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DETERMINING THE APPLICABLE LAW ON PRIVILEGES IN INTERNATIONAL COMMERCIAL ARBITRATION

Abstract

International arbitration is rapidly becoming a preferred method for dispute settlement between commercial entities and is replacing the traditional methods of resolving disputes in front of state courts. As such, international arbitration develops in its own pace, slowly creating coherent rules suitable for efficient settlement of the complex disputes brought in front of the arbitral tribunals. Although there are a large number of specific practices that have emerged throughout the years, the question of privileges might be one of the last few issues that remain unresolved to this date. Parties increasingly rely and invoke privileges in proceedings to avail themselves from having to disclose certain documents, when faced with a request for document production from the opposite side. When raising privileges, parties will generally expect that the nature and the scope of privileges will be based on their domestic legal system. This reliance and expectation in fact represents the root of the problems that arise, since not all countries treat privileges in the same manner. Currently there is lack of guidance that would aid arbitrators in dealing with this issue and in determining the applicable law. In this paper we are going to give a brief introduction of privileges, defining the concept of privileges; the types of privileges that exist and which are most likely to arise in international arbitration and focus on the methods for determining the applicable law for privileges. At the end, we are going to propose a method which we believe would be most suitable for determining the applicable law on privileges and which would pave the way for uniform approach in dealing with privileges in the future.

Key words: International Arbitration, privileges, IBA Rules, legal advice privilege, settlement discussion privilege

I. INTRODUCTION

International arbitration is rapidly becoming a preferred method for dispute settlement between commercial entities and is replacing the traditional methods of resolving disputes in front of state courts. As such, international arbitration develops in its own pace, slowly creating coherent rules suitable for efficient settlement of the complex disputes brought in front of the arbitral tribunals.

In light of this, there are specific practices that have emerged throughout the years. Document disclosure or document production has already become one of the established practices in international arbitration.[1] In this regard, the IBA Rules on the Taking of Evidence have certainly made a significant contribution. Parties increasingly rely on document production as effective fact-finding mechanism. The purpose of document production is either to enable the parties to establish the facts on which they base their claim, or to contest the facts on which the other party is basing their claim.[2] However, very often when parties are faced with request for production of documents, they invoke privilege rights to avail themselves from having to disclose certain documents.

When raising privileges rights, parties will generally expect that the nature and the scope of privileges will be based on their domestic legal system.[3] This reliance and

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[1] Wesler, Irene and De Berti, Giovanni, Best practices in Arbitration: A Selection of Established and Possible Future Best Practices, 2010, Austrian Arbitration Yearbook, p. 80.

[2] Tercier, Pierre and Bersheda, Tetiana, Document Production in Arbitration: A Civil Law Viewpoint, in The Search for "Truth" in Arbitration, 2011, ASA Special Series No. 35, p. 77.

[3] Kuitkowski, Diana, The Law Applicable to Privilege Claims in International Arbitration, Journal of International Arbitration, 2015, Volume 32, Issue 1, p. 66.

expectation in fact represents the root of the problems that arise, since not all countries treat privileges in the same manner. There is a general tendency to consider that common law countries treat privileges as substantial matters, whereas civil law countries consider them to be question of procedure.[4]

In international arbitration, there is a consensus that arbitrators enjoy broad discretion when dealing with evidentiary issues.[5] According to Born, although there is a difference in the way arbitrators exercise their discretion over matters of disclosure, a so called "in*ternational*" approach has begun to evolve, based on the IBA Rules on the Taking of Evidence.[6] However, despite the fact that there seems to be an internationally accepted approach in dealing with other evidentiary matters, to this date there has not been such similar approach when arbitrators are faced with the question of privileges. Even though there has been a significant increase in the number of cases in which the question of privileges has arisen, so far there is lack of sufficient guidance.

In this paper we are going to give a brief introduction of privileges, defining the concept of privileges; the types of privileges that exist and which are most likely to arise in international arbitration and focus on the methods for determining the applicable law for privileges. At the end, we are going to propose a method which we believe would be most suitable for determining the applicable law on privileges and which would pave the way for uniform approach in dealing with privileges in the future.

