EVIDENTIARY PRIVILEGES IN INTERNATIONAL ARBITRATION

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I. INTRODUCTION

EVIDENTIARY rules employed in judicial proceedings are not strictly applied in international arbitration. Although this flexibility with regard to evidentiary matters is often considered a benefit of international arbitration, in certain situations it can lead to unpredictability and conflicts with national law. One such area is the application of evidentiary and testimonial privileges in international arbitration.[1] There is very little authority addressing how international arbitrators should proceed when presented with a claim of privilege.

Evidentiary rules are usually viewed as procedural in character and thus governed by the law of the forum or, in arbitration, subject to the discretion accorded to arbitrators for procedural matters. Most rules of evidence concern the necessity for, or probative value of, certain information or testimony and facilitate fact-finding by excluding evidence that might be unreliable or misleading. In contrast, privileges do not aid in the ascertainment of truth, but rather exist to protect certain interests or relationships and thereby to advance goals of social and public policy. The rules regarding privileges allow a person or party to refuse to testify or to disclose certain information, even though that information might be relevant and reliable. Rules of privilege are premised on the concept that, in order to further certain interests, confidentiality or non-disclosure is considered more important than the value of the evidence.

Claims of privilege arise in arbitrations in several ways. For example, a party might seek documents from another party that are covered by a business-secrets privilege under the latter party's local law. A party-witness might be asked about discussions with his or her attorney or about the content of settlement negotiations. In arbitrations involving a government, claims of national security or official secrets privilege can

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1. This article will treat testimonial and evidentiary privileges together under the rubric of privileges and sometimes refer to them together as "evidentiary privileges". The article does not deal with "privileges" as used in some systems to refer to immunities from legal processes granted to diplomats, members of the royal family and members of parliament.

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arise. In each of these situations, international arbitrators may have to consider the application of rules of evidentiary and testimonial privileges.

This article addresses the treatment of privileges in international arbitration. The article discusses some of the more common privileges, their rationale, and their application in domestic and international law. It examines rules and authorities dealing with privileges in arbitration. Based on the widespread acceptance of privileges, the reliance on them, and the policies they are meant to advance, we contend that international arbitrators normally should accede to a claim of privilege valid under the municipal law of the jurisdiction with the closest relationship with the allegedly privileged evidence, so long as such a claim is made in good faith.

II. THE NATURE OF PRIVILEGES

A. Privileges: Definition, Scope and Effect

A privilege is a legally recognised right to withhold certain testimonial or documentary evidence from a legal proceeding, including the right to prevent another from disclosing such information.[2] Whether developed judicially or by statute, each privilege reflects a judgment that the social value of excluding evidence outweighs the influence such evidence may have in ascertaining truth in a particular case. Privileges therefore reflect the public policy of the legal system that grants them.

The law of privileges in any given jurisdiction can be complicated, ambiguous and subject to various exceptions, and the scope of privileges can vary among legal systems. Privileges can be absolute or qualified. An absolute privilege allows the holder to refuse to testify or to submit evidence under any circumstance, whereas a qualified privilege can be overcome under certain conditions, such as when a showing is made that the evidence is necessary for a fair determination. Qualified privileges sometimes involve a judicial examination of evidence *in camera* to conduct the appropriate inquiry as to admissibility. Even absolute privileges may have exceptions, such as when an allegedly privileged communication involves a criminal act. Privileges generally require the holder to invoke them, and some can be considered waived if not invoked at an appropriate time or if the holder raises the subject of the evidence in the legal proceeding.

Privileges also vary in terms of the persons that hold them and whether they extend to others from whom the evidence is sought. For example, under the French attorney-client privilege, the attorney can withhold evidence even when the client consents to its production.[3] The English attorney-client privilege extends to certain communications between the

2. C. F. Dugan, "Foreign Privileges in U.S. Litigation" (1996) 5 J. Int'l L. & Prac. 33, 34.
3. O. Bodington, *The French Law of Evidence* (1904).

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attorney and persons who are not clients,[4] whereas the United States privilege generally extends only to certain attorney-client communications. In many jurisdictions in the United States, contacts between an attorney and a person who is not a client may be protected under the work-product doctrine,[5] but this is not an absolute bar to admissibility of such evidence and is technically not always considered a privilege.

In Anglo-American legal systems, the concept of precluding evidence on the basis of privilege is widespread. Common law privileges arose in connection with the development of the power to compel testimony. Therefore, certain privileges can be seen as fulfilling an inherent need for the legal system to ensure that those who might be expected to lie about events—such as a party or certain relatives of a party—would not be forced to do so.[6] Other privileges advance the integrity of the legal system by making professional representation possible and protecting certain important interests. The first privilege to be recognised in English law, in the 16th century, was the privilege protecting communications between the attorney and client.[7] Thereafter, a spousal communications privilege was recognised.[8] Other privileges that have been established in common law jurisdictions include those against self-incrimination and family testimony; disclosure of certain business, tax, banking, State secrets and internal investigation information; and disclosure of communications undertaken in the course of professional relationships—such as those between doctor and patient, accountant and client, journalist and source, and psychotherapist and patient.

The approach of English law is to provide few absolute privileges, and to accord substantial discretion to the court to determine whether public policy weighs in favour of nondisclosure in individual cases. This discretionary approach is used, for example, in cases involving medical communications and information, journalistic sources and State secrets. Other commonwealth jurisdictions have rejected this discretionary approach, instead making various privileges absolute.[9]

In the United States, the Supreme Court proposed a specific codification of privileges in connection with the drafting of the Federal Rules of Evidence.[10] The Congress, however, rejected these proposals and

4. K. Reichenberg, "The Recognition of Foreign Privileges in United States Discovery Proceedings" (1988) 9 Nw. J. Int'l L. & Bus. 80, 109 n.161.

5. See e.g. *Hickman* v. *Taylor,* 329 U.S. 495 (1947).

6. "Developments in the Law: Privileged Communications" (1985) 98 Harv. L. Rev. 1472, 1455 ("Developments").

7. W. S. Holdsworth, 5 *A History of English Law* (1924), p.333 (citing cases from 1576–79).

8. "Developments" *supra* n.6, at p.1456.

9. G. L. Peiris, "Privilege and Confidentiality in Commonwealth Law" (1985) 18 Comp. & Int'l L.J. of Southern Africa 320, 328.

10. E. D. Green and C. R. Nesson (eds.), *Federal Rules Of Evidence* (1988), p.73.

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instead adopted a general rule, Rule 501 of the Federal Rules of Evidence, that preserves existing common law privileges and allows the development of new privileges in accordance with common law principles.[11] Many individual states in the United States have specified privileges by statute.[12]

Civil law jurisdictions have doctrines that serve the same function of excluding relevant evidence for values unrelated to probity, even if such doctrines are not always identified as privileges.[13] For example, in many systems, a witness need not give testimony as to secrets received through the exercise of certain professional duties.[14] In many countries, parties to civil proceedings cannot be compelled to testify or provide information,[15] and in criminal proceedings a defendant cannot be forced to answer questions, although the refusal to answer may be considered by the court.[16] In some places, a witness or party can refuse to testify if "faced with an immediate financial loss".[17] Another prevalent concept is that a party need not produce evidence that is against its interest.[18]

When a court decides that a privilege is not applicable and a party refuses an order to produce the evidence in question, such production can be compelled by the court.[19] In international arbitration, the arbitrators do not usually have the equivalent power to compel production, but must

11. Federal Rules of Evidence, Rule 501 states that:
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with State law.

12. See e.g. California Evidence Code §§952–1070.

13. M. Damaska, *Evidence Law Adrift* (1997), p.12.

14. See *infra* sec. II B.1.

15. For example in Germany. Dirk-Reiner Martens, "Germany" in C. Platto (ed.), *Obtaining Evidence in Another Jurisdiction in Business Disputes* (2nd edn 1993); Reichenberg, *supra* n.4, at p.88 n.37.

16. J. Merryman, *The Civil Law Tradition* 2nd edn. (1985), p.130.

17. M. Damaska, *The Faces of Justice and State Authority* (1986), p.209 n.55 (quoting Code of Civil Proc. of the Swiss Canton of Zurich §159).

18. *Idem* at p.210.

19. See e.g. R. Cross and C. Tapper, *Cross on Evidence* (7th edn, 1990), p.201.

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rely upon a party to seek the assistance of a domestic court.[20] Alternatively, and more commonly, the arbitrators may draw an adverse inference from the failure to produce required evidence.[21]

B. Types of Privileges

There are many different types of privileges. Some, such as the privilege against self-incrimination, normally arise in criminal proceedings, but may occasionally be invoked in a civil proceeding. Some are limited to a small number of jurisdictions, while others are widespread. Sometimes unusual privileges are created by statute. We will identify some of the most common privileges, recognising that the list is not comprehensive and that some of the privileges identified are unlikely to arise in an international arbitration. By examining some of the privileges, the extent of their use and the policy reasons underlying them, we can better explore whether and to what extent international arbitrators should apply claimed privileges.

1. Professional Privileges

Professional privileges are those that apply to certain kinds of communications received or transmitted in the course of the exercise of professional relationships. The notion of a general professional privilege is associated with civil law jurisdictions, such as France, where the Penal Code provides for penalties if professional confidences are broken.[22] A similar general professional privilege exists in other countries with a civil

20. See e.g. UNCITRAL Model Law, Art.27 ("The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."); English Arbitration Act 1996 §43(1) (a party "may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence"); Swiss Law on Private International Law, Art.184 (tribunal can request judicial assistance when necessary); German Civil Procedure Code §1036(1) (arbitrators must seek judicial assistance for discovery) and §1036(2) (court is competent to decide in event of a refusal to testify); cf. 9 U.S.C. §7 (1994) (arbitrators may subpoena persons and documents even from non-parties); *Amgen Inc.* v. *Kidney Center of Delaware County, Ltd.,* 879 F. Supp. 878 (N.D. Ill. 1995) (arbitrators' discovery power extends to those outside jurisdiction of the court); *In re Technostroyexport*, 853 F. Supp. 695, 698 (S.D.N.Y. 1994) (discussing Russian and Swedish law).

21. A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (3rd edn, 1999), pp.317–318.

22. Code Pénal, Arts. 226–13 and 226–14 (formerly Art. 378). The privilege has even been found to extend to telephone operators. Cass. 15 Mar. 1948, Pas 1948 p.169, cited in F. J. Hampson, "The International Criminal Tribunal for Yugoslavia and the Reluctant Witness" (1998) 47 I.C.L.Q. 50, 60 n.35.

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law tradition.[23] In a particularly broad formulation found in Argentine law, witnesses may refuse to answer questions when an answer will reveal "professional, military, scientific, artistic or industrial secrets" as well as when the answer may incriminate the witness or affect his or her honour.[24] With respect to international tribunals, the Rules of the Permanent Court of International Justice, the predecessor of the current International Court of Justice, specified that witnesses would not be compelled to violate professional secrecy.[25]

In many other systems, privileges are specified with respect to individual professional relationships; there is no general professional privilege. Each type of protected communication is thus treated as a distinct privilege with its own jurisprudence. This was the approach of a recent scholarly effort to draft Transnational Rules of Civil Procedure. [26] This project, which was an effort to merge elements of the common law and civil law systems, included specific privileges for certain professional relationships.[27]

Whether covered by a general professional privilege or by law applicable to specific relationships, all professional privileges have the same rationale—to encourage open communications between professionals and those with whom they have a professional relationship. In engaging in such communications, people often rely on the expectation of confidentiality that is provided by privileges. The privilege may be held by the professional, the client, or both; may be subject to certain exceptions; and may or may not be waivable.

23. See e.g. German Code of Civil Procedure §383; Belgian Code Judiciaire Art.929; Netherlands Code of Crim. Proc. Art.191 para.4; Civil Procedure Code of Brazil, Art.406; Japanese Code of Civil Procedure Arts. 280–281; German Penal Code Art.300; Italian Penal Code Art.622; Decree 32,171 (29 July 1942) Art.7 (Portugal); Swiss Penal Code Art.321; F. Dessemonte and T. Ansay (eds.), *Introduction to Swiss Law* (1995), p.274; J. Ofori Boateng, "Privileges under the Evidence Decree: Non-professional and Professional Communications" (1982) 16 U. Ghana L.J. 25. See also P. Eijsvoogel (ed.), *Evidence Before International Arbitral Tribunals* (1994), pp.85, 271 (Belgium, Tunisia). Among common law countries, the Canadian Law Reform Commission recommended such a general privilege. *Report on Evidence by the Law Reform Commission of Canada* §41 (1975).

24. C. Platto (ed.), *Obtaining Evidence in Another Jurisdiction in Business Disputes* (1st edn 1988), p.113.

25. D. Sandifer, Evidence Before International Tribunals (1975) at p.377 (citing the drafting committee's report as saying "in its own courts every government must claim to exercise occasionally the right to refuse to produce a document on the ground of public interest and of that interest it claims to be the sole judge").

26. G. Hazard *et al.*, "Transnational Rules of Civil Procedure: Rules and Commentary" (1997) 30 Cornell Int'l L.J. 493.

27. *Idem.* Rule 20 enumerates the attorney-client, work-product, husband-wife, priest-penitent, and doctor-patient privileges. The doctor-patient privilege explicitly incorporates a psychotherapist-patient privilege.

