to this danger and will correspondingly review complaints about excessive demands for disclosure with care. In *Omar v Omar*, the Court of Appeal held that a party seeking disclosure must demonstrate that each document is likely to exist, is relevant to some issue in the proceedings, and necessary to dispose fairly of the action. A witness summons may be set aside if the request is irrelevant, is a fishing exercise, is speculative or oppressive.

11.39 The tribunal may also decide to place restrictions on persons who have access to the confidential material, for instance allowing only the legal representatives of the parties to the arbitration to view the document. In very rare cases, the tribunal may consider ordering disclosure of the document to be made only to the arbitrators and not the opposing party, although that would inevitably raise a question as to the enforceability of any award.

11.40 As mentioned at the beginning of this section, the general duty of confidentiality between parties to an arbitration (i.e., the obligation not to disclose matters revealed within the arbitration to the rest of the world) provides an additional safeguard for a bank which was ordered during the arbitration to disclose confidential information, and for the third party whose information was disclosed. Godfrey and Elcock suggest that it is a matter of good practice and courtesy for a bank to inform the third party customer of the tribunal’s order for disclosure prior to the actual production. They note, however, that under *Robertson v Canadian Imperial Bank of Commerce*, where for some reason the bank is unable to issue such notification, it is nevertheless required to comply with the disclosure order and will not be in breach of its duty of confidentiality to the customer in so doing.

C. Privilege

11.41 The successful assertion of privilege is another limitation on a party’s obligation to disclose documents in the evidence-taking process. In international arbitration, there is wider consensus that privilege rather than confidentiality operates as a bar to admissibility of evidence. Accordingly, the existence and scope of privilege is of vital importance to a party’s disclosure strategy. However, beyond a surface recognition of the effect of privilege, there is in fact little agreement or uniform practice about the appropriate treatment of privilege in international arbitration. Privilege has been identified as an outlier in comparison to the rest of evidence-taking procedure in arbitration, where autonomous rules for discovery in arbitral proceedings have developed over the last 20 years.

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This section will begin with a summary of the relevant law of privilege in the context of financial institutions. It will then survey the provisions on privilege in various lex arbitri and international instruments, again with a particular focus on the IBA Rules of Evidence 2010. The section will then turn its attention to two difficult issues: privilege in the context of the in-house counsel, and the question of the applicable law of privilege in an arbitration, focusing on crucial differences between civil and common law approaches to privilege, and explaining why such differences are significant in arbitration.

2. Legal professional privilege and financial institutions

Under English law, there is an important distinction between legal advice privilege and litigation privilege. Legal advice privilege covers confidential communications between legal advisers and their clients, both where litigation is pending and where there is yet no prospect of litigation. Thus its significance is often only truly appreciated when a dispute subsequently arises. Litigation privilege extends to all communications between legal advisers, the clients, and third parties, provided that (a) such communications are generated when litigation is in prospect or pending, and (b) that the sole or dominant purpose of the communication is either the giving or obtaining of advice in connection with the litigation, or the collection of evidence for use in the litigation. It is of course by no means certain that the English law of privilege will apply in any given arbitration, but it will be used here as a means to illustrate the particular considerations that may arise for a bank wishing to rely on privilege as a bar to disclosure in an arbitration to which it is a party.

The potential importance of legal professional privilege to banks is evident. Banks are heavy users of legal advice, both in the ordinary course of their business as well as when disputes arise between themselves and third parties. The shield of legal professional privilege is often the only recourse banks have to restrict their obligation to disclose or allow inspection of documents, and accordingly the importance of ensuring that privilege exists and continues to cover those documents is obvious.

It is fair to say that legal professional privilege has been firmly recognized as an exception to the obligation to disclose in international arbitration. In *Reineccius and others v Bank for International Settlements, Procedural Order No 6*, the Bank of International Settlements refused disclosure of 12 documents to First Eagle on the...
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ground of attorney-client privilege, citing Article 9(2)(a) of the IBA Rules of Evidence 2010. A number of these documents were drafted by general counsel of the Bank of International Settlements. The arbitral tribunal acknowledged the widespread recognition of the attorney-client privilege, both in domestic legal systems as well as in public international and international commercial arbitration rules and arbitral awards. According to the tribunal, the rationale for attorney-client privilege is that those who must make decisions on their own or on others’ behalf are entitled to seek and receive legal advice, and that the provision, exploration, and evaluation of a full canvass of legal options would be inhibited if counsel and their clients were not assured in advance that any advice proffered and communications generated would remain confidential and immune to discovery.