II. DEFINING PRIVILEGES

Unlike other evidentiary rules that aim to exclude certain evidence because it does not meet the requirements of relevance and necessity to the case at hand, privilege rights are embodiment of social values which entitle the holder of the evidence to withhold it, even though that evidence is of importance in the fact-finding process. The aim of the concept of privilege is striking a balance between two diverging policies. On one hand is the promotion of justice which requires that all relevant evidence for the establishment of the factual situation is made available to the adjudicator so that he can make a proper decision, while on the other is the social interest in preserving and encouraging relationships whose viability is based on confidential communications.[7] If considered closely, the duty to disclose documents and privilege rights that protect the documents represent two sides of the same coin.[8] Marghitola defines privileges as: "[e]videntiary privileges are rules that allow a party (or a witness) to withhold evidence from the other side".[9]

The concept of privileges has its roots in national laws. All countries in the world recognize and embody the concept of privileges in their legal systems, however, not all

[4] Berger, Klaus Peter, Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion, Arbitration International, 2006, Volume 22, Issue 4, p. 508; Kuitkowski, Op.cit.3, p. 82 – 83; Klamas, Caroline Cavassin, Finding a Balance Between Different Standards of Privilege to Enable Predictability, Fairness and Equality in International Arbitration, Revista Brasiliera de Arbitragem, 2015, Volume 12, p.172; Tawil, Guido Santiago, and Lima, Ignacio J. Mirorini, Chapter 2. Privilege-Related Issues in International Arbitration in Teresa Giovannini and Alexis Mourre (eds), Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, Dossiers of the ICC Institute of World Business Law, 2009, Volume 6, p. 39.

[5] Berger, Op.cit.4, p. 506; Tawil and Lima, Op.cit.4, p. 30; Meyer, Olaf, Time to Take a Closer Look: Privilege in International Arbitration, Journal of International Arbitration, 2007, Volume 24, Issue 4, p.368; Alvarez, Henri C., Evidentiary Privileges in International Arbitration in Albert Jan van den Berg (ed), International Arbitration 2006: Back to Basics?, ICCA Congress Series, 2007,Volume 13, p. 664.

[6] Born, Gary, International Commercial Arbitration, 2nd edition, Kluwer Law International, 2014, p. 2321.

[7] Alvarez, Op.cit.5, p. 666.

[8] Meyer, Op.cit.5, p.366.

[9] Marghitola, Reto, Document Production in International Arbitration, Kluwer Law International 2015, p. 74.

countries treat them in the same manner. Observation of privileges in various legal systems leads to the conclusion that they can differ among themselves with regards to the scope of the privilege rights, the treatment of the privileges and with regards to the holder of the right of waiver of the privilege. As a result, national laws do not offer much help in the establishment of a uniform way for dealing with privileges in international arbitration but are rather considered to be the cause of the problem.

Even though the question of privileges arises very often in international arbitration, there are no specific rules that would help the arbitrators when dealing with such issues. Privileges are not addressed in either of the more significant national arbitration laws. Neither the UNCITRAL Model Law on International Commercial Arbitration 1985 (2006) (hereafter: UNCITRAL Model Law) nor any of the rules of prominent arbitral institutions contain any provision regarding privileges. They contain only very general rules that give power to the arbitrators to order production of evidence, and to determine its relevance.

Some of the rare exceptions are the ICDR Rules[10] and the CPR Rules for Non-Administered Arbitration[11] which recognize privileges as basis for exclusion of evidence, but both sets of rules contain only rudimentary guidelines. Finally, the revised version of the IBA Rules on Taking of Evidence in International Arbitration from 2010 (hereafter: IBA Rules) embody certain principles and guidelines when dealing with the issues of privileges, which would be subject to discussion further in the text.

