

THE APPLICATION OF LEGAL PROFESSIONAL PRIVILEGE IN NIGERIA-SEATED ARBITRAL PROCEEDINGS*

Abstract

In arbitration proceedings, which have gained traction as a dispute resolution mechanism for the settlement of commercial disputes in Nigeria, the application of legal professional privilege is very crucial in maintaining the balance between the need for disclosure and the obligation to protect the confidentiality of communications between legal practitioners and their clients. Indeed, legal professional privilege is upheld by Nigerian statutes and reinforced by judicial precedents, emphasizing the sanctity of lawyer-client confidentiality. This article provides valuable insights on the extent of the applicability of legal professional privilege in arbitration proceedings seated in Nigeria. It sheds light on how Nigerian courts determine privilege claims, highlighting the need to ensure that disclosure should not breach confidentiality obligations.

Keywords: Arbitration, Communications, Disputes, Disclosure, Legal Practitioners, Nigeria, Privilege.

1. Introduction

Legal professional privilege is widely regarded as one of the oldest and most revered privileges in the realm of evidence law. This privilege was established to primarily safeguard legal practitioners from being compelled to testify against their clients under oath, as doing so would compromise the legal practitioner's integrity and professional ethics.¹ It ensures 'that one who seeks advice or aid from a lawyer should be completely free of any fear that his secrets will be uncovered'.² As noted by Lord Atkin in *Minter v Priest*, 'if a person goes to a professional legal adviser for the purpose of seeing whether the professional person will give him professional advice, communications made for the purpose of indicating the advice required will be protected.'³ As such, the purpose of the legal professional privilege is to encourage clients to freely share information with their legal practitioners that the clients may otherwise withhold in the absence of any assurance that such information would be protected. In theory, such open and honest communication will aid the legal practitioner in offering well-considered and robust professional guidance, while reassuring the client that their communications will not be used against them.⁴ Legal professional privilege covers legal advice between a legal practitioner and a client and all such incidental communications. It also extends to all communications made in the context of and in contemplation of adversarial proceedings and would include communications made with third parties such as third-party witnesses and experts for the purpose of and in contemplation of such proceedings. Indeed, legal professional privilege is relevant in the context of arbitration proceedings, not only litigation proceedings.

2. Brief Introduction to Legal Professional Privilege under Nigerian Law

Under Nigerian law, the lawyer-client relationship is clothed with privilege, based on the oath and honour of a lawyer, who is duty-bound to guard the confidences of his clients.⁵ As held by the Court of Appeal in *Agetu v C.O.P.*⁶

Although a court may have inherent power and authority to, in deserving cases, order the production of any material and relevant document in the course of proceedings, no person or party shall be compelled to produce such document if the person through who or by whom he had possession thereof did not consent to the production.

Similarly, in *First Nation Airways Support Services Ltd v Emirates Airlines Ltd*, the court held that the confidence reposed in a legal practitioner is a privilege 'that cannot and must not be taken for granted and abused by a legal practitioner. It must be zealously guarded'.⁷ Unlike English law, and as discussed in further detail below, Nigerian law does not clearly distinguish between legal advice privilege and litigation privilege. However, statutes, such as the Arbitration and Mediation Act, 2023, the Evidence Act, 2011 (as amended), the Legal Practitioners Act,⁸ and the Rules of Professional

*By Stanley U. NWEKE-EZE, LLB (First Class Honours) (NAU), LLM (Commercial Law) (Cambridge), LLM (International Law) (Harvard), PhD (International Investment Law) (Hong Kong). Admitted to practice law in Nigeria, State of New York, and England and Wales. Email: snweekeze@llm17.law.harvard.edu.

¹Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* (3d ed.1997, Section of Litigation, American Bar Association) 2

² *United States v. Grand Jury Investigation*, (401 F. Supp. 361, 369, Western District of Pennsylvania, United States District Court. 1975).

³ *Minter v Priest* [1930] A.C. 558

⁴ Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Preexisting Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 969-70 (1999).

⁵ In a consideration of the import of Section 192 of the Evidence Act 2011, the court in *Mekwunye v Carnation Registrars Ltd and Anor* (2021) LPELR – 55187 (CA) held that a lawyer is duty bound to guard the confidences of his client except in circumstances where the law permits otherwise.

⁶ *Agetu v. C.O.P* [2020] 13 NWLR (Pt 1741) 245 at pp 264-265

⁷ *First Nation Airways Support Services Ltd v. Emirates Airlines Ltd* (2019) LPELR – 50714 (CA)

⁸ Cap L11, Laws of the Federation of Nigeria, 2004.

