilege in commentaries and legal writings and in recent case law has also led to increased discussion of the application of evidentiary privileges in international arbitration as a difficult topic of increasing practical importance because of the uncertainties that exist in when, how and in what circumstances privilege protection could or should be available, and the extent of that protection⁴. But is this really such a problem area for arbitration?

In an increasingly global corporate and investment environment, multinational corporations and individuals operating across borders, require and receive legal

* Partners in the law firm Bär & Karrer, Switzerland.

¹ The last years have seen a proliferation of cases especially in common law countries. To mention just a few: In England - *Three Rivers District Council v Bank of England (No 5)* [2003] EWCA Civ 474; *Three Rivers District Council v Bank of England (No 10)* [2004] EWCA Civ 218; *United States of America v Philip Morris Inc. & Others and British Tobacco* [2004] EWCA Civ 330. In Australia - *Vance v Mc Cormick* [2004] ACTWC 78; *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122; *Kennedy v Wallace* [2004] FCAFC 337. In the EU: *AM&S Europe Ltd v. Commission* [1982] ECR 1575; *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Commission* [2003] ECR II - 4771.

² See e.g. NICOLA LAVER, *Attorney/Client Privilege-the new Dangers*, International Bar News, December 2003, p. 5 ss.

³ As regards legal privilege in the context of investigations conducted by the Swiss Competition Authority ("WEKO"), see FRANZ HOFFET/DOROTHEA SECKLER, *Vom Anwaltsgeheimnis zum "Legal Privilege"*, *Die Revision des Kartellgesetzes erfordert eine neue Sicht auf den Schutz der Anwaltskorrespondenz*, SJZ 101 (2005) Nr. 14, p. 333 ss.

⁴ See e.g. BERNHARD F. MEYER-HAUSER, *Das Anwaltsgeheimnis und Schiedsgericht*, Schulthess, Zurich, 2004; JAVIER H. RUBINSTEIN/BRITTON G. GUERRINA: *The Attorney-Client Privilege and International Arbitration*, in: *Journal of International Arbitration*, Vol. 18 N. 6 (2001), p. 587 ss; DAVID W. RIVKIN/ BERNARDO CREMADES, *The Difficult Issue of Privilege*, in: *Arbitration and ADR*, Newsletter of Committee D of the International Bar Association Section on Business Law, Vol. 5 Nr. 3 (2000), p. 1 ss.; RICHARD M. MOSK/ TOM GINSBURG: *Evidentiary Privileges in International Arbitration*, in: *International and Comparative Law Quarterly*, Vol. 50, London 2001, p. 345 ss.; NORAH GALLAGHER, *Legal Privilege in International Arbitration*, in: *International Arbitration Law Review*, Issue 2, (2003), p. 45 ss;

advice in many different jurisdictions. With increased international expansion, corporations are now also exchanging information and documents to an extent undreamt of twenty years ago. As corporations operate in more international locations, often unfamiliar ones, they face greater challenges, complexities and risks. All perfect ingredients for more (and more complex) disputes.

International arbitration inevitably involves parties, lawyers and arbitrators from (often very) diverse legal, commercial and cultural traditions. Tribunals will most often comprise arbitrators from multiple jurisdictions and in particular, from legal traditions different from those of the parties and their counsel (often also from different jurisdictions). Arbitrators and counsel overseeing the claim or defense strategy across different jurisdictions and across legal cultures (in a multi-jurisdictional matter) where advice or evidence is inevitably sought in one jurisdiction involving relationships or communications of another, will have to contend with very different, often ill-defined or sometimes even contradictory notions of legal privilege.

There is no single international code of commonly accepted principles even though all professional privileges have the same rationale - to encourage frank and open communications between professionals and those with whom they have a professional relationship. The number, type and scope of those privileges can vary dramatically not just from one country to another but also among common law or civil law countries⁵. The privilege may be held by the professional, the client, or perhaps even both; it may be subject to certain exceptions and may or may not be waivable. The recent writings and case law show that privilege can be a legal minefield in contentious proceedings at national level and even more so in cross-border litigation. How does this translate into international arbitration proceedings when various different legal regimes and expectations interact?

The growth of international arbitration and its increasing popularity as a dispute resolution mechanism used in most international commercial contracts has increased focus on the predictability and accessibility of the process, creating greater need for clear and accessible rules of the game. Much has been achieved but "privilege" is one of the particularly delicate areas where there are no settled rules, and parties, counsel and tribunals are left to their own devices.

