CHAPTER 8

Legal Privilege Disputes in International Arbitration in Denmark: A Practical Introduction

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§8.01 INTRODUCTION

Few things in life are certain, but those involved in international arbitration can, with virtual certainty, expect that questions surrounding legal privilege, when they arise, will be extremely difficult to answer. The challenges that questions of legal privilege present in international arbitration are so marked that the following maxim has been applied to the issue: 'the only thing that is clear is that nothing is clear in this area'.[1]

The absence of clear answers is, in part, a result of varying interpretations of legal privilege across jurisdictions and legal traditions. In particular, there are considerable differences between how legal privilege is understood in common law, which has recognised and developed the concept of privilege from the seventeenth century onwards, and civil law, which often traditionally does not explicitly recognise the concept of privilege but can provide comparable protections through other legal mechanisms. A marked example of this is Denmark, a civil law jurisdiction, where it is often said that there simply is no general concept of '*legal privilege*' but where protections analogous to legal privilege can be found in certain statutory provisions.

The absence of clear answers also, in the opinion of these authors, stems from the collision of multiple additional reasonable but conflicting factors at play when questions of legal privilege arise in international arbitration. First, there is the fact that questions of legal privilege are often of central importance to an arbitration, so much

1. Klaus Berger, *Evidentiary Privileges: Best Practice Standard Versus/and Arbitral Discretion*, 2 Arb. Int. 501 (2006), at 501 https://doi.org/10.1093/arbitration/22.4.501.

so that the outcome of the arbitration can sometimes hinge on how they are answered. Second, legal privilege sits at the intersection between central arbitral goals such as fairness, efficiency, and a party's right to present its case. Third, there is the (perhaps understandable and reasonable) lack of a uniform approach to answering questions of legal privilege across individual international arbitrations.

The challenges of applying legal privilege in international arbitrations have been written about extensively by arbitral scholars and practitioners[2] but have not been subject to much attention by commentators in Denmark specifically. The authors of this chapter have engaged with the complexities surrounding legal privilege in international arbitrations in Denmark in various contexts over recent years and gleaned insights regarding how the difficulties might be practically approached. In this chapter, the authors seek to add some clarity on this topic by providing a practical introduction to the application of legal privilege in international arbitration disputes from a Danish perspective.

This chapter begins with a short description of the differing interpretations of legal privilege across jurisdictions (§8.02) and continues with a discussion regarding how questions of legal privilege arise in international arbitrations in Denmark in the first place (§8.03) and why questions of legal privilege are important in international arbitration (§8.04). Following which, this chapter will discuss the various methods tribunals can deploy to determine which national law applies to questions of legal privilege in international arbitration (§8.05) and how questions of legal privilege can be interpreted if the choice of law dictates application of Danish law (§8.06).

§8.02 SUMMARY OF THE CONCEPT OF LEGAL PRIVILEGE IN DIFFERING JURISDICTIONS

A good starting point for any discussion on legal privilege in international arbitration is to define what is meant by the concept of privilege.[3] This is an especially difficult task because privilege has no uniform definition applicable across jurisdictions, with common and civil law jurisdictions often having stark differences in how they define and apply privilege. In the following sections, these differences will briefly be examined.

2. *See*, for example, Tatjana Shterjova, *The Challenges of Taking Evidence in International Commercial Arbitration: The Problem of Legal Privileges,* in *Towards a Universal Justice? Putting International Courts and Jurisdictions into Perspective*, Brill (2016), at 432-445; Corina Gugler & Karina Goldberg, *Privilege and Document Production in International Arbitration: How do Arbitrators Deal with Different Legal Systems' Approaches?,* RBA N53, (2017) https://doi.org/10.54648/rba2017004, Dourtrina Internacional; Craig Tevendale & Ula Cartwright-Finch, *Privilege in International Arbitration, Is It Time to Recognize the Consensus?,* Journal of International Arbitration 26(6) (2009) https://doi.org/10.54648/joia2009043.
3. While common law recognises many different types of privileges, this chapter will, by and large, focus on privileges arising from the attorney-client relationship or legal proceedings (so named legal privilege).

[A] Privilege in Common Law Countries as Exemplified by US Law

The concept or principle of privilege originates in UK common law and is today of central importance in common law rules of evidence. While jurisdictional differences between common law countries can be observed, privilege's overarching themes remain similar. How privilege is defined and interpreted under US law will be discussed here.

Under US law, confidentiality and privilege are related but distinct concepts, which are often mixed up even by US legal professionals. Therefore, teasing out their similarities and differences is vital to understanding how common law countries treat these concepts and how confusion regarding these concepts can arise in international arbitration.

Succinctly put, confidentiality is a *duty* that is owed from one person to another. For example, the duty of client-lawyer confidentiality means that the lawyer has a duty to the client to keep information obtained through the legal representation confidential.[4] Generally speaking, in the US, the duty of client-lawyer confidentiality is enshrined in the bar rules for lawyers.[5] Therefore, if lawyers breach confidentiality, they could be sanctioned by their bar, potentially resulting in the highest penalty of disbarment. They could also face civil charges if their conduct rises to legal malpractice but likely would not face criminal charges or fines (assuming their conduct is not otherwise illegal).

Since confidentiality is a duty, it can generally only be expressly waived by informed consent given by the person to whom the duty is owed. Therefore, for the most part, a lawyer is only permitted to share information that is protected by client-lawyer confidentiality if the client expressly provides the lawyer with informed consent to do so.[6] There are circumstances under the bar rules in which a lawyer can break confidentiality without client permission; however, these are, for the most part, limited to situations in which future harm could occur to the lawyer or third parties.[7]

In contrast, privilege is the *right* under law to keep information that is privileged from being disclosed in a court proceeding.[8] Courts in the US have strong powers to compel the disclosure of evidence in court proceedings, including, in extreme cases, the ability to imprison people unwilling to share compelled information for the crime of contempt of court. However, US lawmakers have decided that the ability to compel information should have limits, as some information should be protected from disclosure for the benefit of society as a whole. The mechanism through which this

4. Rule 1.6(a) of American Bar Association (ABA) Model Rules of Professional Conduct.
5. Each individual bar of each individual state will have individual bar rules that the lawyers practising under that bar must followed. However, they are largely similar to each other and to the ABA Model Rules of Professional Conduct, which will be cited in this chapter.
6. Rule 1.6(a) of the ABA Model Rules of Professional Conduct.
7. Rule 1.6(b) of the ABA Model Rules of Professional Conduct.
8. Black's Law Dictionary Eighth Edition defines privilege as 'A special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty. A privilege grants someone the legal freedom to do or not to do a given act. It immunizes conduct that, under ordinary circumstances, would subject the actor to liability.'

information is protected is a privilege, which is a statutory right created by the state or federal legislature or by court through case law (and occasionally by constitutions).

The attorney-client privilege is the oldest privilege known to common law.[9] In recognising the attorney-client privilege,[10] US lawmakers deemed it more important to society for clients to be able to freely share information with their lawyers without fear that it would later be disclosed in court than for courts to freely use information obtained via the client-lawyer relationship to decide individual cases. This is because 'sound legal advice and advocacy serves public ends'.[11] Further, given the duty of confidentiality owed by lawyers to their clients, without the attorney-client privilege, lawyers could be placed in a rather unfair situation where they must choose between violating confidentiality and facing disbarment or being imprisoned for contempt of court.