Conduct, 2023 appear to provide for legal advice privilege, while litigation privilege, as applicable under the Common Law, continues to apply in Nigeria as Received law.

3. The Application of Legal Professional Privilege in Nigeria-seated Arbitration Proceedings

In the conduct of arbitration proceedings in Nigeria-seated arbitration proceedings, the arbitral tribunal would usually be called upon to order the disclosure of certain information for the parties. In doing so, it is generally important for the tribunal to strike a balance between the principles of legal professional privilege and the need for disclosure of confidential information. This exigency stems from the nuanced nature of legal professional privilege, which safeguards the confidentiality of communications between a lawyer and their client to foster open and candid legal advice. Conversely, disclosure requirements serve the interest of transparency and fairness in arbitral proceedings by ensuring that all relevant information is accessible to the parties involved. While arbitration guarantees confidentiality of its proceedings unlike litigation, the risk of misuse of the information disclosed in the arbitration afterwards still exists, and the possibility of a post-arbitration litigation further aggravates that risk. So, there is a need to carefully consider the limits of legal professional privilege as well as disclosure in arbitration based on necessity and fairness in each instance. That said, the application of legal professional privilege in Nigeria-seated arbitration proceedings is generally based on more flexible principles and determined by the arbitral tribunal in line with the agreement of the parties. In the absence of prior agreement by the parties, and subject to its underlying obligation to act fairly and impartially, an arbitral tribunal is not required under Nigerian law to determine the specific details regarding admissibility of evidence in accordance with a specific piece of legislation. Indeed, Section 31(3) of the Arbitration and Mediation Act, 2023 empowers the arbitral tribunal to determine the admissibility, relevance, materiality, and weight of any evidence. Based on the foregoing, the tribunal has the powers to adopt the principles of legal professional privilege as a basis for determining the admissibility, relevance, materiality, and weight to be attached to lawyer-client communications. In addition, by the default rules of procedure under the Arbitration and Mediation Act, 2023—the Arbitration Rules—the arbitral tribunal may request for the disclosure of documents by any party to the arbitral proceedings⁹ and if the party fails to do, the arbitral tribunal may render its award based on the evidence before it.¹⁰

Essentially, the Arbitration and Mediation Act, 2023 allows the arbitral tribunal the power to determine the balance that would be applied in the determination of the limits and scope of the legal professional privilege and disclosures in the arbitration conducted subject to the said law. In doing so, the arbitral tribunal can be guided by relevant sources of laws regarding legal professional privilege in Nigeria, which are discussed in turns below.

Legal Practitioners Act 1962

The Legal Practitioners Act ('LPA') is a legislative framework that regulates the legal profession in Nigeria. Legal professional privilege extends to all communications made to a legal practitioner in his role as a barrister or as a barrister and solicitor either generally or for the purpose of any office or proceeding in Nigeria.¹¹ Section 24 of the LPA defines a '*legal practitioner*' to mean a person entitled in accordance with the provisions of this Act to practise as a barrister or as a barrister and solicitor, generally or for the purposes of any particular office or proceedings. The importance of this legislation to the principles of legal professional privilege is that it answers the question '*who is a legal professional?*' and for that purpose delimits the persons that can take benefit of the privilege afforded to legal professionals.

Rules of Professional Conduct for Legal Practitioners 2023

The Rules of Professional Conduct for Legal Practitioners ('RPC') 2023 is made by the General Council of the Bar¹² for the purpose of ensuring the maintenance of the highest standards of professional conduct, etiquette, and discipline amongst legal practitioners in its attempt to manage the affairs of the Nigerian Bar Association. Rule 19 of the RPC further emphasises the principles of legal professional privilege and the scope of its application in Nigeria:

- (1) Except as provided under paragraph (3) of this rule –
 - (a) all oral or written communications made by a client to his lawyer in the normal course of professional employment are privileged; and
 - (b) a lawyer shall not knowingly –
 - i. reveal a confidence or secret of his client,
 - ii. use a confidence or secret of his client to the disadvantage of the client, or
 - iii. use a confidence or secret of his client to the advantage of himself or of a third person unless the client consents after full disclosure.
- (2) A lawyer may reveal –

⁹ Arbitration Rules, art. 28(5)

¹⁰ Arbitration Rules, art. 31(3)

¹¹ The Legal Practitioners Act, s 2, stipulates that persons shall be entitled to practice as barrister and solicitor if, and only if, his name is on the roll. It follows therefore that legal privilege applies to legal practitioners in Nigeria in any capacity they operate per section 2 of the LPA.