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A. Attorney-client privilege

Under early Roman law, an attorney could not be compelled to testify against his client.[28] This was the precursor of the modern attorney-client privilege, which privilege serves the important public policy goal of candid communications between lawyers and their clients.[29] Indeed, it is difficult to imagine any legal system that involves professional representation functioning without such a privilege, and this explains its long history and wide acceptance among many different legal systems.[30] The attorney-client privilege also exists in international criminal law. For example, it is provided for under the Rules of the International Criminal Tribunal for the former Yugoslavia (ICTY) and has been successfully invoked there.[31]

In most legal systems, the attorney-client privilege generally is seen as belonging to the party and not to the attorney, and is waivable by the party. This contrasts with other professional privileges that are sometimes not waivable in civil law jurisdictions. The improper disclosure of attorney-client communications by a lawyer can be subject to sanction under professional ethical rules and requirements.[32] The attorney-client

28. M. Radin, "The Privilege of Confidential Communication Between Lawyer and Client" (1928) 16 Cal. L. Rev. 487, 488.

29. "Developments" *supra* n.6, at p.1501; 8 *Wigmore on Evidence*, §2290–91.

30. See e.g. *Rio Tinto Zinc Corp.* v. *Westinghouse Electric Corp.* [1978] 1 All E.R. 434 (United Kingdom); Codice Penale, Art.622 (Italy) (cited in D. R. Mastromarco, "Disparity in the Application of Legal Principles as a Form of Trade Restraint: Attorney-Client Privilege in the European Community" (1990) 13 Hastings Int'l Comp. L. Rev. 479, 490 n.50); Evidence Act of Nigeria (1945) §169, 172; D. Field and F. Raitt, *The Law of Evidence in Scotland* (1996) pp.262–265; C. Fennell, *The Law of Evidence in Ireland* (1992), pp.166–179; Ho Hock Lai, "History and Judicial Theories of Legal Professional Privilege" (1995) Sing. J. Legal Stud. 558 (Singapore); A. Paizes, "Towards a Broader Balancing of Interests: Exploring the Theoretical Foundations of the Legal Professional Privilege" (1989) 106 S. Afr. L.J. 109 (South Africa).

31. ICTY Rules of Evidence, Rule 97 ("All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless: (i) the client consents to disclosure; or (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure"). *Decision on Prosecution Motion for Production of Defence Witness Statements, Prosecutor* v. *Duško Tadic,* Case No. IT-94–1-T, Trial Chamber II, 27 Nov. 1996, *reprinted in* G. K. McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (2000), Vol. II, p.966. See also Rule 14 of proposed rules of evidence for the International Criminal Court as quoted in M. Rasmussen, "Rules of Evidence for the International Criminal Court" (1995) 64 Nordic J. Int'l L. 275, 281; R. Wedgwood, "International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaškic" (1998) 11 Leiden J. Int'l L. 635, 635–36 (describing difficulty of constructing a system of evidence before international criminal tribunals).

32. American Bar Association, Model Rules of Professional Conduct Rule 1(6) and Model Code of Professional Responsibility, Canon 4 (professional rules proscribing the conduct); Standards for Imposing Lawyer Sanctions, Standard 4.21 (describing disbarment as an appropriate sanction for knowingly improper disclosure which causes injury or potential injury).

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privilege, although absolute in the sense that a court may not fail to apply it in a particular case, has exceptions. Thus, it may not be invoked if the communication itself constitutes a criminal act or fraud,[33] or in some instances of litigation between the attorney and the client.[34] The privilege is usually limited to communications made in the course of, or in anticipation of, legal advice.[35] A recent United States Supreme Court case held that the privilege survives the death of the client.[36] There is a controversy about whether there can be an inadvertent waiver of the privilege, such as by mistakenly including a privileged communication in the production of otherwise non-privileged documents.[37]

In European Union law, the existence of the attorney-client privilege was confirmed in the case of *AM&S Europe Ltd.* v. *Commission*.[38] The issue concerned the European Commission's antitrust investigation of a U.K. company. The company refused to provide for production and inspection of certain documents created by counsel on the staff of the company on the grounds that the attorney-client privilege protected the documents. Although the Commission's investigation power is plenary and there is no explicit provision for attorney-client privilege in European Union law, the Court found that the Commission's investigatory power is subject to a restriction for attorney-client privileges for any communications between a company and independent lawyers in the Member States of the European Union. While the European Court of Justice did not extend this privilege to "in-house counsel" in the case before it, it is highly significant that the Court found an attorney-client privilege despite the lack of any explicit provision in European law to that effect. The Court's findings suggest that the privilege forms a general principle common to the Member States of the European Union.[39] In other

33. Cross and Tapper, *supra* n.19, at p.440.

34. For example, when filing the action is seen to constitute a waiver. *Byers* v. *Burleson*, 100 F.R.D. 436 (D.D.C. 1983). See also B. Witkin, *California Evidence* (3d edn, 1986), p.1107.

35. Cross and Tapper, *supra* n.19, at pp.441–442; *United States* v. *United Shoe Machine Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950).

36. *Swidler and Berlin* v. *United States*, 524 U.S. 399 (1998).

37. In the United States, courts have come to different conclusions as to whether inadvertent disclosure constitutes a waiver. Compare *In re Sealed Case*, 877 F. 2d 976 (D.C. Cir. 1989) (privilege waived by inadvertent disclosure) with *Aramony* v. *United Way of America*, 969 F. Supp. 226, 235 (S.D.N.Y. 1997) (privilege not waived).

38. 1982 E. Comm. Ct. J. Rep. 1575 (Case 155/79). See generally A. M. Hill, "A Problem of Privilege: In-house Counsel and the Attorney-Client Privilege in the United States and the European Community" (1995) 27 Case W. Res. J. Int'l L. 145.

39. This decision provoked controversy insofar as it excluded in-house counsel and non-European Union lawyers. See P. H. Burkard, "Attorney-Client Privilege in the EEC: the Perspective of Multinational Corporate Counsel" (1986) 20 Int'l Lawyer 677, 684. D. R. Mastromarco, *supra* n.30; see also *John Deere* v. *EEC Commission*, 28 O.J. Eur. Comm. (No. L 35) 58, 59 (1985) (relying on in-house counsel's advice to support finding of antitrust violation).

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jurisdictions, certain communications between a company and its in-house counsel are treated the same as a communication between the company and its outside counsel.[40]

B. Medical privileges

The physician-patient privilege also has a long history. Historians have traced its origin to the reception of Roman law in the middle ages.[41] This privilege is designed to foster open communications between patients and medical personnel by allowing physicians to avoid testifying about a patient. The medical privilege is stringently applied in France, where doctors have been subjected to penalties under the Penal Code for breaches of doctor-patient confidentiality.[42]

The physician-patient privilege is widespread, although legal systems vary on whether it includes medical records and under what circumstances doctors can avoid testimony.[43] Most American states have legislated a physician-patient privilege, although federal courts have declined to recognise such a privilege because it did not exist at common law.[44] In *Miss M* v. *Commission,* the European Court of Justice had to consider the question whether a medical privilege existed in the laws of the Member States.[45] It found that in all Member States there was a principle of doctor-patient confidentiality, although there were certain limits on the scope of the confidentiality, varying from State to State. Ultimately the Court ordered production of medical records when the patient-litigant had asked for disclosure, rejecting the Respondent Commission's argument that medical records were confidential and should not be received into evidence.

40. In most jurisdictions in the United States, legal advice by in-house counsel is included by the privilege, but any communications involving only business responsibilities are not included. See A. Stevens, "An Analysis of the Troubling Issues Surrounding In-house Counsel and the Attorney-Client Privilege" (1998) 23 Hamline L. Rev. 289; *Upjohn* v. *United States*, 449 U.S. 383 (1981); J. Rogers, "Corporate Counsel—Attorney-Client Privilege" 16 ABA/BNA Manual on Professional Conduct 335 (5 July, 2000).

41. D. W. Shuman, "The Origins of the Physician-Patient Privilege and Professional Secret" (1985) 39 Sw. L.J. 661, 679–80.

42. See *supra* n.22.

43. New Zealand Evidence Act 1908 §8l; Israel Evidence Ordinance, §49; Victoria Evidence Act (Australia) 1958 §28; Bernfeld, "Medical Secrecy" (1972) 3 Cambrian L. Rev. 11, 14, cited in Shuman, *supra* n.41, at n.85.

44. As of 1999, all states but South Carolina and West Virginia had some form of the privilege. A federal case declining to recognise the privilege is *Gilbreath* v. *Guadalupe Hospital Foundation, Inc.* 5 F. 3d 785 (5th Cir. 1993), See also American Arbitration Association, American Bar Association, American Medical Association, Commission on Health Care Dispute Resolution, Draft Final Report, 27 July 1998, 598 PLI/Lit 551 (WESTLAW) (stating arbitrators should carefully consider claims of privilege and confidentiality in addressing evidentiary issues).

45. 1980 E. Comm. Ct. J. Rep. 1797 (Case 155/78).

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Unlike the attorney-client privilege, the medical privilege was not recognised at common law under the theory that patients would not withhold information in seeking medical treatment simply because of the threat of disclosure in a courtroom.[46] To this date, British courts do not generally recognise the privilege, although individual courts may permit nondisclosure in particular cases.[47] In those common law jurisdictions that do recognise a medical privilege, the privilege belongs to the patient and can be waived, either expressly or by implication. The privilege is limited so that it might not apply in certain cases, such as in certain criminal proceedings or certain personal injury cases.[48] Furthermore, courts generally limit invocation of the privilege to communications made for the purpose of securing a diagnosis or treatment.[49] Some courts include medical records within the privilege, but these can also be protected under a broader right to privacy.[50]

The medical privilege in France, as other professional privileges, is held by the professional rather than the patient. Furthermore, some French lawyers assert that it is absolute and cannot be waived, although in practice it has only been held to be absolute in the criminal context.[51] The privilege extends both to disclosures by the patient and to medical records.

The special duties of medical personnel have led to the recognition of a form of privilege in the international law of armed conflict. Article 16 of Additional Protocol I to the Geneva Convention of 1949 requires that medical personnel shall not be compelled to give information concerning the wounded or sick if the information would prove harmful to the patients or their families.[52]

In many jurisdictions, the medical privilege extends to psychotherapists and mental health professionals.[53] In the United States, however, the

46. *Rex* v. *Duchess of Kingston* , 20 How. St. Tr. 355 (1776).

47. Cross and Tapper, *supra* n.19; see also Law Reform Committee (London) Privilege in Civil Proceedings 20–22 (1967). The very limited British privilege does not extend to arbitral practice. International Chamber of Commerce, *The Taking of Evidence in International Arbitral Practice* (1989), pp.63–64. The limited privilege was presumably enough for the European Court in the *Miss M* case to find that privilege formed a principle common to all Member States.

48. See e.g. *People* v. *Aercega*, 32 Cal. 3d 504, 523, 651 P. 2d 338 (1982) (criminal proceedings); Conn. Gen. Stat. §52–146f (1983); Tex. R. Evid. 510(d)(5).

49. See ALI Res't Evidence R. 211; Uniform Rules r. 27.

50. See S.A. Silver, "Beyond *Jaffee* v. *Redmond*: Should the Federal Courts Recognize a Right to Physician-Patient Confidentiality?" (1998) Ohio State Law Journal 1809, 1855 nn. 216–218; 10 A.L.R. 4th 552.

51. Shuman, *supra* n.41, at pp.683–684.

52. See also Article 10 of Additional Protocol II, applicable in non-international conflicts.

53. For a discussion, see T. D. Ragsdale, "The Constitutional Right to Privacy and the Psychotherapist-Patient Privilege as Limitations on the National Transportation Safety Board's Right to Investigate Air Traffic Accidents" (1991) 57 J. Air L. and Com. 469, 480–496.

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psychotherapist-patient privilege is treated as a distinct privilege that has been recognised in some form by all 50 states, and by the United States Supreme Court since 1996.[54] Previously, some federal courts had been reluctant to recognise a physician-patient privilege, in part because it did not exist at common law.[55] Although the Congress had declined to adopt the privilege by statute, the United States Supreme Court relied on "the principles of the common law . . . in the light of reason and experience", to find a federal privilege for confidential communications made to licensed psychotherapists in the course of diagnosis or treatment.[56] All American states provide for some exceptions to the psychotherapist privilege, such as exceptions for doctor-patient disputes, for information related to child abuse, and for instances when there is a serious threat of harm to the patient or others.[57] The United States Supreme Court similarly recognised that such exceptions must exist, but did not define them.[58]

There is some question at the International Criminal Tribunal for the Former Yugoslavia concerning whether a defendant accused of rape is entitled to reports prepared by psychotherapists who have counselled witnesses.[59] It is unclear whether the prosecution in seeking to withhold these statements invoked the psychotherapist privilege. Nevertheless, the conflict between the criminal defendant's right to have access to all exculpatory evidence and the witnesses' interest in privacy presents a continuing dilemma.

C. Journalists' privilege

Some legal systems allow journalists to withhold evidence that would reveal their sources.[60] Such a privilege is based on the public policy that a compulsory disclosure would hinder the media's ability to carry out investigative tasks essential for free communication in an open society.

