

Impact of Third Party Funding on Privilege in Litigation and International Arbitration

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Privilege exists to protect certain interests and relationships, ‘thereby advanc[ing] the goals of social and public policy’.¹ The most widely understood definition of privilege is ‘a legally recognized right, belonging to a client, to withhold certain testimonial or documentary evidence from a legal proceeding, including the right to prevent another from disclosing such information’.² Such information may include, among other things, business trade-secrets, settlement discussions between parties to litigation, communications between a client and its lawyer and inter-lawyer communications regarding the weaknesses and strengths of a case.

This definition addresses only one application of privilege, and does not begin to scratch the surface of the many complex scenarios and diverging aims of privilege in the practice of law. Whatever the application and context in which privilege arises, one of the fundamental bases of privilege is the encouragement and protection of an open and honest dialogue between lawyers and their clients. In today’s ever-fluctuating market, however, the relationship between a client and lawyer is changing – creating an increasingly complicated dynamic, often fuelled by the commercial aspects of the relationship.

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1 Richard Mosk and Tom Ginsburg, ‘Evidentiary Privileges in International Arbitration’ (2001) 50 Int’l & Comp L Q 345–85.

2 *Ibid.* See also Gu Weixia, Note and Comment, ‘Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?’ (2004) 15 Am Rev Int’l Arb 607, 609; James Carter, ‘Privilege gets a new framework’ (2010) Int’l Arb Law Rev 177–179.

One very prominent example of this is the additional complication in the fundamental lawyer–client relationship created by the interposition of third party funders introduced into the relationship in order to fund clients’ claims.

On the face of it, the rationale for privilege in both the common and civil law approach stems from the relationship between client and lawyer. The introduction of a third party into that relationship inevitably creates complications. If privilege is to apply to the communications between the members of this tripartite group, it will do so under a specific subspecies of the protection that allows the lawyer or the client to communicate with outsiders for the purpose of furthering the client’s interests in litigation or arbitration.

While third party funding of litigation and international arbitration is still a relatively new phenomenon, it is one that is developing fast.³ Moreover, it is an industry that has itself been a casualty of litigation. For example, the *S&T Oil Equipment and Machinery Ltd v Juridica Investments Limited*⁴ litigation in the United States considers a funder’s rights to see attorney work product and other sensitive material without compromising the attorney–client and work–product privileges. In a third party funding scenario, it can be readily assumed that a potential funder will wish to perform a measure of due diligence in order to ascertain the prospects of a case and, ultimately, the potential return on its investment. Part of the funder’s due diligence often, if not always, includes a review of the internal due diligence analysis of the viability of the case under consideration that has already been performed by the prospective client’s lawyers. This, however, raises a critical concern vis-à-vis the disclosure consequences of sharing documents with a third party that would otherwise be protected by the privileges that exist between a lawyer and his or her client.

The fundamental question under consideration in this article is this: how far are documents exchanged between an arbitral party, or representative counsel, and a third party funder protected from discovery, both in domestic litigation and international arbitration? The article will

3 Rachael Mulheron and Peter Cashman, ‘Third Party Funding: A Changing Landscape’ (2008) 27 CJQ 312; Alison Ross, ‘New era for third-party funding in the UK – and beyond?’ *Global Arbitration Review*, 23 November 2011, available at www.globalarbitrationreview.com/news/article/29983/new-era-third-party-funding-uk-8211-beyond; Sebastian Perry, ‘Third-party funding: an arbitrator’s perspective’, *Global Arbitration Review*, 23 November 2011, available at <http://www.globalarbitrationreview.com/news/article/29981/third-party-funding-arbitrators-perspective>.

4 *S&T Oil Equipment and Machinery LTD v Juridica Investments Ltd*, No H-11-0542 (5th Cir, 5 January 2012).

review these overarching questions in four parts. First, it addresses the fundamental differences between civil and common law jurisdictions regarding privilege and confidentiality. Next, it addresses the domestic rules of evidence and procedure that govern document disclosure in the context of litigation in five representative jurisdictions: the United States, England and Wales, France, Germany and Switzerland. From this discussion, the article will assess the likelihood of whether these would protect privileged work–product exchanged with third party funders. The fourth part details certain arbitral institutional approaches to rules of evidence; explains how such rules are applied in international arbitration, together with the impact of the domestic rules of evidence in our representative jurisdictions; and gives an overview of the practical realities of rules of evidence choices in arbitrations seated in those countries. Finally, the article will provide some concluding thoughts and practical recommendations on how best to ensure the protection of privileged documents that are exchanged with third party funders.

Common law privilege and civil law confidentiality

Common law privilege and confidentiality

Concepts of legal privilege vary from jurisdiction to jurisdiction. In common law jurisdictions such as the United States and England and Wales, the privilege belongs to the client, and the client’s lawyer is obliged to keep the privileged information confidential unless the client waives the privilege. Broadly speaking, in jurisdictions where litigants have an obligation to disclose all documents and materials relevant to their case (negative as well as advantageous), the concept of privilege has arisen to curtail the scope of that obligation. Thus, the general rule in litigation in common law jurisdictions is that the parties are obliged to disclose all documents that are relevant and material to the outcome of the case, unless they are protected against disclosure by a relevant privilege.⁵

As discussed below, although seemingly derived from the same concerns, a lawyer’s duty of confidentiality to his client is a concept separate from that of privilege, and is dealt with by the Solicitors Regulation Authority Rules in England and Wales, and generally by the

⁵ See, eg, English Civil Procedure Rule 31.3 (providing for a party to litigation to prevent inspection of privileged documents by other parties to litigation); Federal Rules of Civil Procedure, Rule 26(b)(1) (to the same effect).

State Bars in the United States.⁶ This separate duty can be overridden under certain circumstances, for example, by compulsion to divulge information under state statutes or other rules and regulations.⁷

Civil law confidentiality

By contrast with the approach in common law systems, which incorporate concepts of both privilege and confidentiality, in civil law jurisdictions, the substance of the attorney–client relationship is protected by ‘professional secrecy’, which is a ‘doctrine founded in the lawyer’s ethical obligations that cannot be waived by the client’.⁸ Broad disclosure requirements such as those that exist in litigation in common law countries are unknown in civil law countries, and a privilege against disclosure is therefore not necessary. A lawyer practising in a civil law country owes a duty of confidentiality towards his client, usually based on statutory obligations imposed on lawyers. The breach of this duty is regarded as a very serious matter that is frequently

6 See, eg, US Model Rules of Professional Conduct (2010) Rule 1.6 Confidentiality of Information:

‘(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

(4) to secure legal advice about the lawyer’s compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or

(6) to comply with other law or a court order.’

See also Solicitors’ Code of Conduct (2011) Outcome 4.1: ‘keep the affairs of clients confidential unless disclosure is required or permitted by law or the client consents.’

7 Money laundering and fraud represent an example where this confidentiality rule may be overridden, such as reporting requirements under the Money Laundering Regulations 2007 and the Proceeds of Crime Act 2002 in the United Kingdom. Similarly, the US Model Rules of Professional Conduct explicitly include various circumstances, including fraud, under Rule 1.6(b).

8 Carter, note 2 above.

punishable by criminal sanctions.⁹ It must be emphasised, therefore, that while the rules on confidentiality exist for the protection of the client, both the rights and the obligations are matters for the lawyer, rather than the client. Thus, it is the obligation of the lawyer to keep his communications with his client secret, and it is also the lawyer's right not to be compelled to reveal those secrets. As a result, the common law concept of privilege, which exists to override duties of disclosure in litigation that do not generally exist in civil law countries, is almost alien to civil law jurisdictions, which have developed in an entirely different way from the common law jurisdictions.

Application of national privilege rules to communications with third party funders

The third party funder is introduced into the relationship between a client and lawyer solely for the purpose of furthering the possibility of litigation or arbitration. In most cases, a third party funder will be introduced to a dispute during the due diligence phase, before arbitration or litigation proceedings have formally commenced, in order to consider the potential merits and inherent legal costs of an action, as well as the financial consequences of defeat or success.

In addressing the protection of privilege in this relationship, the documents to which a third party funder may have access can be divided into the following classes:

1. communications between the lawyer and the client relating to the potential action for their own due diligence or litigation purposes, which are then distributed to third party funders; and
2. communications originating from the third party funder itself, and shared with the lawyer and the client, including those that are created for the funder's own evaluation of the case.