Other privileges exist that are potentially applicable to international arbitration, including the work-product privilege, which protects attorney work-product that has been prepared in anticipation of litigation from disclosure;[12] the joint and common interest privilege, which protects information shared between parties that have a joint and common interest;[13] the without prejudice privilege, which protects information shared in the course of settlement negotiations;[14] the mediation privilege, which protects information shared during mediation;[15] the trade secrets privilege, which protects the confidentiality of a trade secret;[16] and the accountant privilege, which protects information shared with an accountant.[17] As the concept and interpretation of privilege are often closely tied with the public policy considerations in the given jurisdiction, not all types of privileges exist or are applied to the same extent in each jurisdiction.[18]

Another feature of privilege under US law is that it can be waived voluntarily and involuntarily. The holder of the privilege (the client) can always waive the privilege voluntarily if, for example, a client wishes to introduce attorney work-product into a court proceeding. However, the privilege can also be waived involuntarily or inadvertently if, for example, the privileged material is shared with an unnecessary third party.[19] Additionally, subject matter waivers dictate that if the holder of a privilege waives certain communication, all communication related to that subject is also

9. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
10. Black's Law Dictionary Eighth Edition defines attorney-client privilege as 'The client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney.'
11. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
12. Nicolas Grégoire, *Evidentiary Privileges in International Arbitration: A Comparative Analysis under English, American, Swiss and French Law*, Collection Genevoise (Schulthess Éditions Romandes/LGDJ 2016), at 69.
13. *Ibid.*, at 73.
14. *Ibid.*, at 77-78.
15. *Ibid.*, at 87-88.
16. *Ibid.*, at 97.
17. *Ibid.*, at 115.
18. *Ibid.*, at 11.
19. *United States v. Evans*, 113 F.3d 1457, 1462 (7th Cir. 1997).

waived, as the holder should not be able to 'selectively invoke the privilege to their own advantage'.[20]

[B] Privilege in Civil Law Countries as Exemplified by Danish Law

Civil law countries have also adopted the concept of legal privilege, albeit often with a narrower scope. Whereas civil law jurisdictions often do not explicitly apply legal privileges, there are several doctrines that serve the same or similar purposes as the legal privileges found in common law.[21] This includes rules pertaining to witnesses being exempt from giving testimony on topics covered by professional secrecy or the right of a party not to produce evidence that may be adverse to its interest.[22]

The narrower interpretation of legal privilege in civil law jurisdictions arguably derives from civil law jurisdictions' more limited approach to disclosure.[23] For example, under Danish law, non-voluntary disclosure is not a given feature of court proceedings, and there is a comparatively restrictive stance on broad disclosure requests. Courts tend to refuse unspecific document requests and seek to limit potential '*fishing expeditions*' unless the documents sought are very likely to be determinative to the outcome of the case. As a natural consequence of this approach, there is a lesser need to protect parties from wide-reaching disclosure requests by employing specific privilege rules.[24]

However, this doesn't mean that the concept of privilege is entirely irrelevant under Danish law. Various statutory rules apply in Danish law that have similar characteristics to legal privilege as understood in common law that can be applied in Danish civil proceedings to prevent evidence from being disclosed. For example, section 170(1) of the Danish Administration of Justice Act (AJA) (in Danish *Retsplejeloven*) permits lawyers to withhold information from court proceedings if that information is protected by the lawyer's duty of confidentiality.

Attorneys in Denmark, as in most jurisdictions, have a duty of confidentiality towards their clients. Chapter 5 of the Code of Conduct of the Danish Bar and Law Society prescribes this broad duty of confidentiality, pursuant to which Danish attorneys must keep all information confidential that the attorney receives as part of his or her duties to the client.[25] This duty of confidentiality is also found in statutory provisions under Danish law. Pursuant to section 129 of the AJA, which refers to section 152 of the Danish Criminal Code, an attorney can face a fine or imprisonment for up to six months for breach of the duty of confidentiality. Confidentiality is an

20. Patricia Shaughnessy, *Dealing with Privileges in International Commercial Arbitration*, 51 Sc.St.L (2007) 451, 468.
21. Richard M. Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, Int'l & Comp. L.Q. (2001) 345, at 348 https://doi.org/10.1093/iclq/50.2.345.
22. *Ibid*.
23. Grégoire, *supra* n. 12, at 1.
24. *Ibid*.
25. Lars Økjær Jørgensen & Martin Lavesen, *De advokatetiske regler kommenteret*, (3rd ed. 2022), 126; the Code of Conduct of the Danish Bar and Law Society, Applicable from 1 Sep. 2022, Chapter 5, at 4.

absolute right that is owed to the holder of this right, namely the client, and therefore, generally, only the client can waive confidentiality.

Pursuant to section 170(1) of the AJA, an attorney is not required to testify about matters that are covered by his or her duty of confidentiality. The English translation of section 170(1) of the AJA is as follows:

> Where the giving of evidence would be against the wishes of a person having a right to confidentiality, persons bound by professional secrecy, such as ministers of religion of the Danish State Church or other religious communities, medical doctors, defence counsels, court mediators, patent advisers entered on the list referred to in Article 134(1) of the European Patent Convention and lawyers, must not be demanded to give evidence about matters having come to their knowledge in the course of the exercise of their functions.

This protection also applies to documentary evidence under section 298 of the AJA and is also extended to people who are directly connected with the attorney and people who execute functions specifically covered by section 170(4), such as assistants or trainees.[26]

However, the protection against testifying and disclosure provided in section 170(1) is not absolute. Of course, an attorney may give testimony or disclose matters if the client gives the attorney permission to do so.[27] In addition, a court may also order an attorney to provide evidence that is protected by confidentiality if: (1) the evidence is 'essential to the outcome of the case' and (2) the 'merits of the case and its importance to the party concerned or to society are found to justify the giving of such order'.[28] Case law indicates that lawyers can only be compelled to testify if there are strong and specific arguments that they should under the above criteria.[29] Importantly, the test is not whether the production of the document in question is deemed likely to inflict harm to the party in possession, and it would be insufficient to only argue that

26. While there is limited case law determining the extent of this provision, a recent Supreme Court judgment, in case BS-6234/2021, rendered in July 2021 addressed the scope of who is covered by 170(1). If the Supreme Court found that a legal advisor was not covered by section 170(4), even though the legal advisor was a partner and co-owner of a law firm, because she was not admitted to the bar and because she was not nor was she assisted by an attorney from her law firm who could have been covered by section 170(1).
27. Section 170(1) of the AJA.
28. Section 170(2) of AJA; defence counsel in criminal proceedings are not subject to these exceptions per section 170(2) of the AJA.
29. Michael Kistrup & Bernhard Gomard, *Civilprocessen* (8th ed. Karnov Group 2022), at 594. For further examples, *see also* U 2009 2615, an attorney was ordered to give evidence about matters that had come to his knowledge through dealings with client 'K' who died before the related proceedings commenced. The Supreme Court found that a statement from the attorney on certain matters had to be assumed to be of decisive importance to the outcome of the case. The Supreme Court emphasised that it had to be considered highly probable that K would have waived the attorney's confidentiality to give evidence. In contrast, in U.2016.469H where an attorney had prepared a letter regarding inheritance, the Supreme Court found no basis to assume that the deceased client would have waived the right to confidentiality and allowed the attorney to testify. The Supreme Court found that the nature of the case and its importance to the concerned party, or society, did not justify requiring the attorney to give evidence. The Supreme Court attached particular importance to the fact that it was a matter of legal advice in a case of a personal nature.