¹² By section 1 of Legal Practitioners Act, the General Council of the Bar is charged with the responsibility of managing the affairs of the Nigerian Bar Association which includes the enactment of the rules of professional conduct.

- (a) a confidence or secret with the consent of the client or clients affected, after full disclosure to the client;
 - (b) confidence or secret when permitted under these rules or required by law or a court order;
 - (c) confidence or secret necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct; and
 - (d) the intention of his client to commit a crime and the information necessary to prevent the crime.
- (3) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, but a lawyer may reveal the information allowed under paragraph (2) of this rule through an employee.
- (4) A lawyer shall –
- (a) not in any way communicate on the subject of controversy or negotiate or compromise the matter with the other party who is represented by a lawyer; and
 - (b) deal only with the lawyer of the other party in respect of the matter.
- (5) A lawyer shall avoid anything that may tend to mislead an opposing party who is not represented by a lawyer and shall not undertake to advise him as to the law.

By these rules, the core of the legal professional privilege in Nigeria is rooted in the fiduciary duty imposed on legal practitioners in Nigeria for the protection of all oral and written communications made by a client to his lawyer in the normal course of professional employment. The privilege conferred on all such communications does not apply in instances where the client consents to the disclosure; where such disclosure is required by law or a court order; where such communication reveals the intention of the client to commit a crime and the information necessary to prevent the commission of the crime; and in instances where such disclosure must necessarily be made by the legal practitioner to establish or collect his fees or to defend himself or his employees or associates against an accusation of wrongful conduct.¹³ The Court of Appeal in *Mekwunye v. Carnation Registrars Limited* upheld the provisions of the Rules of Professional Conduct for Legal Practitioners 2007 (which is substantially similar to the 2023 version of the RPC) relating to client/attorney confidentiality when it held as follows:

By virtue of rule 19 of the Rules of Professional Conduct for Legal Practitioners 2007, except as provided under sub-rule of the rule, an oral or written communication made by a client to his lawyer in the normal course of professional employment is privileged. This connotes that a legal practitioner is forbidden to disclose any communication made to him in the course of his employment for a party in the normal course of professional employment. By the provision, a legal practitioner cannot state the content or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment. He is equally not permitted to disclose any advice given by him to his client in the course and purpose of his professional employment. All oral and material communications made by a client to his lawyer in the normal course of professional employment are privileged.¹⁴

In *Ikeme v. Anekwe*, the court in interpreting Rule 26 of the old Rules of Professional Conduct for Legal Practitioners 1967 (which is identical to Rule 19 of the 2023 version of the RPC), held as follows: ‘Similarly, a counsel owes it a duty to maintain the confidentiality of his relationship and not to disclose any information he came across at the time of receiving instruction of any other or adverse party.’¹⁵ While the arbitral tribunal retains the power to conduct arbitration proceedings as it deems appropriate, the duty imposed on legal practitioners under the RPC would remain on them within the confines of the arbitration, and unless an exception is established, the legal practitioner would still be required to maintain the legal professional privilege during the conduct of the arbitration.

International Bar Association Rules on the Taking of Evidence in International Arbitration, 2020 (the ‘IBA Rules’)¹⁶

The IBA Rules are a set of soft regulations that are discretionary but reflect international best practices in the conduct of arbitration as it relates to the taking of evidence. Although the IBA Rules are not binding, they are typically relied on by Nigeria-seated arbitral tribunals as guidance and may be persuasively relied upon by parties to the arbitration. Article 9.2(b) of the IBA Rules provides that the Arbitral Tribunal shall, at the request of a party or on its own motion, exclude from evidence or production of any document, statement, oral testimony, or inspection, in whole or in part as a result of any legal impediment or privilege under the legal or ethical rules determined by the arbitral tribunal to be applicable as stipulated in Article 9.4 of the IBA Rules as follows:

¹³ Rules of Professional Conduct for Legal Practitioners, 2023, r 19

¹⁴ *Mekwunye v. Carnation Registrars Limited* (2021) 15 NWLR (Pt. 1798) 1 (CA)

¹⁵ *Ikeme v. Anekwe* (2003) 10 NWLR (Pt. 829) 548

¹⁶ IBA Rules on the Taking of Evidence in International Arbitration Adopted by a resolution of the IBA Council 17 December 2020 International Bar Association

In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:

1. any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
2. any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiation
3. the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;
4. any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication, or advice contained therein, or otherwise; and
5. the need to maintain fairness and equality between the Parties, particularly if they are subject to different legal or ethical rules.