9 See, eg, in Germany, Criminal Procedure Code, s 203(1): 'Wer unbefugt ein fremdes Geheimnis, namentlich ein zum persönlichen Lebensbereich gehörendes Geheimnis oder ein Betriebs- oder Geschäftsgeheimnis, offenbart, das ihm als... Rechtsanwalt, Patentanwalt, Notar, Verteidiger in einem gesetzlich geordneten Verfahren... Steuerbevollmächtigten oder Organ oder Mitglied eines Organs einer Rechtsanwalts-, Patentanwalts-... oder Steuerberatungsgesellschaft... anvertraut worden oder sonst bekanntgeworden ist, wird mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft', available at www.gesetze-im-internet.de/stgb/_203.html.

Unofficial translation by Prof Dr Michael Bohlander: 'Whosoever unlawfully discloses a secret of another, in particular, a secret which belongs to the sphere of personal privacy or a business or trade secret, which was confided to or otherwise made known to him in his capacity as a[n]... attorney, patent attorney, notary, defence counsel in statutorily regulated proceedings... or organ or member of an organ of a law, patent law... in the form of a company... shall be liable to imprisonment of not more than one year or a fine', available at www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P203.

These distinctions separate who created the document, the purpose of the document's creation and who was being communicated with when it was created. These distinctions are important primarily under common law systems as will be shown below.

Common law privilege and disclosure to third party funders

PROTECTING COMMUNICATIONS BETWEEN THE LAWYER AND THE PARTY TO THE POTENTIAL ACTION WHICH ARE THEN DISTRIBUTED TO THIRD PARTY FUNDERS

England and Wales. Under English law, documents created by a lawyer when conducting his retainer for a client will generally be protected by 'litigation privilege' and/or 'legal advice' privilege.

The litigation privilege applies to any communications between a lawyer (acting in a professional capacity) and the client, or between a lawyer and a third party, that has come into existence for the purpose of supporting litigation or arbitration, and where the communication's dominant purpose was 'to obtain legal advice or to conduct or aid in the conduct of litigation'.¹⁰ In the leading judgment of *Winterthur Swiss Insurance Co & Or v AG (Manchester) Ltd (in Liquidation) & Ors*,¹¹ Mr Justice Aikens set out the following rationale for the existence of this privilege at paragraph 68:

'The rationale for... litigation privilege rests, in modern terms, on the principles of access to justice, the proper administration of justice, a fair trial and equality of arms. Those who engage in litigation or are contemplating doing so may well require professional legal advice to pursue the adversarial litigation effectively. To obtain the legal advice and to pursue the adversarial litigation efficiently, the communications between a lawyer and his client and a lawyer and a third party and any communication brought into existence for the *dominant purpose* [authors' emphasis added] of being used in litigation must be kept confidential, without fear that what is said or written might be disclosed. Therefore, those classes of communication are covered by "litigation privilege".'

The 'dominant purpose' of a communication such as a due diligence or case assessment memorandum prepared by a lawyer for his client and sent to a funder would clearly be the conduct of international arbitration or litigation proceedings, which the funder is being invited to finance. Litigation privilege would therefore protect the first class of documents

10 *Arroyo & Ors v BP Exploration Co (Colombia) Ltd* (Case No HQ08X00328 17 March 2010) (quoting *Waugh v British Railways Board* [1980] AC 521 (House of Lords, Davies LJ)) ('*Arroyo*').

11 *Winterthur Swiss Insurance Co & Or v AG (Manchester) Ltd (in Liquidation) & Ors* [2006] EWHC 839 (Comm Ct) ('*Winterthur*').

listed above: those created by counsel in the ordinary course of their due diligence assessment of a case. But a degree of uncertainty lies in whether that protection would continue after the documents have passed into the hands of the third party funder, including in relation to follow-up communications between the lawyer and the funder.

The rationale for the legal advice privilege is to protect confidential communications between a lawyer and client for the giving and receiving of legal advice.¹² The scope is therefore both narrower and wider than the litigation privilege, in that it excludes communications with third parties, but goes beyond litigation to cover legal advice given in any context.

Clearly, for either litigation or legal advice privilege to operate, documents must remain confidential. Transfer of documents to third parties is deemed a waiver of privilege precisely because the confidentiality of the documents is lost.¹³ In such a circumstance, privilege may be protected from waiver if documents are provided on express terms that privilege is not intended to be waived in so doing, and the receiving party makes undertakings to keep the documents confidential.¹⁴

An alternative exception to waiver is the ‘common interest privilege’. Generally, the concept of common interest has developed to operate where common legal interests are intended to be furthered *by* disclosures to the third party. The alternative to waiver lies in the assertion that, owing to the common interest in documents provided to the third party funder, the original privilege was *never waived* by the party supplying the documents.

In England, the common interest privilege has been held to apply where an insured provides documents to an insurer, since they generally have a ‘common interest’ in the litigation to which the insurance relates.¹⁵ Mr Justice Aikens provided some guidance in the *Winterthur* case as to when common interest privilege will apply:

‘[W]here a communication is produced by or at the instance of one party for the purpose of obtaining legal advice or to *assist in the conduct of litigation* [author’s emphasis added], then a second party that has a common interest in the subject matter of the communication or the

12 *Three Rivers District Council & Ors v The Bank of England* [2004] EWCA Civ 218.

13 To reiterate *Winterthur* at para 68: ‘To obtain the legal advice and to pursue the adversarial litigation efficiently, the communications between a lawyer and his client and a lawyer and a third party and any communication brought into existence for the dominant purpose of being used in litigation *must be kept confidential*.’ [author’s emphasis added] See also *USP Strategies v London General Holdings Ltd* [2004] EWHC 373 (Ch).

14 *USP Strategies v London General Holdings Ltd* [2004] EWHC 373 (Ch). See also *B v Auckland District Law Society* [2003] UKPC 38 (although, as a Privy Council ruling, this authority is merely persuasive in other English courts).

15 *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027.

litigation can assert a right of privilege over that communication as against a third party. The basis for the right to assert this ‘common interest privilege’ must be the common interest in the confidentiality of the communication.’¹⁶

A third party funder may be deemed to share a common interest in the confidentiality of communications provided by the client’s lawyer as it has the common interest of pursuing litigation or arbitration in much the same way an insurer does. However, the more direct approach of explicitly stating that the documents are provided subject to privilege would be the safest course to retain the litigation privilege under English law.

United States. The position in the United States is rather more confused, not least owing to the multiplicity of variations in state rules and doctrines. Privilege will be discussed here as understood at the federal level only. Two species of privilege similar to the English legal advice and litigation privileges are relevant: the ‘attorney–client’ privilege and the ‘lawyer work–product’ doctrine, or simply ‘work–product’ doctrine. While common interest has been held in some cases to constitute an exception to the waiver of work–product or attorney–client privilege,¹⁷ this theory has not remained consistent in application.

Attorney–client privilege protects confidential communication between the lawyer and client for the purpose of providing legal advice.¹⁸ As with the English legal advice privilege, the dominant purpose of the communication must be the seeking or provision of legal advice, and it is restricted to communications between lawyer and client.

The work–product doctrine, established in *Hickman v Taylor*,¹⁹ initially protected a lawyer’s ‘interviews, statements, memoranda, correspondence, briefs, mental impressions, and countless other tangible and intangible’²⁰ items of work–product. The protection has since been codified in the Federal Rules of Civil Procedure and now appears in rule 26(b) (3):

‘(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared *in anticipation of litigation or for trial* by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b) (4), those materials may be discovered if:

16 *Winterthur*, note 11 above, para 78.

17 *Union Carbide Corp v Dow Chem Co*, 619 F Supp 1036, 1047 (D Del 1985).

18 *Restatement (Third) of the Law Governing Lawyers*, §§ 68, 70.

19 *Hickman v Taylor*, 329 US 495 (1947).

20 *Ibid* 511.

- (i) they are otherwise discoverable under Rule 26(b)(1);²¹ and
- (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.'

Third party funding agreements have been held to 'create confusion concerning the party who actually owns and controls the lawsuit, and create risks that the attorney-client privilege will be waived unintentionally'.²² Indeed, in *Leader Technologies Inc v Facebook, Inc*²³ ('*Leader Technologies*') at least one US court has granted a request for discovery of documents provided to potential third party funders on the basis that the disclosure of documents waived legal and work-product privileges.