the document in question is relevant to the requesting party's case. In addition, even if the above two conditions are met, the court cannot order disclosure of confidential information obtained in connection with a *legal proceeding* or *litigation* in connection with which the lawyer's advice has been sought.[30]

Of course, an attorney can always choose not to give evidence that the court has ordered it to provide. As described above, courts in Denmark do not have such wide-ranging powers as courts in common law countries to compel the production of information, even when the court has specifically ordered its production. However, failure to adhere to the court's directive to disclose information may result in the court favouring the opposing party when assessing evidence, potentially prejudicing the non-compliant party's case.[31]

In Danish arbitration practice, the exemption under section 170(1) has been referenced as a narrow exemption. In the context of a privilege dispute in an arbitration, it might be a somewhat difficult task to satisfy such criteria given that disclosure proceedings most often will take place at the outset of the arbitration proceedings, whereas witness evidence in Danish civil proceedings is almost exclusively given orally only and at the main hearing, i.e., at the end of proceedings. Requests for document production in civil proceedings also need not necessarily be done at the outset of court proceedings. Thus, in arbitration, arbitrators might only (be able to) consider the prima facie relevance of the documents sought, and by extension, an analysis of whether the documents sought might be 'essential to the outcome of the case' is inevitably more difficult.

§8.03 HOW QUESTIONS REGARDING LEGAL PRIVILEGE ARISE IN INTERNATIONAL ARBITRATIONS IN DENMARK

Questions of legal privilege arise in international arbitration in connection with the introduction of evidence. It is generally during the document production phase of the arbitration that most privilege disputes will arise; however, questions of legal privilege may, of course, also arise in connection with the cross-examination of witnesses or at other stages of the arbitration that involve the introduction of evidence.

There are several legitimate reasons why a party or attorney would seek to invoke legal privilege in order to be exempt from disclosing certain evidence. For example, the documents in dispute may be attorney work-product generated for the arbitration in question and therefore revealing them could result in unjustified prejudice to the disclosing party. The party may also fear broader consequences from disclosing the document, for example, that sharing it could result in waiving its privilege, which could impact not only the arbitration but also other legal matters the party is involved in.[32]

30. Section 170(2) of AJA.
31. Kistrup & Gomard, *supra* n. 29, at 615: 'A party's failure to comply with the court's discovery order has the same effect as failure to comply with a request from the court to produce documents, cf. Section 339(3) of the AJA […] The court may, when assessing the evidence, give the failure effect in favor of the opposing party.'
32. Grégoire, *supra* n. 12, at 204.

The attorney may fear reprisal for violating client confidentiality if the ethical rules governing the attorney's conduct are not aligned with the privilege rules deployed by the tribunal.[33]

However, a party cannot invoke legal privilege without reference to rules that mandate tribunal recognition that the legal privilege is applicable in the arbitration in the first place. What is most common for international arbitrations seated in Denmark is the requirement or choice that institutional rules and/or international arbitral standards will apply to the arbitration, both of which may address privilege directly or indirectly. These rules and standards are, therefore, often the starting point for those seeking to invoke the protection of legal privilege in international arbitration.

It is quite common for the International Bar Association's Rules on the Taking of Evidence in International Arbitration (the 'IBA Rules') to apply to international arbitrations in Denmark as guidelines that the tribunal should follow in deciding questions of evidence, although tribunals normally will not be bound by them. The IBA Rules contain two articles that address legal privilege: Article 9.2(b) that requires tribunals to exclude evidence that is protected by privilege; and Article 9.4 that provides further description of how tribunals should determine whether evidence is protected by privilege. Specifically, Article 9.4 provides that tribunals must first apply any 'mandatory legal or ethical rules' to determine questions of privilege, and in the absence of such rules, tribunals may consider other potentially relevant factors, such as the need to protect the confidentiality of the document, either because the document was created to obtain legal advice or because it was created in connection with settlement negotiations; the expectation of the parties and lawyers in regards the privilege of the evidence; any waiver of the privilege; and the need to maintain fairness and equality as between the parties. While Article 9.2(b) uses the seemingly mandatory term of '*shall*', the use of the term '*may*' in Article 9.4 shows that the IBA Rules provide tribunals with discretion on whether to exclude evidence on the grounds of privilege and how to determine whether evidence is or is not privileged.[34]

The institutional rules governing international arbitrations in Denmark can also pave the way for the introduction of questions of legal privilege in arbitration. While not many arbitral institutions will have rules that directly govern questions of privilege, most institutional rules will have provisions that indirectly permit the application of legal privilege.

This is the case under the rules of the Danish Institute of Arbitration (the 'DIA Rules'). Specifically, Article 28(2) of the DIA Rules provides that:

> The conduct of the arbitration shall be governed by the Rules. Where the Rules are silent, the conduct of the arbitration shall be governed by what the parties have

33. Elisabeth Vanas-Metzler, *Chapter II: The Arbitrator and the Arbitration Procedure, the Tension Between Document Disclosure and Legal Privilege in International Commercial Arbitration – An Austrian Perspective*, in Christian Lausegger, Peter Klein, et al. (eds), Austrian Yearbook on International Arbitration 2015 (Manz'sche Verlags- und Universitätsbuchhandlung 2015), at 259.
34. Peter Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide,* (1st ed. Cambridge University Press 2013), at 146.

> otherwise agreed or, failing such agreement, by what the Arbitral Tribunal considers appropriate. The Arbitral Tribunal may, for instance, determine the admissibility, relevance, materiality and weight of any evidence.[35]

This gives tribunals acting under the DIA Rules discretion to apply rules that they consider appropriate to answer questions of the admissibility of certain evidence, including questions of privilege, as long as the parties have not themselves agreed on which rules should apply.

Further, Article 33 of the DIA Rules provides that the tribunal may draw an adverse inference if parties fail to produce evidence the tribunal has ordered to be produced. Article 33 is therefore effectively a mechanism for tribunals to ensure that parties comply with orders to produce documents, and, as such, opens the door for questions of privilege to arise in arbitrations at the DIA.

Similarly, while the current version of the Danish Arbitration Association's Rules on the Taking of Evidence in Arbitration (the 'DAA Rules') does not refer to privilege directly, Article 8.6 does provide that objection can be made against the introduction of evidence if 'there are legal impediments or restrictions' connected with that evidence or if 'the evidence is subject to confidentiality that the Arbitral Tribunal considers compelling'.[36] The DAA Rules thereby clearly mirror the IBA Rules' provisions and nod to the applicability of legal privilege in principle. Finally, Article 8.5 of the DAA Rules provides that a party's failure to produce evidence 'without a valid reason' allows the tribunal to 'let this have evidential influence to the advantage of the other party'.

It is important to note that none of these international standards or institutional rules that either explicitly or indirectly permit the application of legal privilege in arbitration are themselves detailed enough to answer the specific questions of legal privilege that arise in arbitration by design; for example, the IBA Rules are as specific as is possible for guidelines whose purpose is to apply to large volumes of international arbitrations across fora and jurisdictions. This also suggests that these rules anticipate that questions of privilege will 'fall within the tribunal's mandate', meaning that tribunals will be given a large amount of discretion in answering questions of privilege even when these rules apply.[37]

Nevertheless, rules such as the IBA Rules, DIA Rules and DAA Rules provide the starting point for counsel to assert legal privilege in international arbitrations in Denmark, should they wish to protect certain evidence from disclosure and consequently provide the foundational mandate for tribunals to engage with these assertions and not dismiss them outright.