Turning to the questions of the type of privileges, various legal systems recognize a number of privileges such as attorney-client privilege, medical privilege, journalist privilege, accountant-client privilege, privilege against self-incrimination, privilege of settlement discussions, family privilege, clergy-penitent privilege and privilege for government information. However, privileges which are most likely to be invoked in international arbitration are legal advice privilege and privilege on settlement discussions.

Privileges on obtained legal advice are generally recognized in every developed legal system.[12] The rationale of the existence of this privilege is that clients must be able to inform their counsels truthfully and properly, so that the counsels are able to prepare for the case in sufficient and precise manner. If clients fear that disclosure of certain information to their counsel might be used against them in proceedings, then they would be inclined to hold back that information. However, the major difference that exist, which might have practical implications is that predominantly in common law countries privileges on legal advice are also extended to in-house counsel, whereas in civil law countries that is not the case.[13]

Another type of privileges which are commonly invoked in international arbitration are privileges on settlement discussions. The rationale behind their existence is the need to encourage parties to settle their disputes through direct negotiations, conciliation or mediation, and to discourage them to go to state court or to arbitrate. Without such protection, the counsels and the parties would be reluctant to disclose information that might be useful in the settlement proceedings, if it may cause them damage in further proceedings, should the settlement discussions fail.[14] Similarly, one party may commence settlement proceedings

[10] International Center for Dispute Resolution (ICDR) Arbitration Rules (2014), Article 22.

[11] International Institute for Conflict Prevention and Resolution (CPR) Rules for Non-Administered Arbitration (2007), Article 12.2.

[12] According to Berger, the attorney – client privilege is recognized in over 90 jurisdictions, Berger, Op.cit.4, p.505.

[13] The European Court of Justice confirmed the standpoint that privileges on legal advice do not extend to in-house council in two cases: ECJ, Case 155/79, AM & S Europe Ltd. v. Commission of the European Communities, 1982, ECR 1575; and ECJ, Case C-550/07 P, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission, Joined Cases T-125 and 253/03, 2007, ECR II-3523

[14] Alexander, Nadja, International and Comparative Mediation, Global Trends in Dispute Resolution, Volume 4, Kluwer Law International, 2009. p. 246.

only to reveal the other party's weaknesses and to prepare stronger case for the further proceedings. The main difference among legal systems with regards to settlement discussions is that some legal systems extend privileges to settlement discussions in all forms, whereas some legal systems extend them only to more formal settlement discussions, such as mediation.

III. DETERMINING THE APPLICABLE LAW FOR QUESTIONS FOR PRIVILEGES

When privileges are raised, the arbitral tribunal is faced with the challenge of finding the most suitable and comprehensive way to address this issue. Regardless of the qualifications of privileges as procedural or substantive, in absence of an agreement between the parties that would regulate the question, arbitrators enjoy considerable discretion when dealing with privileges.[15]

However, this discretion is not unlimited, and arbitrators need to abide by certain requirements. One of the most important is the requirement of fair and equal treatment of the parties. This requirement is qualified as a mandatory provision,[16] and consequently its violation might open the award for challenge. The principle of equality of the parties means that application of different set of rules in dealing with privileges should not result in unfair situation in which one of the parties would have advantage over the other. Very often it is the case when the parties are from countries which have completely opposite regimes in dealing with question of privileges.

Additional requirement which the arbitral tribunal must take into consideration is the expectations of the parties. When choosing arbitration as a dispute resolution mechanism, the reasonable expectations of the parties are that privileges which their national law grants them would continue to apply. The fact that the parties have chosen arbitration does not constitute waiver of privileges which the parties enjoy in their home jurisdictions.[17] If arbitrators were to apply different law than what the parties would expect, the parties might find themselves in a situation in which they would be obliged to disclose something which they reasonably believed to be under protection.

Arbitrators would need to be cautions and take approach which would not go against the legitimate expectations of the parties. Regardless of the approach that the arbitrators decide to follow, it is recommended that they should decide at the very beginning of the arbitration. This would prevent a possible situation in which a party invokes a privilege right on a document after the other party has disclosed a document that would be also covered by the privilege right invoked later. Below are considered several approaches that arbitrators could take when faced with the question of privileges.