Both New Jersey and Pennsylvania legal ethics boards have issued advisory opinions cautioning practitioners to ensure their clients understand that they risk waiver of privilege in providing attorney-client and work-product privileged documents to third parties who may potentially purchase an

21 Rule 26(b)(1) reads: '*Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.'

22 *Fausone v US Claims, Inc*, 915 So 2d 626, 630 (Fla Dist Ct App 2005).

23 *Leader Technologies, Inc v Facebook, Inc*, 719 F Supp 2d 373 ('*Leader Technologies*').

interest in a personal injury claim.²⁴ These opinions were referred to with approval in *Leader Technologies* when Magistrate Judge Stark ordered that disclosure of work-product documents to potential litigation funders, despite prior entry into non-disclosure agreements, had waived the privilege against non-disclosure.²⁵ He rejected the application of the common interest privilege in this context. However, he also indicated that ‘the law is unsettled,... [and] presents a close and difficult question’.²⁶ On appeal, the court found that Judge Stark had carried out a thorough review of authorities in reaching his ruling and declined to overturn his judgment.²⁷

It is worth noting that even if disclosures to funders satisfy the other requirements for the application of the common interest privilege in the United States in that they ‘would not have been made but for the sake of

24 New Jersey Advisory Commission on Professional Ethics, Opinion Number 691 (2001): ‘An additional important issue raised by this inquiry is that of confidentiality of information. RPC 1.6(a) provides that “A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation... .” The attorney must ensure that the client fully understands the risks of disclosure of such information, including the possible loss of the attorney-client privilege, before securing the client’s authorization to disclose information the financial institution may require in order to assess the risk of the transaction. Upon securing such authorization, the attorney should still endeavor to limit, to the extent possible, the amount of information provided to the institution. For example, the attorney should provide the institution with only that information which would be discoverable by the attorney’s adversary. Philadelphia Bar Association Opinion 99-8 (February 2000). Under no circumstances should the attorney consider additional disclosures as impliedly authorized in order to carry out the transaction.’

Pennsylvania State Bar Association Committee on Legal Ethics and Professional Responsibility Opinion Number 99-8 (February 2000):

‘As an initial matter, the Committee directs the inquirer’s attention to Rule 1.6 which addresses issues relating to confidentiality of client information. This Rule, and the related concerns about the attorney-client privilege, presents the most serious ethical concern prompted by this inquiry. The importance of consultation with the client about the possible risk of loss of not only client confidentiality but also of the attorney-client privilege as a result of supplying assessment-type information to the potential lender cannot be underestimated. The inquirer is well advised to document carefully the client’s assent to the disclosure and, even then, to make it clear to the lender that the disclosures will be restricted as much as possible – perhaps even limited to only that information which would be discoverable without intrusion upon the privilege.’

25 Transcript of Oral Argument of 12 March 2010 at 71:1-22, *Leader Technologies, Inc v Facebook, Inc*, 2010 WL 2545960 (D Del Mar, 2010) (No 08-0862).

26 Transcript of Oral Argument of 12 March 2010 at 65:21, 66:2-3, *Leader Technologies, Inc v Facebook, Inc*, 2010 WL 2545960 (D Del Mar, 2010) (No 08-0862); for a recent history of common interest and third party cases, see *Net2Phone, Inc v eBay, Inc*, 2008 US Dist LEXIS 50451 (D NJ 26 June 2008); *Corning, Inc v SRU Biosystems, LLC*, 223 FRD 189 (D Del 2004). For an opposing view, see *Hewlett-Packard Co v Bausch & Lomb, Inc*, 397 F Supp 1146 (ND Cal 1987).

27 *Leader Technologies*, note 23 above, 377.

securing, advancing, or supplying legal representation’,²⁸ there is still some disagreement as to whether such common interest must be ‘identical, [and] not [just] similar, and be legal, not solely commercial’.²⁹ The New Jersey and Pennsylvania legal ethics boards have been recently supported by a New York City Bar formal opinion on third party litigation financing generally, stating ‘the argument has been made that the common interest privilege does not apply to such communications because the financing company’s interest in the outcome of a litigation is commercial, rather than legal’.³⁰

However, in the Eastern District of Texas in *Mondis Technology, Ltd v LG Electronics, Inc*, the court determined that documents created ‘with the intention of coordinating potential investors to aid in future possible litigation... [did] not create a waiver [of work–product protection] because they were disclosed subject to non-disclosure agreements and thus did not substantially increase the likelihood that an adversary would come into possession of the materials’.³¹ On making this holding, the court did not feel it necessary to discuss attorney–client privilege.³² In another Eastern District of Texas ruling, the court explained that while ‘the work product protection exists to promote the adversary system by safeguarding the fruits of an attorney’s trial preparations from the discovery attempts of an opponent, the attorney–client privilege exists to protect the confidential communications between an attorney and client... [and so] the attorney–client privilege... is waived by disclosure of confidential communications to third parties’.³³ This analysis comports with a more general opinion that ‘work product protection is waived only when documents are used in a manner contrary to the doctrine’s purpose, when disclosure substantially increases the opportunity for potential adversaries to obtain the information’.³⁴

In November 2010, in the wake of the *Leader Technologies* decision, the American Bar Association presented an Issues Paper stating

28 *In re Regents of the Univ of Cal*, 101 F 3d 1386, 1389 (Fed Cir 1996).

29 *Ibid*.

30 New York City Bar Association, ‘Formal Opinion 2011-2: Third Party Litigation Financing’, published June 2011 (citing *Leader Technologies; Abrams v First Tenn Bank Nat’l Ass’n*, No 3:03-cv-428, 2007 WL 320966, at *1 (ED Tenn 30 January 2007); Nate Raymond, ‘Litigation Funders Face Discovery Woes’, Nat’l LJ, 21 February 2011 (reporting that in at least one case, the initial conversations between a funding company and the client were not protected from disclosure by the attorney–client privilege)) (available at www.nycbar.org/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02).

31 *Mondis Technology, Ltd v LG Electronics, Inc*, No 2:07-cv-565, 2011 WL 1714304, at *3 (ED Tex 4 May 2011) (internal quotations and citations omitted) (*‘Mondis’*).

32 *Ibid*.

33 *Wi-Lan, Inc v Acer, Inc*, No 2:07-cv-473, 2010 WL 4118625, at *5 (ED Tex, 18 October 2010).

34 See, eg, *Schanfield v Sojitz Corp of America*, 258 FRD 211, 214 (SDNY 2009) (internal quotations and citations omitted).

‘[a]s to privilege, the common interest exception very likely does not allow the lawyer who knows most about the matter to make disclosure to the ALF supplier [third party funder] without losing the benefit of the privilege and work product doctrine’.³⁵ Since then, in October 2011, the ABA followed up with a draft White Paper, which, although not yet representing definitive policy, cited the distinction between waiver under attorney–client privilege for failure of common interest (as held in *Leader Technologies*, and there apparently applied to the work-product doctrine) and greater protection under work-product doctrine as held in *Mondis*.³⁶

In summary, US federal courts appear to be hostile to the idea that common interest subsists between the party with the claim and their third party financier, and state ethics committees have issued cautions regarding that point. However, it is still an unresolved issue in American federal jurisprudence whether work–product doctrine suffers from a similar threat of waiver to the attorney–client privilege where a third party funder is provided with documents relating to a case they are reviewing for due diligence purposes.

COMMUNICATIONS ORIGINATING FROM THE THIRD PARTY FUNDER, AND SHARED WITH THE LAWYER AND THE PARTY TO THE POTENTIAL ACTION

We now turn to considering the protection of communications originating from or originally intended for the third party funder. This is distinguishable from the first category, which deals with documents created by the lawyer, and not originally intended for the third party funder, but that are provided to them in order to advance litigation or arbitration. The question is not one of waiver, because the communication concerned is with the third party from the outset. Rather, the question is whether such communications fall within the protection of privilege at all. By definition, these communications cannot be protected by legal advice doctrines as they explicitly include a third party to the retainer. Accordingly, the issue ultimately becomes whether they fall within the context of litigation privilege or work-product doctrine.

England and Wales. Under English law, there is some precedent in the context of litigation insurance for the protection under the litigation and legal advice privileges of communications between a party and a third party

35 American Bar Association Commission on Ethics 20/20, *Issues Paper Concerning Lawyer’s Involvement in Alternative Litigation Financing* (23 November 2010), at 4 (available at www.americanbar.org/content/dam/aba/migrated/ethics2020/alfposting.authcheckdam.pdf).