11.46 Despite the broad recognition of privilege as a bar to disclosure and general consensus on the justification for privilege, the exact scope of the doctrine nevertheless remains contentious. In respect of the English law of privilege, certain fundamental questions remain unanswered: for instance, the identity of the ‘client’ whose communications with legal advisers are protected. In *Three Rivers District Council v Governor and Company of the Bank of England (No 6)*, the House of Lords heard argument on the point but declined to provide a definition of the ‘client’ for the purposes of legal advice privilege. The Court of Appeal in the previous decision of *Three Rivers (No 5)* had previously held that even though the claim had been brought against the Bank of England, the ‘client’ was not the Bank of England as a whole, but rather a specific internal unit (the Bingham Investigation Unit) within the Bank of England. This meant that communications between the Bank’s legal advisers, Freshfields, and employees or officers of the Bank other than those within the Bingham Investigation Unit were not covered by privilege and had to be disclosed. The corollary appears to be that only communications between the legal advisers and the persons within the company who are specifically charged with obtaining/receiving the legal advice are privileged.

11.47 The Court of Appeal’s decision means that if a bank foresees that English legal advice privilege is of potential relevance in an arbitration (or other dispute), it should be careful to identify those persons within the bank who are designated to seek and receive legal advice from counsel, and restrict communications between all other bank personnel and counsel, because the latter will not attract privilege in the absence of litigation being in reasonable contemplation (when litigation privilege may apply). The state of the law regarding legal advice privilege has been much criticized by commentators, in particular because the Court of Appeal failed to

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33 The issue of legal advice provided by in-house counsel will be examined subsequently.
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distinguish between the question ‘who is the client’ and which persons have been authorized by the bank to communicate with counsel.  

3. Relevant instruments

a. National arbitration legislation

While virtually all legal systems recognize legal professional privilege, and this is widely reflected in decisions of both courts and arbitral tribunals, there is nevertheless a surprising silence on the topic in national arbitration statutes, which neither mandate that arbitral tribunals respect privilege nor that parties should reach agreement on the matter as they see fit. The lack of guidance for arbitrators has been lamented by commentators, and described by Born as ‘unfortunate and remarkable’ since disagreements concerning the existence and scope of privilege arise frequently. The issue of privilege is at most touched upon briefly and indirectly: for instance, in section 43 of the UK Arbitration Act 1996, a party to arbitral proceedings may seek the assistance of the court to secure the attendance before the tribunal of a witness in order to give testimony, or to produce documents or other material evidence, provided that a person could be compelled to produce such documents or material evidence in legal proceedings. Given that legal professional privilege is well-established in UK civil procedure, section 43 of the Arbitration Act extends the scope of protection from discovery to the context of arbitration.

b. Institutional rules

Similarly, the rules of a number of important arbitral institutions do not mention privilege, presumably leaving it to parties to agree on the matter if they regard privilege as an applicable bar to disclosure, or to the tribunal’s discretion on appropriate arbitral procedure. The LCIA, HKIAC, and 2012 ICC Rules are silent on the issue, as are the UNCITRAL Arbitration Rules.

Nevertheless, a significant number of institutional rules do at least acknowledge the issue of privilege, in varying degrees. The ICSID Arbitration Rules require the tribunal to establish procedures for the protection of privileged information, subject to any agreement by the parties. Under the ICDR Rules, the tribunal is to take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and a client, and the AAA Rules make similar provision. The SIAC Rules simply confer upon the tribunal

38 Born, International Commercial Arbitration, Ch 14 ‘Procedures in international arbitration’.
40 Born, International Commercial Arbitration, Ch 14 ‘Procedures in international arbitration’.
41 Rule 32(2) of the ICSID Arbitration Rules 2006.
42 Article 20(6) of the ICDR International Arbitration Rules 2009.
43 Rule 34(c) of the AAA Commercial Arbitration Rules 2013.
the power to determine any claim of legal or other privilege, without mandating that the tribunal take any more active role in protecting privileged information.