1. The conflict of law approach

In situation in which arbitrators do not have clear cut rules to rely on when dealing with privilege, they might choose to go through the conflict of law rules to determine the

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[15] Shaughnessy, Patricia, Dealing with Privileges in International Commercial Arbitration, Scandinavian Studies: Procedural Law, 2007, p. 458.

[16] For example, this requirement is embodied the UNCITRAL Model Law on International Commercial Arbitration, Article 18. Equal treatment of parties:

"The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

[17] Born, Op.cit.6, p. 2379; Sindler, Michelle and Wüstemann, Tina, Privilege across borders in arbitration: multi-jurisdictional nightmare or a storm in a teacup? ASA Bulletin, 2005, Volume 23, Issue 4, p. 618; Kuitkowski, Op.cit.3, 2015, p. 81.

applicable law. If arbitrators are to go through the conflict of law rules, it would be most reasonable for them to apply the law that has the closest connection to the privilege. It is likely that this law would be different from the "proper law" applicable to the contract, and from the law applicable to the arbitral procedure, i.e. the *lex arbitri*. This approach leaves the arbitrators with a variety of possible laws which they might apply for every privilege, since there is no consensus as to which law should be considered as relevant for every privilege.

When speaking about privilege on legal advice, it might be the law of the place where communications were made between the counsel and the party that should be applied, the law of the domicile of the party claiming privileges, or the law where the counsel of the party is qualified to practice. Applying the law of the place where the communication was made seems rather unfit, as that place might be a pure coincidence. A German party and U.S. counsel might have met in U.K. or at an airport in Spain, purely of convenience, and it makes little sense to subject the privilege to U.K. or to Spanish law.

Next, when deciding whether the law of the domicile of the client, or the place where the counsel is qualified should be applied, we believe that the place where the counsel is qualified should prevail. The rationale behind this is that counsels are more aware of the different privileges that exist, and that they will usually consider the issue depending on the law on which they are qualified. Additionally, the parties might be international companies that operate in many countries, so another difficulty would be to find the effective seat of the company, or alternatively the branch of the company with which the privilege is most closely connected.

When deciding on privileges for settlement discussions, arbitrators have the possibility of applying the law of the place where the discussions were made, the law of the domicile of the parties, or the law of where the counsels of the parties are qualified. Again, the place where the discussions were led might be only for convenience of the parties and might have nothing to do with them. According to O'Malley the law where the counsels are qualified has the strongest significance and is most likely to be used for most privileges.[18] He supports his opinion by relaying on a case in which an Italian and a Dutch party were involved, both represented by Dutch counsels. The parties conducted settlement discussions that failed, and in subsequent arbitration proceedings, the Dutch party used information obtained in the settlement discussions to which the Italian party objected. The Tribunal found that since the settlement privileges were not recognized in the jurisdiction of their counsels – the Netherlands, such privilege does not exist. However, a problem will arise when the counsel of one party comes from a jurisdiction that recognizes privileges for settlement discussions while the counsel of the other party is qualified in jurisdiction that does not.

The advantage of this approach is that it recognizes the expectations of the parties, and as a result they would not have a leeway of disputing the decision if the tribunal undertakes to go through the task of evaluating the law that is most closely connected to the privilege. In addition, unlike direct application of the law of the contract, or the procedural arbitration law, going through the conflict of law rules ensures that the law chosen by the tribunal would be the most closely connected to the privilege, and consequently more acceptable for the parties.

However, one of the major flaws of this approach is that it might lead to unequal treatment of the parties. If the question of privilege of communications with in house counsel is raised in a dispute between a U.S. and a Swiss party, the application of this approach might lead to a situation in which the communication of the Swiss party with its in house counsel by application of Swiss law- would not be privileged, whereas the same communication of the

[18] O'Malley, Nathan D., Rules of Evidence in International Arbitration: An Annotated Guide, Informa Law from Routledge, 2012, p. 287.