54. *Jaffee* v. *Redmond*, 518 U.S. 1, 116 S. Ct. 1923 (1996) at n.11.

55. See e.g. *In re Doe*, 711 F.2d 1187 (2d Cir. 1983); *United States* v. *Meagher*, 531 F.2d 752 (5th Cir.), cert. denied, 429 U.S. 853 (1976); *United States* v. *Colletta*, 602 F.Supp. 1322, 1327 (E.D.Pa.) ("[t]here is no general federal common-law physician-patient privilege"), aff'd mem., 770 F.2d 1076 (3d Cir.1985).

56. *Jaffee* v. *Redmond*, 518 U.S. 1, 116 S. Ct. 1923 (1996). The "reason and experience" language of Rule 501 comes from *Wolfle* v. *United States*, 291 U.S. 7, 12 (1934) "which in turn referred to the oft-repeated observation that 'the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."' *Jaffee*, 116 S. Ct. at 1927 (*quoting Funk* v. *United States*, 290 U.S. 371, 383 (1933)).

57. See e.g. Cal Evid. Code §1016–1027 (1995). See B. J. Wadsworth, "Case Note: *Jaffee* v. *Richmond*" (1997) 32 Land & Water L. Rev. 873, 880–881; *Tarasoff* v. *Regents of the University of California*, 17 Cal. 3d 425, 551 P. 2d 334 (Cal. 1976); but see *Boynton* v. *Burglass* 590 So. 2d 446 (Fla. 1991).

58. *Jaffee* v. *Redmond*, 518 U.S. 1, 116 S. Ct. 1923 (1996) at n.19.

59. See Further Order on Motion for Access to Non-public Materials in the Lasva Valley, 16 Feb. 1999.

60. D. R. Khuluse, "Journalistic Privilege" (1993) 9 S. Afr. J. on Hum. Rts. 279.

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The privilege is typically limited to a right to withhold sources, rather than to withhold information generally, but some jurisdictions have expanded the privilege to include information obtained in the newsgathering process.[61] The journalists' privilege has been rejected in Scotland[62] and Ireland.[63] English courts also rejected it,[64] but a 1981 statute granted a qualified privilege.[65] English courts can also utilise their discretion to allow a journalist to withhold evidence, the disclosure of which would violate public policy.[66]

In the United States, the privilege is based, in part, on recognised constitutional freedoms of the press and speech. Some states began to provide a limited testimonial privilege for journalists by statute in the 19th century, allowing journalists to refuse to name their sources. Most states retain some form of a journalists' privilege allowing a reporter to refuse to testify as to confidential sources or disclose unpublished information.[67] Federal courts have held that the constitutional protection of free speech prevents forced disclosures in certain cases,[68] although this privilege has been qualified by the United States Supreme Court.[69] The qualified privilege does not extend to the editorial process,[70] and is held by the reporter so that it can be neither invoked nor waived by the source.[71]

Some European countries may include journalists in the scope of their general privilege for professional communications. Furthermore, as the discussion of United States case law demonstrated, the freedom of the press is at least arguably implicated if journalists can be forced to testify. The European Court of Human Rights recently held that the British Government violated the Convention on Human Rights by fining a

61. See e.g. California Evidence Code §970 (immunity for refusing to disclose "any unpublished information obtained or prepared in gathering, reviewing or processing information for communication to the public").

62. *H.M.A.* v. *Airs*, [1975] S.L.T. 177.

63. *Re Kevin O'Kelly* (1974) 108 I.L.T.R. 97.

64. *Attorney-General* v. *Mulholland* [1963] 2 Q.B. 477.

65. Contempt of Court Act 1981 Sec. 10 (England) ("No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime").

66. *Attorney-General* v. *Clough* [1963] 1 Q.B. 773; *Attorney-General* v. *Mulholland*, [1963] 2 Q.B. 477.

67. Reporters Privilege, 580 Practicing Law Institute/Pat 27, 37 (1999) (31 states and District of Columbia have shield laws allowing journalists to protect their sources).

68. *Baker* v. *F and F Inv.* 470 F. 2d 778 (2nd Cir. 1972).

69. *Branzburg* v. *Hayes,* 408 U.S. 665 (1972) (no constitutional right to refuse to disclose confidential information in a criminal grand jury proceeding).

70. *Herbert* v. *Lando*, 441 U.S. 153 (1979).

71. Reporters Privilege, *supra* n.67.

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journalist who refused to reveal his source.[72] This ruling can be seen as establishing a form of journalists' privilege in European law.

D. Accountant-client privilege

Many American states have adopted a privilege for communications between an accountant and the client, either as an extension of the attorney-client privilege when the accountant is providing tax advice or as a separate privilege.[73] Until recently, there was no analogous privilege in United States federal law.[74] In 1998, however, Congress extended the attorney-client privilege to tax practitioners.[75] English law has a limited accountant-client privilege.[76] This privilege does not exist in most other common law jurisdictions. Accountant-client communications may be included in the general professional privilege of some civil law jurisdictions.

E. Other professional privileges

Other privileges exist in some jurisdictions. Many jurisdictions provide for a privilege for patent advisers.[77] In California, there is a statutory privilege for counsellors for sexual assault victims.[78] A form of privilege has been proposed for personnel of relief organisations and other international staff that are involved in the conflict in the former Yugoslavia on the grounds that requiring their testimony may lead to reprisals against similar persons.[79] Canadian courts have extended qualified privileges to social workers[80] and marriage counsellors.[81] A number of proposed privileges have been rejected in some jurisdictions, such as a privilege for communications with a probation officer,[82] and a so-called academic freedom privilege.[83]

72. *Goodwin* v. *United Kingdom* (1996) 22 E.H.R.R. 123.
73. C. A. Wright and K. W. Graham, Jr., *Federal Practice and Procedures*, §5427 (state statutes and cases).
74. See e.g. *Couch* v. *United States*, 409 U.S. 322, 335 (1973) (rejecting privilege claim).
75. Internal Revenue Code §7525.
76. *Martin and Co.* v. *Martin* [1953] 2 Q.B. 286.
77. See e.g. Sec. 104, Patent Act of 1977 (U.K.)
78. Cal. Evidence Code §1035.8.
79. Hampson, *supra* n.22. The ICTY has found that the International Committee of the Red Cross has a right, under the Geneva Conventions and customary international law, to non-disclosure of certain information related to its work. "Decision Denying Request for Assistance in Securing Documents and Witnesses from the International Committee of the Red Cross", Trial Chamber III, 7 June 2000.
80. *R. Kryschuk and Zulprik*, (1958) 14 D.L.R. 676 (2d.) (P.M. Ct. of Sask.).
81. *G.* v. *G.* (1964) 1OR 361 (AC of Ont.).
82. *People* v. *Carter*, 34 Cal. App 3d 748, 751, 110 Cal. Rpts 324 (1973).
83. *University of Pennsylvania* v. *Equal Employment Opportunity Commission*, 493 U.S. 182 (1990); see also C. J. Stevens, "Note: Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege" (1990) 69 Cal. L. Rev. 1538.

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F. Conclusion

In sum, professional privileges exist widely in both common law and civil law jurisdictions. The most widespread privilege appears to be the attorney-client privilege, and this has been applied by international tribunals, even without an explicit requirement that they do so. Although not all countries explicitly provide for privileges, the fact that witnesses cannot be compelled to testify or provide information against their will in many systems means that, practically speaking, some professional secrets can be protected in nearly every legal system.

2. Self-incrimination

The privilege against self-incrimination was developed as a rule of equity in English law in the 17th and 18th century.[84] The privilege prevents a criminal defendant from being forced to testify against himself or herself and also protects against involuntary confessions. A witness in any proceeding need not answer a question that will have a tendency to subject him or her to criminal prosecution. Although some believe that the privilege against self-incrimination should not exist if there are adequate safeguards against coercion,[85] it has been widely accepted. Provisions for a privilege against self-incrimination appear in at least 50 different legal systems,[86] in international human rights instruments,[87] and in international criminal law.[88] It is incorporated into the Fifth Amendment of the United States Constitution.[89]

84. Holdsworth, *supra* n.7, at p.333.

85. 8 Wigmore, *supra* n.29, §2251.

86. M. Cherif Bassiouni, "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions" (1993) 3 Duke J. Comp. & Int'l L. 235, 265 n.138 (listing 48 countries that have constitutionally codified right against self-incrimination). This right is also recognised in Germany, the Netherlands, France, England, Israel, and Norway. See also J. K. Walker, "A Comparative Discussion of the Privilege Against Self-Incrimination" (1993) 14 N.Y.L. Sch. J. Int'l & Comp. L. 1; G. Stessens, "The Obligation to Produce Documents Versus the Privilege Against Self-Incrimination: Human Rights Protection Extended Too Far?" (1997) 22 Eur. L. Rev. 45; B. J. Zupancic, "The Crown and the Criminal: the Privilege Against Self-Incrimination Towards General Principles of Criminal Procedure" (1997) 9 Rev. Euro. Dr. Pub. 11.

87. International Covenant on Civil and Political Rights, opened for signature 19 Dec. 1966, art. 14(3)(g), S. Treaty Doc. No. 95 –2, at 28, 999 U.N.T.S. 171, 177 (entered into force 23 Mar. 1976 [hereinafter ICCPR] ("In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees . . . not to be compelled to testify against himself or to confess guilt").

88. Article 67(1)(g) of the Rome Statute on the International Criminal Court (ICC).

89. "No person . . . shall be compelled in any criminal case to be a witness against himself . . .." U.S. Const, Amend. V. The privilege against self-incrimination is the subject of much scholarly commentary. See e.g. E. Griswold, *The Fifth Amendment Today* (1955). For a useful article on the application of the privilege with regard to foreign privileges, see D. M. Amann, "A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context" (1998) 45 UCLA L. Rev. 1201.

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As with other privileges, the privilege against self-incrimination varies in scope in various jurisdictions.[90] Some jurisdictions extend the privilege to corporations as well as to natural persons.[91] In others, courts have held that, because the right developed specifically to protect natural persons, it cannot be extended to corporations.[92] There are also differences as to whether, if a criminal defendant can be questioned, the fact finder can consider a refusal to answer a question. In the United States, a person can waive the privilege by making certain statements.[93]

3. Family Testimony

In many jurisdictions, spouses cannot, without consent of the other spouse, be forced to testify against each other. This privilege is sometimes seen as an extension of the privilege against self-incrimination, but it also exists even in systems without that privilege[94] and is sometimes available in civil proceedings.[95] The spousal communications privilege existed at common law,[96] and also exists in many European jurisdictions[97] and in the United States.[98] The privilege against adverse spousal testimony has been

90. See B. L. Ingraham, *The Structure of Criminal Procedure: Laws and Practice of France, the Soviet Union, China, and the United States* (1987), pp.62, 79; see generally M. Pieck, "The Accused's Privilege Against Self-Incrimination in the Civil Law" (1962) 11 Am. J. Comp. L. 585.

91. See e.g. *New Zealand Apple and Pear Marketing Board* v. *Master & Sons Ltd.*, [1986] 1 N.Z.L.R. 191, 196 (stating that "[t]here seems no policy reason why a corporation should not avail itself of the rule" granting right against self-incrimination); *Triplex Safety Glass Co. Ltd.* v. *Lancegaye Safety Glass Ltd.*, [1939] 2 K.B. 395, 409 (Ct. App.) (asserting that court could "see no ground for depriving a juristic person of those safeguards which the law of England accords even the least deserving of natural person").

92. *Hale* v. *Henkel*, 201 U.S. 43, 69–70 (1906) (denying corporations the right to privilege against self-incrimination); see *Caltex*, 118 A.L.R. at 405 ("[T]he modern and international treatment of the privilege as a human right which protects personal freedom, privacy and human dignity is a less than convincing argument for holding that corporations should enjoy the privilege"). See discussion in D. Yoshida, "The Applicability of the Attorney-Client Privilege to Communication with Foreign Legal Professionals" (1997) 66 Fordham L. Rev. 209.

93. *Rogers* v. *United States*, 340 U.S. 367 (1951) and subsequent cases discussed in "Note: Testimonial Waiver of the Privilege Against Self-Incrimination" (1979) 92 Harvard Law Review 1752.

94. See e.g. T. Ansay and D. Wallace, Jr. (eds.), *Introduction to Turkish Law* (3d edn, 1987), p.233.

95. See e.g. California Evidence Code §970; J. Weinstein, Evidence Manual 18–47 (1999); B. Witkin, *California Evidence*, 1116–18 (1986).

96. J. W. Strong *et al.*, *McCormick on Evidence* (4th edn, 1992) §98, at p.112.

97. See e.g. *Introduction to Swiss Law*, *supra* n.23, at p.274 (Switzerland); *Introduction to Dutch Law for Foreign Lawyers* (2d ed. 1993) 209 quoting Art.191 para.1, Wetboek van Burgerlijke Rechtsvording (Netherlands); see also Wetboek Strafvoerding Art.217. In Italy, family were treated as incompetent witnesses, a position subsequently reversed by the Constitutional Court. C. Certuma, *The Italian Legal System* (1985), p.205. Family testimony cannot be compelled however, so it remains a waivable privilege in Italian law. *Idem*.