11.51 The lack of detailed guidance on the applicability of privilege is in line with the procedural autonomy of parties to decide upon how they want their arbitration conducted. Under none of the institutional rules is the tribunal required to protect legal professional privilege as a mandatory procedural rule, regardless of parties’ agreement to contrary effect. The difficulty of course is that if parties make no provision on the applicable law of privilege in their arbitration agreement (which they are unlikely to do), it is difficult for parties to subsequently come to any agreement on the matter once their relationship has broken down. As Waincymer observes, once a dispute has arisen parties are likely to take polarized positions on the issue of privilege, because each party appreciates the practical implications of disclosure of documents held by both independent and in-house counsel. As a result, the matter falls for determination by the tribunal, which will have to exercise its discretion in a manner compatible with the applicable lex arbitri and institutional rules, both of which will in all likelihood provide sparse guidance. Often, the rules on privilege that the arbitrators finally settle upon are derived from or heavily influenced by their own national law of privilege, which may differ depending (broadly speaking) on whether they come from common or civil law backgrounds.

c. IBA Rules on the Taking of Evidence in International Arbitration 2010

11.52 Under Article 9(2)(b) of the IBA Rules, the arbitral tribunal is to exclude from evidence or production any document, statement, oral testimony, or inspection on the basis of legal impediment or privilege under the legal or ethical rules determined by the tribunal to be applicable. Article 9(3) stipulates a number of issues that the tribunal may take into account when considering issues of legal impediment or privilege: (a) the need to protect the confidentiality of a document created in connection with and for the purpose of providing or obtaining legal advice, (b) the need to protect the confidentiality of documents created for the purpose of settlement negotiations, (c) the expectations of the parties and their advisers at the time the legal impediment or privilege arose, (d) any waiver of legal impediment or privilege by virtue of (inter alia) consent or earlier disclosure, and (e) the need to maintain fairness and equality as between the parties, particularly if they are subject to different legal or ethical rules.

11.53 The IBA Rules certainly constitute the most comprehensive pronouncement on the subject in the context of international arbitration, and have been recognized as the primary body of principles providing guidance on the issue of privilege. O’Malley

45 Waincymer, Procedure and Evidence in International Arbitration, Part II, Ch 11.
46 Born, International Commercial Arbitration, Ch 14 ‘Procedures in international arbitration’.
47 Nathan O’Malley, Rules of Evidence in International Arbitration (Informa Law 2012), Ch 9 ‘Objections to the disclosure and admissibility of evidence’.

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describes the factors listed in Article 9(3) as ‘transnational procedural principles’ which may be applied directly by the tribunal, while taking into account the ‘legitimate expectations’ of the parties. Other commentators have distilled useful principles for arbitrators from the IBA Rules’ provisions on privilege: (i) arbitrators should admit an appropriate privilege objection raised in good faith, and (ii) in the interests of predictability, they should safeguard parties’ legitimate expectations as to the application of a certain privilege standard.  

However, it must be conceded that while Article 9(3) does identify important general considerations, often arbitrators will find it necessary to identify an applicable national law of privilege, not only because such regimes are usually sufficiently well-developed to assist the tribunal in finding previously adopted solutions to specific factual scenarios, but also because it may be in line with parties’ legitimate expectations that a national law of privilege, which parties are familiar with, govern their dispute. Indeed, it is most frequently the case that arbitrators apply national rules of privilege, rather than any regime based on ‘international standards’. Large lending institutions which are high-volume users of dispute resolution processes in routine matters such as debt collection may well prefer the application of well-established national laws of privilege which they are more familiar with, rather than individualized, bespoke privilege rules created to govern individual arbitrations.

### 4. Choice of law

There is a most remarkable lack of consensus as to how to resolve the choice-of-law problem in relation to legal professional privilege in international arbitration. Very diverse methods have been adopted by arbitrators and recommended by academics. In practice, the problem is often not even recognized or acknowledged. When it is, it is often left to the tribunal to decide according to its good sense what law of privilege ought to govern the evidence-taking process. This subsection considers the most commonly utilized options.

