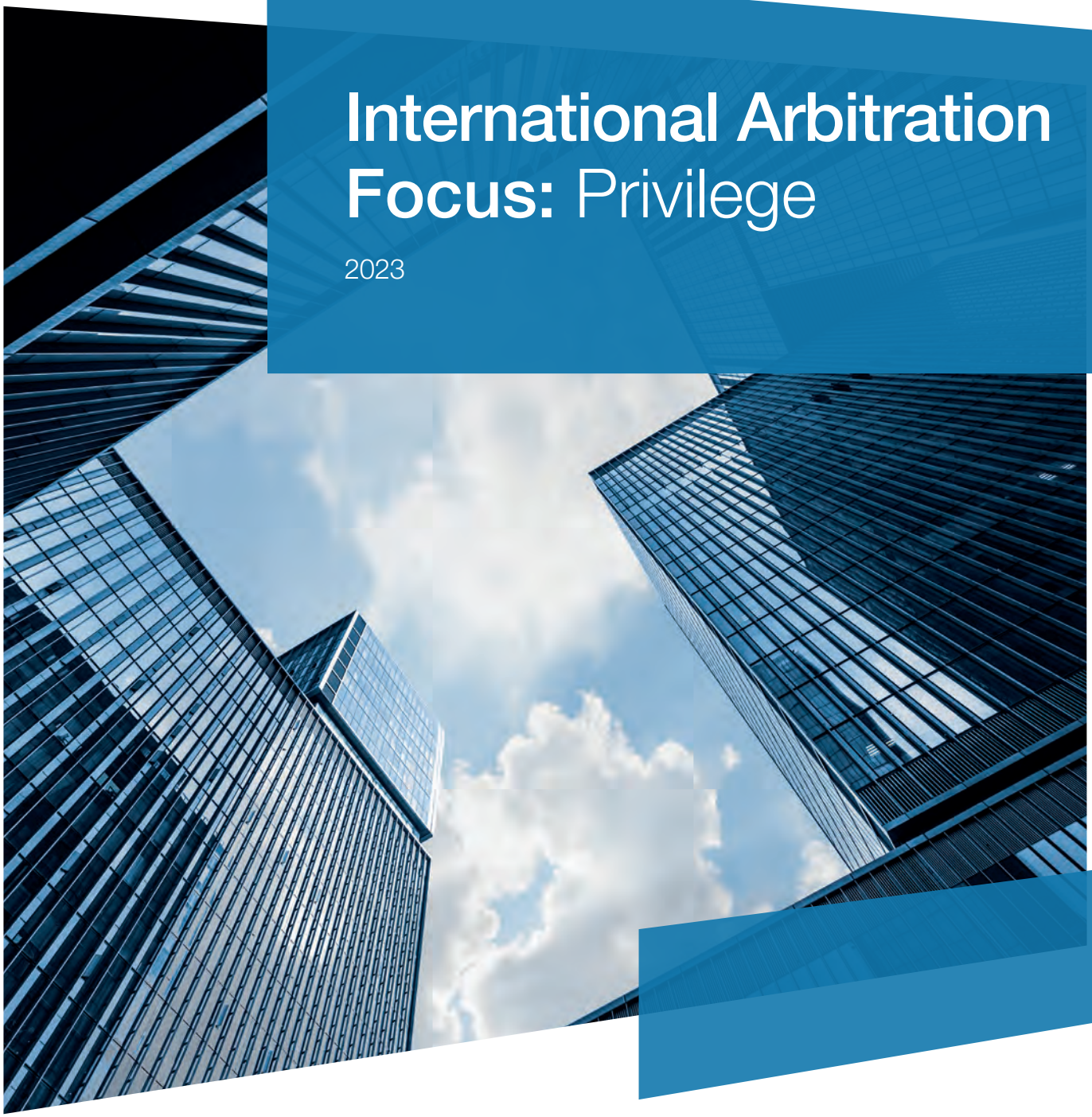
International Arbitration Focus: Privilege

2023



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Welcome

This Reed Smith newsletter on international arbitration appears as summer beckons. It is addressed to privilege in international arbitration, a subject that is never far from the lips of lawyers. It is a subject that throws up remarkable complexity when applied within the context of international arbitration.

We have not sought to be comprehensive in this newsletter; that would be impossible to achieve. We have instead asked our global lawyers to give insight into how matters of privilege are treated in their jurisdictions within an international arbitration context. The insights are drawn together in the editorial. We hope that the contributions and editorial will be thought-provoking.