98. *Trammel* v. *United States,* 445 U.S. 40 (1980).

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criticised[99] and limited.[100] There is also a privilege covering spousal communications, which privilege is held by both spouses, reflecting the notion that court-ordered testimony could harm the marital relationship.

Many European jurisdictions recognise a privilege that prevents parents and children from testifying against each other.[101] There has also been discussion of enacting a parent-child testimonial privilege in United States federal law.[102] Some have argued that this is required under the constitutional protection of family privacy recognised by the United States Supreme Court, [103] but such a privilege is not widely recognised in the United States.[104]

4. Clergy-Penitent Privilege

The clergy-penitent privilege probably originated in the Middle Ages under the influence of canon law, in order to protect the sanctity of confession.[105] Medieval French law required that the breach of the seal of confession be severely punished.[106] Many scholars, however, believe this privilege was not recognised at common law, at least after the Protestant Reformation.[107] As a result, the privilege does not exist in many common law jurisdictions, but is more frequently found in jurisdictions influenced by French law.[108] Irish courts, however, have created such a privilege.[109]

In the United States, the privilege has been recognised by federal courts,[110] but has been developed primarily by state legislatures, all of which have provided for some version of the privilege. These statutes usually refer to "members of the clergy", without listing the specific types of clergy who can hold the privilege. Some statutes define members of the clergy as including priests, ministers, rabbis and any "other similar

99. 8 Wigmore on Evidence §2227.

100. 2 B. Witkin, *California Evidence* §1113–1120.

101. See e.g. *In re Erato*, 2 F.3d 11 (2d Cir. 1993) (refusing to apply Dutch parent-child privilege in the United States); D. J. Harris and M. O'Boyle, *Law of the European Convention on Human Rights* (1995) (family testimony privilege not a violation of accused's right to call and hear witness on his behalf).

102. See "Family Matters: Congress to Consider a Parent-Child Legal Privilege" (Jan. 1999) Cal. Lawyer 21.

103. The foundational cases in family privacy are *Meyer* v. *Nebraska,* 262 U.S. 390 (1923) and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); see D. Meyer, "The Paradox of Family Privacy" (2000) 53 Vand. L. Rev. 527, 533.

104. See *In re Grand Jury*, 103 F.3d 1140 (1997).

105. Shuman, *supra* n.41, at p.668; Code of Canon Law of the Catholic Church 1983 c. 983 §§1–2 ("The sacramental seal is inviolable; therefore it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason").

106. Shuman, *supra* n.41, at p.680.

107. M. J. Mazza, "Should Clergy Hold the Priest-Penitent Privilege?" (1998) 82 Marq. L. Rev. 171, 173 n.27.

108. See Bodington, *supra* n.22, at p.100; Quebec C. Civ. Proc. Act, SQ 1965 Vol. 2 §308.

109. *Cook* v. *Carroll* [1945] IR 515; see Fennell *supra* n.30, at pp.183–86.

110. *Mockaitis* v. *Harcleroad*, 104 F. 3d 1522, 1532 (9th. Cir. 1997); *In re Grand Jury Investigation*, 918 F. 2d 374, 384 (3d Cir. 1990).

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functionary of a religious organization".[111] Some courts have limited the privilege to communications that the religion requires to be kept confidential. Thus a New Jersey court held that a communication with a Catholic nun fell outside the statutory privilege.[112] Other courts, however, have treated the privilege expansively and have extended it to non-clergy that perform a religious counselling role.[113]

Unlike the other protected communications described above, the sanctity of religious confession historically was not waivable, but rather resulted in an absolute duty of nondisclosure. Because the privilege implicates the religious duties of the one receiving the communication as well as of the speaker, it is broader than privileges extending to attorney-client communications, in connection with which client waiver is possible. Thus, the clergyman may claim a privilege even if the penitent waives his or her own privilege.[114]

5. Business Secrets Privilege

A common privilege in civil cases is the so-called business or trade-secrets privilege. German civil procedure has a business secret privilege providing that "testimony can be refused with regard to questions which the witness could not answer without disclosing a business secret".[115] There is no provision for a "protective order" that allows the testimony to be heard *in camera*; the privilege is absolute. In other countries and in international arbitral practice, trade secrets are protected, but in some instances may be compelled so long as there is a protective order to prevent unauthorised disclosure outside the proceedings.[116] Such protective orders are within the discretion of the judge or arbitrator to issue, and hence are not technically the subject of a privilege.[117] There may be an issue as to whether such orders by arbitral tribunals are enforceable in national courts.[118]

111. See e.g. Wis. Stat §905.06(1)(a).

112. *In re Murtha*, 279 A. 2d 889 (N.J. Super. Ct. App. Div. 1971); but see *Eckmann* v. *Board of Education*, 106 F.R.D. 70 (E.D. Mo. 1985) (Federal court coming to opposite conclusion).

113. Mazza, *supra* n.53, at p.185.

114. See discussion in Mazza, *supra* n.53, at pp.187–192. United States statutes also vary on who holds the privilege: the penitent alone, or both the penitent and the member of the clergy.

115. *Zivilprozessordnung* §384(3).

116. T. S. Durst and C. L. Mann, "Behind Closed Doors: Closing the Courtroom in Trade Secrets Cases" (2000) 8 Tex. Intell. Prop. L.J. 355. See WIPO Arbitration Rules Art.52 and ICC Arbitration Rules Art.20(7) (allowing panels to issue protective orders to protect confidential information).

117. Reichenberg, *supra* n.4, at p.93.

118. C. S. Baldwin, "Protecting Confidential and Proprietary Information in International Arbitration" (1996) 31 Tex. Int'l L.J. 451, 462–465.

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6. The Self-evaluative Privilege

A growing number of courts in the United States are recognising a self-evaluative privilege that protects internal reports by an entity on past performance or corrective action. This privilege can be seen as a variant of the civil law notion that a witness or party need not testify against its own interest. It is also based on the principle that such evaluations and corrective action are socially desirable and should not be deterred by their use as evidence of an admission of culpability. In the leading case, a plaintiff sought reports of a defendant hospital's peer review committee to use as evidence in a malpractice action.[119] The court accepted the hospital's objection that the report should be treated as privileged, noting the potential chilling effect of such discovery on constructive professional criticism necessary to ensure improved performance. Similar claims have arisen in a wide range of contexts, including employment discrimination, environmental audits and products liability, although courts have not always accepted the claims.[120]

7. Settlement Discussions

Many systems will treat as privileged or inadmissible statements made in the course of settlement discussions[121] and some include a privilege for statements made in mediations.[122] The rationale for this privilege is the need to encourage settlements and discourage litigation. If parties could bring into evidence the statements of their adversaries made in the course of settlement discussions, such discussions would be impeded, as parties would be careful not to make any offer or statement that might be considered an admission. Typically, the privilege is a joint one, so that a statement cannot be admitted into evidence without the consent of both parties.[123]

119. *Bredice* v. *Doctor's Hospital,* 50 F.R.D. 249 (D.D.C. 1970).

120. See D. Motzenbecker, "Two Courts Refuse to Protect Self-Critical Analysis: Can the Privilege Find Solid Ground?" (March 2000) Litigation News, at 3; M. Clark, "The Privilege for Self-Critical Analysis" (1999) 42 Res Gest. 287, J. Kesan and B. Mishra, "Do We Need the Corporate Self-Evaluative Privilege?" (unpublished draft on file with authors).

121. See e.g. Federal Rules of Evidence, Rule 408 (evidence of offers of compromise not admissible to prove liability, invalidity of claim, or damages). See discussion in R. Clifford Potter, "Settlement of Claims and Litigation: Legal Rules, Negotiation Strategies, and In-house Guidelines" (Feb. 1986) 41 Business Lawyer 515.

122. California Evidence Code §1119; *Folb* v. *Motion Picture Industry Pension and Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998).

123. Cross and Tapper, *supra* n.19, at p.452.

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8. Privileges for Government Information: Official Information and National Security

There are special protections provided to official documents in many legal systems, especially in common law jurisdictions with extensive discovery provisions.[124] These are drawn from the longstanding common law privileges for State secrets or Crown privilege.[125] In the United States, this privilege has been codified into the Federal Rules of Evidence[126] and covers documents classified as confidential, secret and top secret.[127] Virtually every national government has some equivalent doctrine protecting military, diplomatic and other State secrets. The rationale for the privilege is that the danger to the national interest from disclosure outweighs any public or private interest in truthful fact-finding in a particular litigation.[128]

The privilege belongs to the government and cannot be claimed or waived by a private party.[129] There are different views on the treatment of the privilege. One view is that such a claim of privilege is conclusive. Another view is that the allegedly privileged material must be submitted to the judge in confidence in order for the judge to determine whether the matter is indeed a State secret.[130] A compromise position is that judges need to satisfy themselves that the disclosure would cause harm, but need not "jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[131] It is important to recognise that national judges are part of the government and may have security clearances or the equivalent. Providing material protected by a State secrets privilege to foreign arbitrators is not practicable or likely.

Courts in some jurisdictions may, in certain situations, utilise a balancing test, whereby a party's need for the document is balanced against the government's interest in maintaining secrecy.[132] Sometimes, government refusal to produce material notwithstanding an order to

124. See e.g. U.K. Official Secrets Act 1989; Canada Evidence Act §36.1; Nigeria Evidence Act 1945 §166 (preventing disclosure of any unpublished official records except with permission of department head).

125. See e.g. *Totten* v. *U.S.*, 92 U.S. 105 (1875); *Duncan* v. *Cammell Laird & Co.* [1942] A.C. 624; *Ellis* v. *Home Office* [1953] 2 Q.B. 135; see also 8 *Wigmore on Evidence*, pp.792–807, §2378.

126. Fed. R. Ev. 501.

127. See e.g. *U.S.* v. *Reynolds,* 345 U.S. 1 (1945); *Totten* v. *U.S., supra* n.125; *Clift* v. *U.S.*, 808 F. Supp. 101 (D.Conn., 1991) (state secrets privilege bars discovery of government information on encoding devices in a civil action; when government makes showing of reasonable danger to security, no need to inspect documents, even *in camera*).

128. Weinstein, *supra* note at 18–56.

129. *U.S.* v. *Reynolds,* 345 U.S. at 7–8.

130. See e.g. California Evidence Code 915 (h).

131. *U.S.* v. *Reynolds*, 345 U.S. at 10.

132. See e.g. *Kelly* v. *City of San Jose*, 114 F.R.D. 653 (N.D. Cal. 1997).

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produce such documents in a criminal case will lead to a dismissal of the case as to the defendant.[133]

In the United States there is an "executive privilege".[134] This privilege allows the President and other high officials to withhold certain communications within the Executive Department from the courts and Congress. In addition to the federal authorities, several state courts have recognised a privilege protecting the deliberative processes of government.[135] In England, the Crown privilege protects government documents and communications the disclosure of which would be harmful to national security or diplomatic relations.[136] In addition, a wide range of government information is inadmissible in court under the public policy exception to discovery rules.

Two interesting variations are found in Turkey and Italy. In Turkey, government employees cannot be forced to testify without higher approval from their superiors.[137] In Italy, the court asks the Prime Minister to investigate claims of executive privilege, and if not approved within 60 days can compel testimony.[138] This places a political check on assertions of privilege by lower officials.

National security privileges protect sensitive government information from public disclosure.[139] In the United States, there is a national security exception to documents that are accessible to the public under the Freedom of Information Act, which Act provides for public access to

133. See Classified Information Procedures Act, 18 U.S.C.app §6. See also D. Martella, "Defending the Land of the Free and the Home of the Fearful: the Classified Information Procedures Act" (1992) 7 Am. U. J. Int'l L. & Pol'y 851; J. Jarvis, "Protecting the Nation's National Security: the Classified Information Procedures Act" (1995) 20 Thurgood Marshall L. Rev 319.

134. See *U.S.* v. *Nixon*, 418 U.S. 683 (1974); see also M. J. Rosell, *Executive Privilege: The Dilemma of Secrecy and Accountability* (1994).

135. *Capital Info. Group* v. *Alaska,* 923 P.2d 29, 33–34 (Alaska 1996); *Times Mirror Co.* v. *Superior Ct.*, 53 Cal. 3d 1325, 283 Cal. Rptr. 893, 813 P.2d 240, 248–251 (Cal. 1991); *City of Colorado Springs* v. *White*, 967 P.2d 1041 (Col. 1998); *Hamilton* v. *Verdow*, 287 Md. 544, 414 A.2d 914, 924 (Md. 1980); *Ostoin* v. *Waterford Township Police Dep't*, 189 Mich. App. 334, 471 N.W.2d 666, 668 (Mich. Ct. App. 1991); *Nero* v. *Hyland*, 76 N.J. 213, 386 A.2d 846, 853 (N.J. 1978); *State ex rel. Attorney Gen.* v. *First Judicial Dist. Court*, 96 N.M. 254, 629 P.2d 330, 333–334 (N.M. 1981); *Dorchester Master Ltd. Partnership* v. *Cabot Pipeline Corp*., 137 Misc.2d 442, 521 N.Y.S.2d 209, 210–211 (N.Y.Sup.Ct. 1987); *Killington, Ltd.* v. *Lash*, 153 Vt. 628, 572 A.2d 1368, 1373–1374 (Vt. 1990). But see *Rubin* v. *City of Los Angeles*, 190 Cal App. 3d 560, 235 Cal. Rptr. 516 (1987) (trial court could not create nonstatutory, local state secrets privilege that functioned as special defence barring organisation's suit, and organisation's motion to compel responses to its interrogatories was improperly denied based on that privilege).