U.S. party with its in house counsel, subjected to U.S. law would be privileged. This decision would lead to an unfair situation, and a direct violation of the right of fair and equal treatment of the parties, giving them a ground for challenge of the award.

In addition, another problem with this approach is that arbitrators would have to go through the same path of determining the law with the closest connection when dealing with every privilege that might be raised. If the parties raise a limited number of privilege objections this would not be a problem, but if many objections are raised, it would be very difficult for the tribunal to go through each of them.

2. The "*least favored privilege*" approach

According to the "least favored privilege" approach, the arbitral tribunal would enter into assessment of the different rules raised by the parties and would choose the rules which grant the lowest protection to privileges. That means that when parties argue as to which law should apply to the issue of privileges, the tribunal would choose to apply the law that offers the narrower protection to both parties equally. On the surface this principle ensures equal treatment of all parties, since they would be all subject to the same standard of privileges.[19] In addition, the "least favored nation" approach favors a broader admission of evidence, which would ultimately help the tribunal to establish the factual situation of the case.

Although this approach establishes equality between the parties, it is very problematic because it goes directly against the legitimate expectations of the parties. Taking the same example of U.S. and a Swiss party, the U.S. party would have legitimate expectation that the communication with its in-house counsel would enjoy privilege protection. However, Swiss law does not grant such protection. Since Swiss law grants lower protection than the U.S. law, the arbitral tribunal would choose it as applicable law, and consequently the U.S. party would be forced to disclose something which it reasonably believed to be privileged.

From a practical standpoint, this approach doesn't provide a viable solution for the arbitrators, and even more its application might go directly against the expectations of the parties. If a party is forced to disclose information that enjoys privilege protection, it is very likely that it would challenge the award on the ground of violation of public policy.

iii-3. The "*most favored privilege*" approach

The "most favored privilege" approach is opposite of the "least favored privilege" approach. According to this approach, the arbitral tribunal assesses the laws raised by the parties and applies the law that grants the widest protection equally to both parties, even though that law would be normally applicable only to one of the parties. The "most favored privilege" approach seeks to remedy the flaws of the "least favored privilege" approach, and the "closest connection" test.

Firstly, the "most favored privilege" approach guarantees fair and equal treatment of the parties since the same standard of privilege would apply to both parties. This approach levels the playing field.[20] Secondly, the "most favored privilege" approach does not go against the legitimate expectations of the parties. The parties can be assured that at the very minimum privileges that are granted to them under national law would continue to apply in the arbitral proceedings, and consequently there would be no unfair surprises. The fact that the opposing party might be granted a higher level of protection, cannot be considered as surprise, or something that would go against the legitimate expectations of the parties.

The concept of "most favorable privilege" is incorporated in several conventions, rules and guidelines such as the Hague Convention on the Taking of Evidence Abroad in

[19] Berger, Op.cit.4, p. 519.

[20] Böckstiegel, Karl - Heinz and Kröll, Stefan Michael et al. (eds), Arbitration in Germany: The Model Law in Practice, Kluwer Law International, 2007, p. 327.

Civil or Commercial Matters,[21] the Inter-American Convention on the Taking of Evidence Abroad,[22] the European Council Regulation (EC) No 1206/2001[23] and the ICDR Guidelines for Arbitrators Concerning Exchanges of Information.[24] Finally, the principle is established in the IBA Rules on the Taking of Evidence in International Arbitration[25], which would be subject to discussion and interpretation in the following chapter. As evident, a considerable number of rules pertaining to taking of evidence, both by state courts and arbitral tribunals, have chosen to incorporate such principle.

However, one of the drawbacks of the principle that might arise is that parties would be inclined towards selecting a counsel from a jurisdiction that would grant high protection of privileges.[26] However it is far more likely that parties would choose their representatives based on skills and experience they possess rather than the level of protection of privileges of the country where they practice law. Additionally, the issue of privileges has caused so much controversy, just because the parties are unaware and do not expect that it might be raised in further proceedings. It is more logical that if the parties are aware that it might come to a situation in which the issue of privilege would be raised, they would insist on regulating it beforehand.