36 American Bar Association Commission on Ethics 20/20, *Draft White Paper on Alternative Litigation Finance*, Section VB, ‘Confidentiality, Privilege and Work Product’ (available at www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_alf_white_paper_posting.authcheckdam.pdf).

agent interested in the litigation. In *Arroyo*, the Senior Master refused to order production by the claimants of an after the event (ATE) insurance policy that had been negotiated in some detail with the insurers,³⁷ where ‘the communications in the negotiation and drafting of this policy and the final agreed policy were... brought into existence for the dominant purpose [of] conducting litigation and also that the same [was] likely to reflect legal advice’.³⁸ Indeed, the Senior Master noted that the party seeking disclosure of the ATE policy had conceded that documents connected with the negotiation of the ATE policy would be privileged against disclosure.³⁹ The Senior Master distinguished the case at hand from earlier judgments where disclosure of ATE policies had been ordered on the basis that those policies had not been the subject of detailed negotiation.⁴⁰ In this case, where detailed negotiation had been a part of the process of arriving at the policy, ‘[i]t seem[ed] to [the Senior Master] to be plain that by its nature, knowledge of the terms of an ATE policy would be of tactical advantage to the opposing party in the litigation’.⁴¹

It would follow by direct analogy that general communications regarding the negotiations of a funding arrangement between (i) a third party funder; (ii) a party to a claim; and (iii) the lawyer, and the funding agreement itself, would therefore receive protection under the litigation privilege on the same basis, affording protection to the party’s litigation strategy. Thus, it can also be argued that a document created by the third party funder to analyse a case would fit the rationale of the *Arroyo* decision, in that its disclosure would also inevitably expose the party’s litigation strategy. The question, therefore, must hinge on whether such a document was ‘brought into existence for the dominant purpose [of] conducting litigation’.⁴² The creation of such a document is analogous to the creation of an ATE policy; in either case, the documents are created with the dominant purpose of insuring or funding the conduct of litigation.

In *Waugh v British Railways Board*, the view of the House of Lords was that the public interest and search for truth should prevail over the litigation privilege doctrine such that ‘unless the purpose of submission to the legal

37 In this action a group of Colombian farmers were seeking damages for environmental effects of industry on their land. They had secured insurance against their litigation costs in the action, and the defendant argued that the terms of the insurance policy should be disclosed in order to assess the claimants’ ability to pay costs should the action fail.

38 *Arroyo*, note 10 above, para 69.

39 *Ibid* para 60.

40 *Ibid* para 64: ‘If an ATE policy is in wholly standard terms. . . there may be no viable claim for privilege (or in any event no practical point in asserting privilege) as every aspect of the policy will already be in the public domain.’

41 *Ibid* para 60.

42 *Ibid* para 69.

adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply'.⁴³ Moreover, the purpose is construed by the court objectively, and from the perspective of the person who commissioned the creation of the document, regardless of the author.⁴⁴

One might argue that the dominant purpose of a document created by a third party funder as part of their own case due diligence is to assess their *financial interest* in the conduct of litigation, rather than the conduct of the litigation itself, and thus documents created by a third party funder are not protected by litigation privilege. The timing of document creation may also be important. In *Winterthur*, where documents assessing the facts of the case were created prior to entering into an ATE policy, it was held that 'the dominant purpose was to make a decision on whether the ATE policy would be issued and the potential claim funded. If the policy was not issued, then there would be no litigation'.⁴⁵

An early case due diligence memorandum by a potential third party funder, prior to a commitment to finance litigation, could be viewed in the same terms, its purpose being to determine whether to enter into an agreement to fund litigation, rather whether to litigate. However, these enquiries often amount to the same thing – impecunious parties may not be able to pursue a claim at all if funding is not available. The availability of insurance or funding frequently provides tactical options that would not otherwise exist, and so it could be said that documents relating to exploring the possibility of insurance or funding in fact reflect litigation strategy.

This, however, remains an open question. It is also worth noting that this scenario presents additional arguments as to relevance. Specifically, if a party opposing the disclosure of such documents successfully argues that the documents are not relevant to the merits of the underlying claim, then it could prevent their disclosure without the court resorting to analysis of these complex privilege issues. The question of redaction is also raised.⁴⁶

United States. Under the American work-product doctrine 'documents should be deemed prepared "in anticipation of litigation", and thus within the scope of the Rule, if "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation"'.⁴⁷

43 *Waugh v British Railways Board* [1980] AC 521, 533 (Wilberforce LJ, for the majority).

44 *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027 at 1037.

45 *Winterthur*, note 11 above, para 91.

46 Where a document is partly privileged by containing reference to legal advice, it may be redacted. *The Sagheera* [1997] 1 Lloyd's Rep 160.

47 *US v Adlman*, 134 F 3d 1194, 1202 (2d Cir 1998) (quoting Wright, Charles, Miller, Arthur and Richard Marcus, 8 *Federal Practice & Procedure* § 2024, at 343 (1994)) (emphasis in original).

However, lawyer fee arrangements have been held not to reveal the mental impressions, thoughts or conclusions of an attorney, and so not to be protected by the work–product doctrine.⁴⁸ In the case of the fee agreement between client and third party funder, we would contend that the same analysis ought to apply as in the English case of *Arroyo*, that exposure of negotiation documents and fee agreements with third party funders would represent in itself a disclosure of the funding aspects of litigation strategy.

Certainly, ‘the [work-product] doctrine has been held to protect work performed by those “enlisted by legal counsel to perform investigative or analytical tasks to aid counsel in preparation for litigation”’.⁴⁹ This in itself indicates that due diligence materials produced by the third party funder ought to be within the scope of the doctrine, as part of the preparation for litigation.

There also exists a distinction between ‘opinion work product’, which lies in documents evidencing ‘mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation’,⁵⁰ and ‘fact work product’, which includes all other documents prepared for litigation and ‘may encompass factual material’.⁵¹ The former has a higher threshold of protection from discovery,⁵² whereas the latter is open to discovery on a showing by the applicant party of a ‘substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means’.⁵³ Anything relevant to a matter produced by a third party funder representing opinion work product ought to be offered a high level of protection.

Moreover, to the extent that the third party funder’s work–product is a synthesis of factual data provided by the party or its lawyer, this ought to be protected. Only if the funder’s work-product deals with new information resulting from the funder’s own investigations does it seem there is any significant likelihood of production being required. However, a ‘substantial equivalent’ of the information may be available elsewhere already and the applicant would need to demonstrate a ‘substantial need’ for its disclosure in order to prepare its case.

48 *Montgomery County v Microvote Corp*, 175 F 3d 296, 303 (3d Cir 1999) (stating ‘the fee arrangement letter does not come within the ambit of the work-product privilege’); *Murray v Stuckey’s Inc*, 153 FRD 151, 153 (ND Iowa 1993) (‘Nor are [fee arrangements] prepared in anticipation of litigation such that work-product privilege would ordinarily apply’).

49 *Gucci America, Inc v Guess?, Inc*, 271 FRD 58, at *74 (SDNY 23 September 2010) (quoting *Costabile v Westchester, New York*, 254 FRD 160, 164 (SDNY 2008)).

50 Fed R Civ P 26(b) (3) (B).

51 *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F 3d 180, 183 (2d Cir 2007).

52 *US v Adlman*, 134 F 3d 1194, 1204 (2d Cir 1998). See also Fed R Civ P. 26(b) (3) (B).

53 Fed R Civ P 26(b) (3).

Civil law confidentiality and disclosure to third party funders

As discussed above in the second section, in civil law countries, the lawyer has a duty to protect the confidentiality of all information regarding a client that comes into his or her possession. This is based on the ethical rules of the profession or the applicable domestic criminal code, rather than the rules of evidence (which tend to be limited in their demands in civil law countries). Here we illustrate this distinction from the common law through summaries of the German, French and Swiss requirements of confidentiality.

Germany

In Germany, under the Criminal Procedure Code,⁵⁴ client documents held in a lawyer's possession are protected from disclosure. Indeed, in the absence of consent of the client, a lawyer may not disclose confidential information or documents obtained in the course of handling a matter.⁵⁵ However, documents not under the lawyer's control are not protected from disclosure. As long as a German in-house lawyer is admitted to practise as an attorney in Germany, they may also refuse to provide testimony.

