Dealing with Privileges in International Commercial Arbitration

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1 Introduction

Arbitration has increasingly become the preferred method for resolving disputes which arise in international commercial contexts in part because it offers flexibility and the opportunity for the parties to control the procedure.[2] Parties are able to opt out of parochial procedural and evidentiary rules and can fashion the procedures to best suit their particular needs. However, exercising this party control requires party agreement and in a contested dispute, parties often are unwilling or unable to reach agreement over issues which will have an impact on their position. When a party stands to gain from resisting the position of the other party, the arbitrators will usually have to make a decision that will probably favour one party at the cost of the other party

These contested issues increasingly involve evidence which one party seeks to obtain or to submit while the other party resists. Within the context of evidentiary issues, privileges pose the greatest challenge to arbitrators. While the parties may have opted out of national procedural rules when choosing arbitration, they probably did not expect to opt out of the protection of privileges which they enjoy in their national legal system. The parties may reasonably expect that they bring with them to the arbitration their privileges even if this means that the parties and their evidence are subject to widely varying types of privileges and even if the arbitrators are unfamiliar with their privileges which arise from national law.

When dealing with evidentiary issues, arbitrators frequently have to balance the demand for promoting efficiency and controlling obstruction with the requirement of providing the right to be heard and equal treatment.[3] When in an international arbitration a party claims rights based on evidentiary privileges, the arbitrators must perform this balancing act in mid-air. The law and practice relating to evidentiary privileges is far from being internationally harmonised and even on a national level, it defies easy assessment and is in a state of flux. How can arbitrators find the right balance and avoid falling into the chasm of a potentially challengeable award? Do the arbitrators have the discretion to reject

2 Loukas Mistelis, *International Arbitration - Corporate Attitudes and Practices. 12 Perceptions Tested: Myths, Data and Analysis; Research Report*, 15(3-4) American Review of International Arbitration 525-590 (2006) [published in June 2006]. This study of approximately 100 targeted "top-tier companies" revealed that companies considered that "flexibility of the procedure" as the most important advantage of arbitration, followed by the enforceability of awards.

3 These two rights represent the due process guarantee in arbitration and have been called the "Magna Carta" of arbitration. Holtzman and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary*, page 564 (1994). These rights are a central provision of the UNCITRAL Model Law on International Commercial Arbitration, (hereinafter referred to as the "Model Law"), Generally Assembly Resolution 40/72, 40 GAOR Supp. No. 53, A/40/53, p. 308 (adopted 11 December 1985) and are contained in Article 18 of the Model Law. These rights are also established in the Swedish Arbitration Act, Section 8, Lag (1999:116) om skiljeförfarande, Prop. 1998/99:35, bet. 1998/99:JuU12. (hereinafter SAA) in Section 21 and 24 (1). The guarantee of these rights is reflected in the provisions for setting aside an award, Model Law Article 34 (2) (ii), SAA Section 34 (6), and Article V (1)(b) of the New York Convention of 1958.

claims of privilege? How can the arbitrators treat the parties equally when they invoke widely differing privileges? What law should the arbitrators apply when determining the existence, scope, and potential waiver of privileges? Do the privileges attach to the evidence or to the parties or to their legal representatives? May arbitrators or should they draw negative inferences when a party invokes a privilege? Issues of privilege raise many difficult questions that are not easily resolved and the answers can have substantial impact on the ability of a party to prove its case.

This essay focuses on how arbitrators may deal with claims of privilege in arbitration primarily from an international perspective. However, it also considers how these issues may appear in the context of an international commercial arbitration held in Sweden, which is thus conducted pursuant to the Swedish Arbitration Act.[4] The law relating to privileges is extensive,[5] as is the law relating to evidentiary issues in arbitration and subsequent challenges to awards. Consequently, this essay does not attempt to deal extensively with all of the issues relating to the topic but rather provides some thoughts on selected issues which could give rise to further reflection in a more comprehensive study.

2 The Context of Privilege Issues

The issue of privilege typically arises when a party seeks to obtain evidence from another party and is met with an objection to the request based on an allegation that the sought evidence is subject to a privilege. Often the issue first arises when a party requests access to or the production of documents from the opposing party, but the issue can also arise when a witness is testifying and may invoke the privilege to avoid revealing allegedly privileged information. When a party refuses to provide the requested evidence based on a privilege, the arbitrators will have to determine whether to order the party to provide the requested evidence or whether to accept the allegation of a privilege. Acceptance of the privilege will have the effect of preventing the party seeking the evidence from being able to offer the evidence in the proceedings. A party has the burden of proving the facts which support its claims and defences[6] and without the necessary evidence, the party may lose on the particular claim or defence or even the entire case.

4 Swedish Arbitration Act, Lag (1999:116) om skiljeförfarande, Prop. 1998/99:35, bet. 1998/99:JuU12. (hereinafter refered to as the "SAA").

5 The attorney-client privilege alone has been the subject of over 8,000 reported cases in the United States and hundreds of articles. *See,* Patricia Shaughnessy, *Attorney-Client Privilege: A Comparative Study of American, Swedish and EC Law*, page 27 (2001).

6 Article 24 (1) of the UNCITRAL Arbitration Rules, (General Assembly Resolution 31/98 adopted on 15 December 1976) (hereinafter referred to as the "UNCITRAL Rules") provides that: "Each party shall have the burden of proving the facts relied on to prove his claim or defence." The Model Law does not have a corresponding provision, but legislative history shows that the Commission thought it was "a generally recognized principle that reliance by a party on a fact required the party to prove that fact." Holtzman and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary*, page 568 (1994).