This article highlights the areas of legal privilege that have led to the greatest debate and discusses some of the concerns that arbitration practitioners and users have identified as the major difficulties or uncertainties they face in attempting to apply legal privilege in international arbitration. We also consider some practical impact of these potential difficulties for clients and practitioners (counsel and arbitrators) in the hope of assessing whether questions of privilege pose real

⁵ See e.g. DIANA GOOD, PATRICK BOYLAN, JANE LARNER, STEPHEN LACEY, *"Privilege: a world tour"* and *"Privilege: the in-house view"*, available at www.practicallaw.com; DAVID W. RIVKIN/ BERNARDO CREMADES, op. cit., p. 1 ss.

dilemmas in international arbitration or whether this debate (from an arbitration perspective at least) is rather just a storm in a teacup⁶.

Stand and Deliver!

The question which arises in every international arbitration is how the material facts of the case which go to the issues to be determined are to be ascertained by the tribunal. How evidence is produced, its admissibility, relevance and significance determines both the conduct and the result of the arbitration. One of the most frequent areas of cross-cultural dispute in an arbitration is the question of disclosure or production of documents or release of information.

Traditions and rules on document production vary significantly between common law and civil law jurisdictions. Common law lawyers (in the UK, the US and elsewhere) have developed sophisticated, time-consuming and very expensive systems of discovery or disclosure of documents. Such complicated procedures are thought unnecessary in order to do justice in civil law procedures in which parties may in principle produce only those documents on which they rely. Exemptions from production naturally vary in similar ways. Production of documentary evidence in international arbitration is now largely 'harmonized', combining elements of the two systems⁷.

Privilege rules impact on the admissibility of evidence. Claims of legal privilege can arise in several ways. For example, a party might seek documents from another party that are covered by legal privilege under the latter party's local law. A party witness might be asked about discussions with his or her lawyer. If applicable, evidentiary privileges allow a person to refuse to testify or to disclose certain information or to oblige others to refrain from doing so, even though that information might be relevant for the outcome of the dispute.

Although it is an essential pre-requisite of privilege that the communication is confidential, one needs to distinguish between privilege and the related issue of the duty of confidentiality, which will not be discussed in this article. Privilege is arguably a specific expression of the issue of confidentiality⁸. However, it is not linked to the duty to keep confidential the proceedings and the award and any

⁶ This article is not intended to be a comprehensive analysis and many of the issues covered are necessarily summary in nature. Our focus is on legal privilege which – apart from the protection of business and trade secrets – is the privilege most likely to appear in international arbitration. Other typical privileges are e.g. privilege against self-incrimination, 'without prejudice' privilege, family testimony, privilege of civil servants or persons appointed to a public office; See also RICHARD M. MOSK/ TOM GINSBURG, *op. cit.*, p. 349 ss.

⁷ See e.g. GABRIELLE KAUFMANN-KOHLER/PHILIPPE BÄRTSCH, *Discovery in International Arbitration: How Much is too Much?*, *SchiedsVZ* (January 2004), p. 17; DAVID P. RONEY/ANNA K. MÜLLER, *The Arbitral Procedure*, in: *International Arbitration in Switzerland*, Gabrielle Kaufmann-Kohler/Blaise Stucki (eds.), 2004, p. 60 ss; ALAIN REDFERN/MARTIN HUNTER, *Law and Practice of International Commercial Arbitration*, 4th edition, 2004, p. 300.

⁸ See e.g. LOUKAS A. MISTELIS, *Confidentiality and Third Party Participation*, in: *Arbitration International*, Vol. 21 No. 2 (2005), p. 216. Also *Prudential Assurance Co. v Fountain Page Ltd* [1991] IWL 756 at 765: legal privilege provides a permissive right while a duty of confidence refers to a legal obligation.

materials submitted by another party in the framework of the arbitral proceedings⁹.

Variations on a theme: different concepts of (legal) privilege

While largely in agreement on the fundamental underlying principles, different jurisdictions have different concepts as to the nature and scope of privileges. Parties to an arbitration may enjoy different privileges before their national courts resulting in a "conflict of privileges" in their "international" dispute.

One of the problems of the reality of modern commerce is that clients operate across borders and are therefore subject simultaneously to different systems. When dealing with a multinational corporation, it is not possible to maintain a firewall between different procedures in different countries. Indeed, managing the interaction between the multiple jurisdictions and foreseeing the consequences a seemingly prudent move in one instance could have in another is an important aspect of modern legal practice. It is often only during the course of a dispute that the extent of the differences and the problems they can cause become obvious.