FRANCE

In France, the private practising lawyer (or *avocat*) is bound by professional confidentiality under the New Criminal Code.⁵⁶ The lawyer must not divulge information obtained from the client. Material written by the lawyer in relation to a matter, and correspondence exchanged between the lawyer and the client,

54 German Criminal Procedure Code, s 97: 'Aufzeichnungen, welche die in § 53 Abs. 1 Satz 1 Nr. 1 bis 3b Genannten über die ihnen vom Beschuldigten anvertrauten Mitteilungen oder über andere Umstände gemacht haben, auf die sich das Zeugnisverweigerungsrecht erstreckt' (available at www.gesetze-im-internet.de/stpo/_97.html).

Unofficial translation by the German Federal Ministry of Justice: '2. notes by persons specified in Section 53 subsection (1), numbers 1 to 3b, concerning confidential information entrusted to them by the accused or concerning other circumstances covered by the right of refusal to testify' (available at www.iuscomp.org/gla/statutes/StPO.htm) where under section 53(1).3 attorneys-at-law are an included class of persons with the right to refuse to testify.

55 German Criminal Procedure Code, s 203, note 9 above.

56 French New Criminal Code, Art 226-13: 'La révélation d'une information à caractère secret par une personne qui en est dépositaire soit par état ou par profession, soit en raison d'une fonction ou d'une mission temporaire, est punie d'un an d'emprisonnement et de 15000 euros d'amende' (available at www.legifrance.gouv.fr/affichCode.do?sessionId=742CE22FE71667CE52E98F03DEF9E9EB6tpdjo12v_2?idSectionTA=LEGISCTA000006181756&cidTexte=LEGITEXT000006070719&dateTexte=20120117).

Unofficial translation by John Rason Spencer QC: 'The disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year's imprisonment and a fine of €15,000' (available at <http://legislationline.org/documents/section/criminal-codes>).

is also protected and the lawyer must not divulge it.⁵⁷ The client is not himself bound by this obligation and can disclose confidential material as, and to whom, he wishes. Further, in-house lawyers (*juristes d'entreprise*) are accorded separate status in France from the *avocat*. While in-house lawyers must respect professional secrecy relating to 'business secrets', in legal proceedings there is no protection of documents exchanged between the in-house counsel and their 'client'.

The result, therefore, is very similar in these two civil law examples. The lawyer must keep confidential information received from the client, bound by criminal codes. But the information held by others – the client, or in this case a third party funder – is not part of that confidentiality and is open to scrutiny by the courts if they so desire. Moreover, a court in a civil law system will have the opportunity to require from the *parties* the production of any documents in their control that the court deems relevant to reaching the truth of matters in dispute. Critically, in France care must be taken regarding the provision of legal advice by in-house lawyers. As the requirements of confidentiality do not extend to them in legal proceedings, written legal advice should be limited to external counsel.

Such outcomes may surprise a common law jurist, but are fundamentally shaped by the differing evidentiary requirements and inquisitorial nature of civil law judicial systems. It is worth noting, however, that wide-ranging orders for document production (which are customary in common law jurisdictions) are not typical of civil judicial procedure.⁵⁸ Parties, in having no obligation to produce documents they do not wish to disclose to support their positive case, will likely not have to produce any of the document classes at issue here. There is, therefore, not the same amount of emphasis placed on a party protecting its interests to privacy in considering its litigation strategy, which has given rise to the litigation and work-product privileges in the common law system.

57 French Law of 31 December 1971, Art 66-5: 'En toutes matières, que ce soit dans le domaine du conseil ou dans celui de la défense, les consultations adressées par un avocat à son client ou destinées à celui-ci, les correspondances échangées entre le client et son avocat, entre l'avocat et ses confrères à l'exception pour ces dernières de celles portant la mention "officielle", les notes d'entretien et, plus généralement, toutes les pièces du dossier sont couvertes par le secret professionnel' (available at www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068396&dateTexte=vig).

Unofficial translation by authors: 'Whether in the context of general legal counselling or of legal advice given in relation to a defence, all of the following situations are covered by professional secrecy: advice given by an attorney to his client; any correspondence exchanged between a client and his lawyer; any correspondence exchanged between a lawyer and others in the legal profession (with the exception of correspondence labelled "official"); meeting notes; and, more generally, all documents forming part of a file.'

58 See, eg, Oliver Bolthausen and Peter Acker, 'Obtaining discovery in international arbitral proceedings: the European v American mentality' (2008) 74(3) *Arbitration* 225–236.

SWITZERLAND

The situation is different under Swiss law. Confidentiality is guarded in Switzerland by attorney secrecy (or *Anwaltsgeheimnis*), which requires that a lawyer keep secret information that the client intends to keep secret, and which is in fact secret, both under professional obligations and the Swiss Criminal Procedure Code.⁵⁹ This does not apply to in-house counsel.⁶⁰ Swiss civil procedure first gives effect to this secrecy requirement by a right of attorneys to refuse to give testimony,⁶¹ as with the French and German systems. However, unlike the positions in France and Germany, since 2011 under Swiss federal law, the client and third parties may also refuse to disclose all attorney correspondence to the extent that it relates to the representation of a party, on the basis of this attorney secrecy.⁶²

59 Swiss Criminal Procedure Code, Art 321: '1. ... Rechtsanwälte, Verteidiger, Notare, Patentanwälte... zur Verschwiegenheit verpflichtete Revisoren... das ihnen infolge ihres Berufes anvertraut worden ist oder das sie in dessen Ausübung wahrgenommen haben, werden, auf Antrag, mit Freiheitsstrafe bis zu drei Jahren oder Geldstrafe bestraft' (available at www.admin.ch/ch/d/sr/311_0/a321.html).

Unofficial translation by the Swiss Federation: '1. Any person who in his capacity as a... lawyer, defence lawyer, notary, patent attorney... subject to a duty of confidentiality under the Code of Obligations... discloses confidential information that has been confided to him in his professional capacity or which has come to his knowledge in the practice of his profession shall be liable to a custodial sentence not exceeding three years or to a monetary penalty' (available at www.admin.ch/ch/e/rs/311_0/a321.html).

60 Basler Oberholzer, Kommentar zum Strafrecht II (2nd edn, Basel, 2007), Swiss Criminal Procedure Code, Art 321, at note 5.

61 See Swiss Civil Procedure Code, Art 166: 'Eine dritte Person kann die Mitwirkung verweigern:... soweit sie sich wegen Verletzung eines Geheimnisses nach Artikel 321 StGB' (available at www.admin.ch/ch/d/sr/272/a166.html).

Unofficial translation by the Swiss Federation: 'Any third party may refuse to cooperate:... to the extent that the revelation of a secret would be punishable by virtue of Article 321 SCC' (available at www.admin.ch/ch/e/rs/272/a166.html).

62 Swiss Civil Procedure Code, Art 160:

'1. Die Parteien und Dritte sind zur Mitwirkung bei der Beweiserhebung verpflichtet. Insbesondere haben sie:

- a. als Partei, als Zeugin oder als Zeuge wahrheitsgemäss auszusagen;
 - b. Urkunden herauszugeben; *ausgenommen ist die anwaltliche Korrespondenz, soweit sie die berufsmässige Vertretung einer Partei oder einer Drittperson betrifft;* (emphasis added)
 - c. einen Augenschein an Person oder Eigentum durch Sachverständige zu dulden.'
- (Available at www.admin.ch/ch/d/sr/272/a160.html.)

Unofficial translation by the Swiss Federation:

'1. Parties and third parties have a duty to cooperate in the taking of evidence. In particular, they have the duty:

- a. to make a truthful deposition as a party or a witness;
- b. to produce the physical records, *with the exception of correspondence with lawyers provided it concerns the professional representation of a party or third party;* (emphasis added)
- c. to allow an examination of their person or property by an expert.'

(Available at www.admin.ch/ch/e/rs/272/a160.html.)