Arbitrators have no powers of compulsion in most countries, including Sweden[7], and thus even if the arbitrators make an order to produce the evidence, the party may simply continue to refuse by relying on an alleged privilege. Arbitrators may be able to draw negative inferences from a party's failure to comply with their orders,[8] but as is discussed below, this may be an inappropriate response to a good faith invocation of a privilege and furthermore, may not provide a satisfactory substitute for the evidence. If the party seeking the evidence considers the evidence necessary to prove its case, it may request the arbitrators to give their permission to obtaining the assistance of the District Court to order the resisting party to produce the evidence under threat of compulsion or to hear the witness under oath at the Court.[9] However, should the arbitrators believe that the sought-after evidence is not needed or that the request is brought simply to obstruct or delay the proceedings, the arbitrators may choose to not give their permission to seek court assistance.[10] If the arbitrators deny the party request to obtain court-assisted evidence taking, the decision is final and a party cannot directly appeal to the court for the assistance.[11]

When a privilege issue arises the arbitrators must decide whether the privilege actually applies to the particular evidence. This is not easily determined without knowing the content and context of the evidence. If the sought after evidence is not relevant or is redundant, perhaps the arbitrators can avoid determining the privilege by simply rejecting the attempt to introduce the evidence on these grounds. However, the relevance of the evidence is also difficult to determine without knowing just what the evidence might prove. By refusing to order the production of the evidence and by refusing to give permission for court assistance, the arbitrators are in effect excluding potential

7 SAA Section 25 (2) specifically prohibits the arbitrators from imposing sanctions: "The arbitrators may not administer oaths or truth affirmations. Nor may they impose conditional fines or otherwise order compulsory measures with a view to obtaining requested evidence."

8 International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules), Rule 9.4 (adopted by a resolution of the IBA Council on 1 June 1998).

9 Model Law Article 27 and SAA, Section 27. The provisions are essentially similar, although in the Model Law the arbitrators make the actual request to the court while pursuant to the SAA, the parties make the request if allowed by the arbitrators. *See*, Jernej Sekolec and Nils Eliasson, *The UNCITRAL Model Law on Arbitration and the Swedish Arbitration Act: a Comparison*, Report presented at the conference: "The Swedish Arbitration Act 1999, A Critical Review of Strengths and Weaknesses" 7 - 8 October 2004, Section II, page 29 – 30. (available on the www.sccinstitute.se website, last visited October 1, 2006).

10 *But see*, Lars Heuman, *Arbitration law of Sweden: Practice and Procedure*, page 456 (2003); "If a party's request for court assistance is groundless, the arbitrators can deny it. However, if the court intervention serves an important purpose, the arbitrators should consent to the taking of evidence, even if the party's main purpose is presumably to delay the proceedings." The arbitrators should bear in mind their important obligation to "handle the dispute in an impartial, practical, and speedy manner." SAA Section 21. Appealing to the court will not only result in a delay but may require translating documents, using local counsel, making confidential matters subject to a public hearing, and require witness to travel to the court.

11 *Id.* at 457 – 58.

evidence. Do arbitrators have the discretion to exclude evidence, especially potentially relevant or even decisive evidence? Could an award be set aside or its enforcement refused when the arbitrators refuse to order the production of the evidence? Are there any consequences if the arbitrators improperly disregard an alleged privilege?

3 Arbitrators have Broad Discretion

Perhaps the best point of departure for a discussion of dealing with privileges in arbitration is to focus on what is required in order to render an award that is unlikely to be set aside.[12] In other words, when can the arbitrators' decision to accept or reject a claim of privilege result in an error which could jeopardise the award? It is an accepted principle, which is a feature of most modern arbitration laws and rules, that subject to the agreements of the parties, the arbitrators have wide discretion to conduct the arbitral proceedings as they deem appropriate in the circumstances of the particular case.[13] The determination of an evidentiary privilege claim is within the scope of conducting the proceedings and most modern arbitration rules provide the arbitrators with complete discretion to determine the admissibility, relevance and probative value of evidence.[14] However, as already noted the right to be heard and the right to equal treatment

12 Some commentators refer to the duty to render an enforceable award. However, this may be a controversial objective because arbitrators cannot always know where an award may be enforced; indeed it the prevailing party may seek to enforce it in more than one jurisdiction. A better aspiration is to render an award that conforms to the requirements of the seat of the arbitration and thus cannot be set aside. Rule 47 of the new Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (New SCC Rules) imposes an obligation on the Arbitral Tribunal and the parties to make every reasonable effort to ensure that all awards are legally enforceable. (The new Rules were adopted by the Board of Directors of the Stockholm Chamber of Commerce on November 13, 2006 and will be in effect for all cases filed with the SCC Arbitration Institute after January 1, 2007. The rules were drafted in English and translated into Swedish; the SCC Board approved the Swedish version of the Rules.)

13 *See e.g.*, Article19 (2) of the UNCITRAL Model Law and Article 2 (4) of the IBA Rules. The SAA provides in Section 21 "The arbitrators shall handle the dispute in an impartial, practical, and speedy manner. They shall thereupon act in accordance with the decisions of the parties insofar as there is no impediment in so doing." The new SCC Rules provide as follows:

Article 19 Conduct of the Arbitration

(1) Subject to these Rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate.

(2) In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, practical and expeditious manner, giving each party an equal and reasonable opportunity to present its case.

14 UNCITRAL Rule 25 (6) provides: "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence." Similarly, the new Article 26 of the new SCC Rule provides that "The admissibility, relevance, materiality and weight of evidence shall be for the Arbitral Tribunal to determine."

are essential guarantees of arbitral procedure.[15] Arbitrators must ensure that these essential rights are observed during the conduct of the arbitral proceedings, but these guarantees leave a large area of discretion for the arbitrator to exercise in conducting the proceedings. Consequently, while the parties are guaranteed these outer limits of arbitrator discretion, arbitrators are empowered with corresponding broad powers over the conduct of the proceedings, subject to the agreements of the parties which do not contravene mandatory requirements of law or that are impossible to carry out in practice.[16]

Although the neither the UNCITRAL Model Law nor the UNCITRAL Rules specifically state that an arbitrator may exclude evidence, this power is presumed inherent in the arbitrator's power to determine the admissibility of evidence. Similarly, the new SCC Rules empower the arbitral tribunal to determine admissibility and relevance of evidence.[17] Under all modern arbitration laws and rules, once evidence is admitted, the arbitrators have the discretion to determine its relevance, materiality and weight.[18] If arbitrators may deem that submitted evidence is so irrelevant, unreliable, or lacking probative value that they can chose to disregard it, then surely they can also refuse to admit it. Arbitrators have an important mandate to conduct proceedings in an efficient manner and should prevent a party from prolonging, confusing, or obstructing proceedings by presenting unnecessary evidence.[19] This discretion and power to conduct the proceedings efficiently should also allow the tribunal to determine whether to accept or reject a claim of privilege.