35. Article 28(2), DIA Rules 2021.
36. Article 8.6, DAA Rules 2010.
37. Diana Kuitkowski, *The Law Applicable to Privilege Claims in International Arbitration*, Journal of International Arbitration 32(1) (2015), at 80 https://doi.org/10.54648/joia2015003; Craig Tevendale & Ula Cartwright-Finch, *Privilege in International Arbitration, Is It Time to Recognize the Consensus?*, Journal of International Arbitration 26(6) (2009), at 827 https://doi.org/10.54648/joia2009043.

§8.04 THE IMPORTANCE OF QUESTIONS OF LEGAL PRIVILEGE IN INTERNATIONAL ARBITRATION

Questions of legal privilege are often or at least potentially some of the most important evidentiary questions that can arise in an arbitration and are consequently often fiercely argued by counsel and carefully considered by tribunals when they arise.

Fundamentally, questions of privilege are important in international arbitration because how a tribunal rules on questions of privilege and how counsel and parties behave in relation to those rulings can have a significant impact on the outcome of the arbitration. On the one hand, if a tribunal rules that a document or witness testimony is subject to legal privilege, this could result in a party being unable to obtain or introduce evidence crucial for proving its case. On the other hand, if a tribunal rules that the evidence is not subject to legal privilege and must be shared with the opposing party, it may prove decisive to the opposing party's success. The weight attributed to evidence that was subject to an unsuccessful claim for the application of legal privilege ultimately depends on the actual content of the evidence. However, in practice, such evidence will often become a key part of the opposing party's evidentiary strategy, given the alleged perception of importance created by the unrecognised assertion of legal privilege.

How a tribunal rules on questions of privilege can be dependent on which party has the burden of proof to prove or disprove that the privilege applies. International arbitration commentators generally agree that it is usually the party invoking legal privilege that bears the burden of proving it is applicable.[38] This is because '[a]rbitrators … should not allow a party to escape the obligation to disclose important evidence by making a broad and unsubstantiated claim of privilege'.[39] This burden of proof naturally introduces a risk that the party asserting legal privilege would need to produce the requested documents if the privilege is not established or rendered probable.

However, taking into account the policy considerations underpinning legal privilege and the various legitimate reasons why a party or attorney would seek to invoke legal privilege discussed above, arbitral tribunals have been seen to be reluctant to order the production of documents that are *likely* to be covered by a legal privilege under the applicable law. This reluctance could potentially indicate a lower threshold for satisfying the burden of proof.

Questions of privilege can raise particular challenges for counsel and tribunals because it is sometimes necessary to review the contested evidence to determine whether legal privilege applies, but having the tribunal review the evidence would violate the legal privilege if it does apply. To resolve this challenge, parties and tribunals may agree to make use of an independent lawyer or umpire to rule in place of

38. *See, e.g.*, Shaughnessy, *supra* n. 20, at 467; and Roman Khodykin, Carol Mulcahy & Nicholas Fletcher, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (© Oxford University Press 2019) pp. 407-510, at 452, para. 12.170. This position also aligns with the IBA Rules.
39. Shaughnessy, *supra* n. 20, at 469.

the tribunal regarding whether privilege applies to the contested document(s) in cases where the specific document for which privilege is asserted needs to be examined. This practice is codified in Article 3(8) of the IBA Rules and Article 2.7 of the DAA Rules. In international arbitration in Denmark, it has been seen that parties agree to appoint a Supreme Court judge as a neutral candidate to act as an umpire.[40]

It has, however, been questioned whether a tribunal has the authority to order the use of such umpire if one or both parties do not consent. The authors are aware of at least one instance where an international tribunal seated in Denmark ruled that it was empowered to refer the determination of whether a document was subject to a legal privilege to an umpire, as this was considered appropriate in the given circumstances. However, while the tribunal did order the parties to engage an umpire, none of the parties did, in fact, object, so the question remains subject to uncertainty.

Even if a tribunal (or an umpire) rules that a privilege does not apply to a particular piece of evidence and orders a party to share it with the opposing party, that party may elect not to share it. Generally speaking, a tribunal seated in Denmark has little power to compel production. However, the tribunal has the power, subject to, for example, Article 33 of the DIA Rules, to adversely infer that a document is harmful to the case of the party that is withholding it.

Usually, the applicable institutional rules only permit a tribunal to draw an adverse inference if there is no valid reason for the party not to comply with the tribunal's order.[41] It would be counterintuitive for a tribunal to reject a claim of legal privilege and order production *and* simultaneously find it reasonable for a party to withhold the evidence on the same rejected grounds of privilege. It therefore seems reasonable to assume that if a party withholds a document on grounds of legal privilege after a tribunal has determined that no such privilege exists, there is a risk that a tribunal may adversely infer that the evidence is harmful to the withholding party. Consequently, parties must carefully weigh decisions not to produce on the grounds of legal privilege when ordered by the tribunal to avoid the risk of this *catch-22* situation. One author notes, however, that drawing an adverse inference regarding documents withheld on privilege grounds that were argued in good faith but ultimately unrecognised may be inappropriate and that therefore tribunals should tread cautiously in this regard.[42]

The importance of such adverse inference is difficult to measure empirically, and most tribunals would likely not enjoy basing their decisions on the merits solely on adverse inferences. Nonetheless, such inferences may become a key part of the opposing party's evidentiary strategy, given the perception of importance created by the assertion of legal privilege and the subsequent withholding of the document(s). To make a credible substitute for the evidence itself, a party's arguments pertaining to adverse inferences should be thoughtfully presented to the tribunal within the context

40. Section 47(a)(3) of the AJA allows requests to the president of a court to appoint a sitting judge as umpire to act in arbitration.
41. *See* Art. 33 of the DIA Rules or IBA Rules Art. 9(6) and 9(7) and para. 8.5 of the DAA Rules.
42. Shaughnessy, *supra* n. 20, at 454 and 469.

of the substantive matters at hand. This may sometimes prove to be an underestimated task, considering that the content of the evidence will remain unknown.

Consequently, reaching a fair and well-supported decision regarding assertions of legal privilege in international arbitration is obviously extremely important, as the ruling can not only impact the outcome of the arbitration but can also be complicated by specific challenges that legal privilege presents, such as nuances with regard to the burden of proof, the potential necessity of involving third parties, and how parties react to the ruling itself.

§8.05 HOW TRIBUNALS CAN DETERMINE THE APPLICABLE LAW TO ANSWER QUESTIONS OF LEGAL PRIVILEGE THAT ARISE IN INTERNATIONAL ARBITRATION IN DENMARK

As noted above, while international standards and institutional rules provide for recognition of confidentiality and/or legal privilege in principle, they are not detailed enough to answer more specific questions on the extent of any invoked legal privilege.[43] This leaves counsel and tribunals grappling with important questions of legal privilege in a peculiar and challenging situation: they *must or can* apply legal privilege per the international standards or tribunal orders but have limited or no international standards guiding *how* to apply legal privilege to any given document or information.