136. See *Burmah Oil Co.* v. *Bank of England* [1979] 1 W.L.R. 772.

137. Code Civ. Proc. Art.271; see Ansay and Wallace, *supra* n.94, at p.233.

138. Act No. 801 (24 Oct. 1977); Arts. 202–204 Code. Crim. Proc.

139. S. Coliver *et al.* (eds.), *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999).

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documents.[140] Such an exception is widespread, perhaps universal, in countries with freedom of information provisions.[141] The European Court of Human Rights has also found such an exception to the general right to information.[142]

Many international agreements have provisions allowing States to withhold national security information from others.[143] For example, Article XXI of the General Agreement on Tariffs and Trade says that: "[n]othing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests." While other elements of Article XXI have proved controversial, this evidentiary privilege has not been the subject of any disputes under the WTO or its predecessor GATT.[144]

The national security privilege with regard to document production has been recognised by various international tribunals. For example, in the *Sabotage* cases before the U.S.-German Mixed Claims Commission, Germany requested to inspect United States Government documents, but was refused.[145] One authority discusses this case approvingly, noting that

> it would be manifestly unwise for such a tribunal as the United States-German Mixed Claims Commission, in the absence of a specific grant of authority in the arbitral agreement, to authorize the Agent of one of the parties to proceedings before it to conduct a personal examination of the files of the other party … Such a procedure would be too easily subject to abuse.[146]

140. See 552 U.S.C. 552 (b)(1) (matters "specifically authorized to be kept secret in the interest of national defense or foreign policy" exempt from disclosure).

141. See e.g. U.K Official Secrets Act 1989 §1 (national security exception); Act of 17 July 1978 (France) (right to information subject to enumerated exceptions including national security); New Zealand Official Information Act 1982 (including national security exception).

142. *European Convention on Human Rights* Art.10(2) (right to information may be restricted in the interests of national security) as applied in *Leander* v. *Sweden*, 116 Eur. Ct. H.R. (ser. A) 1987 (national security exception applied when plaintiff sought access to Swedish government information denying him a security clearance).

143. See e.g. European Convention of Obtaining Abroad of Information and Evidence in Administrative Matters, Art.7(b) noting that a State can refuse to comply with a request for information if "compliance with the request might interfere with sovereignty, security, public policy, or other essential interests". Article 72 of the Rome Statute on the International Criminal Court (ICC) is specifically addressed to the protection of national security information.

144. O. Q. Swaak-Goldman, "Who Defines Members' Security Interest in the WTO?" (1996) 9 Leiden J. Int'l L. 361, 364 (exception has proven "relatively uncontroversial"); H. L. Schloemann and S. Ohlhoff, "'Constitutionalization' and Dispute Settlement in the WTO: National Security as an Issue of Competence" (1999) 93 A.J.I.L. 424, 426 (1999).

145. Sandifer, *supra* n.22, at p.380.

146. *Idem*.

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In the *Corfu Channel* case before the International Court of Justice (ICJ), the United Kingdom refused to produce certain documents requested by the respondent State, Albania, on the grounds of naval secrecy. The Court refused to draw any adverse inference from this failure to produce confidential documents, noting that it was impossible to know the contents.[147] Earlier, the Permanent Court of International Justice decided not to take certain confidential documents into consideration in the cases concerning *Jurisdiction of the European Commission of the Danube* and the *Territorial Jurisdiction of the International Commission of the River Oder*.[148]

The International Criminal Tribunal for the Former Yugoslavia dealt with the national security privilege extensively in the case against Tihomir Blaskic.[149] Blaskic, a Croatian military commander, was accused of failing to restrain his troops from committing atrocities against Bosnian Muslims in 1993. In early 1997, the ICTY Prosecutor issued subpoenas to the governments of Croatia and Bosnia seeking military records, communications between the defendant and the Ministry of Defence, and other documents. Bosnia complied with the subpoena, but Croatia contested the subpoena served on it on the grounds that the Tribunal had no authority to request a sovereign State to perform any act, and that Croatia could withhold national security information.[150]

The Trial Court's consideration of the issue of privilege placed special emphasis on the criminal nature of the process at issue.[151] The Tribunal found that a State's claim of national security privilege did not lead to automatic deference, for to do so would mean that the Tribunal could not uncover where the orders at issue were given. This holding was confirmed on appeal. The Appeals Chamber established a procedure for responding to assertions of privilege and protecting sensitive national security information, a version of which procedure was subsequently adopted in the Tribunal Rules.[152] The procedure includes *in camera* review of the information and allows for a refusal to disclose in exceptional cases, when a State considers "one or two particular documents to be so delicate from

147. (1949) ICJ Reports, 32.

148. See A. A. Mawdsley, "Evidence Before the International Court of Justice", in R. St. John MacDonald (ed.), *Essays in Honour of Wang Tieya* (1994), pp.533, 540. But see Sandifer, *supra* n.22, at p.379 (arguing that the refusal was based not on the confidential character of the documents, but on their inaccessibility to certain parties in the proceedings).

149. See *Prosecutor* v. *Blaskic*, Decision on the Objections of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, Case No. IT-95–14-PT, Tr. Ch. II, 18 July 1997, *reversed in part and affirmed in part*, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, Case. No. IT-95–14-AR108 *bis,* A. Ch., 2 Oct. 1997, available at www.un.org/icty (hereafter *Blaskic*).

150. *Idem*.

151. Para. 69 *Blaskic* trial decision.

152. Tribunal Rules Art.54 bis.

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the national security point of view, while at the same time of scant relevance to the trial proceedings, that it prefers not to submit such documents to the Judge".[153]

That the national security privilege is recognised for international criminal cases, even with some exceptions, suggests that it would be recognised in civil proceedings—probably without exceptions. As a practical matter, no State will produce documents that it considers to be too sensitive for its national security interests. A State may even be less than candid about the existence of such documents. Thus the issue normally will be whether to draw an adverse inference against a State that does not produce requested documents. Drawing such an inference is difficult when the existence or nature of documents is unknown. It appears that generally the invocation of a State secrets privilege will be accepted.

9. Other Privileges

There are many other privileges. Many jurisdictions provide statutory protection to bank records. Other privileges include those for political votes, tax returns, identity of and information supplied by confidential informers and others. These privileges are recognised not only within municipal legal systems, but in many cases before international tribunals as well.[154] In addition, many jurisdictions have statutes that make certain information confidential and prohibit or limit disclosure in certain situations. Information so protected includes insurance information, law enforcement information, grand jury material, certain health related records, certain consumer information, and school records.

III. THE PROBLEM OF CROSS-JURISDICTIONAL PRIVILEGES: DETERMINING APPLICABLE LAW

Issues of cross-jurisdictional privilege can arise whenever evidence is sought in one jurisdiction involving a status, relationship or communication of another jurisdiction. Whenever such an issue arises, either in cross-jurisdictional litigation or arbitration, the tribunal must first determine what law applies to a claim of privilege. A claim of privilege can be based on the law of the forum, the law of the domicile or residence of a party, the law most closely connected with the communication or document, or perhaps international law or general principles of law. If the privilege as raised is common to all the relevant legal systems, it is likely

153. Para. 68 of *Blaskic* Appeals Decision.

154. See C. F. Amerasinghe, "Problems of Evidence Before International Administrative Tribunals", in R. Lillich (ed.), *Fact-Finding Before International Tribunals* (1992), pp.205, 219.

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that the decision-maker would accept the claim so long as it is invoked properly. A privilege as raised, however, may not be common to all the relevant systems. Even if a privilege exists in all the systems, it might have sufficiently varied scope so as to raise issues about what law governs. When confronted with a claim of privilege in such circumstances, the arbitral panel or court must determine whether certain privilege rules should apply.

In any forum in which choice-of-law issues arise, the decision regarding privileges may be affected by whether a privilege is regarded as substantive or procedural. Substantive law is determined by the law of the contract or other choice-of-law principles, while procedural matters are typically determined by the law of the forum, or sometimes, in the case of arbitration, by arbitral rules or the discretion of the arbitrators. In some instances, the parties may designate applicable rules. In practice, the distinction between procedural and substantive law is far from clear. Normally, rules of evidence are considered to be procedural in character, but this is not always true.[155] For example, some issues of evidence are considered to be substantive, such as the Statute of Frauds that in some systems requires written evidence of a contract.[156]

In some civil law jurisdictions, the law of evidence is considered to be procedural in character.[157] In other civil law jurisdictions, the law of evidence related to issues of admissibility and the weight of evidence is traditionally considered substantive, while the law related to the collection of evidence is considered procedural.[158] Privileges could arguably fall into either category. However, the fact that privileges are contained in the procedural codes in many civil law jurisdictions may indicate that they may be seen as more procedural in character.[159] On the other hand, privileges deal with substantive rights.

In United States federal law, privilege law has been considered substantive under *Erie R.R.* v. *Tompkins*[160] which case establishes that in diversity cases (those between parties of different states), federal courts apply state substantive law.[161] Thus, when federal courts consider claims governed by state law, they are required to defer to state privilege law. This approach has been incorporated into Rule 501 of the Federal Rules of Evidence.[162]

155. See discussion in Rubino-Sammartano, *supra* n.207, at p.368.
156. See e.g. H. Smit, "The Role of the Arbitral Tribunal in Civil and Common Law Systems with Respect to the Presentation of Evidence", in A. J. van den Berg (ed.), *Planning Efficient Arbitration Proceedings*, ICCA Congress Series No. 7, (1996), p.168.
157. P. Eijsvoogel, *supra* n.23, at p.5.
158. *Idem*.
159. See n.23 *supra.*
160. 304 U.S. 64 (1938).
161. See e.g. *Republic Gear* v. *Borg-Warner Corp.*, 381 F. 2d 551, 555–556 (2d Cir. 1967).
162. Fed. R. Evid. 501. See text in n.11 *supra*.

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In some cases municipal or international law may have specific provisions addressed to assertions of foreign privileges. Under the Hague Convention on the Taking of Evidence Abroad in Civil or Criminal Matters, if applicable, a person "may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence (a) under the law of the State of execution; or (b) under the law of the State of origin, and the privilege or duty has been specified [in the Letter of Request for evidence]."[163] The Hague Convention thus allows a witness to apply a wide range of privileges, available in either State.[164] National law relevant to international civil and criminal litigation frequently reflects this approach.[165] In some countries deference to an applicable foreign privilege is mandatory, but in other countries the matter is within the discretion of the court. In Dutch law, for example, it is within the discretion of the judge whether a witness may invoke a privilege or duty that is not provided by Dutch law.[166]

IV. JUDICIAL TREATMENT OF PRIVILEGES FROM OTHER JURISDICTIONS

A. United States Practice: Privileges from Other Domestic Jurisdictions

Because they work in a federal system, United States courts have had to confront the question of how to treat privileges of other jurisdictions. As mentioned above, Rule 501 of the Federal Rules of Evidence requires federal courts to apply state privilege law in diversity cases. Rule 501 has been criticised because it is unclear *which* state law applies if there is more than one possibility.[167] This situation might arise when the allegedly privileged communication took place in a state different from the forum. In such cases, federal courts apply the conflicts-of-law rules of the state in which they sit to determine which privilege law applies.[168] These rules

163. Hague Convention on the Taking of Evidence Abroad in Civil or Criminal Matters (18 Mar. 1970), Art.11. Article 12 of the Inter-American Convention on the Taking of Evidence Abroad has a similar provision.

164. The Convention applies in instances when the evidence or witness is present in the State of execution. See B. Ristau, *II International Judicial Assistance (Civil and Commercial)* (1984), pp.216–220; *Westinghouse*, discussed in Ristau, pp.5–39; see also Dugan, *supra* n.2, at p.43 (arguing that this evinces a practice for courts to be bound by privilege rules of State of execution that should be recognised by U.S. courts).

165. See e.g. U.K. Evidence Act 1975 §3 (protecting a witness from having to give any evidence which would be privileged in ordinary civil proceedings in the requesting country, subject to certain procedural limitations); and New Zealand Evidence Act 1908 §48D(1) (Witnesses "shall have the same right to refuse to answer any question, whether on the ground that his answer might tend to incriminate him, or on the ground of privilege . . .").

166. Platto, *supra* n.24, at p.94.

167. E. C. Dudley, Jr., "Federal Rule of Evidence 501: Privilege and Vertical Choice of Law" (1994) 82 Geo. L.J. 1781.

168. *Klaxon Con.* v. *Stentor Electric Manufacturing Co*., 313 U.S. 487 (1941); see e.g. *Hyde Construction Co.* v. *Koehring*, 455 F.2d 339 (5th Cir. 1972).