The Swedish Arbitration Act specifically empowers the arbitrators to refuse to admit evidence when it is "manifestly irrelevant" or with regard to when it is offered, however it does not expressly provide for excluding evidence on other grounds such as a privilege.[20] This provision is an exception to the strong Swedish procedural tradition of liberally accepting evidence and allowing the judge to determine its weight based on objections to the quality of the evidence, such as hearsay.[21] The Swedish Act does not specifically address the rights of

15 UNCITRAL Model Law, Article 18.

16 UNCITRAL Model Law, Article 19 (2) and SAA Section 21. Unlike the Swedish law, the Model Law does not specifically provide for not following the parties' agreement when it is impossible to so, but this could be implied.

17 *See* footnote 14.

18 Article 19(2) of the Model law; Article 25 (6) of the UNCITRAL Rules; and Article 9 of the IBA Rules.

19 *See e.g., Iron Ore Company of Canada v. Argonaunt Shipping, Inc.,* XII YBCA 173 (1987);

20 SAA Section 25, paragraph 2 provides: "The arbitrators may refuse to admit evidence which is offered where such evidence is manifestly irrelevant to the case or where such refusal is justified having regard to the time at which the evidence is offered."

21 It has been suggested that the arbitrators should apply this provision very restrictively and thus only refuse to admit proffered evidence when the arbitrators have taken a position in the legal issue which makes the proffered evidence lack significance. Stefan Lindskog, *Skiljeförfarande*, page 727 (2005).

arbitrators to evaluate evidence, but such a right is generally accepted.[22] The lack of a specific reference to refusing to admit evidence based on a privilege in the Swedish statutory provision should not be interpreted to exclude the discretion of the arbitrators to refuse to order the production of allegedly privileged material or testimony.[23] Refusing to admit evidence is distinct, albeit related, to refusing to order the production of evidence. Generally, the allegedly privileged evidence will not be available to exclude because the party asserting the privilege will refuse to produce it and thus the arbitrators will not need to refuse to admit evidence but will refuse to order a party to produce it. However, the situation could be imagined where a privilege could be invoked to prevent the admission of privileged evidence. For example, if a party has obtained privileged material, such as a copy of a letter containing privileged communications or information, the privilege-holder may request the arbitrators to refuse to admit the evidence despite its relevance in order to protect the privileged material.[24] Even if the arbitral proceedings are conducted confidentially,[25] refusal to admit the evidence might be appropriate because the use of the privileged material would be contrary to the justifications for the privilege.[26] Furthermore, any confidentiality may be lost if the award is subject to judicial challenge, particularly if the award contained information about the

22 Heuman, *supra.* At footnote 7, at page 472 – 73. "The Swedish Arbitration Act does not include any provision as to how the arbitrators are to analyse and assess the weight of the evidence presented. Like the Code of Judicial Procedure, the Act is probably based on the principle of a free evaluation of evidence, i.e., on the arbitrators being entrusted with assessing the weight of the individual items of evidence and factoring them together. *An award may not be set aside on the ground that the arbitrators have been incorrect in their evaluation of evidence."* (Emphasis added). *See also, id.* at page 422, "an incorrect evaluation of the evidence is not a ground for challenge . . ."

23 The issue of refusing to admit evidence based on other grounds such as a privilege or improperly obtained evidence was not discussed in the legislative reports. *See e.g., Ny lag om skiljeförfarande*, Prop. 1998/99:35, pages 114 – 120.

24 In Swedish procedural law unlike many other jurisdictions, even improperly obtained evidence may be admitted as evidence, although the manner in which the evidence was obtained may affect its probative value. Heuman, *supra.* at footnote 7, at page 424. It is not settled whether improperly obtained evidence should be admitted in international arbitrations conducted in Sweden. *Id.*

25 Issues regarding the potential confidentiality of proceedings go beyond this essay, but it should be noted that unless the parties have made a confidentiality agreement, there may be limited confidentiality in arbitral proceedings conducted in Sweden. *See,* Bulgarian Foreign Trade Bank case (Sweden) Swedish Supreme Court, 27 October 2000, Case no. T 1881:99. Stockholm Arbitration Report (2000, no. 2) pp. 137 - 147 with notes by M.I.M Aboul Enein, pp. 148 - 150, G. Aksen, pp. 150 - 155, G. Reid and L. Greenwood, pp. 155 - 160; 15 Mealey's International Arbitration Report (2000, no.1) pp. 1 to 8; 13 World Trade and Arbitration Materials (2001, no. 1) pp. 147 -155A, and on Kluwer Arbitration on-line. *See also,* Stockholm Arbitration Reports, 2000:2, pp 137 – 147. An English translation of the court of appeal decision in is case is available at 14 Mealey's International Arbitration Report (1999, no. 4) pp. A-1.

26 In some jurisdictions, privileged communications based on confidentiality, such as the legal privilege, will be lose their privilege when they lose their confidentiality regardless of the reason for the disclosure. *See e.g.,* Suburban Sew 'n Sweep v. Swiss-Bernina, 91 F.R.D. 254 (N:D. Ill. 1981). *See also,* Shaughnessy, *supra.* at footnote , pages 384 – 390.

privileged material. Arbitrators should be considered to have the discretion to determination whether alleged privileged material may be admitted.

In the international arbitration community, evidence issues are usually considered matters of procedure which are within the control of the arbitrators, regardless of whether the proceedings are characterized by an inquisitorial or adversarial approach that reflects the traditions and preference of the parties and the arbitrators.[27] Generally, issues relating to procedure in arbitration will be subject to the lex arbitri,[28] which usually will be the law of the place of arbitration.[29] However, issues of evidence can raise complicated and thorny choice-of-law issues when the parties, evidence, and counsel are connected to different legal systems which have varying rules and which may or may not attach to the evidence.[30] The rules of evidence that apply to civil proceedings are not directly nor indirectly applicable to arbitral proceedings, although as a matter of practice both arbitrators and legal counsel may be affected by and inclined to follow evidentiary approaches of their national law.[31] While privilege issues are related to general evidence matters, they create special challenges. In many legal systems issues of privileges are considered matters of substantive not procedural law.[32] This characterisation can have important consequences regarding choice-of-law issues and as and as already noted there is great variation regarding privilege law in various jurisdictions.