Since privileges are derived from national rather than international law,[44] rules on legal privilege often necessitate the application of national law to be effective. Counsel and tribunals seeking guidance on how to answer specific legal privilege questions that arise in international arbitration therefore inevitably turn to national law to fill the gap left by international standards and institutional rules. However, the natural question then becomes, which national law should apply?

Should parties agree, either before or during arbitration, on the law to apply to questions of legal privilege, then this will naturally be the applicable law. However, it is unlikely that the parties' arbitration agreement would specifically outline what rules or laws to apply to questions of legal privilege,[45] and it is uncommon for the tribunal's procedural orders to do so either. It is equally unlikely that the parties could agree on what rules to apply after issues of legal privilege arise since they would likely wish to invoke the legal privilege rules that best support their position with regard to the disputed evidence.

In the absence of such agreement, tribunals must decide, with input from parties and counsel, on which national law to apply to questions of legal privilege. However, it can be especially complex to even arrive at the applicable law to determine the extent of any asserted privilege, given that there are several choices of law methods that could be employed to determine the applicable law and that there is a lack of guidance within Danish law and commentary as to which method is appropriate. Further, even though

43. Ashford, *supra* n. 34, at 147.
44. Vanas-Metzler, *supra* n. 33), at 261.
45. Berger, *supra* n. 1, at 509; Grégoire, *supra* n. 12, at 128.

the IBA Rules do not dictate any application of a specific choice-of-law method, they do suggest that tribunals consider general concepts of '*fairness*' and '*equality*', which are relevant when determining the appropriate choice of law, which only adds an additional layer of complexity.[46]

In Danish practice, and likely due to this complexity, parties sometimes fail to effectively argue which law should apply or fail to identify the appropriate legal test for arriving at that conclusion. Instead, parties often assume that a particular law must apply and jump straight to arguing why evidence is protected or not under that law or confine arguments to address specific wording included in procedural orders. The lack of guidance on how to arrive at the appropriate law, coupled with tribunal orders that often address applicable law and the application of privilege simultaneously, may also result in arguments being presented under several substantive laws, further muddling the picture.

This chapter does not attempt to identify which method '*should*' be applied in international arbitrations to determine the applicable law, including in Denmark, for two reasons. First, such a discussion would exceed the scope of this chapter. Second, the appropriate method would likely depend on the circumstances present in the specific arbitration, as tribunals should, as a basic proposition, apply a law that aligns as best as possible with parties' legitimate expectations in accordance with Article 9.4(c) of the IBA Rules, and such expectations will naturally vary from case to case.

This section will instead first address the impact of legal characterisation of legal privilege on potentially applicable privilege rules (section §8.05[A]) and subsequently introduce possible choice-of-law methods (and choice-of-law analyses) to determine which law to apply to disputed questions of legal privilege (section §8.05[B]).

[A] The Impact of Legal Characterisation of Legal Privilege on Potentially Applicable Privilege Rules in Arbitration

Before embarking on a discussion of identifying the applicable privileges rules, it is relevant to first examine whether the qualification of legal privilege should be viewed as a substantive matter or as a procedural matter.[47] In short, the question is whether legal privilege is (mainly) a matter of procedure as it concerns the introduction of evidence or whether legal privilege is (mainly) a substantive matter that concerns parties' rights and obligations. This determination is relevant because the qualification might indirectly affect the applicable privilege rules as, absent party agreement, arbitrators would generally enjoy substantial discretion to determine the applicable rules on matters of procedure while recognising privileges as a matter of substantive law would necessitate a choice-of-law analysis.

Procedural matters in arbitration are generally understood to include procedural steps and conduct, evidentiary and pleading rules, disclosure powers of arbitrators,

46. Ashford, *supra* n. 34, at 160 and 162.
47. Grégoire, *supra* n. 12, 120.

and the form, making and publication of the award.[48] Legal privilege could therefore be understood to be a matter of procedural law because privilege concerns the admissibility of evidence, which is 'usually governed by procedural law'.[49]

Section 19(2) of the Danish Arbitration Act provides that failing agreement on procedure, the arbitral tribunal may conduct the arbitration in such manner 'as it considers appropriate', and as mentioned in section 3, Article 28(2) of the DIA Rules contains a similar rule. It is generally accepted that (absent party agreement otherwise) the law of the seat governs the procedural aspects of the arbitration, as it is said to regulate both the '*internal*' procedural conduct of the arbitration and the '*external*' relationship between the arbitration and national courts.[50] Characterising legal privilege as a procedural matter could therefore mean that the privilege rules of the *lex arbitri* should apply.[51]

Legal privilege could also be understood to be a substantive question because 'the underlying purpose of legal privilege' is 'the protection of the confidential communication between the client and his attorney', which creates a substantive right for the privilege holder.[52] Privilege gives the client (in jurisdictions where the client is the privilege holder) a substantive right that can 'affect parties' behaviour outside of any procedural setting'.[53] As such, privilege should not be described as a procedural or solely procedural matter.

Characterising legal privilege as a substantive question would mean that a tribunal would have to apply conflict of law rules in national arbitration laws to determine the law to apply to the legal privilege question at issue.[54] The Danish Arbitration Act provides in section 28(2) that '[f]ailing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'. According to the preparatory works, the determination of applicable conflict of laws rules should be made with regard to the domicile or place of business of the parties, the subject matter of the dispute, and the place of arbitration.[55] It has been said in Danish commentary that when applying this rule, generally the jurisdiction to which the dispute is most closely connected should be chosen as the applicable law.[56] Deviating from the Danish Arbitration Act, Article 26(3) of the DIA Rules states that '[f]ailing a designation by the parties of the rules of law applicable to the decision on the merits of the case, the Arbitral Tribunal shall apply the rules which

48. Gary B. Born, *International Commercial Arbitration, Part II: International Arbitration Procedures* (3rd ed. © Kluwer Law International; Kluwer Law International 2021, at 1651.
49. Grégoire, *supra* n. 12, at 121.
50. Born, *supra* n. 48, at 1651.
51. Berger, *supra* n. 1, at 508.
52. Audley W. Sheppard & Fabian G. von Schlabrendorff, *Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holisitic Solution, Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honor of Robert Briner – 2005*, (ICC 2022), 742-774, at 763.
53. *Ibid*.
54. Berger, *supra* n. 1, 509.
55. Forarbejderne til Voldgiftsloven, LFF 2005-03-16 nr 127, 16 Mar. 2005, section 28, 100.
56. Niels Schiersing, *Voldgiftsloven med kommentarer*, (Jurist- og Økonomforbundets Forlag 2016), 373.

it considers appropriate after consultation of the parties' thus widening the tribunal's discretion.

There is by no means agreement across jurisdictions on whether privilege is a procedural or substantive matter, and most arbitral laws, including the Danish Arbitration Act, are 'silent on the issue of characterization'.[57] There is even disagreement about whether common or civil law jurisdictions generally perceive privilege as procedural or substantive. Some authors say that common law jurisdictions generally perceive privilege as substantive, and civil law jurisdictions generally perceive privilege as procedural,[58] while other authors say the opposite.[59] There is oftentimes not even inter-jurisdictional agreement on the question – in the US, some courts characterise privilege as procedural while others characterise it as substantive or quasi-substantive.[60] Some authors have suggested that questions of legal privilege are both procedural and substantive in nature, which means that 'arbitral tribunals do not have complete discretion in deciding which privileges should apply in any particular case, because they must recognise and give effect to applicable substantive privileges'.[61]

In practice, it is seen that regardless of whether a tribunal characterises privilege as a procedural or substantive matter (which would rarely be set out explicitly by the tribunal), some form of choice-of-law analysis will take place to determine the applicable law. Even in cases where tribunals have been seen to include in procedural orders, for example, that the tribunal 'retains full discretion' to decide any document production-related dispute or positively described certain criteria for exempting documents from production on grounds of legal privilege, a choice of law still seems to be made, either directly because the choice of law was in dispute or indirectly by reference to the applicable law in the tribunal's order on document production. In one case, the tribunal noted that it had not intended to convey by its previous order that any qualification regarding legal privilege should go beyond what is generally accepted in the applicable law.