The right to proper legal advice is reflected in the principle of legal privilege, as it is known in common law countries¹⁰, and the principle of the "professional secrecy" of civil law countries¹¹. Both concepts, in current legal thinking, are mainly based on the principle of a client's right of defense, and therefore a proper functioning of the administration of justice.

Many privileges were developed in the common law jurisdictions as a result of obligations to disclose internal documents or communications as part of the discovery process and where, in contrast to proceedings in civil law jurisdictions, parties must disclose all relevant documents, even those detrimental to one's case. To allow a party to seek proper legal advice, to negotiate settlements and to prepare for litigation, protections were developed whereby documents under these headings did not have to be disclosed, subject to certain specific criteria. Such protections, known as "attorney-client privilege" (US), "solicitor-client privilege" (Canada), "legal professional privilege" (UK) or "client legal privilege" (Aus-

⁹ For a detailed discussion, see e.g. BERNHARD F. MEYER-HAUSER, op. cit., p. 67 ss.; CHRISTOPH MÜLLER, *La confidentialité en arbitrage commercial international: Un trompe-l'oeil?*, 23 ASA Bulletin 2/2005 (June), p. 216 ss.

¹⁰ According to the US Supreme Court in *Upjohn Co v. US* (1981) 449 US 383, the purpose of legal privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice [...] The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client"; see also *R v Derby Magistrates' Court, ex parte B* (1996) AC 487; and Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioner for Income Tax* (2002) 2 MRI 299.

¹¹ See e.g. PETER BURCKHARD, *Legal Professional Secrecy and Privilege in Switzerland*, IBA Section on Business Law, International Litigation News, October 2004, p. 33 ss: "[...] clients should be encouraged to avail themselves of professional legal advice, and to be frank with their lawyers about their situation without fear of sensitive information later being disclosed to other parties or the court; it is only through open communication and based on the knowledge of all relevant facts that lawyers are able to give accurate legal advice. [...] effective legal advice protected behind the veil of confidentiality is considered necessary to promote equality under the law in adversarial systems. There is general consent that this veil should not be lifted even if information highly relevant for the outcome of the legal proceedings is kept hidden behind it; the public interest in "correct" decisions has to stand back."

tralia), have been recognized by the highest courts in the various common law jurisdictions although the precise scope of such privileges can vary slightly between the common law jurisdictions. For the most part these are recognized as doctrines of *substantive law*, not easily dislodged except by clear legislative intent. In broad terms, the privilege is best described as a right to resist the (otherwise) compulsory disclosure of confidential information contained in a communication made orally or in writing between a lawyer (including an in-house counsel) and client, where the statements or materials were made or brought into existence for the dominant purpose of obtaining or giving legal advice, or where the communications took place for use in existing or contemplated proceedings¹².

The term "legal professional privilege" is really a misnomer as the privilege in question vests in the "client". The privilege is that of the client not the lawyer. The role of the lawyer is crucial to the existence of the privilege, but it is the client who can waive the privilege. The lawyer must protect the privilege unless instructed otherwise. The privilege rule is mitigated by the fact that a lawyer may not aid a client to commit a felony and the privilege does not extend to cases where the communications were intended to further criminal or fraudulent purposes.

In civil law jurisdictions, even though there is no similar concept of discovery, lawyers can generally also call on privileges in civil proceedings: privileges which provide for the obligation of secrecy for persons (including lawyers) who through their functions are depositories for the secrets or confidential information of others. In-house counsel in civil law jurisdictions are generally not able to invoke the privilege. The civil law concept of "professional secrecy" founded essentially in professional ethics, is again seen as necessary to allow a client to seek legal advice in full confidence that the information given to the lawyer will not be used against him. The principle is often reflected in the criminal codes of the countries concerned and a breach by the lawyer is sanctioned under criminal law. Unlike in common law jurisdictions, in the context of (civil) proceedings, the issue of privileges is considered to be a matter of *procedure*¹³. As in the common law system, "professional secrecy" cannot be invoked to help a client commit a felony. In certain civil law systems, professional secrecy may even provide for the confidentiality of communications between lawyers (e.g. France, where correspondence between lawyers is confidential and may not even be disclosed to the client) while in many other civil law systems and in the common law systems this is not the case. On the contrary, the lawyer has an obligation to his client to pass on that

¹² See e.g. *Baker v. Campbell* (1983) 153 CLR 52. Also *US v British American Tobacco* fn 1 above: the proceedings must actually be taking place or there must be a "real prospect" of litigation taking place. See also *Grant v Downs* (1976) 135 CLR 674 (High Court of Australia). Communications between several parties in anticipation of litigation remain privileged even if not all the parties become party to the litigation. This is referred to as "common interest privilege".