Despite important variation in such approaches, there remains general consensus that in arbitration the arbitrators enjoy considerable discretion in dealing with evidentiary issues. This discretion frees the arbitrators from adhering to a particular approach, allowing them the option of "picking and choosing" the most appropriate rules to solve the particular evidentiary issues

27 In some legal systems, issues of admissibility, relevance, materiality and probative value of evidence may be issues of substantive law, however, in the context of arbitration these issues are not controlled by the substantive choice of law and "as a matter of policy, it is desirable for arbitration to avoid the application of technical rules of evidence wherever possible." Holtzman and Neuhaus, *supra* at footnote 6, page 567.

28 SAA Section 46, which provides "This Act shall apply to arbitral proceedings which take place in Sweden notwithstanding that the dispute has an international connection." *See*, Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration,* page 561 (2003).

29 *See,* Observations by Dr. Patricia Shaughnessy, *The Right of the Parties to Determine the Place of an International Commercial Arbitration,* Decision by the Svea Court of Appeal in Sweden Rendered in 2005 in Case No. T 1038-05, Stockholm International Arbitration Review, 2005:2, page 259, 264. *See also,* Gary Born, *International Commercial Arbitration,* page 413 (2nd ed. 2001).

30 Born, *id.*

31 *See generally*, R. Doak Bishop, *The Art of Advocacy in International Arbitration* (2004). *See also*, Heuman, at footnote 7, page 423.

32 Michelle Sindler and Tina Wustermann, *Privilege Across Borders in Arbitration: multi-jurisdictional nightmare or a storm in a teacup?*, ASA Bulletin, Vol. 23, No. 4 , 610 (2005) page 622 – 623.

that may arise in the proceedings.[33] But does this mean that arbitrators may freely pick and chose which privileges to recognise and respect?

4 Limits on Arbitrator Discretion

The discretion of arbitrators may be limited by the agreement of the parties and by the essential guarantee of a "fair hearing". Both arbitral discretion and party autonomy are limited by mandatory provisions of law and by over-riding notions of public policy, but such restrictions are limited in practice. As noted, most arbitration laws do not impose mandatory evidentiary provisions but instead reinforce the discretion of the arbitrators, leaving it to the parties to impose any limitations on this discretion. Parties may agree to specific procedures regarding the evidence,[34] in which case the parties' agreement will be controlling, but such agreements may be more concerned with general pre-arbitration disclosure processes or the order of presenting evidence than with actually producing or admitting particular evidence. Parties may agree to apply the IBA Rules,[35] which in turn invest the arbitrators with broad discretion to determine whether to admit or exclude evidence and to determine the value that should be given to the admitted evidence. While the right to a fair hearing ensures that a party will be given the right to present a case and the right to equal treatment,[36] it does not guarantee that a party will be able to present all of the evidence which it deems appropriate. The vague notion of a fair hearing leaves plenty of discretion to the arbitrators in matters of evidence and courts are unlikely to set aside or refuse to enforce an award unless the protesting party can demonstrate a serious abuse of this discretion and that it probably affected the outcome of the case.[37] Over-riding notions of public policy are limited to ensuring compliance with important state interests and if an award cannot be challenged on the basis of either

33 Fouchard, Galliard, and Goldman, *On International Commercial Arbitration,* page 689 (1999). *See also,* van Hof, *Commentary on the UNCITRAL Arbitration Rules, the Application by the Iran-US Claims Tribunal,* pages 170 – 174 (1991).

34 Gary Born, *International Commercial Arbitration,* page 470 (2001) "In a considerable number of cases, the parties will agree to a relatively consensual process for both taking and presentation of evidence in the arbitration."

35 It may not be advisable for party to import these "rules" into an arbitration in their entirety, instead the IBA Rules may be best used as a source of guidance or parties may select specific rules to apply in particular cases.

36 Article 19 of the Model Law.

37 *See e.g., International Chemical Workers Union v. Columbia Chemicals Co,* 331 F.3d 491, 172 L.R.R.M. (BNA) 2619, 148 Lab.Cas. P 10, 211.(5th Cir. 2003) "We do not look over the shoulder of the Arbitrator in order to alter his credibility decisions, rather we only consider whether the Arbitrator provided a fair and full hearing consistent with the FAA and the LMRA." Unlike the UNCITRAL Model Law, the SAA specifically requires that an alleged procedural error has probably affected the outcome of the case. SAA Section 34 (6). *See* Heuman, *supra* at footnote 10, pages 624 -627.

violating party-autonomy or the right to a fair trial, then it should not violate public policy.[38]

The limits of what arbitrators may do are set by the applicable statutory provisions for setting aside an award[39] and by the New York Convention provisions for refusal of the enforcement of the award.[40] Because the Model Law provisions for setting aside awards essentially and conveniently mirrors the New York Convention provisions for non-enforcement,[41] these provisions can be considered simultaneously. Pursuant to these provisions, an award can be challenged if a party was not given proper notice or was otherwise unable to present his case.[42] An award can also be challenged if the procedure was not in accordance with the agreement of the parties or failing such an agreement, not in accordance with the law of the place of the arbitration.[43] Furthermore, the Model Law provides in perhaps its "most important provision"[44] that the parties are entitled to be treated with equality and shall be given a full opportunity to present their case.[45] These provisions provide the basis to challenge the award if the arbitrators' exclusion of evidence was either contrary to the agreement of the parties or prevented a party from having the opportunity to present its case.