#### a. Closest connection test

The closest connection test seeks to identify the single national law which has closest proximity to parties and the dispute, based on a range of relevant factors. It has been described as the most popular private international law method for determining the applicable rule of privilege. Yet the method is not without its problems: primarily, the sheer number of considerations that the tribunal must take into account.

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50 Nathan O’Malley, *Rules of Evidence in International Arbitration* (Informa Law 2012), Ch 9 ‘Objections to the disclosure and admissibility of evidence’.
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11.58 Sindler and Wüstemann suggest a host of potentially material factors, including: the law of the parties’ agreement or contract, the place where the arbitration is held, the jurisdiction where the party or lawyer claiming protection resides, the place or places where the communication or information was created, sent and stored, the jurisdiction where the lawyer with whom the communication took place is qualified to practice, and the jurisdiction where enforcement of any order or award will be sought.\(^{51}\)

11.59 It is immediately apparent that this list is not exhaustive, and any number of other relevant factors might be considered. In the context of complex financial disputes, the problem may be compounded by the number and type of documents for which disclosure is sought, the multi-jurisdictional nature of banking activities, branches, and subsidiaries, and the involvement of more than one set of legal advisers located in different jurisdictions on the transaction or scheme in question. Take for example claims for fraud brought against a Swiss bank in an arbitration in London by a number of investors from France, Germany, and Italy whom the bank had approached and entered into contracts with in these various jurisdictions, each of these investors demanding production of documents which were generated during communications between various local external and in-house counsel by the bank’s subsidiaries in those jurisdictions. Under the closest connection test, the tribunal must take a holistic view of these various relevant factors and work out the applicable law of privilege for each document for which disclosure is sought. The closest connection test has been criticized on the basis of its complexity and difficulty of application,\(^{52}\) as well as the potential arbitrariness and subjectivity that this choice-of-law mechanism involves, with its consequent adverse effects on predictability and legal certainty.\(^{53}\)

11.60 Born suggests that it is generally preferable for the tribunal to apply the law of the jurisdiction where the lawyer is qualified to practice, in the interests of predictability and parties’ expectations.\(^{54}\) This proposal has the virtue of simplicity and clarity, but there is no obvious justification for applying it as a blanket rule, particularly where the communication has occurred in another jurisdiction to a party domiciled in that jurisdiction in the context of a transaction that is to be concluded in that place also. If the closest connection test is to be properly applied, everything turns on the specific factual circumstances, and the consequence is an element of unpredictability for parties to the arbitration.

b. Cumulative approach

11.61 A tribunal may wish to depart from the single approach typified by the closest connection test, and adopt a cumulative approach, where it identifies potentially

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52 Waincymer, Procedure and Evidence in International Arbitration, Part II, Ch 11.
53 Meyer, ‘Time to take a closer look: privilege in international arbitration’.
54 Born, International Commercial Arbitration, Ch 14 ‘Procedures in international arbitration’.
relevance sources of national law and draws from them commonly accepted principles. For instance, in a dispute between a French and a German bank in an arbitration held in Paris, the tribunal may feel that parties come from similar legal heritages and thus attempt to apply rules on privilege which are common to civil law jurisdictions. This approach has several benefits: it is more consistent with parties’ expectations about applicable privilege rules, and the fact that the rules are held by several (or at least two jurisdictions) reduces the chance of anomalous or unusual rules being applied to the discovery process. Meyer favours this approach, arguing that the tribunal ought to start with the ‘lowest common denominator’ of the parties’ national laws, before taking other individual factors into account. It is not however clear that arbitrators are well-placed to undertake this sort of comparative legal analysis, particularly when the arbitrators come from different legal backgrounds.\\n
Another choice-of-law solution that falls under the category of cumulative approaches is the layering together of parties’ national laws, resulting generally in a broadening of the applicable law of privilege. Proponents justify this approach on the basis of equality: if a party asserts a privilege that the other party does not recognize under his or her own national law of privilege, that other party should also be able to avail him or herself of the same right. This may be described as a ‘highest common denominator’ approach.