It is a feature of international arbitration that it can, in many ways, fashion its own way in commercial life. It is precisely that feature which enables it to remain relevant and current to best serve its users. Where privilege is concerned, perhaps it is time to put down some anchors and fashion a simplified framework in the best traditions of the rule of law and the furtherance of clarity for all stakeholders.

As we prepared this edition of the newsletter, the IBA announced a task force that has been given the remit to work on the subject of privilege in international arbitration. The IBA and Reed Smith would no doubt consider each other timely and topical. Time will tell if that is a generally held view.

We hope that you enjoy this edition of our newsletter.

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Note from the Editors

In this newsletter, we address the subject of privilege in international arbitration

As recorded by Gary Born in the latest edition of his work, historically, there has been limited authority concerning the appropriate treatment of privilege in international arbitration. As pointed out in the same work, given the frequency with which privilege issues arise, and their potential importance, this lack of authority is unfortunate.

The lack of authority perhaps reflects that the subject of privilege in international arbitration is a difficult one. It is nevertheless a matter of routine practical concern for lawyers and in-house counsel engaged in advising and assisting their clients. It is, therefore, a subject that merits simplification from an international arbitration perspective, if simplification is possible.

Why is the subject difficult? The subject is difficult in international arbitration because the term "privilege" can mean different things to different people versed in different legal systems. The notion of privilege can become confused with the notion of confidentiality. For some, privilege is primarily a rule of evidence to be applied during disclosure or discovery processes. For some, it is primarily a fundamental and substantive right. For some, it takes the form of a duty or obligation of confidentiality or secrecy imposed on lawyers, which may or may not be waivable by the client. For others, it is an almost meaningless term or notion that cannot be directly associated with anything in their own legal system. This is often because disclosure obligations do not exist, or exist only in limited form in the jurisdiction concerned. Countries with civil law traditions often fall into the latter two categories.

In practice, privilege is a difficult subject because international arbitral tribunals will often adopt a "cocktail" of applicable laws and discretion when confronted with questions of privilege. Depending on where the arbitration is taking place, parties may be faced with (i) systems of law that simply do not understand the concept of privilege in the way understood by other systems of law; (ii) systems of law that take an approach that conflicts with another potentiality applicable law; and (iii) ultimately, the tribunal's discretion. Where the tribunal is made up of members from a legal tradition with no real notions of legal privilege, outcomes can sometimes surprise. In practice, the background and experience of the tribunal members, and perhaps of counsel, may be the most important factors. There is no real uniformity regarding choice-of-law rules for privilege in international arbitration.

The cocktail exists in multiple forms, variously referred to as the "autonomous" approach, the "closest connection" approach, the "most protective law" approach, the "least protective law" approach, the "practical" approach, or else given other nomenclatures. There is no sure way of predicting which cocktail, or which combination of cocktails, will be selected by any given tribunal to resolve privilege issues in any given arbitration. Uncertainty is inherent and is all the more inherent as more international factors apply, ranging from the seat, the nationality of the parties, the nationality or residence of counsel involved, the nationality or residence of tribunal members, and the law applicable to the dispute and/or the arbitration agreement.

Given the multiplicity of possible approaches, general counsel of a U.S. company exchanging with their European subsidiary counterparts (or their external counsel), or vice versa, might be forgiven if unable to offer firm advice to management as to how such exchanges would be treated in a future international arbitral process. How would such exchanges be treated in an arbitration seated in London, Shanghai or Paris? It is almost certain that, even with other things being largely equal, the outcomes will not be the same.

In a court process, where international elements are present, one can encounter the same and wider difficulties where privilege issues arise. For example, in a court process, judges may have to grapple with notions of privilege as a substantive right invoked against an investigative body or regulator endowed by the legislator with fact-gathering powers. This can occur in jurisdictions with civil law traditions or common law traditions. The parties' agreement or disagreement in such confrontations is generally not a relevant consideration. But in international arbitration, the parties' agreement is a relevant consideration. It will usually prevail above all else, bar public policy considerations, mandatory laws or considerations of abuse of process. In international arbitration, one is less concerned with substantive rights, and more concerned with matters of evidence.

By the nature of things in international arbitration, unlike court process, it should be possible for stakeholders to fashion a simpler and more transparent outcome in this otherwise complex and uncertain area. Simplification should enable general counsel to give much firmer advice to management and adopt practices that will ensure privilege is maintained in accordance with the parties' legitimate expectations in any future arbitral process.