However, as already noted the arbitrators' broad discretion means that there is a corresponding substantial tolerance for the arbitrators to exclude evidence, unless it is contrary to the specific agreement of the parties.[46] Furthermore, unlike the Model Law, under Swedish law the alleged error must have probably affected the outcome of the case and the complaining party must not have contributed to the error, thus creating an even broader scope of discretion for the arbitrators.[47] If the parties make procedural agreements before or during the arbitration which were intended to limit the arbitrators' discretion, these agreements should be recorded and observed by the tribunal since a failure to comply with the parties' agreed-upon procedures can be a basis for challenging

38 Fouchard, Galliard, and Goldman, *supra. at footnote 14*, page 689.

39 Model Law Article 34 and SAA Sections 33 and 34.

40 New York Convention of 1958, Article V.

41 Holtzman and Neuhaus, *supra.* at footnote 3, page 915 - 916. There are two substantive differences.

42 Article 34 (2)(a)(ii) of the Model Law and Article V(1)(b) of the New York Convention.

43 Article 34 (2)(a)(iv) of the Model Law (unlike the corresponding provision in the New York Convention, this provision provides "not in accordance with this law" but this will usually be the law of the place of arbitration); and Article V(1)(d) of the New York Convention.

44 Holtzman and Neuhaus, *supra.* at footnote 3, page 564 (noting that Article 18 together with Article 19 "might be regarded as the most important provisions of the Model Law").

45 Article 18 of the Model Law.

46 Although parties may make agreements regarding the procedures and evidence, such agreements must also comply with Article 18 of the Model Law. Holtzman and Neuhaus, *supra.* at footnote 3, page 551 – 552.

47 SAA Section 34 (6) provides for challenges based on procedural irregularities which occur without the fault of the party when it probably influenced the outcome of the case

the award.[48] Should the parties make any such agreements, they will be deemed to have waived the right to claim any procedural irregularity arising out of the failure to comply with the agreement if the complaining party does not timely object to the alleged error.[49] But assuming that the parties have not made any binding agreements and now disagree about the evidentiary issue, the arbitrators will have to decide whether accepting or rejecting the evidence will violate a party's right to present its case and to be treated equally.

While the Model Law guarantees each party the right to a *full* opportunity to present its case, in practice this only obliges the arbitrators to provide a *reasonable* opportunity.[50] The UNCITRAL Secretariat specifically noted that this provision should not be interpreted to undermine the efficiency of the proceedings and does not empower a party to delay and obstruct the proceedings.[51] The Swedish Act is more restrictive in that it provides that the arbitrators shall provide the parties "to the extent necessary" an opportunity to present their case.[52] In practice, this creates a standard of a "reasonable opportunity" and thus although on its linguistic face the Swedish Act appears to create a more limited right than the Model Law, in practice it is probably similar to the Model Law standard. Both the Model Law and the Swedish Act seek to equip the arbitrators with the discretion necessary to balance the right to be heard with the need to ensure efficiency and fairness.[53] However, as already noted, there is an essential difference in this right between the Model Law and the Swedish Act because in the latter a party must prove that the alleged failure to be afforded this opportunity has probably affected the outcome, while the Model Law has no similar requirement.

A party does not have the right to bring into the arbitration all of its desired evidence and particularly when the proffered evidence may be redundant, irrelevant, or immaterial, the arbitrators may refuse to admit it. However, an important distinction can be made between excluding evidence because it may not be admissible and excluding evidence even though may be admissible. For example, an arbitrator may exclude otherwise admissible evidence because it is deemed redundant or is offered too late. It should also be noted that although the arbitrators must treat the parties with equality does not mean that they should be treated with mathematical equivalence. One party may have a greater burden of proof than the other, or may have more facts to establish, or other reasons for

48 New York Convention, Article V(1)(d) provides for refusing enforcement when "the arbitral procedure was not in accordance with the agreement of the parties." Model Law Section 34 82)(iv) has a similar provision and the SAA also provides for such challenges. *Id.*

49 SAA Section 34 (6) second paragraph and Model Law Article 4.

50 Holtzman and Neuhaus, *supra.* at footnote 3, page 551 – 552. "It is also submitted that the terms "equality" and "full opportunity" are to be interpreted reasonably in regulating the procedural aspects of the arbitration."

51 *Id.*

52 SAA Section 24

53 *See,* SOU 1994:81, page 278 and Prop. 1998/99:35, page 227 where the legislative intention is expressed that the parties should not be allowed to intentionally delay the proceedings by irrelevant investigations or by trying to introduce unnecessary evidence.

being allowed greater opportunities to provide evidence. Arbitrators need to have discretion to be able to properly conduct the proceedings to achieve the overall objective of a fair and efficient procedure. But these vague concepts can be difficult to apply in practice – the devil is in the details.[54]

5 Judicial Review of Evidentiary Issues

Any judicial review of arbitral proceedings to determine whether the arbitrators afforded a party a reasonable opportunity to present its case will be essentially a fact-based review. This invests the arbitrators with greater discretion because reviewing courts will usually refrain from reviewing specific facts that are closely entwined with the merits of the dispute. They will also avoid substituting their judgment for the arbitrators who have been charged with deciding the dispute and who have greater familiarity with the issues and evidence. Consequently, courts will be inclined to defer to the arbitrators on fact-based issues, particularly when assessing the situation requires reviewing the arbitration proceeding in its entirety rather than isolating and examining a particular incident. Furthermore, parties agreed to arbitrate rather than litigate and by doing so they selected a dispute resolution process that would not adhere to judicial notions of evidence-taking.[55] Courts may be disinclined to provide a disgruntled party with an opportunity to obtain the judicial review of evidentiary issues, which in some legal systems is often even limited in judicial appellate review of lower court decisions.

As noted above, unlike the Swedish Arbitration Act, the Model law does not require that an alleged procedural error be material or have a casual link to the outcome of the case;[56] neither does the corresponding provision of the New York Convention. The reviewing court has the discretion to set-aside or refuse to enforce an award when a procedural error has occurred, but the reported cases indicate that most courts will defer to the arbitrators unless there the alleged error is material and linked to the final outcome. It should also be noted that a party wishing to challenge an award for a procedural error has the burden of proof and must also ensure that it has not waived the right to make the challenge, either implicitly or explicitly.[57] Finally, an arbitral award may be set aside for violations of public policy, but as noted above if a challenged failed under the more specific procedural error grounds, it is unlikely to succeed on the basis of public policy.