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usually involve a determination as to which state has the "most significant relationship" with the evidence.[169] When that state is not the forum, courts will sometimes rely on the American Law Institute's Restatement (2d) of Conflicts of Laws, which establishes a presumption in favour of admissibility of evidence.[170] In cases when a state court is asked to enforce an out-of-state subpoena or take a deposition it will usually apply its own privilege law.[171] Thus, United States courts typically treat privileges as substantive, but the approach is not consistent and has been criticised for leading to inconsistent results.[172]

B. United States Practice: Foreign Privileges

The availability of extensive discovery in judicial proceedings in the United States has meant that United States courts have been confronted with issues of foreign privilege more than courts in other countries. Although United States courts generally are not required to defer to foreign privileges outside the Hague Convention context, some decisions have suggested that if properly presented, such privileges would be recognised.[173] The United States statute implementing the Hague Convention requires deference to privileges in cases when the Convention

169. See e.g. *Hercules Inc.* v. *Martin Marietta Corp.*, 143 F.R.D. 266, 268–69 (D.Utah 1992).

170. Res't (2d) Conflicts of Laws Sec. 139 (1971) ("(1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum. (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect"). Note that the Restatement of Foreign Relations Law takes a different approach with regard to assertions of foreign privilege by providing that statements privileged where made will not be subject to discovery. Res't (3d) For. Rel'ns Law §442 comment d. Comment c suggests that the court ought to "look to the way that confidentiality or disclosure fits into the regulation by the foreign state of the activity in question, and to reflections of the foreign state's concern for confidentiality in laws existing prior to the start of the controversy …" This balancing approach looks to an assessment of the interests at issue rather than a choice-of-law analysis to determine if a privilege should be applied.

171. See *Shaklee Corp.* v. *Gunnell*, 110 F.R.D. 190, 192 (N.D. Cal. 1986); *Palmer* v. *Fisher*, 228 F.2d 603 (7th Cir. 1955); but see *In re Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964); see also *In Re Codey*, 82 N.Y. 2d 521, 530 (1993) (applying privilege law of the trial court jurisdiction). In cases where both laws would reach the same conclusion, the court may not specify which law is applied. *In re American General Life and Accident Ins. Co.*, 26 Med. L. Rprt. 1606 (Sup. Ct. Bronx 1996).

172. Dudley, *supra* n.167.

173. *In re Investigation of World Arrangements*, 13 F.R.D. 280, 286 (D.D.C. 1952); *Graco, Inc.* v. *Kremlin, Inc.* 101 F.R.D. 503, 516 (N.D. Ill. 1987); see generally K. Reichenberg, *supra* n.4, at p.80 n.211.

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applies.[174] Some courts have required foreign parties seeking evidence in the United States to show that the documents or evidence sought would be discoverable under their own law.[175] This approach appears to involve an implicit deference to foreign privileges.

In United States litigation, the issue of foreign privileges has arisen most frequently in cases concerning the scope of the attorney-client privilege, and specifically whether the privilege extends to those professionals who perform quasi-legal services in other systems. The Restatement of Law Governing Lawyers notes that the attorney-client privilege would include communications made to a foreign lawyer.[176] The question is whether quasi-legal professionals who enjoy privileges in their home jurisdictions would be included in the scope of the attorney-client privilege. Some United States courts have recognised such foreign privileges.[177] Other United States courts have refused to recognise foreign legal professional privileges. For example, in one case the court refused to recognise the West German privilege for communications between client and tax adviser.[178] Similarly, another court decided that communications between an alleged patent infringer and its British patent agent were not protected by the United States attorney-client privilege, and that comity

174. See 28 U.S.C. §1782 (1988), Article 12, which allows a court to compel testimony for use in foreign proceedings, and states that "[a] person may not be compelled to give his testimony or statement . . . in violation of any legally applicable privilege." Although this was intended to include deference to foreign privileges when they legally apply, see *In re Erato*, 2 F.3d 11 (1993), this does not constitute a blanket incorporation of foreign privileges into United States law. See also *In re Grand Jury Proceedings, Doe # 700*, 817 F.2d 1108, 1112 (4th Cir. 1987). Note also that the Hague Convention does not include international arbitration in the scope of "foreign proceedings". *NBC* v. *Bear Stearns*, 165 F. 3d 184 (1999).

175. *In re Asta Medica*, *S.A.* 981 F.2d 1, 7 (1st Cir. 1992). But see *In re application of Gianoli Aldunate*, 3 F.3d 54, 58 (2d. Cir. 1993) (discovery possible under 28 U.S.C. §1782 even when information would not be discoverable in the jurisdiction of the party seeking production); *In Re Application of Metallgesellschaft AG*, 121 F.3d 77, 79 (S.D.N.Y. 1997) (same).

176. ALI Res't Law Governing Lawyers, Sec. 122 comment e.

177. See e.g. *Foseco Int'l Ltd.* v. *Fireline, Inc*. 546 F. Supp 22, 25 (N.D. Ohio 1985) (recognising that communications between patent agents and foreign corporations may be treated as privileged if privilege is recognised in the country in which patent application is filed). *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 391 (D.D.C. 1978) (recognising that U.S. has no strong policy interest in patent agent communications relates to patent activity in the U.K. and therefore will defer to U.K. rule in U.S. litigation). *Golden Trade S.r.L.* v. *Lee Apparel Co., et al.* 143 F.R.D. 514 (S.D.N.Y. 1992) (claims of attorney-client privilege attached to communications between a company and its patent agents outside the U.S. determined under law of the place of the corporation because of comity). *Stryker Bayer AG and Miles, Inc.* v. *Bayer Laboratories, Inc.* 33 U.S.P.Q. 2d 1655, 1994 WL 705331 S.D.N.Y. (communications between a company and its patent agents outside the U.S. privileged).

178. *Duttle* v. *Bandler and Kass,* 127 F.R.D. 46, 51 (S.D.N.Y. 1989). See discussion in Dugan, *supra* n.2, at p.49 (arguing that the court may have been reluctant to apply the privilege because it was raised by plaintiff as opposed to defendant). See also *Ghana Supply Com'n* v. *New England Power Co.*, 83 F.R.D. 586, 589 (D. Mass 1979) (refusing to allow a plaintiff to claim foreign privilege in U.S. courts when it chose the forum).

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did not require deference to a British privilege because United States domestic public policy favoured liberal discovery.[179]

Foreign privileges can be an issue in criminal cases. In a case before the United States Court of Appeals, the court refused to apply the Dutch parent-child privilege when a United States resident sought to avoid a subpoena in the United States arising out of a foreign criminal investigation of her son.[180] The judicial assistance treaty in force between the United States and the Netherlands specifically required that "[t]estimonial privileges under the laws of the Requesting State shall not apply in the execution of requests … ."[181] It is possible that without such a provision, a court might apply such a privilege.

In some instances, if the absence of a privilege in one jurisdiction results in an order compelling production, this might place a witness in the position of having to violate secrecy laws of another jurisdiction.[182] In one case when such an issue was raised, a United States court declined to sanction a party that could not produce ordered documents without violating Swiss secrecy law.[183] The court, however, explicitly found that it had the power to order such documents, and other courts have ordered production when the balance of hardships weighed in favour of production despite the risk of foreign civil or criminal sanctions.[184] United States courts typically follow such a balancing approach, sometimes but not always leading to an order for production.[185] A recent United States Supreme Court case held that the domestic constitutional privilege against self-incrimination does not extend to instances in which a defendant fears foreign prosecution.[186]

In sum, United States courts in different circumstances will sometimes, but not always, defer to privileges based solely on foreign law. Judicial

179. *Odone* v. *Croda International PLC,* 950 F. Supp. 10 (1997). See also *In re Honda America Motor Co.*, 168 F.R.D. 535, 539 (1996); *Duplan Corp.* v. *Deering Milliken, Inc.* 397 F. Supp. 1146, 1169 (1975) (finding Article 378 of the French Penal Code and §15(1) of the British Civil Evidence Act extend attorney-client privilege to those who are not a member of a bar).

180. *In re Erato*, 2 F.3d 11 (1993).

181. Treaty on Mutual Assistance in Criminal Matters, Art.5, 12 June 1981 U.S-Neth., T.I.A.S. No. 10,734.

182. Some countries have passed blocking statutes that prohibit compliance with discovery orders for the production of evidence located within the blocking State's territory. Such statutes can include penal sanctions for violations. See G. Born, *International Civil Litigation in United States Courts* 371–373 (2d ed. 1992).

183. *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958).

184. *U.S.* v. *First National City Bank*, 396 F.2d 897 (2d Cir. 1968).

185. *United States* v. *First National Bank of Chicago*, 699 F. 2d 341 (7th Cir. 1983) (no production ordered in response to IRS summons when Greek law imposed criminal sanctions for disclosure of bank documents).

186. *United States* v. *Balsys*, 118 S. Ct. 2218 (1998). See Amann, *supra* n.89, at p.1201; S. A. Leahy, "*United States* v. *Balsys:* Foreign Prosecution and the Applicability of the Fifth Amendment Privilege Against Self-incrimination" (1999) 48 DePaul L. Rev. 987.

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analysis has been inconsistent, sometimes examining policy interests, sometimes deferring to foreign privileges as a matter of comity and occasionally undertaking a choice-of-law analysis.[187] In the United States, courts are more likely to apply foreign privileges in civil cases than in the context of administrative or criminal law.[188] This suggests that when strong United States policy or regulatory interests are at stake, such as in the public law context, the courts will not allow foreign privileges to impede the fact-finding process.

C. Other Countries

In some civil law countries, foreign parties, like domestic parties, are entitled to protections which may prevent disclosure of sensitive information—for example the rule that parties need not testify against their own interest. In such cases, issues of privilege will not arise.

One issue that does arise with some frequency concerns whether courts ought to defer to foreign privileges simply because of the possibility of self-incrimination in a foreign proceeding. In English civil litigation, parties can no longer refuse to testify on the grounds that they may be exposed to criminal prosecution based in foreign law,[189] but a court has held that the threat of prosecution under European antitrust law may be sufficient to avoid an order for disclosure, as European law is incorporated into English law.[190]

In the 1997 case of *Brannigan* v. *Davison*, in an appeal from New Zealand, the Privy Council considered whether accountants could be required to give evidence in a New Zealand proceeding that would potentially expose them to criminal sanctions for violating Cook Islands banking secrecy laws.[191] The Privy Council declined to extend the privilege against self-incrimination to prosecutions based on foreign law, but also noted that courts could take the threat of foreign prosecution into account in determining whether to order production of such privileged materials.[192] The Privy Council suggested balancing the adverse consequences to the witness from ordering production against the detriment to the judicial inquiry caused by refusing to order the evidence, and held that a "reasonable excuse" as to why production should not be ordered would be sufficient. Thus it converted absolute foreign privileges into qualified privileges.

187. See *Renfield Corp.* v. *Remy Martin S.A.*, 98 F.R.D. 442 (D. Del. 1982) (applying choice-of-law analysis to determine United States law had most significant relationship with the case, leading to decision not to order discovery of privileged documents).
188. Reichenberg, *supra* n.4, at 132.
189. Civil Evidence Act [1968] §14(1).
190. *Re: Westinghouse Electric Corp.* [1977] 3 All E.R. 703 (Denning, J.).
191. [1997] A.C. 238 (PC).
192. *Idem* at 251B–D.

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This balancing approach has been followed by courts in a number of countries. For example, an English Appeals Court cited *Brannigan* when it used its discretion to deny a requested order for disclosure of banking information, although it held that no bank secrecy privilege should be applied because there was no significant risk of prosecution.[193] An Australian court held that the local interest in criminal investigation outweighed the interest in bank secrecy under the laws of Malta, and that the risk of violating a foreign law was not a "reasonable excuse" for non-production.[194]

Canadian courts have declined to allow persons to refuse to testify on the grounds that doing so would violate foreign criminal law.[195] Similarly, claims of banking secrecy based on Swiss law have been rejected.[196] On the other hand, some courts have declined to order the production of privileged documents from a foreign non-party.[197]

Another interesting issue is whether documents required to be produced in one proceeding are available for legal proceedings in another jurisdiction. In one case, an English court held that documents produced by a foreign company for local tax proceedings could not be used in other local proceedings or delivered abroad for use in a foreign proceeding.[198] The limited waiver of the accountant's privilege for purposes of a tax proceeding could not be considered a general waiver for all purposes.

V. PRIVILEGES IN ARBITRATION: RELEVANT LAW AND RULES

In the past, very few arbitral rules mentioned testimonial or evidentiary privileges, and many of the most commonly used rules do not refer to them.[199] However, a growing body of rules now explicitly requires arbitrators to consider privileges. For example, Article 38 of the Swiss Canton of Zurich Rules of Arbitration provides for a family testimony privilege and an official and professional secrets privilege co-extensive with that provided by Swiss criminal law.[200] The Rules of the Commercial

193. *Credit Suisse Fides Trust SA* v. *Cuoghi,* [1997] All E.R. 724.
194. *Bank Valletta PLC* v. *National Crime Authority,* [1999] 164 A.L.R. 45.
195. *Spencer* v. *The Queen* [1985] 2 S.C.R. 278
196. *Arab Banking Corp.* v. *Wightman* 70 A.C.W.S. 3d 50 [Quebec Ct. App. 1997].
197. *Unilever PLC* v. *Procter and Gamble*, 38 F.T.R. 319 (Fed. Trial Div. 1990).
198. *Bourns* v. *Raychem Corp.*, [1999] All E.R. 154.
199. For example, Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), Rules of the International Chamber of Commerce (ICC), and the Arbitration Rules of the International Centre for the Settlement of Investment Disputes (ICSID) do not mention privileges.
200. International Arbitration Rules of Zurich Chamber of Commerce (1989), Article 38 (granting testimonial privilege to party's spouse and other relatives, and providing that a witness can "refuse to testify against himself and refuse testimony which would infringe official or professional secrecy protected by criminal law, unless the witness has been freed of its secrecy obligation").