Another downside of this approach is that the offering of a broad privilege protection, might eventually cause difficulties for arbitrators in establishing the factual situation of the case. While this is true, it is worth noting that in many cases the parties would try to obtain as much information as possible and would request disclosure of a large number of documents, even though only a small percentage of those documents will be relevant for the case at hand.

Consequently, the "most favored privilege" approach seems to fulfill the requirements of fair and equal treatment of the parties and takes into consideration their legitimate expectations. It also arbitrators in rendering enforceable awards, as it is less likely that parties would challenge an award if they would be granted more protection than expected.

IV. TOWARDS UNIFORM APPROACH: THE IBA RULES ON TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010)

There is an ongoing debate among scholars and practitioners for the need of establishment of autonomous harmonized rules, principles or guidelines that would deal with the issue of privileges.[27] Some authors even suggest development of transnational privilege standards, based on privileges that are established in most jurisdictions.[28] Although such approach would in large part bring security and predictability for the arbitrators and the parties, it seems unrealistic that such standards could be developed in the near future. While most of the countries provide privilege protections, as already elaborated, the scope and the nature of those privileges varies significantly among different legal jurisdictions. In addition, it is unlikely that harmonized rules would be able to address all possible scenarios in which

[21] The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Article 11.
[22] Inter-American Convention on the Taking of Evidence Abroad (1976), Article 12.
[23] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, Article 14.1.
[24] ICDR Guidelines for Arbitrators Concerning Exchanges of Information (2008), Article 7 (Privileges and Professional Ethics).
[25] The IBA Rules on the Taking of Evidence in International Arbitration, Art. 9.2(g):
[26] Berger, Op.cit.4, p. 519.
[27] Meyer, Op.cit.5, p.373-377; Tawil and Lima, Op.cit.4, p. 436; Berger, Op.cit.4, p. 513-515; Klamas, Op.cit.4, p.171.
[28] Kaufmann - Kohler, Gabrielle, Bartsch, Philippe, Discovery in International Arbitration: How much is too much, German Arbitration Journal, 2004, Vol. 1, p.19; Meyer, Op.cit.5, p.373-377.

privileges might arise.[29] It seems that if there was ever a will and possibility for compromise among countries in the establishment in such transnational standards, it would have been done already. In line of this goes the fact that many conventions and rules seem to circle around that issue, leaving it to the discretion of the arbitrators.

It seems guidelines that help the arbitrators when dealing with privileges would be more suitable and plausible. Application of guidelines as "soft law" might be more useful since it would enable the arbitral tribunals to approach this highly complex issue according to the facts of each individual case. It might also be more in line with the expectations of the parties, given their varied backgrounds, and the differing rules of privileges that exist in their home jurisdictions. Even though "soft law" does not have a binding character, it is a powerful tool especially in situations in which gaps exist or there are no supplementary rules that would aid the parties. According to prof. Kaufmann- Kohler even though "soft law" lacks enforceability, parties very often perceive it as binding, and choose to abide by it.[30]

The International Bar Association with its rules and guidelines has certainly played a major role in filling the gaps that exist in international arbitration, particularly with the drafting of IBA Rules. One of the main objectives of the IBA Rules is to help in the process of harmonization of the procedures commonly applied in international arbitration. The IBA Rules are not mandatory for the parties or the arbitrators, and they are not obliged to follow them. According to the IBA Commentary, "the tribunal and the parties may choose to adopt them fully or just in part, or even more they might choose to use the Rules only as guidelines."[31] Consequently, the Rules offer great flexibility and supporting role to the parties and the arbitrators.