However, if the arbitrators find that a party did not meet its burden of proof and thus did not award a particular claim or rejected a defence and if they excluded the evidence proffered by the party to meet this burden, the arbitrators may have abused their discretion unless there were reasonable grounds for

54 Willliam W. Park, *Arbitrator's Discontents: Of Elephants and Pornography*, 17 Arbitration International, No. 3, page 263, 268 (2001).

55 Generica Ltd. v. Pharmaceutical Basics Inc., 125 F3rd 1123, 1130 (7th Cir. 1997).

56 *Id.* at 921 – 22.

57 Article 4 of the UNCITRAL Model Law.

excluding the evidence.[58] In such cases it can be especially important to distinguish between excluding evidence, namely not admitting it, and attaching little significance or weight to admitted evidence. While the arbitrators have considerable discretion as regards evidentiary matters, they must be concerned with conducting the proceedings both efficiently and fairly. The arbitrator should strive to achieve both of these important goals but when they are in conflict, the requirements of a fair hearing should trump efficiency.

Arbitrators may be inclined to deal with the problem of "to admit or not to admit" by having a generous leniency towards admitting evidence, while exercising more restraint in their evaluation of the admitted evidence.[59] While a party seeking to challenge an award because an arbitrator refused to admit evidence may have to overcome arbitrator discretion to prevail, it will be far more difficult to convince a court that an arbitrator erred when she did admit the evidence but allegedly failed to properly evaluate its significance. According to a leading commentator, under Swedish law it is not even possible to attack an award on the grounds that the arbitrator improperly evaluated the evidence.[60] This commentator notes that the power to refuse to admit evidence should be exercised restrictively when the arbitrators cannot properly assess the significance of the evidence, because otherwise there would be a risk that the award could be set aside.[61] Under international principles, admitting evidence, but failing to give it evidentiary significance, will not automatically immunize an award from an attack, but a successful attack will certainly require meeting quite a substantial burden of proof.

A pig may provide a metaphor to illustrate: a party to an arbitration concerning chickens may want to present a pig as evidence. The other party may complain that the pig has nothing to do with the chicken dispute and furthermore the pig is messy and noisy and distracting and allowing it in will delay and confuse the proceedings. The arbitrators can chose to order that the pig may not be admitted to the arbitration or, alternatively, the arbitrators can allow the party to bring the pig in the room and then proceed to let it sit in a corner, largely ignored despite its occasional grunts. To the arbitrators, the pig is only a piglet – it lacks evidentiary weight. We can conclude that the determination of whether the evidence is admitted or not is relatively black or white – it's in or it's out - but the degree to which admitted evidence influences the arbitrators' decision is decidedly grey and courts will not be inclined to substitute their judgement for the arbitrators in determining the shade of grey. The parties have chosen to arbitrate and thus to limit court review, and evaluation of evidence is by its nature discretionary. That does mean that arbitrators have license to totally disregard admitted evidence and to act entirely arbitrarily. The requirement of a

58 Heuman, *supra.* at footnote 10, pages 427 – 28.

59 William Park, *supra.* at footnote 48, "The predisposition of many arbitrators for admitting evidence does not mean that an arbitrator should allow undue surprise, misleading questions or testimony with little probative value. . . Arbitrators accept some documents and testimony *de bene esse*, avoiding any attribution of fixed weight." *Id.* at 270.

60 Heuman, *supra.* at footnote 10, page 422.

61 *Id.* at page 427.

reasoned award acts as a check on arbitrator misconduct, however there is substantial distance between arbitrator misconduct and exercising discretion.

6 Dealing with Privileges

The problem with privileges is more difficult than the problem with the pig because a privilege cannot be allowed into the room and then be put into a corner and ignored. In other words, the issue cannot be avoided by admitting the contested evidence and then not giving it much evidentiary weight. If evidence is subject to a privilege then a party should not be forced to reveal the evidence and the arbitrators should not order that it be produced and thus allow for it to be admitted. It is not possible to turn the heated question into a more innocuous one of determining the evidentiary value of the evidence.

Privilege law has expanded exponentially in recent years and frequently becomes a highly contested issue.[62] Increasingly, privileges are becoming a complex issue in international commercial arbitration where parties bring with them to the arbitration privileges granted to them by their national law. These problems become more complex when the lawyers come from a different jurisdictions and the evidence may have been created or stored in other jurisdictions.[63] The most common privileges that surface in arbitrations are probably the legal privilege, the privilege for settlement discussions, and the privilege for trade-secrets. It is important to note at the outset that these privileges are distinct and subject to different analysis.

A distinction should be made between testimonial privileges and information privileges. Testimonial privileges, like the legal privilege, seek to protect the confidentiality of communications between selected service-providers such as a lawyer, accountant, priest, or doctor and their clients and patients. These privileges are generally justified by the need to encourage candid communication which is needed for the effective provision of services that are deemed important to society. Maintaining confidentiality is a key element of creating and preserving these types of privilege. Information privileges, such as the trade-secret privilege, are not intended to promote relationships but rather to promote economic benefits from creating and exploiting the protected information. Consequently, the existence of an informational privilege is not conditioned upon continued confidentiality, but rather continued control over the exploitation of the economic value of the privileged information.[64] The extent and nature of testimonial privileges differ in some important respects from information privileges and these differences can be especially important for waiver issues. Furthermore, unlike an information privilege, a testimonial privilege protects the confidential communication and not the information. If the information protected by a testimonial privilege is available from a non-

62 Patricia Shaughnessy, *supra.* at footnote 5, pages 597 – 598.

63 Rubenstein and Guerrina, *The Attorney-Client Privilege and International Arbitration*, Journal of International Arbitration, Vol 18, No. 6 pages 587 – 589 (2001).

64 Shaughnessy, *supra.* at footnote 5, page 255.

privileged source, it may be admitted via the non-privileged channel because the privilege protects the communication and not the content.[65] However, an information privilege protects the content and not the communication.