The IBA Rules serve as invaluable guidelines for arbitral tribunals and parties involved in arbitration proceedings seated in Nigeria, offering a framework that reflects international best practices in evidence-taking.

Evidence Act 2011

The Evidence Act 2011 (the ‘Evidence Act’) is the principal Nigerian legislation on the collection, tendering, and admissibility of evidence in Nigeria.¹⁷ The provisions relating to legal professional privilege can be conspicuously found in sections 192 to 195 of the Evidence Act. Specifically, the Evidence Act prohibits a legal practitioner from disclosing any communication made to him in the course of and for the purpose of his employment.¹⁸ It further prohibits the legal practitioner from stating the contents or conditions of any document with which he become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment.¹⁹ The Evidence Act sets out the circumstances within which the privilege, ordinarily conferred on such otherwise privileged communications, would not apply. For example, such communications may be disclosed by the legal practitioner where it was made by the client in the furtherance of any illegal purpose or in circumstances such as fraud or crime.²⁰ However, section 256 (1) (a) of the Evidence Act provides that the Evidence Act will not apply to proceedings before an arbitrator. It follows therefore that the provisions of the Evidence Act, 2011 do not apply to Nigeria-seated arbitral proceedings.

Common Law Principles on Legal Professional Privilege

The Common Law principles on legal professional privilege are applicable to Nigeria-seated arbitrations. This is based on the provisions of section 32(1) of the Interpretation Act which provides that in the absence of any applicable laws, Common Law and doctrines of equity shall be in force so far as local circumstances shall permit and subject to any existing law.²¹ Accordingly, with the absence of any direct legislation governing evidentiary issues in arbitration within Nigeria due to the inapplicability of the primary legislation on the subject of evidence in Nigeria – the Evidence Act – to arbitration proceedings,²² the Common Law continues to be of significant importance in arbitration practice.²³ However, the Common Law principles are only persuasive. Indeed, in *Jegede & Anor v. INEC & Ors.*, the Supreme Court made it clear that the Common Law is merely a persuasive source of law in Nigeria in any event when it held that ‘[the] decisions of English courts are treated with optimum respect by all the courts in this country. But they have only persuasive effect and not binding authority on Nigerian courts.’²⁴

¹⁷ See *Mekwunye v. Carnation Registrars Ltd and Anor* (2021) 15 NWLR (Pt. 1798) 1 at 41 where the Court of Appeal confirmed that a lawyer is duty-bound to guard the confidences of his client except in circumstances where the law permits otherwise. Also, the Court of Appeal in *Central Bank of Nigeria v. Registered Trustees, N.B.A.* (2021) 5 NWLR (Pt. 1769) 268 affirmed that the intendment of Section 192 of the Evidence Act 2011 is to prohibit a legal practitioner from disclosing privileged information that was obtained from communications between that legal practitioner and his/her client during the course of or in furtherance of his/her employment, except under limited circumstances as provided under the law. In *Abubakar v. Chuks* (2007) 18 NWLR (Pt 1066) 386 at 420 E-F, the Supreme Court held that a solicitor is not permitted to disclose the contents or the condition of any document with which he has become acquainted in the course of and for the purpose of such employment.

¹⁸ Evidence Act 2011, s 192.

¹⁹ Evidence Act, 2011, s 192(1)

²⁰ Evidence Act, 2011, s 192(1)

²¹ Cap I23 Laws of the Federation of Nigeria 2004

²² Evidence Act 2011, s 256 (1) (a)

²³ G. C Nwakoby ‘*Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria 2004 - Call For Amendment*’ 2010. Available at: <https://www.ajol.info/index.php/nauij/article/view/138176/127745> (last accessed on 22 April 2024)

²⁴ *Jegede & Anor v. INEC & Ors.* (2021) 14 NWLR (Pt. 1797) 409

Legal professional privilege is recognised under Common Law. The English Court of Appeal in *Candey Ltd v. Bosh & Anor*²⁵ emphasised that the right to privilege is vested in the client and not the attorney. Also, in *Annesley v Earl of Anglesea*,²⁶ the English court established that communications between client and attorney must be protected as confidential information provided that such communications relate to the legal relationship between that attorney and client, does not disclose any intention to commit a crime, and is not made for the furtherance of a criminal objective. In *Wentworth v. Lloyd*, the court held that no adverse inference can be drawn under English law if a client withholds information based on the principles of privilege.²⁷ However, as earlier noted, the applicability of these Common Law principles on evidence, including the foregoing, to arbitration proceedings are not mandatory, hence, the arbitral tribunal may opt to make adverse inference nonetheless if it believes that it is fair and reasonable to make such inferences.

