A Dangerous Opinion?
Legal Advice Privilege; Litigation Privilege

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Professional Privilege is a matter that has engaged Courts in considerable exercises in ratiocination. I am indebted to Herbert Smith Freehills, a leading international law firm, for the following summary of the position in English Law:

> There are two types of legal professional privilege, both of which require that the relevant communication or document must be confidential.
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> (1) Litigation privilege – This applies where, at the time the communication or document was created:
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> - litigation was in reasonable prospect; and
> - it was created for the dominant purpose of the litigation.
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> (2) Legal advice privilege – This applies to:
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> - lawyer/client communications for
> - the purpose of giving/obtaining legal advice.
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> Privilege also applies where all or part of a document evidences a privileged communication.
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> In some circumstances privilege can be lost where privileged material subsequently is disseminated.

Generally, the privilege is for the Client to waive or not as he sees fit. A possible exception is where the lawyer has expressed personal views in confidence.

There has been discussion as to whether the rules apply to the giving or obtaining of 'legal' advice by lay advisers or advocates, such as quantity surveyors, engineers, architects, or doctors, especially in arbitration, adjudication, of determinative expertise. 'Legal' in this context, means advice in a legal context and not the prediction of what a Court may do. (According to Justice Oliver Wendell Holmes Jr., the great American jurist, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.[2]" According to Professor Anthony d'Amato[3], "This … has become the standard interpretation of

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[2] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harvard Law Review 460-61 (1897).

[3] Leighton Professor of Law, Northwestern University.

Holmes's prediction theory. Thus a lawyer predicts judicial decisions (which constitute the law), ~~and~~ [as] the meteorologist predicts tomorrow's weather.[4]")

In my early days, it was my practice when faced, as sole arbitrator, with a lawyer for one Party and a non-lawyer for the other, to make an Order that the latter should have such obligations and privileges as would a solicitor in the Court. Another trick I used once was to say that I would order the non-lawyer to disclose his Client's correspondence on condition that the solicitor did the same. I have no idea if that was good law. The solicitor withdrew the application.

The question of what may or may not amount to the Practice of Law was the subject of my 1999 submission to the Florida Bar[5]. The dangerous opinion of my title however, is the proposition that none of the legal debate about privilege in the Court – of whatever geographical jurisdiction - has any bearing upon the business of arbitration or any other determination of facts by private agreement.

When the parties have agreed to have the facts and their private obligations, one to another, determined privately, with or without the assistance of a third party or parties it follows logically that, absent any explicit agreement to the contrary, they intend to give that third party what is required for the decisions to be made. Any relevant facts are therefore disclosable. Their disclosure is voluntary, so far as the Parties in dispute are concerned. Given their agreement, why should it not be?

What a lawyer or other advisor thinks privately about the matter is irrelevant and need not be disclosed. It would do little harm, because a competent third party would disregard it, concerning himself only with relevant evidence and argument. If a relevant opinion is to be expressed by an expert witness, it is a fact that the expert holds that opinion. Similarly, if an argument is advanced by an advocate, it must be that the advocate is of the opinion that the argument properly can be advanced. Arguably, anything else would be counter to the Parties intention, implied by their agreement.

I should say here that my remarks, although applicable to so-called 'adjudication' by agreement (such as that of the FIDIC forms of Contract), may not be applicable to adjudication required by statute, that may be seen as adjunctive to the relevant legal system.

Lawyers in Court are under the supervision of a Judge, who knows the Law – *curia novit lex*. In arbitration, the arbitrator may not be a lawyer at all and, even if legally qualified, may practise in a system other than the Law of the Seat or the Law of the Contract. Thus the general

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[4] D'Amato, Anthony, *A New (and Better) Interpretation of Holmes's Prediction Theory of Law* (2008). Northwestern University School of Law - Faculty Working Papers. Paper 163. http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/163 accessed Wednesday, 09 August 2017.

[5] http://geoffrey.beresfordhartwell.com/Florida.htm April 1999.

principle, that an advocate may not mislead the Court, applies *a fortiori*, in arbitration, by virtue of the agreement of the Parties.

There are few, if any, definitions of arbitration in law but some interest is created by the English declaration of purpose: "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.[6]" The second proposition is rooted in the principle of Party Autonomy – in itself worth a few paragraphs – but the first turns on the single small word 'fair' upon which an essay might well be written[7].

The declaration of purpose is as close to a legal definition as most legal systems get. If arbitration has an ordinary meaning an Englishman intuitively would seek it in the Oxford English Dictionary[8], now available on line[9]. From a number of definitions on the page, that relevant to the present argument is 2.a. "The settlement of a dispute or question at issue by one to whom the conflicting parties agree to refer their claims in order to obtain an equitable decision."[10]

That is the ordinary meaning of the word. No more, no less. The settlement of a question. As to the effect of such a settlement an additional element lies in the second part of the definition: 2.b. *attrib*., as in arbitration bond, arbitration rate, etc. that is accompanied by the example "Arbitration-bond..a bond entered into by two or more parties to abide by the decision of an arbitrator."[11]

So, there are two parts to the ordinary meaning of the word arbitration a) the settlement or determination of the question and b) the bond to abide by the decision of the arbitrator, in other words the arbitration agreement. Although arbitration law general applies only to arbitration following an agreement – often a clause in a wider contract – the process is essentially the determination of the question. The bond, the voluntary act of compliance or the invitation to the State Court to intervene and compel compliance, no longer involves the arbitrator or arbitrators.