Procedural and evidence rules are aimed at promoting fairness, efficiency and effectiveness in litigation. Most evidentiary rules are concerned with ensuring that reliable and probative evidence may be presented in a coherent and orderly fashion. Evidentiary privileges are an exception. Privileges do not promote the inclusion of relevant evidence, rather they exclude potentially reliable, probative, and perhaps even decisive evidence. Resolving privilege disputes delays and frustrates proceedings and may require significant resources including the appointment of special masters and judicial assistance. Nonetheless, privileges have been granted and tolerated because they protect over-riding important interests. National legislators and law-making courts have deemed that the loss of evidence is out-weighed by the benefit to society by the provision of these services or the exploitation of the information which are promoted by the privilege. Privileges are also closely entwined with important considerations of preservation of individual integrity, privacy, and human rights.[66]

When a party seeks to shield potential evidence based on an allegation of a privilege, arbitrators are forced to face tough questions. Should arbitrators respect privileges and refrain from ordering the production of documents which are allegedly privileged or should they order witnesses to testify about privileged matters? Should arbitrators yield to the priorities set by the involved states? Do parties waive privileges simply by submitting to arbitration? How can the arbitrators know whether a privilege actually does exist without unveiling the protected communication or information? How should the applicable law be determined when the parties, the evidence, and the lawyers or other protected service-providers potentially touch-base with a number of different countries and consequently varying scopes of privilege?

It is not possible for the arbitrators to deal with these questions by ordering that the evidence be produced and then giving it little weight. Either they must order that it be produced and if refused, potentially allow the issue to be referred to the court for assistance with evidence-taking or accept the claim of privilege. Some commentators have suggested that the arbitrator could review the alleged documents in camera to determine if the privilege should be sustained.[67] This

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65 *Id.* at footnote 4, page 256. "The (attorney-client) privilege will not prevent discovery of the actual facts that are contained in privileged communications. Thus, a client may be directly questioned as to the facts and information that were contained in a confidential communication, but may not be questioned as to what was communicated to the lawyer. The attorney-client privilege attaches to the confidential communication and not to its content." (Citations omitted).

66 For a discussion of the protection of the legal privilege under European Human Rights law *see Id.* at page 564 – 565. *See also,* Sindler and Wustermann, *supra.* at footnote 26, page 632 – 633.

67 Sindler and Wustermann, *supra.* at footnote 26, page 225- 56. "The tribunal can review the documents itself without the party requesting the documents having access to them . . . This private investigation approach is however not without its own pitfalls, particularly if the tribunal itself looks at the documents yet denies access to one of the parties."

procedure would certainly lead to setting the award aside in Sweden, if the objection had not been waived and if the evidence probably affected the outcome of the case. In Sweden, the principle of "communication" and "contradiction" requires that the adjudicators may not have access to evidence which the opposing party has not had an opportunity to review and to comment upon.[68] Similarly, the European Court of Human Rights has protected the right to have the opportunity to cross-examine witnesses and to challenge evidence.[69] Consequently, it would be ill-advised for arbitrators to review allegedly privileged documents in-camera.

If the parties agreed, the arbitrators could engage an outside advisor to review the alleged privileged evidence and to provide the arbitrators and parties with a report on her conclusions regarding the privilege allegations. But it should be emphasized that such a procedure may require the agreement of the parties and if the party asserting the privilege did not agree to follow the recommendations of the advisor which were adopted by the panel, the issue regarding the privilege would remain. Importantly, agreeing to such a procedure might be considered a waiver of the privilege in some jurisdictions where parties are required to arduously assert the privilege in order to retain it. Submitting privileged material to a private magistrate in a private arbitration, particularly by consent, may be deemed a waiver.[70] A prudent party may be well-advised to tenaciously assert the privilege in order to avoid a waiver, even at the cost of the arbitrators drawing negative inferences.

Although foreign privileges are often recognized, problems arise when different parties have different privileges because it creates an uneven playing field. For example, in some countries a privilege may attach to patent agents while in others it does not. One party could invoke the privilege to shield all of its communications with its patent agents from evidence, while at the same time it could force the other party to disclose all of its communications with its patent agents. Another example is the diversity in the extension of the legal privilege to communications between in-house counsel and management and employees of a company. These are just two of many examples which can demonstrate the difficulty of applying privileges in international arbitration. In the United States, courts have sometimes refused to recognize a foreign privilege which is not recognized by the applicable state or federal law on the basis of public policy because recognizing the privilege would give one party an unfair advantage.[71]

In arbitration, it is particularly important that parties do not perceive that the arbitrators have given one party an evidentiary benefit that the other party is deprived of as this may raise issues of equal treatment.[72] It has been suggested

68 Heuman, *supra.* at footnote 4, pages 385 – 387.

69 *Id.* at 425.

70 *See*, Shaughnessy, *supra.* at footnote 5, pages 316 – 319.

71 *See e.g.*, Odone v. Croda International PLC, 950 F. Supp. 10 (D.C. D.C. 1997).

72 William Park, *The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion,* Arbitration International, Vol. 19, No. 3 page 279, 286 (2003). "Instinctively, good arbitrators shrink from assigning procedural benefits and

by some commentators that the arbitrators should give both parties the benefit of the "most favored treatment" and thus extend the privilege of the party with the greatest protection equally to both parties. However, the justification for excluding potentially powerful evidence from the adjudicative process is to encourage communications between privileged parties. A party which had no expectation of such a privilege was not induced into making confidential communications and thus has no claim to such a privilege. Furthermore, it would be particularly inappropriate to extend the privilege to a party which has no reasonable expectation of such a privilege at the time the communication was made if the privilege was waived by subsequent conduct. Thus, the concept of extending the privilege to all, regardless of legal rights and justifiable expectations, is an easy answer which may result in removing important evidence from the adjudicative process.

Generally, evidentiary privileges should be respected in arbitration. The IBA Rules specifically provides that arbitrators may, at the request of a party, or even sua sponte, exclude privileged evidence.[73] However, arbitrators should not avoid ordering a party to provide important evidence by rejecting a groundless privilege claim. But if in response to such an order, a party or witness invokes a probable privilege, the arbitrators should not compel the evidence. It should be borne in mind that the party who seeks to avail itself of a privilege has the burden of proving the privilege applies, while the party who claims that a privilege which has been established has been waived, bears the burden of proving the waiver.