Within the framework of the Common Law, the concept of legal professional privilege unfolds into two primary and distinct categories, namely litigation privilege and legal advice privilege,²⁸ each embodying a unique facet, as examined below.

Litigation Privilege

This applies to all communications (written and oral) created or made by any person at a time when litigation was pending or is in reasonable contemplation for the purpose of obtaining legal advice as to that litigation proceedings.²⁹ Common Law recognises that litigation privilege extends to arbitration proceedings.³⁰ Indeed, it is deemed to exist, even when it is apparent that a cause of action has not, in fact, accrued but is afoot or in contemplation.³¹ In other words, the communication only needs to have been made under the genuine belief or apprehension that litigation may ensue.³² In *Anderson v. Bank of British Columbia*³³, the court stated that litigation privilege covers communications with experts as far as those communications or documents come into existence when litigation is contemplated or commenced and are made with a view to such litigation either for the purpose of obtaining advice as to the litigation or of obtaining evidence to be used in it. Additionally, in *Rawlinson and Hunter Trustees SA & Ors v. Akers & Anor*³⁴, the court held that where litigation has not been started at the time of the material communication, it must be 'reasonably in contemplation'. Although this does not mean litigation must be more than a 50% prospect, it must be more than a possibility. The litigation privilege protects communications between a lawyer and his clients and extends to conversations between a lawyer and an appropriate agent of the client, especially where the client is a corporation and is thus a legal construct without its own human personality.³⁵ It also extends to all evidence gathering and communications made in contemplation of litigation whether made by a lawyer, so long as they were made in contemplation of adversarial proceedings.³⁶ In *Hampson v. Hampson*,³⁷ the court stated that an exception to the application of litigation privilege is where communications or documents made are not confirmed or are created in vague apprehension of litigation.

Legal Advice Privilege

Legal advice privilege protects the written and oral communications between a lawyer and a client for the purpose of giving legal advice. For such protection to exist, however, such communications must have been made to a lawyer alone.

²⁵ *Candey Ltd v. Bosh & Anor* [2022] EWCA Civ 1103

²⁶ *Annesley v Earl of Anglesea* (1743) L.R.Q.B 317

²⁷ *Wentworth v. Lloyd* (1864) 10 HLC 589

²⁸ Diana Good, Patrick Boylan, Jane Larner and Stephen Lacey, Linklaters, *Privilege: a world tour*. Available at: [https://uk.practicallaw.thomsonreuters.com/2-103-2508?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/2-103-2508?transitionType=Default&contextData=(sc.Default)&firstPage=true) (last accessed on 22 April 2024)

²⁹ Norton Rose Fulbright, *Privilege under English Law*, (May 2016). Available at <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/6c6dfda0/privilege-under-english-law#:~:text=Litigation%20privilege%20only%20applies%20where%20litigation%20%28or%20arbitration%29,sooner%20or%20later%20someone%20might%20make%20a%20claim.> (last accessed on 22 April 2024)

³⁰ *Ibid*; Harper James, 'Why is legal professional privilege important' October 2020. Available at <https://harperjames.co.uk/article/legal-professional-privilege/#section-1> (last accessed on 22 April 2024)

³¹ Norton Rose Fulbright, *Privilege under English Law*, (May 2016). Available at: <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/6c6dfda0/privilege-under-english-law#:~:text=Litigation%20privilege%20only%20applies%20where%20litigation%20%28or%20arbitration%29,sooner%20or%20later%20someone%20might%20make%20a%20claim.> (last accessed on 22 April 2024)

³² Richard S. Pike, *The English Law of Legal Professional Privilege: A Guide for American Attorneys*, (Volume 4, Issue I Fall/Winter 2006, Loyola University Chicago International Law Review). Available at: <https://lawcommons.luc.edu/cgi/viewcontent.cgi?article=1086&context=lucilr> (last accessed on 22 April 2024)

³³ *Anderson v. Bank of British Columbia* (1876) 2 ChD 644, CA

³⁴ *Rawlinson and Hunter Trustees SA & Ors v. Akers & Anor* [2014] All ER (D) 200 (Feb); [2014] EWCA Civ 136