The distinction between procedural and substantive characterisation and its potential implications will not be discussed from a Danish perspective any further, given the scope of this chapter. Rather, assuming a choice-of-law analysis needs to be done, the following sections will address possible choices and methods for arriving at an applicable law to determine the extent of any legal privilege.

[B] Choice-of-Law Methods

Many different methods for conducting a choice-of-law analysis to determine what law to apply to answer questions of legal privilege in international arbitration have been

57. Grégoire, *supra* n. 12, at 121.
58. *Ibid*.
59. Ted P. Pearce, *How to handle privileged communications in international arbitration*, International Bar Association, https://www.ibanet.org/how-to-handle-privileged-communications-in-international-arbitration (accessed 27 Mar. 2024).
60. *Republic Gear Co. v Borg-Warner Corp.*, 381 F.2d 551, 555 n. 2 (2nd Cir. 1967).
61. Sheppard & Schlabrendorff, *supra* n. 52, at 767.

proposed by various arbitration scholars and practitioners over time.[62] This chapter will not attempt to address all of them, as this task has already been accomplished by other articles that provide a comprehensive overview of the various methods that can be deployed.[63] Instead, this chapter will focus on describing the methods that, in our experience, have been considered in international arbitrations in Denmark, specifically application of the law of the seat (section §8.05[B][1]), application of the law governing the merits of the dispute (section §8.05[B][2]), and the closest connection test (section §8.05[B][3]).

[1] Application of the Law of the Seat

One approach that can be taken is to determine that questions of legal privilege in international arbitration should be decided with reference to the law of the seat of the arbitration because questions of privilege concern matters of procedural law.[64] In a Danish context, since the Danish Arbitration Act does not contain rules on privilege, the relevant question would be whether the protection under Danish law outlined in section §8.02[B] that is equivalent to legal privilege should apply (the procedural *lex fori*).[65]

There are advantages to conceptualising privilege as a matter of procedure and applying the law of the seat. One benefit is that '*a single law could be applied to the issue of evidentiary privileges*' throughout the arbitration, which could avoid unequal treatment of the parties.[66] Application of a single law also has the benefit of making privilege analyses much more efficient in arbitrations where there are voluminous documents potentially subject to privileges and where a choice-of-law analysis might require application of laws from multiple different jurisdictions.

However, there may be fairness considerations when applying the law of the seat of the arbitration to questions of legal privilege. The seat may have been chosen for different reasons, both legal and strategic, and may not have any connection with one or both of the parties. In practice, this is often the case for international arbitrations seated in Denmark. It is consequently not rare for a situation to arise where the jurisdiction of the seat has no immediate connection with the evidence subject to the question of privilege or the legal background of the parties or counsel involved.[67] This may not be in line with the parties' legitimate expectations, particularly in situations where the invoked privilege arises out of a particular relationship (such as attorney-client privilege) or documents and communication completely unconnected with the

62. *See*, *e.g.*, Berger, *supra* n. 1; Sheppard & Schlabrendorff, *supra* n. 52, at 767; Pearce, *supra* n. 59.
63. Many commentators on international arbitration also frequently discuss the most or least favoured nation approaches. These methods favour equal treatment in the sense that the law providing the greatest and the least level of protection, respectively, is applied. *See*, *e.g.*, Berger, *supra* n. 1, at 518 or Grégoire, *supra* n. 12, at 150.
64. Grégoire, *supra* n. 12, at 121.
65. *Ibid.*, at 124.
66. *Ibid.*, at 121, citing Berger, *supra* n. 1.
67. Grégoire, *supra* n. 12, at 124; Sheppard & Schlabrendorff, *supra* n. 52, at 768.

particular seat.[68] Applying a choice of law so misaligned with the parties' expectations could also be contrary to the IBA Rules' mandate to consider '*fairness*' and to avoid parties experiencing '*trial by ambush*'.[69]

[2] Application of the Law Governing the Merits of the Dispute

Another approach, assuming that questions of privilege are deemed to be substantive, is that the applicable privileges should be decided in accordance with the parties' choice of the law governing the merits of the dispute.[70] This will most often be the law identified in the choice-of-law provision of the contract underlying the dispute.

There are some advantages to applying the law governing the merits of the dispute to questions of legal privilege. Assuming the law governing the merits of the dispute is the law identified in the choice-of-law provision of the contract, applying this law potentially could reflect the parties' active choice and also '[meet] the need for predictability'.[71] Further, as with applying the law of the seat, using a single law to answer all questions of legal privilege that arise has the benefit of providing uniform and equal treatment of the parties and is also more efficient.[72]

However, while difficult to say in the abstract, some authors doubt that the parties intended, when agreeing to the law governing the contract, for this law to apply to questions of privilege in a potential arbitration emanating from the contract.[73] Legal privileges do not necessarily arise directly out of the contractual relationship, and as such, it might be difficult to align application of the substantive law of the contract with the parties' legitimate expectations in respect of such privileges, in particular, if the parties come from legal traditions that classify privilege as procedural.[74]

[3] Closest Connection Test

Another approach that can be taken to determine which national law to apply is the so-called *closest connection test*, which mandates application of the law to which the evidence in dispute has the closest connection.[75] In other words, the choice-of-law analysis is derived from the document or communication itself rather than the arbitral proceedings or the contract.

The closest connection test has enjoyed wide recognition as an applicable principle for determining the law governing a contract absent an explicit choice-of-law provision. Article 4(1) of the 1980 Rome Convention on the law applicable to

68. Grégoire, *supra* n. 12, 126; Berger, *supra* n. 1, at 509.
69. Preamble 3, Art. 9.4(e) of the IBA Rules; Ashford, *supra* n. 34, 160.
70. Grégoire, *supra* n. 12, at 122.
71. *Ibid.*, at 126.
72. *Ibid.*
73. *Ibid.*, at 769; Sheppard & Schlabrendorff, *supra* n. 52, at 769.
74. Grégoire, *supra* n. 12, at 125-127.
75. Also called 'most significant relationship' or 'centre of gravity' (Grégoire, *supra* n. 12, at 135).

contractual obligations codifies the closest connection test, and the test also 'corresponds to the 'most significant relationship' test favored in the United States'.[76] In contrast to other jurisdictions,[77] the Danish Arbitration Act and the DIA Rules do not explicitly prescribe application of the closest connection test for determining applicable substantive law in the absence of an agreed choice of law for arbitrations seated in Denmark. However, as mentioned in section 5.1, Article 28(2) of the Danish Arbitration Act is said to effectively prescribe a type of '*closest connection*' test.