What qualifies as attorney correspondence is yet to be clarified by court ruling, but it does *not* extend to where the attorney does not act in their role as attorney,⁶³ or to communications with in-house counsel.⁶⁴ In essence, this is analogous to the American work–product doctrine or English litigation privilege, except that it covers all legal advice, rather than being limited to communications in contemplation of litigation. Further protection also exists within the Swiss Civil Procedure Code that it has been argued would allow a third party funder to avoid any duty to testify if an opposing party sought to compel it.⁶⁵

In summary, owing to this powerful new protection that includes third parties, Swiss attorney secrecy now appears to shield any otherwise confidential attorney correspondence that could come into a third party funder’s possession for due diligence purposes and contemplation of litigation. There is no question of waiver in this context by documents passing out of the hands of the client, as there can be under the common law. Care ought to be taken, though, to consider the position of in-house counsel. The internal work of in-house counsel does not share this protection, and may only be guarded from a production order by other, potentially weaker, protections regarding the divulging of trade secrets.⁶⁶

As a final reminder, the scope of protection under all civil law systems discussed here is tempered by a requirement that a production order is made by the court. Parties would not be expected to divulge any of the documents at issue here as a matter of course, as they would in the discovery process that prevails in a common law approach to litigation.

Privilege in international arbitration

In the international arbitration context, many systems of law and rules may come to bear, either on the merits or on the procedure governing this quasi-judicial approach to dispute resolution. While evidentiary rules in judicial proceedings are often strictly applied, the same cannot be said of international arbitration. Furthermore, while privilege in international arbitration is well recognised and respected, it is not very well developed in terms of fine detail. In fact, there are no codified international arbitration rules that a tribunal must apply when faced with a question of privilege, and

63 Basler Schmid, *Kommentar zur schweizerischen Zivilprozessordnung*, Basel 2010, Swiss Civil Procedure Code, Art 160, at note 19.

64 Schmid, *Swiss Civil Procedure Code*, Art 160, at note 20.

65 See A Frischknecht and V Schmidt, ‘Privilege and Confidentiality in Third Party Funder Due Diligence: The Positions in the United States and Switzerland and the Resulting Expectations Gap in International Arbitration’, 8 *TDM* 4, 21–22.

66 *Ibid.*, 20–21, 23.

very few arbitral institution rules even mention privilege in any context.⁶⁷ Rather, most international arbitration rules ‘merely state that the arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of evidence’.⁶⁸ As a result, parties to international arbitrations enjoy the luxury of flexibility with regard to evidentiary matters. But it cannot be denied that such luxury brings with it a certain level of unpredictability and, at times, conflicts with national laws.

The concept of privilege in international arbitration is handled through a complex interaction of institutional rules and domestic laws. For example, as discussed in greater detail below, in the absence of clear or express privilege rules, arbitral tribunals may consider the following when addressing a question of privilege: (a) the *lex arbitri*; (b) the law of the jurisdiction where the discovery is being sought;⁶⁹ (c) in the case of commercial arbitration, the governing law set out in the parties’ arbitration agreement; (d) the general principles of ‘equality and fairness as between the parties (without reference to national laws), particularly if they are subject to different legal or ethical rules;⁷⁰ and/or (e) ‘the expectation of the parties and their advisors at the time the legal impediment or privilege is said to have arisen’.⁷¹ Indeed, all of these considerations could be rendered unnecessary by the inclusion of designated rules to determine privilege in the parties’ original arbitration agreement.

It is worth noting that references to ‘privilege’ in international arbitration rules of evidence may also be taken to cover the professional civil law protections of attorney secrecy in civil law jurisdictions.⁷² But, as a review will demonstrate, the evidentiary rules of international arbitration institutions do not explicitly offer guidance on the civil law approach, because to the extent that the concept is mentioned at all, they refer to ‘privilege’ (which, as shown above, is a common law concept) rather than ‘attorney secrecy’.

67 See, eg, ICDR International Arbitration Rules, Art 20.6, AAA International Arbitration Rules of 2009, Art 20.6 and AAA Commercial Arbitration Rules of 2009, Rule 31(c) (all stating that the tribunal or arbitrator ‘shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and a client’). See below for further details.

68 Daria Kozłowska, ‘Privilege in the multi-jurisdictional area of international commercial arbitration’ (2011) 14(4) Int ALR 128–137; see, eg, UNCITRAL Arbitration Rules of 2010, Art 27.4; UNCITRAL Model Law of 2006, Art 19.2; Swiss Rules on International Arbitration of 2006, Art 25.7; SCC Arbitration Rules of 2010, Art 26.1.

69 Bearing in mind that ‘[n]ational arbitration statutes are uniformly silent on the existence and treatment of privilege’. Gary B Born, *International Commercial Arbitration* (2009), 1911.

70 Klaus Peter Berger, ‘Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion’ (2006) 22 Arb Int’l 50.

71 Carter, note 2 above.

72 Kozłowska, note 68 above.

International commercial arbitration

The *IBA Rules on the Taking of Evidence in International Arbitration* (the ‘IBA Rules’) are regarded as a ‘gold standard’, providing a workable set of rules for disclosure of documents. Article 9(2) (b) of the 2010 IBA Rules provides that the tribunal shall exclude from evidence or production any document where it considers there to be a ‘legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable’. The use of the Article 9(2) (b) power is expanded on by Article 9(3), where the factors to be considered ‘insofar as permitted by any mandatory legal or ethical rules that are determined by [the tribunal] to be applicable’ are:⁷³

1. whether the communication was with regard to the giving of legal advice;
2. whether the communication was regarding settlement negotiations;
3. whether there was any possible waiver of privilege;
4. the dovetailed considerations of the parties’ expectations and the need for fairness and equality between the parties.

Article 9(3) subparts (a) and (b) explicitly recognise something much like the common law concepts of litigation privilege and the ‘without prejudice’ doctrine (ie, the doctrine that protects from disclosure documents relating to settlement negotiations). Significantly, however, this article places some emphasis on due process rationales by drawing out party expectations and fairness as explicit considerations. Thus, the factors above are generally considered to widen the potential scope of a privilege on two bases: (i) that it is fairest to apply the privilege expected by the party relying on greater breadth, rather than surprising that party with narrower protection as the proceedings continue; and (ii) that the opposing party may therefore enjoy greater confidentiality, with regard to its own communications, than it had expected.⁷⁴

What is thought a legitimate expectation of a party in the international arbitration context is measured by the ‘closest connection’,⁷⁵ sharing the attitude of the US federal courts, which frequently apply the ‘touch base’ doctrine under which ‘any communication touching base with the United States will be governed by the federal [privilege] rules...’.⁷⁶ It is also a principle common to many European countries when considering professional

73 *IBA Rules on the Taking of Evidence in International Arbitration*, 2010 Article 9(3) (a)–(e).

74 Kozłowska, note 68 above. See also Mosk and Ginsburg, note 1 above.

75 Kozłowska, note 68 above, 130.

76 *Gucci America, Inc v Guess?, Inc*, 271 FRD 58 (SDNY 23 September 2010) (quoting *Golden Trade SrL v Lee Apparel Co*, 143 FRD 514, 521 (SDNY 1992)). In addition, the application of the work-product privilege is determined according to the procedural laws of the forum of the litigation. *Gucci*, 271 FRD at 74 (citing *United States v Adlman*, 134 F 3d 1194, 1202 (2d Cir 1998)).

confidentiality.⁷⁷ This is contrasted with the general rule applied by the court in England that the *lex fori* will determine whether a particular privilege applies to protect a document against disclosure. The leading English text on conflicts of laws states: ‘[i]n the context of English proceedings, whether or not a document is privileged is to be determined by English law; the fact that under a foreign law the document is not privileged or that the privilege that existed is deemed to have been waived is irrelevant.’⁷⁸

Commercial arbitration institutional rules are typically less explicit than the IBA Rules. For example, under the ICC Rules, the law governing the merits of a dispute is left either to agreement between the parties (say, for example, in the arbitration provision of the underlying commercial contract), or failing that, to the tribunal’s determination.⁷⁹ The tribunal is further empowered to make orders to protect the confidentiality of the proceedings.⁸⁰ But the ICC Rules do not say anything explicit or even tangential on the admissibility of privileged documents. However, as with investment treaty arbitration, as we will see below, the IBA Rules, which do address privilege and admissibility, are frequently overlaid on arbitral institutional rules.

In any event, arbitration remains a flexible system, and the provisions of IBA Article 9(3) are not binding unless they are agreed on by the parties or formally adopted by the arbitration tribunal. As is stated in the preamble, ‘the [IBA] Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration...’.⁸¹ Indeed, ‘the new provision (Article 9(3)) leaves enough room for a flexible approach and does not interfere with the substance of domestic privilege rules or with the complex conflict of laws issues which prevail in the area of privileges’.⁸² So, the considerations already discussed in the second and third sections above remain relevant, and a detailed answer on what privilege will govern in a commercial international arbitration is in part a question of national law.