The difficulty is that this method runs the risk of over-exclusion of evidence, thwarting the effectiveness of discovery, deprives the tribunal of sufficient means to appraise relevant facts, and may even endanger the enforcement of the arbitral award. Under Article V(1)(b) of the New York Convention, the court of a Contracting State is permitted to refuse to recognize and enforce an award if it finds that the party seeking non-recognition of the award was unable to present his or her case during the arbitration. Enforcement of such awards may also be contrary to the public policy of the enforcing State, under Article V(2)(b) of the Convention. There is thus a danger that the procedural decision of a tribunal that is too willing to dismiss demands for disclosure may sit uneasily with an enforcing court. It is also by no means clear that the cumulative approach is consistent with both parties’ expectations: over-exclusion on the grounds of privilege may be as alien to one party as over-inclusion.

c. Approach based on equal treatment and legitimate expectations of parties

Under Article 9(3)(e) of the IBA Rules of Evidence, when considering issues of legal privilege the tribunal is to take into account the need to maintain fairness and equality between the parties, particularly if the parties are subject to different legal

56 Meyer, ‘Time to take a closer look: privilege in international arbitration’.
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or ethical rules. A possible third approach may be based on Article 9(3)(e), seeking to put the parties on equal footing as regards the applicable law of privilege.

11.65 It is unclear whether ‘fairness and equality’ as well as the legitimate expectations of parties require that each party’s national law of privilege applies to their communications with their legal advisers, or if a single law of privilege is to apply to both parties, or if parties expect the tribunal to settle upon applicable rules of privilege independently of national law.

11.66 The fundamental difficulty is that the scope and degree of protection under different national laws of privilege may be significant, and this could itself lead to inequality of protection between parties to an arbitration. If a tribunal decides, on the basis of equality and fair treatment, that the English law of privilege applies to communications between an English bank and its advisers, and the French law of privilege governs all communications between the bank’s opponent and its lawyers, the different standards of protection may result in inequality and a sense of unfairness. Born observes that there are significant differences between national laws in respect of the categories of privilege that are recognized, the persons entitled to invoke privileges, and the scope of privileges. The general philosophy of discovery in common law jurisdictions is that open disclosure is vital to the interests of justice and a fair trial. The tribunal or court will have the ability to reach a correct, just, and well-reasoned conclusion only if it is in possession of all or most of the relevant facts. Correspondingly, privilege as an exception to this general rule must be construed narrowly, as a ‘derogation [from] the search for truth’. In contrast, in civil law jurisdictions discovery is a much more reserved and restrained exercise. The process is typically led by the court, while parties themselves have very limited rights to demand disclosure from one another.

11.67 The differences between civil and common law fact-finding processes do not stem from mere habit or tradition, but rather reflects a deep-seated divergence in philosophy. Common law-style discovery, where both courts and parties have wide-ranging powers and rights to demand disclosure, is regarded by many civil law practitioners as an invasion of privacy which is only justified in criminal cases. Civil law systems balance the importance of justice and truth-finding with the need to ensure that disputes are heard and settled within a reasonable time and at reasonable cost. They are accordingly less concerned about keeping legal privilege within narrow confines.

57 Born, _International Commercial Arbitration_, Ch 14 ‘Procedures in international arbitration’.
61 Meyer, ‘Time to take a closer look: privilege in international arbitration’. 

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Schlabrendorff and Sheppard suggest that the solution to the problem of lack of parity between parties who come from different national legal backgrounds with inconsistent approaches to privilege is the adoption of the ‘most favourable privilege’ test. The tribunal is to determine the applicable privileges for each party under the closest connection test, but to subsequently make adjustments by allowing either party to claim the same legal privileges as are available to the other party. Thus, a party from a common law country can claim the same extent of privileges as his or her civil law opponent. While this approach does have the merit of ensuring equal treatment of parties, it does so essentially by subverting more restrictive privilege regimes and promoting more liberal national rules. It does not achieve any kind of balance between the relevant competing regimes. But financial institutions which prize control over their extensive archives of internal documents and communications may yet prefer stronger privilege rights under the ‘more favourable privilege’ approach.

d. Harmonized rules on privilege?