Under the closest connection test as applied to questions of legal privilege arising in international arbitration, various factors could be considered to determine which jurisdiction has the closest connection to the information in question. Some connecting factors potentially relevant in determination of the law applicable to privileges are:

> (i) the place where the communication was created, (ii) the place where the communication was sent, (iii) the place where the communication was received, (iv) the place where the communication is stored, (v) the place where the party (or witness) claiming the privilege resides, (vi) the place where the lawyer is admitted, (vii) the place where the lawyer has his professional domicile, (viii) the jurisdiction governing the lawyer-client relationship, (ix) the jurisdiction about which the legal advice was sought, and (x) the place where the party requesting disclosure resides.[78]

Arbitrators in Denmark have been seen to consider all possibly relevant connecting factors to determine the strength of the connection between the evidence in question and the choice of law. In one instance, an array of factors pointing to the same choice of law was considered, including the intended use of the document, what jurisdiction the legal advice pertained to, the jurisdiction of the lawyers that made the documents, the domicile of the instructing company, and the location of the project in dispute. These factors were balanced against the fact that the document in question had also been transmitted to another jurisdiction. The arbitrators in this matter also considered the substantive law of the contract as a relevant factor, indicating that the parties' choice of law can be a relevant consideration in the closest connection test, even if it is not determinative in deciding which law to apply to issues of legal privilege. Some have suggested that the same is true for the law of the seat of the arbitration.[79]

The closest connection test has the advantage of providing 'an easily identifiable and predictable solution' to determining the privilege rules applicable to particular evidence.[80] As such, it has been commended by scholars of international arbitration as a flexible and pragmatic approach to answering the question of which law to apply to issues of legal privilege. Several note that it is the preferred method of determining the applicable privilege rules,[81] and some even comment that using the closest connection test to decide the law applicable to privilege has developed into a transnational rule.[82]

76. Sheppard & Schlabrendorff, *supra* n. 52, at 767.
77. Grégoire, *supra* n. 12, at 135.
78. *Ibid.*, at 138.
79. *Ibid.*, at 125.
80. Sheppard & Schlabrendorff, *supra* n. 52, at 768.
81. *See, e.g.*, Berger, *supra* n. 1, at 519; Sheppard & Schlabrendorff, *supra* n. 52, at 767.
82. Grégoire, *supra* n. 12, at 137.

One eminent practitioner and scholar, although not going as far as to recommend the closest connection test outright, concludes that applying some of the factors described above, such as the law of the place where the lawyer is qualified to practice or the client is based, is generally the better choice-of-law solution, as it is more likely to conform to the parties' expectations.[83]

Nonetheless, the closest connection test is not without its caveats. Application of the closest connection test could be cumbersome to parties, counsel and tribunals if there is a substantial volume of documents that each need to be assessed for any applicable privilege in the jurisdiction to which they are most closely connected.[84] This could, in turn, substantially slow down the procedural process, not least because the arbitrators might not be equipped to decide the question of privilege under the applicable national laws, and as such, the closest connection test could potentially tarnish the fair and efficient conduct of proceedings. Application of the closest connection test could also yield seemingly inconsistent outcomes in, for example, an arbitration involving many actors across jurisdictions, where the same information or document could be considered both privileged and not privileged if it had been generated, possessed or shared by people in different jurisdictions.

§8.06 HOW QUESTIONS OF LEGAL PRIVILEGE CAN BE INTERPRETED IN INTERNATIONAL ARBITRATIONS GOVERNED BY DANISH LAW

The above sections describe how a situation can arise in which Danish law must be applied to answer questions of legal privilege in international arbitration. However, this creates an apparent paradox – how should detailed questions of legal privilege be answered under Danish law when Danish law does not traditionally recognise a concept of legal privilege equivalent to the common law concept?

This particular paradox has gained attention in other larger civil law jurisdictions with large volumes of international arbitration proceedings. However, the issue remains associated with legal uncertainty in Denmark, arguably owing to the restrictive Danish legal tradition on disclosure in civil proceedings, and has not gained much scrutiny in Danish scholarly writings.

While it may be correct to say that Danish law does not recognise '*legal privilege*' in the way that it is recognised and codified under common law jurisdictions, this does not mean that Danish law has no individual laws that protect certain confidential information from disclosure, thereby acting as a comparable mechanism to legal privilege. For example, and as described in section §8.02[B], section 170(1) of the AJA provides that lawyers are permitted to withhold evidence that is protected by confidentiality subject to certain important exceptions, which is akin to the fundamental protection provided by attorney-client privilege under common law.

83. Born, *supra* n. 48, at 2384-2385.
84. Craig Tevendale & Ula Cartwright-Finch, *Privilege in International Arbitration: Is It Time to Recognize the Consensus?* Journal of International Arbitration 26(6) (2009), 823-839, at 832 https://doi.org/10.54648/joia2009043.

The challenge is that the laws that provide for protection from disclosure of confidential information under Danish law are not as developed or specific as the laws governing legal privilege in common law jurisdictions. This makes sense considering the different approaches to evidence introduction and privilege that exist between these jurisdictions, as is described in section §8.02. However, it does mean that when questions of legal privilege arise in international arbitration that must be answered with reference to Danish law, there is a need for interpretation and gap-filling.

While many questions will remain open with regard to applying Danish law to questions of privilege in international arbitration, two issues seen to be contentious in practice are addressed in the following sections, namely whether the equivalent of legal privilege under Danish law can be said to have been waived, and whether communications pertaining to in-house counsel are protected by the Danish equivalent of legal privilege.

[A] Waiver of Legal Privilege

As discussed above, waiver of a privilege is an important component of the concept of privilege under common law. As such, an argument could arise in international arbitration that a document must be produced because any legal privilege that once applied was waived by some circumstance. Since Danish law does not operate with the defined legal concept of '*privilege*', it does not explicitly have rules or legal doctrine governing when the equivalent of a legal privilege is waived either. Nonetheless, there are certain rules that speak to circumstances in which a document's confidentiality is maintained or forfeited.

For example, in Danish administrative law, confidentiality of information is generally forfeited when there is no longer a valid reason to keep it from public view.[85] Information loses its confidential status if the client discloses it publicly or if it becomes widely known, such as through media scrutiny. Accordingly, the lapse of confidentiality can occur when the information has been shared with the public.

Further, a question could arise regarding whether the confidential status has been forfeited if it has been shared with an auditor or accountant. Under Danish law, auditors and accountants are subject to professional secrecy[86] since parties frequently need to divulge sensitive information to them during audits. Parties should in principle be able to share this information with auditors without compromising confidentiality to encourage full disclosure in an audit. However, there is no settled law on this topic, and the status of information shared with auditors may depend on the specific circumstances.

It is important to note that client-lawyer confidentiality does not fall away once the issue to which the legal advice pertains is resolved. This is evident from Chapter 5 of the Code of Conduct for the Danish Bar and Law Society, which is based on section 126 of the AJA, pursuant to which 'the duty of confidentiality applies to all information

85. White paper no. 1500 on exchange of information in the public administration (KBET 2008), 25.
86. Revisorloven, LBKG 2022-08-31 nr 1219, Chapter 7, section 30.

that becomes known to him in the course of his professional activity… The obligation of confidentiality is not limited in time, and also applies following termination of the mandate'. As such, any privilege-like protections afforded by client-lawyer confidentiality remain and should be applied in international arbitration, even after the issue has been resolved.