Choice of evidentiary rules and national law

While national law may not directly impinge on investment tribunals, the systems of international commercial arbitration are more likely than investment arbitration tribunals to be governed by the laws of the jurisdiction where the arbitration is seated. It therefore follows that the powers and choices allowed above are likely to be influenced by the domestic legal authority from which such an arbitral tribunal’s jurisdiction is derived. However, it is actually the case that the typical approach of nations has been

77 Craig Tevendale and Ula Cartwright-Finch, ‘Privilege in International Arbitration: Is It Time to Recognize the Consensus?’ (2009) 26 J Int Arb 6, 823–839.

78 Dicey, Morris and Collins, *The Conflict of Laws* (14th edn, 2006), para 7-015.

79 ICC Rules 2012, Art 21(1).

80 *Ibid* Art 22(3).

81 *IBA Rules*, 2010, Preamble, para 2.

82 Berger, note 70 above.

to allow parties to arbitrations, and tribunals, wide discretion to depart from evidentiary rules that would be followed in their own courts. This article will now summarise the statutory and practical position of international commercial arbitrations seated in the example countries.

ENGLAND AND WALES

The Arbitration Act 1996 provides that evidentiary rules can be agreed between the parties, and, failing that, arbitral tribunals have wide discretion.⁸³ The tribunal can order disclosure similar to standard disclosure in English court proceedings, in which the parties must disclose all documents in their possession or control which support, or are detrimental to, their case. However, it has been suggested that this is becoming less common.⁸⁴

UNITED STATES

There are no instructions on evidentiary procedure within the Federal Arbitration Act or in the Uniform Arbitration Act. Wide-ranging American discovery procedure is not common,⁸⁵ and some aspects of American discovery procedure (interrogatories and requests to admit) are presently disallowed by all major US arbitral institutional rules.⁸⁶ In practice, in international arbitration, parties and arbitrators often adopt the IBA Rules.

GERMANY

Parties are free to determine the procedural rules in arbitration in Germany. They can also determine the rules on disclosure. However, if there is no agreement, the tribunal is generally free to determine the admissibility of evidence.⁸⁷

⁸³ Arbitration Act, s 34.

⁸⁴ Further, in *EDO Corporation v Ultra Electronics [2009] EWHC 682 Comm and Travelers Insurance Co v Countrywide Surveyors [2010] EWHC 2455 (TCC)* it was held that English court pre-action disclosure orders are not available if the parties contractually agreed to arbitrate.

⁸⁵ Oliver Bolthausen and Peter Acker, 'Obtaining discovery in international arbitral proceedings: the European v American mentality' (2008) 74(3) *Arbitration* 225–236, 234–235.

⁸⁶ J D Rieyman, *How the Creep of United States Litigation-Style Discovery and Appellate Rights Affects the Efficiency and Cost Efficiency of Arbitration in the United States* (New York: Hoguet Newman & Regal LLP, 2005).

⁸⁷ German Civil Procedure Code, s 1042; 'Allgemeine Verfahrensregeln... (4) Soweit eine Vereinbarung der Parteien nicht vorliegt und dieses Buch keine Regelung enthält, werden die Verfahrensregeln vom Schiedsgericht nach freiem Ermessen bestimmt. Das Schiedsgericht ist berechtigt, über die Zulässigkeit einer Beweiserhebung zu entscheiden, diese durchzuführen und das Ergebnis frei zu würdigen' (available at www.gesetze-im-internet.de/zpo/_1042.html).

Unofficial translation by the German Institution of Arbitration and the German Federal Ministry of Justice: 'General rules of procedure... (4) Failing an agreement by the parties, and in the absence of provisions in this Book, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate. The arbitral tribunal is empowered to determine the admissibility of taking evidence, take evidence and assess freely such evidence' (available at www.trans-lex.org/600550).

There is a growing tendency to use the IBA Rules, thereby enabling the parties to insist on a somewhat limited disclosure of documents, if they can establish their relevance to the case.

FRANCE

French tribunals have discretion to compel production of evidence.⁸⁸ They are also free to establish rules of evidence. In practice, tribunals tend to seek the input of the parties. When the parties to an arbitration are from different legal traditions (which is often the case), tribunals typically seek to make a compromise between those different traditions, which will regularly involve use of the IBA Rules in international arbitrations seated in France.

SWITZERLAND

The Swiss rules of international arbitration are very similar to the UNCITRAL Rules, and at Article 24(3) create the same power for a tribunal to order production of evidence as Article 27(4) of the UNCITRAL rules. In Article 25(7) of the Swiss rules, arbitral tribunals are granted the same power to determine admissibility of evidence as in Article 27(3) of the UNCITRAL Rules. Swiss arbitral tribunals frequently apply the IBA Rules.

International investment arbitration

In ICSID arbitration, where the tribunal has broad discretion in the conduct of proceedings – and, in particular, under Arbitration Rule 34, to determine the admissibility of evidence – the IBA Rules are frequently adopted as a guide to procedures for disclosure of evidence.⁸⁹

However, the ICSID Rules do not address issues of privilege directly as it applies between the parties. Article 42(1) of the Washington Convention,⁹⁰ which established the ICSID, provides: '[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such

88 French New Code of Civil Procedure, Art 1467: '... Si une partie détient un élément de preuve, le tribunal arbitral peut lui enjoindre de le produire selon les modalités qu'il détermine et au besoin à peine d'astreinte' (available at www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000023450804&cidTexte=LEGITEXT00006070716&dateTexte=20120119&oldAction=rechCodeArticle).

Unofficial translation by authors: '... Where a party has in his possession some evidence, the arbitral tribunal may enjoin him to produce the same in a manner it determines. A penalty for any delays may be imposed by the arbitral tribunal where necessary.'

89 See, eg, *Tidewater Inc et al v Venezuela* (Procedural Order No 1 of 29 March 2011).

90 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) (entered into force 14 October 1966), 17 UST 1270, 575 UNTS 159 ('Washington Convention').

rules of international law as may be applicable.’ Article 43 of the Washington Convention permits the tribunal to require the parties to produce documents or other evidence. Rule 34 of the ICSID Arbitration Rules provides, ‘[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value’. Rule 34(2) also authorises the tribunal to call on the parties to produce documents, witnesses and experts.

Under the UNCITRAL Rules,⁹¹ a tribunal has the power to require the production of evidence,⁹² and ‘shall determine the admissibility, relevance, materiality, and weight of the evidence offered’.⁹³ Once again the tribunal has wide discretion to choose its evidentiary procedures. However, while not mentioning privilege rules directly, the question of admissibility is left to the tribunal.

In *Glamis Gold Ltd v United States*,⁹⁴ a NAFTA claim under the UNCITRAL arbitration rules, the tribunal applied the US rules of privilege to its analysis of document requests because the parties had agreed in their submissions that the privilege rules of the United States would apply. There, the tribunal ruled that certain documents would be withheld from disclosure based on the US privilege rules. In several cases, however, investment arbitration tribunals have confirmed that national laws do not automatically apply, and the tribunal remains at liberty to choose its own privilege rules. It is apparent from the *Glamis Gold* case, and from others under the ICSID rules, that international investment arbitration tribunals recognise the important principles underlying the legal professional and litigation/work-product privilege, and will refuse to grant document requests that trespass on that privilege. This point is also implied in the ICSID Arbitration Rules, which state that the tribunal may open a hearing to others besides the disputing parties if there is no objection, and if such a hearing is granted, the tribunal shall establish ‘procedures for the protection of proprietary or privileged information’.⁹⁵

In sum, ICSID and UNCITRAL tribunals are very adept at reaching ‘just’ outcomes without dealing with the technicalities of privilege analysis. The fact that international proceedings are not bound by the same technicalities as domestic law is arguably something that these tribunals (and the parties

91 UNCITRAL Rules do not only apply to investor–state arbitrations, and can (and often are) used in commercial arbitration disputes.

92 UNCITRAL Rules, Art 27(3): ‘At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.’

93 *Ibid* Art 27(4).

94 *Glamis Gold Ltd v United States*, UNCITRAL (Decision on the Parties’ Requests for Production of Documents Withheld on Grounds of Privilege of 17 November 2005) para 20.