To date, there is no uniformly recognized set of rules on privilege: there are no established norms on the topic in international arbitration. A harmonized law of privilege in international arbitration would, if it were to exist, dispel the uncertainty faced by arbitrators when faced with the problem of which national law of privilege to apply in any given case. Commentators have suggested that international rules and decisions of international tribunals such as the European Court of Human Rights and the European Court of Justice have begun to form the basis of uniform standards of privilege, and even that international consensus has coalesced around a set of concrete guidelines governing legal privilege: inter alia, that privilege issues are matters of substantive law, that the applicable law of privilege is the law of the jurisdiction with which the relevant communication is most closely connected, ie the law where the party has its place of business, and that a tribunal may exclude evidence from both sides which is privileged under the law of one party but not that of the other, on the basis of compelling considerations of fairness or equality.

While an international law of privilege would certainly solve a number of problems currently faced by arbitrators, it cannot be allowed to qualify the principle of party autonomy which remains at the heart of the arbitral process. Arbitration as a method of dispute resolution is selected by commercial parties precisely because of the flexibility of its procedures, which allows it to be tailored according to parties’ wishes and the nature of the dispute at hand and the interests at stake. Born warns of the danger of rigid and arbitrary rules if a more formalized approach were

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62 Schlabrendorff and Sheppard, ‘Conflict of legal privileges in international arbitration: an attempt to find a holistic solution’.
63 Waincymer, Procedure and Evidence in International Arbitration, Part II, Ch 11.
64 Meyer, ‘Time to take a closer look: privilege in international arbitration’.
adopted in international arbitration, in a manner ‘redolent of Procrustes’ bed’.\textsuperscript{66} The same advice applies in the context of legal professional privilege: arbitrators must identify the applicable rules on privilege in a manner sensitive to context, taking into account the norms and practices of the industry, and respecting any agreement that parties come to on the subject.

5. \textit{In-house lawyers}

\textbf{11.71} The issue of whether legal professional privilege extends to communications between in-house lawyers and their employers has not been settled in international arbitration. This is unsurprising given the divergence of opinion between national legal systems on the issue. It is nonetheless a matter of great importance to banks and large financial institutions which almost uniformly employ in-house lawyers and which call upon these lawyers on a daily basis to provide advice in relation to both litigious and non-litigious matters. The topic will therefore receive some attention in this subsection.

\textbf{a. The Bank for International Settlements decision}

\textbf{11.72} In \textit{Reineccius and others v Bank for International Settlements, Procedural Order No 6},\textsuperscript{67} First Eagle sought disclosure from the Bank of International Settlements of 17 documents. Some of these documents were legal opinions of outside counsel to the general counsel or senior management of the Bank, while others were summaries of legal advice communicated by general counsel or outside counsel to members of the Board. First Eagle acknowledged that attorney-client privilege might provide a basis to withhold documents from discovery in arbitration, but contended inter alia that the Bank was not entitled to invoke attorney-client privilege as a justification for refusing to share in-house legal advice paid for and owned by the Bank.

\textbf{11.73} The arbitral tribunal substantially dismissed First Eagle’s arguments, and held that 16 out of the 17 documents were subject to attorney–client privilege and need not be produced, including communications between the Bank’s senior management and its in-house legal counsel. As aforementioned, the tribunal affirmed the applicability of legal professional privilege in the context of arbitration, both in respect of corporate entities as well as individuals. It applied the rule that legal communications which are entitled to privilege must be related to making a decision that is in or is in contemplation of a legal dispute, and must be between a lawyer, ‘whether in-house or outside’ (emphasis added), and those who are afforded his or her professional advice for purposes of making or in contemplation of that decision. It added that the tribunal will not give effect to privilege where it is abused by using it in ways that would unfairly benefit the party entitled to it and unfairly prejudice the other

\textsuperscript{66} Born, \textit{International Commercial Arbitration}, Ch 14 ‘Procedures in international arbitration’.

party—the so-called ‘sword and shield rule’ as it is termed in the United States, where a party attempts to ‘use the privilege to prejudice his opponent’s case or to disclose some selected communications for self-serving purposes’.  