¹³ Legal privilege in Switzerland is governed by a variety of rules on the international, federal and cantonal level and its infringement constitutes a severe criminal offence. For a more detailed discussion, see FURRER ANDREAS, *Die Reichweite des Anwaltsgeheimnisses im Zivilprozess, Plädoyer für ein schweizerisches attorney client privilege*, AJP 202 895 ss, 903; PETER BURCKHARDT, op. cit., p. 33 ss.

communication (this difference of itself can lead to problems and misunderstandings if counsel are not aware of the different requirements or obligations)¹⁴.

Legal privilege under Swiss law includes everything that is confined to an independent lawyer in connection with a mandate regardless of the nature or content of the information whether it is accurate, its source or timing. Only the lawyer and not the client can invoke the privilege: the cloak of protection is over the lawyer, not the lawyer/client relationship. The client may waive the lawyer's obligation with the result that the lawyer is free to disclose the information within the limits of the waiver obtained¹⁵. Only information in the lawyer's possession which is part of his core business is protected (primarily representation of the client's interests and/or the rendering of legal advice). The same information or advice attracts no protection in the hands of the client¹⁶. This distinct feature of Swiss privilege law has been heavily criticized¹⁷.

What is clear in both common law and civil law jurisdictions is that privilege cannot be relied on as a blanket defense to disclosure. Objections must be raised and considered on a case-by-case basis and the privilege must be claimed with respect to each specific communication at issue. Courts will not simply accept a blanket claim for privilege covering all communications between a lawyer and his client¹⁸.

Documents which are not otherwise privileged are not, and do not become, privileged merely because they pass between lawyer and client or (especially in civil law jurisdictions) because they are handed over by the client to the lawyer. There is much the privilege does not protect. The privilege does for example not protect communications generated or received by a lawyer acting in some other capacity, or communications in which a lawyer is giving business advice rather than legal advice. A written or electronic communication does not have to be identified as being "privileged" or "confidential" for the privilege to attach but a party cannot protect a communication simply by marking it "confidential" or "privileged" or "attorney work product". The test is always whether a communication satisfies

¹⁴ See also JAVIER H. RUBINSTEIN/BRITTON G. GUERRINA, *op. cit.*, p. 592.

¹⁵ As regards the question whether the lawyer, as a result of the waiver, is not only entitled but obliged to disclose, in Switzerland resort must be had to the applicable cantonal procedural codes and the professional codes of conduct where the solutions offered vary. Article 13 of the Federal Act on the Freedom of Movement for Lawyers ("FAFML") now grants the lawyer an absolute right of refusal to give evidence if there is an overweighing public interest in maintaining secrecy. Art. 13 FAFML is also in line with § 159(3) ZPO ZH and Article 157 1(b) of the new Draft Federal Code of Civil Procedure, both providing for an absolute right to refuse testimony.

¹⁶ BGE 114 III 108.

See also recent (though heavily criticized) decision of the Swiss Federal Tribunal dated 13.8.2004 (IP.133/2004) addressing issues of Swiss legal privilege in the context of criminal proceedings. The court held that documents containing legal advice located at the client's premises that are not related to the client's defense are not privileged from seizure.

As regards Swiss competition law investigations, Swiss competition law now provides a clear legal basis for search of premises of entities domiciled in Switzerland by WEKO, the Swiss Competition Authority. According to the recent guidelines of the Secretariat of the WEKO, documentation of an external lawyer at the company's premises now has some very limited protection to the extent it relates to the specific investigation at stake (See also FRANZ HOFFET/DOROTHEA SECKLER, *op. cit.*, p. 333 ss.).

¹⁷ There are currently discussions going on as to protect also correspondence in the hands of the client; see e.g. FURRER ANDREAS, *op. cit.*, p. 903; FRANZ HOFFET/DOROTHEA SECKLER, *op.cit.*

¹⁸ See e.g. *US v Philip Morris Inc*, above fn. 1.