95 ICSID Arbitration Rules, Rule 32(2).

to the proceedings) value and would willingly preserve. In the particular case of ICSID, while the internal dynamics of an ICSID arbitration will remain protected, where parties to such proceedings clash on the level of confidentiality and privilege to be maintained, their dispute may be settled by the tribunal's inherent powers to make orders and provisional measures under Rule 39(1) of the ICSID Arbitration Rules, and Article 47 of the Washington Convention respectively.

Tribunal's choice of privilege law

Given the powers open to tribunals on the issues of evidence and privilege, under the IBA (institutional and national rules), there is no simple rule as to which privilege rules a tribunal will apply to a potentially privileged document, particularly where this arises in the context of a document that has been provided to a third party, such as a potential insurer or funder.

An international arbitration tribunal will often apply a choice of law analysis to determine the appropriate rules of privilege; the options include:

- the law of the seat of arbitration;
- the law governing the substance of the dispute; or
- the law of the arbitration agreement.

In the alternative, as discussed above, tribunals may choose to look at legitimate expectation and a 'closest connection test'⁹⁶ via:

- the law of the country where the communications took place;
- the law of the country where the documents are held;
- the law of the country with the closest connection to the events;
- the law where the lawyer with whom the communications took place is qualified;
- the law of the domicile of the party claiming privilege.

Other considerations include more pragmatic decisions on privilege based on the materiality of the documents at issue, or a desire to afford the widest possible protection of potentially privileged documents. Indeed, arbitration tribunals tend to approach this analysis mindful of the public policy rationale underlying legal privilege doctrines and the potential for challenges to the arbitration award on due process or public policy grounds. Whether enforcement would be under the New York Convention⁹⁷ (in the case of international commercial arbitration) or the Washington Convention (in the case of investor–state arbitration), the tribunal will endeavour to ensure that the procedure it adopts will not be vulnerable to challenges on such grounds.

96 Kozłowska, note 68 above. See also Mosk and Ginsberg, note 1 above.

97 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, 21 UST 2517, TIAS No 6997, 330 UNTS 38 ('New York Convention').

It is entirely plausible that the domestic legal frameworks represent varied expectations of parties and lawyers involved in an international arbitration. Therefore, where the tribunal is left to decide these issues, the most practical result that is likely to receive the acceptance of all parties is a 'most-favoured-nation' approach. This mechanism applies the strongest protection that any of the parties or their lawyers might have expected in their domestic regime to all participants in the arbitration. In this way, no party receives less protection than they would have expected and the restriction of access to an opponent's materials is no different to the normal regime that the most protected party would have expected.

Conclusions and recommendations

In litigation, we have seen that specific rules exist on litigants' rights in the field of privilege or confidentiality. Considerable uncertainty remains as to how these rules apply where documents that would otherwise benefit from these protections are shared with third party funders.

- US law remains unsettled: while there appears to be a consensus that providing documents to third party funders is a waiver of attorney–client privilege, work-product privilege may remain intact. Parties to litigation in the United States should be very cautious about sharing documents with potential funders that they would not want to be disclosed in litigation. Documents created in negotiating the relationship, such as the funding agreement itself, would likely be protected as work–product, but documents relating to the merits of a dispute itself may well become discoverable as a result of disclosure to a potential funder.
- Under English law, we have seen that protection of privileged documents disclosed to third party funders is possible where the transfer of documents takes place under circumstances involving an express agreement between the discloser and disclosee to continue privilege with appropriate undertakings.
- The traditional civil law approach, as in force in Germany and France, affords no protection from discovery orders to documents outside the sole control of the lawyer, and in France also excludes in-house counsel from that protection. But equally, these regimes do not compel the production of such documents unless the court explicitly required them to be produced, which, as discussed above, is rare.
- Switzerland has recently moved towards a system allowing complete protection from discovery of correspondence between a party and its lawyer, but as in France, in-house counsel are excluded from the underpinning attorney secrecy doctrine.

With such divergent results in the litigation sphere, the question of varying expectations with regard to discovery protection in a multifaceted international arbitration context is almost inevitable. Both national and institutional rules give an opportunity for parties to an international arbitration to limit the scope of discovery and influence a tribunal's decision on what types of documents to include. It is therefore open to the parties to include an agreement on these matters in the arbitration agreement itself, or to seek – from the outset of an arbitration – to limit the scope of discovery in the arbitration proceedings either by agreement between the parties or by order of the tribunal. Where no explicit rules of evidence have been adopted and no restrictions on discovery have been made at the outset of proceedings, the threat of a potential discovery order if an opposing party becomes aware of the third party funder relationship could be very real.

Regardless of the circumstances of privilege, a party to either litigation or arbitration would be wise to disclose documents to third party funders *only after* it has secured a non-disclosure and common interest agreement, to clearly define the conditions under which disclosure to the third party funder is made. Protection from waiver of litigation privilege adds further incentive to do so under English law. Such confidentiality agreements should contain an explicit undertaking from the third party funders to the following effect:

- the documents being provided to the third party funder are privileged and the benefit of the privilege belongs to the client;
- the documents have been prepared, compiled and provided to the third party funder for the sole purpose of pursuing arbitration or litigation proceedings;
- none of the communications between the client or its lawyers and the third party funder constitutes a waiver of any of the benefits of the privilege attaching to those communications;
- the third party funder undertakes to hold the documents disclosed to them in complete confidence and will not disclose the documents to any other person without the prior written consent of the client.

We note that such considerations are beginning to take institutional effect in the context of litigation. A newly established Association of Litigation Funders of England and Wales has recently released a Code of Conduct for Litigation Funders.⁹⁸ This Code enjoins funders to 'observe the confidentiality of all information and documentation relating to the

⁹⁸ Ross, Alison, 'New era for third-party funding in the UK – and beyond?', *Global Arbitration Review*, 23 November 2011, available at www.globalarbitrationreview.com/news/article/29983/new-era-third-party-funding-uk-8211-beyond.

dispute to the extent that the law permits, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the Funder and the Litigant'.⁹⁹

Meanwhile, some international arbitral tribunals have endorsed a similar approach. In *Glamis Gold*, the Tribunal 'recognize[d] that it is generally understood that one reason parties choose arbitration is to avoid the relatively extensive document production practices of courts generally and United States courts in particular'.¹⁰⁰ Third party funding is unlikely to change that sentiment. But whether third party funding is likely to lead to aggressive discovery in arbitration is a question that cannot yet be answered. The fact that the civil law protections described above are rather less robust in this context has certainly not led to a deluge of orders from judges or arbitrators, and US discovery remains foreign to jurists in that tradition. What we have been able to establish here, however, is that third party funding has the potential to expose to discovery documents that the common law practitioner would normally expect to shield. The recognition of this fact can help to reduce the chances of a practitioner or his client receiving an unwelcome surprise.

Furthermore, the common law practitioner should take care when considering representation of clients in civil law arbitral contexts.¹⁰¹ An expectation of privilege where all parties to the arbitration are grounded in the civil law, with a *lex arbitri* and seat also entrenched in a civil law jurisdiction, leaves open the possibility that an arbitral tribunal (knowing of the disclosure of documents to a third party funder) would order such documents to be produced, if requested by the opposing party, and deemed relevant and material to the outcome of the case.

99 Code of Conduct for Litigation Funders, Article 5 (available at www.judiciary.gov.uk/NR/rdonlyres/75D4F49E-BDC6-40BC-B379-B5A1DA82BED9/0/CodeofConductforLitigationFundersNovember2011.pdf).

100 *Glamis Gold Ltd v United States*, UNCITRAL (Decision on the Parties' Requests for Production of Documents Withheld on Grounds of Privilege of 17 November 2005) para 20, note 1.

101 In Bernhard Meyer-Hauser and Philipp Sieber, 'Attorney Secrecy v Attorney Client Privilege in International Commercial Arbitration' (2007) 73(2) *Arbitration* 169–171, this problem is illustrated with an example from their own practice in arbitration proceedings at the Austrian Federal Economic Chamber, where the seat was Vienna, the law of the contract was Swiss and the claimant and respondent were from eastern and southern Europe respectively. The claimant submitted to the record two letters written by respondent's counsel (a common law trained lawyer). Despite protest that the letters were attorney–client privileged and that they must have been obtained by criminal means, the tribunal ruled that in a civil law matter the possibility of criminal conduct in obtaining communications (although not actually confirmed in the case) must be balanced by the needs of a party to use document to prove the truth of a claim asserted, and the letters were admitted into evidence.