However, many questions on waivers will remain subject to further clarification in practice. For example, as Denmark does not have principles equivalent to the joint and common interest privilege known in common law systems, it remains unclear whether or to what extent sharing information between different parties, such as litigation funders or other interested third parties, could result in a waiver that would otherwise apply under Danish law. One approach is to say that because there are no explicit rules on waiver of legal privilege in Danish law, waiver of legal privilege is an irrelevant argument to make in international arbitrations that apply Danish law. However, it is more likely that in the absence of Danish law, parties and arbitrators will turn to international practice for guidance on whether legal privilege has been waived in the circumstances present if such guidance is deemed appropriate, aligned with the parties' legitimate expectations, and consistent with the fair and equal treatment of the parties.

[B] Legal Privilege for In-House Lawyers

Another question that can regularly arise in international arbitration is whether communication with, documents prepared for purposes of advice from, and the advice itself from in-house lawyers are subject to legal privilege. If they are subject to legal privilege, this could prevent the disclosure of a wide number of documents, either because they were created by in-house lawyers or because they were shared with in-house lawyers for purposes of receiving in-house legal advice. In particular, the latter scenario could potentially result in large volumes of evidence being withheld.

The extent to which legal privilege may be applicable to an in-house attorney's work-product remains subject to some uncertainty in Danish law. Whereas in-house lawyers are considered covered by the duty of confidentiality in the Code of Conduct of the Danish Bar and Law Society,[87] in-house lawyers are not expressly mentioned in the AJA as being exempt from giving witness testimony or providing evidence under section 170 of the AJA.[88] Whether in-house lawyers are covered by the provisions of section 170 has also not been addressed by Danish case law.[89]

One way to potentially determine the extent to which section 170 of the AJA may be applicable to in-house lawyers is to evaluate the similarity of the status of in-house lawyers, taking into consideration their capacity as employees and this relationship's

87. Mads Bryde Andersen & Lars Lindencrone Petersen, *Advokatretten*, (2nd ed. Ex Tuto Publishing 2022), 400; Article 1 of the Code of Conduct of the Danish Bar and Law Society, Applicable as from 1 Sep. 2022; Økjær Jørgensen & Lavesen, *supra* n. 25, 27-28.
88. Trine Bonde Jensen, *Virksomhedsjuristens tavshedspligt samt fritagelse for vidne- og editionspligt*, Erhvervsjuridisk Tidsskrift (75) (Karnov Group 2007).
89. *Ibid*.; Bryde Andersen & Lindencrone Petersen, *supra* n. 87, at 405.

effect on independence, with the status of other positions that are exempt from providing evidence under section 170(1) and section 170(4). For example, Danish legal scholar Mads Bryde Andersen states that, due to the nature of the work undertaken by in-house counsels, including actively engaging in decision-making processes within a given company, the relationship cannot be considered on par with that of the independent legal mandate of an external lawyer.[90] This indicates that an in-house lawyer would likely not or at least not as often be considered covered in the same way as an external attorney would be under section 170 of the AJA.[91]

Continuing this analysis, one approach might be to suggest that if an in-house lawyer carries out duties comparable to those of an external lawyer, communications in such instances could be granted protection equivalent to that of legal privilege.[92] Alternatively, another approach could be to consider the evidence itself and provide greater protection to evidence that concerns subject matters that are more internal.[93] To our knowledge, the Danish courts have not dealt with these issues yet.

In contrast, the European Court of Justice (the 'ECJ') has considered this issue and does not consider the in-house lawyer's evidence as protected by legal privilege due to the lack of independence between the in-house lawyer and its employer. The ruling of the ECJ in C-155/79 – *AM & S v. Commission* highlighted two fundamental conditions for legal privilege to apply universally across member states: first, the correspondence must pertain to the client's defence; and second, it must involve independent legal counsel not in the employment of the client.[94] Subsequent cases, such as the *Akzo Nobel* case, further affirmed the exclusion of in-house attorneys from the scope of legal privilege.[95] In this decision, the ECJ emphasised the importance of the purpose of the evidence, stipulating that for legal privilege to attach the evidence must have been intended to be shared with external legal counsel for the purpose of seeking legal advice. The ECJ's rationale rested on the lack of independence of in-house attorneys, given their employment status within the client company.[96] These ECJ rulings thus affirm that legal privilege extends exclusively to communications with externally appointed attorneys under EU law, thereby excluding internal exchanges emanating from or involving an in-house counsel.

Given the unsettled status of this question under Danish law, it is by no means certain whether tribunals would consider communications by or shared with in-house counsel as protected by legal privilege in international arbitrations subject to Danish law, and it is likely that their rulings would depend upon the circumstances present in the individual cases. In one Danish arbitration, the tribunal decided that legal privilege

90. Bryde Andersen & Lindencrone Petersen, *supra* n. 87, at 384.
91. *Ibid*., at 401.
92. Jes Anker Mikkelsen, *Denmark: International Association of Defense Counsel*, https://www.iadclaw.org/assets/1/7/17.8_Denmark.pdf (accessed 27 Mar. 2024).
93. Bryde Andersen & Lindencrone Petersen, *supra* n. 87, at 405.
94. Case 155/79, *A. M. & S. Europe Ltd. v. Commission of the European Communities*, Q.B. 878, 1611 (1983).
95. Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission,* I-08301, 8380-8383 (2010).
96. *Ibid*.

did not apply to documents forwarded for purposes of receiving legal advice from in-house counsel, despite arguments being presented that the in-house legal department, in all material respects, operated as an independent entity from the remaining parts of the company. It was held that the right of audience of in-house lawyers did not suffice to apply legal privilege and that any limitation restrictions applied to the in-house legal department would not render such documents subject to legal privilege either.

§8.07 CONCLUSION

At the beginning of this chapter, we noted that the maxim '*the only thing that is clear is that nothing is clear*' has been used when discussing the issue of legal privilege in international arbitration.[97] While seeking perfect clarity with regard to the application of legal privilege in international arbitration might prove a fool's errand, some lucidity can be gained, particularly by exploring the issue at the level of one individual jurisdiction.

Building on extensive practical experience in recent years, we have sought to examine legal privilege in international arbitration in Denmark from a practitioner's perspective. This chapter has shown how questions of legal privilege can arise in international arbitrations in Denmark through the application of international standards and institutional rules and how to engage in appropriate analysis despite the concept of legal privilege not traditionally being recognised under Danish law. It has shown that when these questions do arise, they can be significant for the arbitration. It has shown that while international standards and institutional rules allow for the introduction of questions of legal privilege, national laws are required to fully implement them. Therefore, this chapter has examined some of the most common methods for deciding which national law to apply in such a scenario. Finally, it has also examined how certain Danish laws may be used to provide useful input on the topic in cases where reference to Danish law is necessary.

Questions of legal privilege in international arbitration, important as they are, will always be subject to some uncertainty due in no small part to the transnational nature of international arbitration and the national nature of legal privilege. This is perhaps especially true in jurisdictions where non-voluntary disclosure is not the main rule, and issues of legal privilege might seem a rare visitor. This does not mean that obtaining answers to these questions will be entirely arbitrary or unpredictable. Instead, to glean answers and prepare a proper strategy, practitioners should consider such issues early on and assess applicable international standards, institutional rules, and national law within the context of fundamental principles of international arbitration. As such, this chapter may serve as a starting point for the exploration of the characteristics of legal privilege disputes in international arbitrations in Denmark and perhaps also more generally in the Nordics.

97. Berger, *supra* n. 1.