The usage and the reference to the IBA Rules has drastically increased in the last decade and they have developed as a commonly accepted standard in arbitral proceedings.[32] According to prof. Kreindler and Dimsey, even in situations in which they are not explicitly agreed upon the parties, the IBA rules "*de facto* frequently provide the process and standards by which all participants (parties, tribunals, fact and expert witness) conduct themselves".[33] A survey conducted by Queen Mary University of London in 2015, shows that 77% of the subjects have used the IBA Rules on the Taking of Evidence, 12% were aware of them, but have never used them, and only 10% were not aware of them.[34] The IBA Rules on the Taking of Evidence were ranked highest in their usage among other soft law instruments, followed by the IBA Guidelines on Conflict of Interest. This recent survey reveals the significance and importance that the IBA Rules have in international arbitration.

Even though the IBA Rules are predominantly used for document production, they can be particularly useful when dealing with privileges as well. When talking about privileges under the IBA rules, Article 9 is the most important provision that encompasses the guidelines for the arbitrators as it deals with admissibility and assessment of evidence by the tribunal. Article 9.1 explicitly grants the tribunal with the power to determine the:

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[29] Alvarez, Op.cit.5, p. 696.

[30] Kaufmann - Kohler, Gabrielle, Soft Law in International Arbitration: Codification and Normativity, Journal of International Dispute Settlement, 2010, p. 2.

[31] Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, p. 3.

[32] Kühner, Detlev, The Revised IBA Rules on the Taking of Evidence in International Arbitration, Journal of International Arbitration, 2010, Volume 27, Issue 6, p. 667.

[33] Kreindler, Richard H., Dimsey, Mariel, Chapter II: The Arbitrator and the Arbitration Procedure, The Applicable Law and Procedural Issues: Conceptions, Preconceptions and Misconceptions, Austrian Yearbook on International Arbitration, 2015, p. 161.

[34] 2015 International Arbitration Survey: Improvements and Innovations in International Commercial Arbitration.

"admissibility, relevance, materiality and weight of the evidence*"*.[35] The UNCITRAL Model Law contains in large part the exact wording in Article 19(2).[36]

Having granted the discretionary power of the tribunal to decide on the evidence, the IBA Rules set forth grounds for exclusion of evidence in Article 9.2.[37] Out of all grounds for exclusion of evidence, subparagraph (b) is the most significant for privileges since it explicitly provides for possibility of exclusion of evidence in the case of "legal impediment or privilege". The section is broadly formulated since the legal impediment or privilege upon which the party relies should be contained either in the legal or ethical rules which the arbitral tribunal will determine to be applicable. Therefore, the IBA Rules are formulated to provide guidance regardless of the classification on the privilege raised by the party as substantial or procedural issue. In addition, the Rules provide possibility for more direct approach by the arbitrators when determining the applicable rules, unlike the UNCITRAL Model Law and other arbitration laws, that compel the arbitrators to apply the conflict of law rules.[38]

Subparagraph (g) of Article 9.2 encompasses the basic principle of fair and equal treatment of the parties and reflects the acceptance of the "most favored privilege" approach by the Working Party. According to the Commentary of the IBA Rules:

> *"Article 9.2(g) is a catch- all provision, intended to assure procedural economy, proportionality, fairness and equality in the case. For example, documents that might be considered to be privileged within one national legal system may not be considered to be privileged within another. If this situation were to create an unfairness, the arbitral tribunal may exclude production of the technically non- privileged documents pursuant to this provision. In general, it is hoped that this provision will help ensure that the arbitral tribunal provides the parties with a fair, as well as an effective and efficient, hearing."*[39]

Article 9.3 contains additional guidelines, providing for 5 additional elements that the arbitral tribunal may take into consideration.[40] The legal advice and the settlement discussions privileges are explicitly recognized in subparagraphs (a), and (b) respectively. According to some authors this construction of Article 9.3 suggests that legal advice privilege and settlement discussions privilege represent transnational or general rules that should be applied directly by the tribunal.[41] While it is true that this type of privileges exists in most legal systems, as already explained there is significant difference about their scope which makes it difficult to apply them directly without subjecting them to rules that would precisely define them.