So the arbitrator is no Court, he or she has no coercive power. Instead the parties have agreed to take part. Evidence is limited to what the arbitrator actually needs. Nothing more is needed;

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[6] Sub-sections 1(a)&(b), Arbitration Act 1996 - http://www.legislation.gov.uk/ukpga/1996/23/section/1 accessed Wednesday, 09 August 2017.
[7] And has been - *Justice as Fairness: A Restatement* is a 2001 work of political philosophy by John Rawls, a revision of his 1971 classic *A Theory of Justice* (1971). Harvard University Press accessed Wednesday, 09 August 2017.
[8] Published by Oxford University Press, Great Clarendon Street, Oxford OX2 6DP, UK
[9] At http://www.oed.com/ accessed Sunday, 20 August 2017.
[10] http://www.oed.com/view/Entry/10184 accessed Sunday, 20 August 2017
[11] 1768 W. Blackstone *Comm. Laws Eng*. iii. i

nothing more can or should be Ordered. On the other hand, each party must be deemed to intend that nothing relevant should be withheld.

Where does that leave privilege? Well, the parties cannot intend to deploy devices, such as legal privilege, to avoid disclosing anything that will help the arbitrator. The ground for declining to produce any document is not that it is protected by privilege, it need not be produced if it is not necessary for the arbitrator's task. If there is doubt, as there may be when A asks B to disclose a document thought necessary and B declines, the burden of proof is on A. A party seeking disclosure must satisfy the arbitrator *prima facie* that the material may help. If the arbitrator, after hearing both parties (the *ex parte* proceeding without notice is impermissible in arbitration) needs to look at the material, it can be examined. If it seems useful it can be shown; if not, the arbitrator must be trusted to put it out of mind.

If the document is in the hands of a party's lawyer – or other professional – it cannot be protected by privilege. The agreed obligation of the parties is to disclose relevant material. The lawyer is one with his client. Correspondence between them after the event in dispute cannot be causative. Conceivably correspondence before the event could evince an intention and may be evidence explaining the circumstances of the event. However, in arbitration, whether or not a party had an intention - or even sought advice – is not of concern. An arbitrator is concerned with facts – what was done or not done, not what might have been done.

In one of my own arbitrations, a document was found with a handwritten note reading, "We must find a pretext to break this contract." The lawyer whose Client had written the note objected to it. It was a silly objection with the obvious risk that it brought more attention to those words than they deserved. Nevertheless, I had no difficulty in putting the note out of my mind. It was no more than a thought, perhaps even a clue. Be that as it may it was not, and could not be, evidence of whether the contract was broken for good and sufficient reason.

As it happens, the party whose lawyer wrote the note did break the contract, advancing a pretext that was both apparent and unsound, which rather spoils my story.

I have tried to argue that neither a lawyer nor anyone else has a privilege, as they have in Court, against disclosure. That is simply because they don't need it; arbitrators have no coercive power[12], therefore there is no protection necessary. If there is material one doesn't wish to disclose, the arbitrator cannot compel it[13]. Of course that arbitrator may be invited to draw his or her own conclusions; there may be extrinsic evidence about it. Those are risks one takes.

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[12] Except perhaps in the USA; see Federal Arbitration Act 1925, 9 U.S. Code § 7 - *Witnesses before arbitrators; fees; compelling attendance* - https://www.law.cornell.edu/uscode/text/9/7 accessed Saturday, 26 August 2017.

[13] In many jurisdictions a party may seek the assistance of the Court or invite the arbitrator to do so. In the E&W AA 1996: Section 43 *Securing the attendance of witnesses.*

> (1)A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.
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> (2)This may only be done with the permission of the tribunal or the agreement of the other parties.

There may be issues about the role of a party's professional adviser and their professional ethics or rules of conduct. Those remain matters for them. Arbitrators have only the power, like any ordinary woman or man, to refuse to hear anyone whose conduct is beyond the pale.

But that is a story for another day. By the way, if any reader feels that I have failed to make good my early reference to "… any other determination of facts by private agreement", let me apologise to my friends in Adjudication, Expertise, Mediation and the like and say that none of those processes have any coercive power and that, *mutatis mutandis* my arguments apply *a fortiori*[14] to all processes for the determination of facts by private agreement.

For completeness, I should say that by 'facts' in the present context, I mean both fact and law. That is because what is the law, what has been found to be the law as part of the question in dispute, is a fact. No longer in issue, it has been determined.

(3)The court procedures may only be used if—

(a)the witness is in the United Kingdom, and

(b)the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.

(4)A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings.

N.B. The use of the Court invokes the element of coercion and thus subsection (4) provides privilege as a protection. http://www.legislation.gov.uk/ukpga/1996/23/section/43 accessed Saturday, 26 August 2017.

[14] English lawyers are discouraged from using Latin. As a Chartered Engineer, I am under no such restriction and am delighted to use two Latin phrases in the same sentence!