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Arbitration and Mediation Center for the Americas (CAMCA) provide that the tribunal "shall consider applicable principles of legal privilege".[201] The CPR Rules for Non-Administered Arbitration of International Disputes allows the tribunal to "determine the applicability of any privilege or immunity" even though arbitrators are not required to apply rules of evidence.[202] The latest revision of the International Arbitration Rules of the American Arbitration Association requires arbitrators to "take into account applicable principles of legal privilege", including the attorney-client privilege.[203] Most of these rules do not provide guidance on how to decide the issue when presented with a claim of privilege, but merely require arbitrators to take privileges into account.[204]

The International Bar Association's Supplementary Rules Governing the Taking of Evidence in International Commercial Arbitration have recently been described as the "state of the art" in international commercial arbitration.[205] These rules limit discovery in that parties cannot seek purely internal documents: the documents must have passed to or from another party or to a third party to be sought. This is in effect a limited business secrets privilege. The rules also have a specific provision stating that the arbitral discretion on the admission of evidence is limited when a party requests exclusion of a document or statement that involves "[a] legal impediment or privilege under the legal or ethical rules determined by the arbitral tribunal to be applicable".[206] Separate grounds for exclusion include "commercial or technical confidentiality" and "grounds of special political or institutional sensitivity (including evidence which has been classified as secret by a government)" that the arbitral tribunal determines to be compelling.[207] Other rules have provisions allowing for the arbitrators to issue protective orders to protect trade secrets.[208]

201. 1996 Rules, Art.22(6).

202. Rule 12.2.

203. Art.20.6, reprinted in (1997) Y.B. Comm. Arb. 303, 313. The CPR Rules for Non-Administered Arbitration of Business Disputes likewise do not require the tribunal to apply rules of evidence used in judicial proceedings, but require the tribunal to "apply the lawyer-client privilege and the work-product immunity." Rule 11.2.

204. But see the CPR Rules, Rule 11.2, *idem*.

205. B. M. Cremades, "Powers of the Arbitrators to Decide on the Admissibility of Evidence and to Organize the Production of Evidence" (1999) 10 ICC Int'l Ct. of Arb. Bull. 49, 50.

206. IBA Rules Art.9(2) paras a and f.

207. *Ibid*. para b. Previously IBA Rules of Evidence had no such provisions and in fact allowed the drawing of an inference if a party failed to comply with an order to produce documents. See M. Rubino-Sammartano, *International Arbitration Law* (1990), p.382. The Mediterranean and Middle East Institute of Arbitration's Standard Rules of Evidence, Art.5(8) allows the arbitrator to draw such inferences when there is an "unjustified refusal" to produce documents or testify. *Idem* at 383.

208. See *supra* n.116.

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Municipal law relevant to arbitration does not usually have special provisions governing privilege. It is sometimes said that parties who have voluntarily chosen to submit their disputes to arbitration have waived the right to apply rules of evidence.[209] Although arbitrators are not bound by rules of evidence, it seems difficult to contend that an agreement to arbitrate would constitute a waiver of applicable privilege law.[210] Privileges available in litigation should also be applicable in arbitration, unless the parties expressly waived their privileges.[211] United States courts that have considered the matter have found that the failure to apply privilege law may be a ground for potential *vacatur* in domestic arbitration.[212] Courts have also denied motions to vacate an arbitration award when the panel had allowed a party to invoke privileges.[213]

Thus, some but not all international arbitration rules discuss privileges, although arbitral rules are beginning to deal with them. Even when the rules mention privilege, there is little specific guidance provided to arbitrators in determining how to deal with a claim of privilege.

VI. THE PROCEDURE-SUBSTANCE DISTINCTION IS NOT DETERMINATIVE WITH REGARD TO PRIVILEGES

Given the lack of guidance for international arbitrators to analyse privilege claims, arbitrators may begin with choice-of-law analysis to determine what privilege law may apply. This leads to the question whether privileges ought to be considered procedural or substantive. As we have seen in Section III *supra*, privileges are considered substantive under some municipal law, but in other countries are considered to be procedural. If privileges are considered to be procedural, the arbitrators would not need to defer to them unless they are mandatory in arbitration under the procedural law of the local forum or the parties have agreed to

209. R. Rodman, *Commercial Arbitration with Forms* 405 (1984).

210. G. B. Born, *International Commercial Arbitration in the United States* (1994), p.840.

211. See R. Bernstein (ed.), *Handbook of Arbitration Practice* (1987), pp.162–163; see also *Moore* v. *Conliffe*, 7 Cal. 4th 634, 637–638 (1994) (AAA arbitration functionally equivalent to judicial proceedings to which the litigation privilege applies); *Robbins* v. *Day*, 954 F.2d 679 (11th Cir. 1992) (recognition of accountants' privilege by arbitral tribunal not grounds for vacating award); *Minerals and Chemicals Philipp Corp.* v. *Panamerican Commodities, S.A.*, 224 N.Y.S. 2d 763 (Sup. Ct. 1962) (arbitrators' subpoena not enforceable as to privileged material); but see *DiMaina* v. *N.Y. State Dep't of Mental Hygiene*, 386 N.Y.S. 2d 590 (Sup. Ct. 1976) (arbitrators' subpoena enforceable under theory that privileges had been waived).

212. *Fahnestock & Co.* v. *Waltman*, 1990 U.S. Dist. Lexis 11024 (S.D.N.Y. 23 Aug. 1990) (arbitrators properly applied privilege); see also 9 U.S.C. 10(a)(3). However, in *Chiarella* v. *Viscount Industrial Co*., 1993 U.S. Dist LEXIS 16903 (S.D.N.Y. 24 Nov. 1993), the court held that arbitrators did not exceed their authority by ordering production of some, but not all, evidence asserted to be privileged. Commentators have noted that the arbitral panel in this case did not actually view any documents asserted to be privileged. J. Carter, "The Attorney-Client Privilege in Arbitration" (Winter1996/97) ADR Currents 1, 17.

213. *Painewebber Group* v. *Zinsmeyer Trusts* 187 F. 3d 988 (1987) (1999); *Hunt* v. *Mobil Oil Corp.,* 654 F. Supp. 1487, 1511.

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the application of a certain procedural law.[214] On the other hand, if privileges are considered to be substantive law, then the arbitrators might be required under principles of party autonomy to apply the governing law in determining what rules apply to the assertion of privileges.[215]

For an arbitral panel that must determine the character of particular evidentiary rules, one authority has suggested a useful approach by focusing not on an abstract distinction between procedure and substance, but rather on an examination of the policies underlying the evidentiary rules at issue.[216] Some common law evidentiary rules, for example, are grounded in the fear that a jury will fail to give the evidence its proper weight. Such considerations have little relevance in arbitration, and thus those rules should not be applied. Other rules, including evidentiary privileges, reflect broader social policy judgments about the value of certain kinds of communication. Such judgments are substantive in character, even if they are manifested in procedural law.[217]

Privileges do not fit neatly into either category of procedure or substance. They are not procedural rules that govern the arbitral process, and as discussed in Section VI, are not addressed in most rules or law related to arbitration. On the other hand, they are not usually considered to be part of the substantive law that governs the transaction. It is unlikely that the parties consider privileges in their choice of substantive law or intend for that law to govern privilege claims when the evidence is connected with another jurisdiction. Furthermore, any choice-of-law clause applicable to the arbitration might be set out in general terms, or might be limited to issues related to the transaction – for example, the interpretation or enforcement of a contract. A choice-of-law clause covering contract interpretation probably would not include the law of privileges.

As privileges have both procedural and substantive qualities, arbitrators must turn to other considerations in determining whether privileges should be accepted. The discretion generally accorded to international arbitrators with regard to evidentiary matters and the inherent power of arbitrators to run the proceedings provides some flexibility.

214. Marc Blessing (1993) "Mandatory Rules of Law versus Party Autonomy in International Arbitration" 14:4 *Journal of International Arbitration* 25.

215. A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (3d. ed. 1999) p.94. Sometimes procedural rules might give the panel discretion in the choice-of-law issue. See e.g. Iran-United States Claims Tribunal Rules, Art.33 (providing broad discretion to the Tribunal in determining what law is applied).

216. Smit, *supra* n.156.

217. See Res't (2d) Conflict of Laws 138 cmt. c (1971) ("a rule phrased in terms of evidence may in fact be a rule of substantive law").

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VII. PRIVILEGES MAY BE GENERAL PRINCIPLES OF INTERNATIONAL LAW

One source of law to which international arbitrators may look when it is concluded that there is no other binding law is international law, including general principles of international law. Arbitrators might do so because the parties so stipulate in the contract or *compromis*, or because the arbitrators simply choose to apply these international rules.[218] As demonstrated in Part II, many privileges are widespread and seen to be important in many different kinds of legal systems. Indeed, certain privileges, such as that allowing the government to withhold certain sensitive information from disclosure, may be universal. Some form of the attorney-client privilege is widespread. It has not been determined whether certain privileges can be considered a general principle of law that ought to be applied by international tribunals in international arbitration, or incorporated into commercial arbitration as part of the so-called *lex mercatoria*.[219]

General principles of law form one of the sources of public international law specified in Article 38(1) of the Statute of the International Court of Justice,[220] and are recognised in arbitrations involving a State or between States.[221] General principles also play an important role in transnational contract law, and national courts have been willing to enforce awards based on them.[222]

General principles are controversial as to their scope, content and methods for finding them,[223] but authorities have nevertheless agreed on numerous general principles that are regularly applied by international tribunals and arbitration panels.[224] Some general principles flow from the form and structure of adjudication, and include those procedural powers and requirements thought to be necessary to the functioning of dispute settlement mechanisms. For example, it has been suggested that the requirement in Article 69 of the Hague Convention of 1907, stating that

218. See e.g. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Art.5 (Iran-United States Claims Tribunal allowed to decide cases on basis of principles of international law).

219. See e.g. K. P. Berger, *The Creeping Codification of the Lex Mercatoria* (1999).

220. Art.38(1c). See generally V. D. Degan, *Sources of International Law* (1997), pp.14–141.

221. *Petroleum Development (Trucial Coast) Ltd. and The Sheikh of Abu Dhabi* (1952) 1 I.C.L.Q. 247; see discussion in Redfern and Hunter, *supra* n.21, at pp.112–123; see also V. V. Veeder, "The Lena Goldfields Arbitration" (1998) 47 I.C.L.Q. 747 (arbitration key for developing the general principle of unjust enrichment).

222. Degan, *supra* n.220, at pp.118–124; Redfern and Hunter, *supra* n.21, at p.122.

223. See e.g. G. Hercsegh, *General Principles of Law and the International Legal Order* (1969), pp.97–100 (arguing that general principles should not be a source of international law).

224. Degan, *supra* n.220; see also B. Cheng, *General Principles of Law* (1953).

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tribunals have the power to call upon the parties to produce documents, was in fact a codification of a general principle of law.[225]

The fact that a privilege exists in many legal systems indicates that it contains a core set of common values and may be considered a general principle of law. The approach of the Hague Convention in protecting privileges is further evidence that the protection of legitimate privileges may be part of general principles of international law.[226]

It might be argued that because a privilege varies in scope across jurisdictions, its content is insufficiently determinate to constitute a general principle of law. This critique, however, could be levelled at all such general principles. There is no necessity that a general principle have exactly the same content in every application.[227] For example, when the International Law Commission sought to codify the law of treaties in the process leading to the Vienna Convention on the Law of Treaties, the Commission was willing to codify areas of law on which little or no customary practice existed. In doing so, the Commission did not require that a principle have the same scope or be found in every jurisdiction.[228] Similarly, the Iran-United States Claims Tribunal developed the law of successor liability into a general principle of law without demonstrating the doctrine was universally accepted.[229] One need not conduct a comprehensive survey of all legal systems to identify such a general principle of law.[230]

Arbitrators can consider whether certain privileges constitute a general principle of law that ought to be applied in the dispute, even if the choice-of-law analysis does not require arbitrators to do so. The fact that certain privileges are widespread suggests that they may indeed constitute a general principle that should be generally applicable.

225. Degan, *supra* n.220, at p.42 (provisions were "well-known principles from the law of procedure common to the majority of advanced legal systems of States").

226. See also Article 69(5) of the Rome Statute on the International Criminal Court (ICC) requiring the Court to respect and observe privileges on confidentiality, as provided in the rules.

227. Degan, *supra* n.220 at p.73. ("As precepts of a very broad character they can obtain in different times and in various types of legal relationship a content which is not always quite identical").

228. *Idem* at pp.76–77 (discussing fraud).