O’Malley suggests that the Bank for International Settlements decision identifies several key principles which may form the basis for a transnational rule on lawyer-client privilege. The tribunal clearly recognized that privilege applied to the communications of in-house counsel and their employers. The same approach has been adopted by other tribunals, such as the CME Czech Republic BV (The Netherlands) v The Czech Republic (Final Award) (14 March 2003) arbitration conducted under UNCITRAL Rules, where the tribunal affirmed that CME was not under an obligation to submit privileged documents such as documents originating from its in-house or external legal advisers to the Czech Republic, to the extent that such legal advice was related to the legal proceedings. In the NAFTA arbitration Vito G Gallo v Government of Canada (Procedural Order No 3) (8 April 2009), the tribunal expressed support for the procedural order in the Bank for International Settlements arbitration, and identified four requirements for a document to be granted special protection under solicitor-client privilege: (i) the document must be drafted by a lawyer acting in his or her capacity as a lawyer, (ii) a solicitor-client relationship based on trust must exist as between the lawyer (in-house or external legal adviser) and the client, (iii) the document must be generated for the purpose of obtaining or giving legal advice, and (iv) the lawyer and the client, when giving and receiving legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation.

Substantial support can therefore be found amongst arbitrators for the proposition that privilege should extend to communications between in-house counsel and their employers, just as it covers advice given by external counsel. The reason why this has not crystallized as a norm in international arbitration is that there is no consensus on the issue between common law and civil law legal systems.

b. Different perspectives on the position of in-house counsel

Broadly speaking, common law jurisdictions permit communications with in-house counsel to be covered by legal professional privilege, while the position in civil law countries is more diverse.

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69 O’Malley, Rules of Evidence in International Arbitration, Ch 9 ‘Objections to the disclosure and admissibility of evidence’.
English law generally regards in-house lawyers as being in the same position as independent external counsel, since they are subject to the same duties to the client and to the court, and are bound to uphold the same standards of honour and etiquette.\textsuperscript{72} Communications between in-house advisers and their employer, who is their client, are subject to legal professional privilege. The approach is similar under US federal law,\textsuperscript{73} though the advice given by in-house counsel must specifically be legal in nature rather than broadly business-related.\textsuperscript{74} The position is much the same in Australia.\textsuperscript{75}

11.77 The position in Europe lacks uniformity. France, Italy, Switzerland, and Sweden do not recognize privilege over the communications of in-house counsel.\textsuperscript{76} This was also the position of the European Court of Justice in \textit{AM&\textdegree S Europe Ltd v European Commission}\textsuperscript{77} and \textit{Akzo Nobel Chemicals Ltd v European Commission}.\textsuperscript{78} In \textit{Akzo}, the Court found that it was unable to conclude that national legal systems within the EU following the \textit{AM&\textdegree S} judgment had come to protect communications between in-house lawyers and their employers, and thus refused to depart from its earlier decision. The argument is that in-house lawyers, unlike external counsel, are insufficiently independent from their employers and their interests, and thus an in-house lawyer might manipulate privilege entitlements to conceal important information.\textsuperscript{79} However, Spain, Denmark, and Belgium take a similar position as the common law jurisdictions, while in Germany there still exists substantial uncertainty on the issue.\textsuperscript{80}

11.78 The corollary of this diversity of practice is that no uniform rule has emerged in the decisions of international arbitrators, or indeed in international litigation. If and until a harmonized international law of privilege that is sufficiently clear, detailed, and certain comes into existence, protection of communications with in-house counsel under legal professional privilege remains very much up to the discretion of the tribunal and their application of choice-of-law rules.

\textsuperscript{72} Alfred Crompton Amusement Machines Ltd v Customs & Excise Comrs (No 2) (1979) 2 QB 102.
\textsuperscript{73} Upjohn Company v United States, 101 SCt 677 (1981).
\textsuperscript{74} Edna Selan Epstein, \textit{The Attorney-Client Privilege and the Work Doctrine} (4th edn, American Bar Association 2007).
\textsuperscript{76} Lex Mundi Dispute Resolution Practice Group, ‘In-House Counsel and the Attorney-Client Privilege’.
\textsuperscript{77} Case 155/79 AM&\textdegree S Europe Ltd v European Commission.
\textsuperscript{78} Case C-550/07 Akzo Nobel Chemicals Ltd v European Commission.
\textsuperscript{79} Meyer, ‘Time to take a closer look: privilege in international arbitration’.
\textsuperscript{80} Berger, ‘Evidentiary Privileges: Best Practice Standards versus/and Arbitral discretion’, 515.