Subparagraph © has a pivotal role in the determination of the law applicable to privileges since it guides the arbitrators to take into consideration the expectations of the parties and their advisors when deciding. The inclusion of both parties and their advisors in the wording of the paragraph can be interpreted to cover not only situations in which the

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[35] The IBA Rules on the Taking of Evidence in International Arbitration, Article 9.1.

[36] The UNCITRAL Model Law on International Commercial Arbitration, Article 19(2), uses the following wording:

> *"The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."*

[37] The IBA Rules on the Taking of Evidence in International Arbitration, Article 9.2.

[38] UNCITRAL Model Law on International Commercial Arbitration, Article 28(2) provides:

> *"Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."*

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

[40] The IBA Rules on the Taking of Evidence in International Arbitration, Article 9.3.

[41] O'Malley, Op.cit.18, p.277.

privilege is vested in the client, but also situations in which the privilege is vested in their advisors. In any case, to avoid any misperceptions the paragraph refers to the actual expectations of the parties and their advisors. According to Marghitola, very often the parties would relate the legal privilege with their counsel and expect that the law of the counsel's jurisdiction would be applicable. Similarly, when addressing settlement discussions privileges, the expectations of the parties would be that the law of their home jurisdiction should govern it, since the privilege does not relate to the status of the person.[42]

Subparagraph (d) addresses possible waivers of privileges. The subparagraph provides examples of what might be considered as waiver by the arbitral tribunal: consent of waiver of the privilege, earlier disclosure of the evidence, and affirmative use of the document, statement oral communication or advice. The proposed enumeration should merely serve as guideline for arbitrators and should not be considered as an exhaustive list of what might constitute waiver of privileges.

Finally, subparagraph (e) reflects and reconfirms the principles of fair and equal treatment of the parties contained in Article 9.2(g) of the Rules. This provision embodies the "most favored privilege" approach in the IBA Rules. According to some authors, this is the key provision since it prevents subjection to the parties to different privilege rules if a pure conflict of law rules approach is applied.[43]

The IBA Rules have been developed to fill in the gaps that exist in international arbitration, and because of that, their presence has constantly increased over the last decade, promoting them into best practice acceptable to all actors involved. Most importantly the IBA Rules encompass the principles of fairness and equality of the parties and ensure that the legitimate expectations of the parties and their advisors would be considered. Although we are far from accepting the IBA Rules as default mechanism that would be applicable to questions of privileges, so far, they provide the most comprehensive and acceptable solutions for this highly complexed issue.

V. CONCLUSION

Questions of privileges might be one of the last few issues that remain unresolved in international arbitration. The number of cases in which privileges are raised as objection of production of evidence is increasing, but currently there is lack of literature that would provide sufficient guidance. As a result, arbitral tribunals face uncertainty when the parties raise privileges as objection. The different treatment of privilege in national regimes, the lack of comprehensive guidelines in the international instruments, and the division among commentary about the nature of privileges are the main obstacles for the establishment of a uniform way in dealing with privileges.

This paper strives to provide useful insights and directions that would assist all participants in the arbitration process. It considers the two most frequently raised types of privileges –privilege on obtained legal advice and settlement discussions privileges. It examines and evaluates various concepts and approaches that can be used by arbitrators. Particularly, it focuses on the possible approaches for determining the applicable law in situations in which privileges might arise during the course of the proceedings.

The paper promotes the usage of the IBA Rules, which are for now the most comprehensive instrument that can aid the arbitrators when dealing with privileges. Although the IBA Rules do not have mandatory character, their function as "soft law" on one hand

[42] Marghitola, Reto, Document Production: New Findings on an Old Issue, ASA Bulletin, 2016, Volume 34, Issue 1, p. 82.
[43] Waincymer, p.810.

which fills existing gaps and their general recognition as useful tool in international arbitration makes them suitable instrument when dealing with privileges. In particular they give guidance to arbitrators, how to deal with question of privileges without going against the legitimate expectations which the parties have and breaching the principle of their equality.

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