229. *Oil Field of Texas, Inc.* and *The Government of the Islamic Republic of Iran, et al.*, Interlocutory Award No. ITL 10–43-FT (9 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 347. The Tribunal frequently relies on general principles of law or the *lex mercatoria* and has contributed to their development in international law. George Aldrich, *Jurisprudence of the Iran-United States Claims Tribunal* (1996), p.157, and Charles N. Brower and Jason D. Breuschke, *The Iran-United States Claims Tribunal* (1998), pp.637–638.

230. See *Prosecutor* v. *Drazen Erdemovic,* Case No. IT-96–22A (ICTY, Appeals Chamber, 7 Oct. 1997) at para. 57; see also Cheng, *supra* n.224, at pp.29–99 (discussing the general principle of self-preservation of States).

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VIII. PRIVILEGES MAY CONSTITUTE TRANSNATIONAL OR INTERNATIONAL PUBLIC POLICY

As rules of law designed to protect important communications, privileges reflect municipal public policy. This leads to the question whether arbitrators ought to apply privileges in certain circumstances as a matter of transnational public policy, even if the privilege as asserted is not found under the law otherwise determined to be applicable.

Normally, considerations of international public policy or *ordre public international* allow arbitrators to avoid applying a law that would otherwise be applicable, because the law in question contravenes concepts considered to be essential to the forum State.[231] With respect to privileges, such a situation would only arise if the applicable law required the violation of some privilege specifically mandated by the law of the forum. In these instances, international public policy might require arbitrators to defer to the privilege in question. It is also arguable that the concept of international public policy of the forum State, which normally would require the application of particular domestic mandatory rules, would protect the municipal public policy interests of other States in applying privileges.[232] Thus as a matter of international comity, it might be in the interests of the forum State to recognise a privilege not found in its own law, but recognised in the municipal law of the jurisdiction most closely connected with the allegedly privileged evidence.

There is some support for the principle that public policy considerations are not limited to those of the forum, but also include "supranational" public policy.[233] Admittedly, privileges do not have the same degree of moral content that is usually associated with such international public policy. International public policy usually concerns criminal activity, such as bribery, smuggling, drug trafficking and violence. There have been suggestions it could apply to the protection of cultural goods and the environment.[234] Yet privileges do involve the protection of individuals, businesses and governments by limiting the spread of confidential and sensitive information. In many cases individuals and entities have relied on the existence of privileges. When some of those privileges are not only widely recognised, but in some instances involve important civil liberties, it is not far-fetched to suggest that some

231. Y. Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration* in P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration* ICCA Congress Series No. 3 (1987), p.227; P. Lalive, *supra* n.239, at p.257.

232. P. Lalive, *Transnational (or Truly International) Public Policy and International Arbitration* in P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration* ICCA Congress Series No. 3 (1987), at p.273.

233. *Idem* at p.276.

234. *Idem* at p.284.

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privileges may be classified as sufficiently significant and widespread to be considered a matter of international public policy.

Certain privileges may be considered as "protecting certain of the essential values and interests of the international community".[235] The arbitrator is in a good position to determine whether a privilege meets the needs of the international community—that is one reason why the parties have chosen to engage in international arbitration. The issue of privilege will normally arise without any specific party agreement on what law applies to that issue, and international public policy may be useful for arbitrators to consider. As privileges include the concept of waiver, adherence to a particular privilege law chosen by the parties, which may preclude the application of a particular privilege, would not violate any public policy, as might be the case with respect to other subjects of international public policy.

Transnational public policy involves interests that exist only on the international plane, such as the need to resolve transnational disputes.[236] Part of the attraction of arbitration is its ability to provide a predictable mechanism for dispute resolution. In turn, such predictable dispute resolution advances transnational public policy interests of all States. If international arbitrators ignore important privileges, governmental and private parties may be reluctant to submit disputes to arbitration. Thus, recognition of privileges in arbitration will help to advance arbitration as a form of dispute settlement and further transnational public policy.

IX. INTERNATIONAL ARBITRATORS SHOULD DEFER TO CLAIMS OF PRIVILEGE

As discussed above, many privileges are widespread and are provided by domestic statutes, international treaties and arbitral rules. They are, arguably, a general principle of international law that should be applied by international tribunals. They may constitute transnational public policy. Even if not bound to do so by a choice-of-law analysis, international arbitral tribunals should accede to an appropriate privilege objection made in good faith.

In evaluating a claim of privilege, arbitrators should consider whether the privilege exists in the law of the jurisdiction with the most significant relationship to the evidence at issue. In so doing, arbitrators would have to consider the nature of the evidence, where it was created or occurred, and the likelihood that the parties expected that the evidence would be governed by local privilege rules or, in the case of testimony, the law of the domicile of the witness. Most of the time, this would be likely to mean

235. *Idem* at p.287.
236. *Idem* at p.314.

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that the parties would be able to rely on their own privilege rules, although this might not be true in every case.

This approach is similar to the so-called principle of proximity which forms the basis of the modern approach to conflicts-of-laws.[237] Rather than applying a single law to the entire dispute between the parties, however, the arbitrators should examine the particular evidence alleged to be privileged and determine what rules are the most proximate. It might be unfair to apply privilege rules of the governing law of the transaction if an allegedly privileged communication took place outside that jurisdiction and had no relationship with that jurisdiction.

Parties rely on privileges. At least some privileges are so well-recognised that it would come as a surprise to a party if the arbitrators overruled an objection based on such a privilege. Lawyers, the clergy and doctors often encourage those with whom they have a relationship to make a full disclosure by treating any communication between them as privileged. Parties to settlement discussions are encouraged to discuss the case and make offers in the expectation that such discussions and offers cannot be used against them in a proceeding. Governments often generate studies, plans, and policy documents under the assumption that such materials are not available to those who lack a security clearance. Similarly, businesses often expect that certain internal information will not be available to competitors. It would be unjust to frustrate the legitimate expectations of the parties in confidentiality.[238]

Some have also argued that the need to give effect to the legitimate expectations of the parties forms a general principle of private international law.[239] By applying the privilege of the jurisdiction with the most significant relation to the evidence in question, regardless of the choice-of-law analysis, arbitrators will fulfil the expectations of the parties or witnesses at the time the communication was made, or in the case of testimony, at the time the events took place. This will also advance the reliance interests of the parties.

As noted, privileges based on foreign law are sometimes recognised in municipal courts. In some instances, however, courts will consider that the policy interests of their own jurisdiction outweigh a foreign party's reliance interests in the secrecy of privileged evidence. This determination may reflect the local interest in truth-seeking and the decision of the local legislature not to adopt the asserted privilege into local law.

237. M. Reimman, "Savigny's Triumph? Choice of Law in Contract Cases at the Close of the Twentieth Century" (1995) 39 Virginia J. Int'l L. 571, 592.

238. Dugan, *supra* n.2, at pp.38–39 ("deprived of their expectations of confidentiality merely because they find themselves haled into unexpected forums").

239. Lalive, *supra*, n.232 at pp.305–306; see also D. Caron, "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution" (1990) 84 A.J.I.L. 104.

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International arbitrators, on the other hand, represent no jurisdiction in particular and have no public policy interests of their own to advance. Therefore, they should be deferential toward rules of privilege, which reflect both municipal and international law. An arbitral tribunal that ignores a privilege may run the risk of jeopardising enforceability of the award if a domestic court determines that local public policy requires the application of privilege law.[240]

If a choice-of-law clause can fairly be interpreted to indicate that the parties intended that a particular law would apply to privileges, the parties should be bound by such a choice, and arbitrators should not recognise privileges based on other law when raised by the parties themselves. Non-party witnesses, however, should be allowed to invoke privileges based on the law with the closest connection to their testimony, for they should not be bound by the parties' choice.

In some circumstances a party might seek to assert a privilege found in the law of the forum but not in the governing law or the law of jurisdiction with the closest connection to the evidence at issue. The arguments in favour of recognising such privileges are less persuasive than for privileges found in the law of the jurisdiction with the closest connection with the evidence. Reliance interests are less of a consideration, as parties are more likely to be concerned with their own law or the law of the jurisdiction with the closest connection to the evidence than that of the site of the arbitration, which is not always identified at the time the communications are taking place. The forum State does not have a policy interest in the rights and relationships of the parties or witnesses in an arbitration, if those parties or witnesses have no relationship to that State other than the fact that the arbitration is being held there. Indeed, if such States intended that their rules of privilege apply to all arbitrations held there, they would include the rules in their arbitration statutes.

Thus, arbitrators should defer to claims of privilege based on the law with the closest relationship with the evidence in question. This approach will protect the reliance interests of the parties by giving effect to their legitimate expectations, and will advance arbitration as a form of dispute settlement. This is not to suggest that arbitrators should not apply the forum State's privilege when it is appropriate to do so.

X. WAIVERS AND OTHER CONSIDERATIONS

Many of the privileges described in Part II are unlikely to be invoked in international arbitration. The self-incrimination privilege is unlikely to be invoked outside the criminal context, unless it is on the basis that testifying in a proceeding could lead to a criminal prosecution elsewhere.

240. New York Convention on the Enforcement of Foreign Arbitral Awards, Art.V(2)(b).

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This is unlikely to arise in international arbitrations as compulsory testimony is rare. Similarly, the medical privilege is typically invoked in tort cases, which are seldom considered in international arbitration. Family privileges generally arise in criminal and family law disputes—not normally the subject of an international arbitration. In practice, the privileges most likely to appear in international arbitration are the attorney-client privilege, the business or trade secrets privilege, the privilege protecting settlement discussions, and the national security or State secrets privilege. All of these are widely accepted.

In evaluating claims of privilege, arbitrators cannot be expected to have complete knowledge of privilege law in the municipal law of the parties. Therefore the burden must be on the person asserting the privilege to show its existence and applicability under the test described above. Once this burden is met, arbitrators should defer to the privilege.

Arbitrators can treat exceptions to privilege as would courts. With respect to qualified privileges, the arbitral tribunal, like a court, may balance the privilege with the need for the evidence. Moreover, arbitrators, like courts, may employ legally recognised exceptions to and waivers of privileges. The arbitral tribunal should, for example, consider a waiver rule so that a party that puts privileged evidence at issue and then seeks to invoke the privilege to hinder the other party from responding should be considered to have waived the privilege. Courts have often used some variant of this rule in considering the application of privileges.[241]

If one party can assert the privilege, the question may arise as to whether the other party should be able to, as a matter of mutuality or equal treatment, assert the same privilege notwithstanding the lack of the privilege in the law with the closest relationship to the evidence. Because the requirement of equal treatment demands that the rules and law of the arbitration be applied uniformly to both parties, a party should be able to invoke a privilege that has been asserted by the other party.

Of course, international arbitrators should not sustain a privilege objection if it is made in bad faith. Bad faith might be indicated, for example, if a government classified a document solely to make it immune from disclosure at the specific proceeding. The requirement of good faith invocation requires a more subjective examination of the party's privilege claim, and allows the panel to deal with the occasional situation when a party is asserting a valid privilege, but not in a manner that deserves deference. This is justifiable as the duty to act in good faith forms a

241. See *Hearn* v. *Rhay*, 68 FRD 574 (E.D. Wash. 1975); *Bowne of New York City, Inc.* v. *Ambrose Corp*, 150 F.R.D. 465 (S.D.N.Y. 1993); *Paramount Communications* v. *Donaghy*, 858 F. Supp 391 (S.D.N.Y. 1994).

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general principle of law, including international law[242] and has been described as "the foundation of all law".[243]

These considerations should help alleviate the concern that a deferential approach will lead parties to invoke privileges in an inappropriate manner, without creating too complex a burden on the tribunal. Because the tribunal need only satisfy itself that the privilege exists and is invoked in good faith, it can avoid complex balancing inquiries that slow down the process and impede consistency. Furthermore, as the party asserting the privilege is generally required to prove its existence, the tribunal will not need to conduct its own separate inquiry other than evaluating the evidence and law on the issue brought before it. Of course the arbitrators must assess whether the privilege asserted is properly applied. This assessment requires a determination of the scope of the privilege and considerations of exceptions and waiver.

It is true that the suppression of relevant evidence may adversely affect the fact-finding process and could lead to an injustice. This can be particularly frustrating for a party or arbitrator whose jurisdiction does not recognise the privilege. Nevertheless, the appropriate invocation of privileges involves fairness to those who rely on them, and advances important goals of public policy.

XI. CONCLUSION

Privileges reflect important public policy goals that parties rely on in ordering their affairs. Although national courts differ in the extent to which they will recognise claims based on a foreign privilege, the general trend is toward a deferential approach in cross-national litigation. Unlike courts, arbitrators have no local policy interests to advance, and should therefore be especially mindful of the legitimate expectations of the parties. While not bound to do so, international arbitrators should generally defer to claims of privilege asserted in good faith. In doing so, arbitrators should consider the privilege rules of the jurisdiction that is most closely connected with the evidence at issue. Such deference will help protect important reliance interests of parties and public policy interests of States. It will also advance arbitration as a form of dispute resolution.

242. J. F. O'Connor, *Good Faith in International Law* (1991); Cheng, *supra* n.224.
243. Cheng, *idem* at 105.

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