³⁵ Norton Rose Fulbright, *Privilege under English Law* (May 2016). Available at: <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/6c6dfda0/privilege-under-english-law#:~:text=Litigation%20privilege%20only%20applies%20where%20litigation%20%28or%20arbitration%29,sooner%20or%20later%20someone%20might%20make%20a%20claim.> (last accessed on 22 April 2024)

³⁶ *Ibid*

³⁷ *Hampson v. Hampson* (1857) 26 LJ Ch 612

Consequently, its scope is narrower compared to litigation privilege, as it does not extend to communications involving third parties.³⁸ In *Three Rivers District Council v. Governor and Company of the Bank of England*³⁹ the Supreme Court delivered its majority ruling that advice privilege is only available for communications with lawyers, and not with other professionals such as accountants. This ruling was upheld in *R. (on the application of Prudential Plc) v. Special Commissioner of Income Tax*.⁴⁰

An extension of the legal professional privilege is the common interest privilege. In other words, the common interest privilege is not a stand-alone privilege wholly separate and apart from the legal professional privilege. Instead, the common interest privilege is basically an expanded version of the legal professional privilege.⁴¹ In *Property Alliance Group v. Royal Bank of Scotland*⁴², the agreements with the regulators contained ‘carve-outs’ which permitted the regulators to share the documents with other third parties (such as other governmental or regulatory agencies) and/or to make the material public or to disclose it further. Birss J found that those carve-outs did not amount to a general waiver of privilege and stated that: ‘[t]he fact that the carve-outs recognize the regulator’s rights and obligations to take a step, which might go so far as even publishing the information in the document, makes no difference if that has not happened. Until they do, I fail to see why the confidentiality and privilege would not be preserved.’ In *State of Qatar v Banque Havilland SA*⁴³ the court held that where a document has been provided to a limited number of people, it will generally take a good deal of persuading that privilege has been waived more broadly, as against the rest of the world. In *PCP Capital Partners LLP & Anor v Barclays Bank Plc*⁴⁴ the court stated that there are circumstances in which privilege will be held to have been waived as a result of a reference to privileged materials in pleadings or a witness statement, even if the reference in question is only to the effect, rather than the content, of the advice. The Court of Appeal in *Raiffeisen Bank International v Asia Coal & Ashurst*⁴⁵ held that waiver would occur where the reference ‘puts in issue the content’ of the privileged material. A statement simply referring to it will not automatically and without more give rise to a loss of confidentiality and therefore a loss of privilege.

4. Conclusion

Legal professional privilege protects communications made by clients to their legal practitioners. It is recognised under Nigerian law and reflected in various sources. However, the arbitral tribunal is not duty bound to adopt those principles, unless the parties otherwise agree. The reason is that the arbitral tribunal is empowered to determine the rules of evidence to adopt in the conduct of the arbitration proceedings. As such, the arbitral tribunal may abandon the legal professional privilege altogether in favour of disclosure of confidential information during the arbitration proceedings. Nonetheless, the arbitral tribunal must seek to ensure that the parties are treated equally and fairly while also striking a balance between upholding legal professional privilege and the disclosure of confidential information during the arbitration process.

³⁸ In *R v Special Commissioner & Anor, ex parte Morgan Grenfell & Co Ltd* (2002) UKHL 21 (16th May, 2002), the court held that a client, in the process of obtaining sufficient advice, should feel safe in making disclosures to his or her attorney and such safety would be undermined if the client felt the attorney could readily disclose matters that are to be treated as confidential.

³⁹ *Three Rivers District Council v Governor and Company of the Bank of England* (No.6) [2004] UKHL 48; [2005] 1 A.C. 610

⁴⁰ *R. (on the application of Prudential Plc) v. Special Commissioner of Income Tax* [2013] UKSC 1; [2013] 2 W.L.R. 325

⁴¹ Kenneth Duvall, *The Common Interest Privilege: What Exactly Is It, and When Does It Apply?* Available at: https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2020-21/summer/common-interest-privilege-what-exactly-is-it-when-does-it-apply/ (last accessed on 22 April 2024)

⁴² *Property Alliance Group v. Royal Bank of Scotland* [2015] EWHC 1557 (Ch)

⁴³ *State of Qatar v. Banque Havilland SA* [2021] EWHC 2172 (Comm)

⁴⁴ *PCP Capital Partners LLP & Anor v. Barclays Bank Plc* [2020] EWHC 1393

⁴⁵ *Raiffeisen Bank International v. Asia Coal & Ashurst* [2020] EWCA Civ 11