As noted at the outset of this essay, the requesting party may try to convince the arbitrators that the evidence is needed and the arbitrators may grant the requesting party the opportunity to seek court assistance in taking the evidence thus shifting the problem to the court. In Sweden, the court would apply the procedural code provisions relating to privileges.[74] In one reported case in England, the arbitrators issued a reasoned interim award declining to order the production of documents based on a legal privilege and thus provided the parties an opportunity to bring the issue to the court.[75] This process delayed the arbitration by six months and it could be questioned whether an interim award is an appropriate form for issuing a decision regarding a production of documents and it may not be enforceable pursuant to the New York Convention. Another tactic that could be used by the party invoking the privilege would be to seek a discovery blocking order from a court. However, such an order might be disregarded by the arbitrators if it were issued by a court outside of the legal seat of the arbitration. As regards court involvement in evidence-taking, it should be remembered that the court must have jurisdiction over the parties subject to its order or over the evidence sought to be protected or produced.

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burdens according to the parties' national practices. Giving one side a stark procedural handicap is an excellent way to invite challenge to an award."

73 Article 9(b) of the IBA Rules.

74 Prop. 1998/99:35 at page 115.

75 Leif Hoegh & Co. A/S v. Petrolsea Inc., (The "World Era") (No. 2), Queen's Bench Division (Commercial Court), QBD (Comm Ct) Dec. 7, 1992; Dec. 17, 1992.

pArbitrators should not draw negative inferences when a party or witness invokes the privilege, as may be suggested by the IBA Rules, unless there is good cause to believe that a party is invoking the privilege in bad faith.[76] Indeed, the IBA Rule provides that such negative inferences should only be inferred when the party invoking the privilege has not provided a satisfactory explanation. Thus, if the claim of privilege is plausible, the inference should not be made. The threat of a negative inference would have the affect of forcing a party to choose between the lesser of two evils - to reveal privileged communications or to suffer negative inferences that may not actually reflect the truth.[77] Privileges have been granted by law after a careful balancing of important competing interests and are a right which the party or witness should be able to rely upon without penalty. Drawing negative inferences and using them as a basis for ascertaining whether burdens of proof have been met could expose an award to a potential challenge. Furthermore, it can be difficult to draw probative negative inferences based upon the content of unknown evidence. On the other hand, if a party has based its claim on an issue which puts privileged evidence into issue, it can be deemed to have impliedly waived the privilege through the assertion of the claim.[78] There are other types of waiver that may eliminate evidence-blocking by invoking a privilege, such as broad subject-matter waivers for selectively using privileged communications.[79]

Some privileges, such as the legal privilege, are absolute. However, even absolute privileges may be waived by the holder of the privilege. It should be noted that in some legal systems the client is the holder and thus the controller of the privilege, while in other legal systems it is the service-provider.[80] Arbitrators should not encourage a witness to waive a privilege, but if the witness does so voluntarily, then there is nothing to prevent the disclosure of the evidence. Once a privilege has been waived, it cannot be recovered. When confidentiality has been abandoned for some specific purpose, it has been lost for all purposes. Like a roll of film which has been exposed to light, it is not possible to use the privilege once it has been waived. In the United States where there is extensive case law on the legal privilege, a waiver of the privilege as to part of protected communication will result in a "subject-matter waiver".[81] This means that the privilege is waived as to all related communications. Parties and witnesses may not selectively invoke the privilege to their own advantage and thus disadvantage the other party and present a skewed version of the facts to the arbitrators. The question has been raised whether a party generally waives its

76 IBA Rules Article 9 (4), *supra.* at footnote 11, which provide that the tribunal may make a negative inference when a party does not have a satisfactory explanation for failing to produce a document.

77 Patricia Shaughnessy, *supra.* at footnote 5, page 543 (2001).

78 *Id.* at pages 355 – 370.

79 *Id.* at pages 325 – 330.

80 Traditionally, in civil law countries with privileges emanating from the Napoleonic Codes, the privilege is "owned" and thus controlled by the lawyer as compared to common-law countries where the privilege-holder is the client. *Id.* at 448.

81 *Id*. at 421.

legal privilege my agreeing to arbitrate.[82] This would seem to be a rather extreme consequence for opting in to an adjudication system which is increasingly essential to doing business in an international context.

7 Conclusion

Arbitrators are vested with considerable discretion in dealing with evidentiary issues. Unless the parties have agreed otherwise, this discretion is only limited by the two primary principles of arbitration: party autonomy and the right to a fair hearing. Arbitrators may exclude evidence to a large extent but when the exclusion of evidence is tantamount to an exclusion of justice, the award may be subject to a challenge. However, sometimes achieving justice requires excluding evidence, such as when it is privileged or when the evidence is redundant, irrelevant, or will lead to delay, obstruction or confusion. By agreeing to arbitrate the parties have selected a brand of justice that places substantial importance on an efficient and flexible procedure with deference to party autonomy and adherence to basic notions of a fair trial. Finding where the balance should be struck between these ideals is not an easy task and is essentially a fact-based determination. Fact-based determinations inherently vest the arbitrators with broad but not unlimited discretion.

Arbitrators should respect privileges in arbitration but should not allow a party to escape the obligation to disclose important evidence by simply making a broad and unsubstantiated claim of privilege. The privilege must be specifically claimed and the arbitrators should be provided with a basis for assessing the alleged privilege. Arbitrators should respect the fact that once a party reveals privileged materials in arbitration, it may have waived the privilege not only for the particular disclosure, but more broadly to materials sharing related subject-matter. Sometimes the privilege issue may be avoided by finding the evidence irrelevant or redundant or by finding that the privilege has been waived. Another manner for dealing with privileges is to allow the party seeking the evidence to obtain court assistance thus transferring the problem to the court. However, this will result in delays, additional costs, potential loss of confidentiality, require local counsel, need for translation, and other inconvenience. Arbitrators should be cautious in drawing negative inferences based upon a failure to produce privileged evidence. Extending an equivalent privilege to the non-privilege asserting party may appear to solve the potential problem of equal treatment of the parties, but it may remove important evidence without promoting the justifications for the privilege. Arbitrators should use their considerable discretion to conduct the proceedings and to determine evidentiary issues, but ultimately they must ensure that the parties are given a fair hearing with equal treatment and a reasonable opportunity to present their cases.

82 Gary Born, *supra.* at footnote 16, page 490.