Simplification should be possible because in international arbitration (i) the parties and tribunals are primarily concerned with whether "privileged" materials should be admissible into evidence; and (ii) the parties' agreement on procedure will generally trump matters of applicable law and tribunal discretion.

By providing transparency and predictability in this area, much distracting and often marginally relevant interlocutory sparring might be avoided. Corporate and overseas counsel will be more certain that any advice and assistance given to their client will not take center stage in the dispute. In turn, this should encourage clear advice to management, without fear that it might be disclosable in a future arbitral process. Undoubtedly, the level of certainty should be capable of improvement when compared to a cocktail approach to such matters. For example, in-house counsel in France could, by agreement in an arbitration, enjoy the same privilege as his or her U.S. counterpart for advice given to the corporate client. This should be non-objectionable in an international arbitral process. Such an agreement would treat the parties fairly and equally. For the arbitral process at least, it would overcome the fact that French in-house counsel otherwise lack the necessary standing for their clients to invoke privilege protections under French law for advice given by in-house counsel.

The form of any such simplification in this area might be imagined (i) in a model clause contained in the arbitration agreement; (ii) by inclusion of a specific rule in the applicable arbitral rules referenced by the arbitration agreement; (iii) by inclusion of a specific rule in soft law such as the IBA Rules; or (iv) by ad hoc treatment in the terms of reference or in the first procedural order of an arbitral reference. Any solution would need to be sensitive to overarching laws or obligations that might apply to particular stakeholders, be they parties, counsel, experts or other participants in the arbitral process. Difficulties as to who exactly enjoys and may invoke privilege in a corporate group situation might be addressed and simplified. The English notion of "without prejudice" communications, deployed to try and settle disputes away from the tribunal's eyes, might be baked in as privileged irrespective of the nationality or location of the participants concerned. Institutional rules or the parties might agree a neutral third-party *in camera* process for dealing with challenges to privilege, to avoid the tribunal becoming tainted by such matters. No doubt other suggestions could be made.

In short, simplification in this area should ideally serve to reinforce the attraction of international arbitration, ensure better predictability of outcome for users, relieve tribunals of otherwise difficult decisions on concepts they may or may not be familiar with, and level the playing field between the disputing parties in a clear and understandable way.

While this edition of the newsletter was in preparation, the IBA announced that it had launched a task force to study privilege in international arbitration. In the 2020 edition of the IBA Rules on the Taking of Evidence in International Arbitration, there is reference to how a tribunal should approach matters of privilege. The IBA Rules essentially reproduce a cocktail approach, with the result that the idea of any predictability and certainty is largely missing. Also, the IBA Rules are rarely adopted as agreed procedure in arbitrations, but rather as "soft" guiding but non-binding principles for the arbitral tribunal.

The IBA's renewed focus on matters of privilege in international arbitration is to be welcomed. In this writer's view, there is sense in treating matters of privilege apart from other evidential matters. Given that the IBA task force will be focusing on privilege, maybe it will end up sharing that view. By focusing on a single evidential aspect of international arbitration, the objective of the IBA task force is ambitious. It is arguably all the more so if the objective is to try and simplify complexity in this area and offer up a fair, practical, easily understandable and workable solution for users of arbitration.

The ambitions of this newsletter are more modest than those of the future IBA task force. The contributors to this newsletter are drawn from Reed Smith's network of arbitration practitioners around the globe. They were asked to consider how a tribunal seated in their jurisdiction, or in jurisdictions where they are active, would respond to an application for disclosure of documents or communications said to be protected by legal privilege by the party opposing the application. Their various contributions illustrate the *à propos* of this editorial. They are rich in lessons from practitioners with arbitration experience in Paris, London, Dubai, Mainland China, Hong Kong, Mexico, New York, Singapore and in investment arbitration.

As will be seen from the contributions, the seat may or may not be important when matters of privilege arise. In England, the law of the seat or the law of the arbitration agreement may, in practice, take precedence over more general choices of law approach. In other countries, such as France, the seat is a more neutral factor, or simply one factor among others to take into account when determining matters of privilege. In some cases, with the UAE providing an example, the approach will differ depending on whether the arbitration in question is "onshore" or "offshore." In Mainland China, there is no real concept of privilege with treatment of such issues often dealt with on an ad hoc basis. Special considerations can apply to investment treaty arbitrations where disclosure of politically sensitive documents is sought. Overall, as expressed by more than one of our contributors either explicitly or implicitly, there is often no clear answer.

In civil law traditions, the rules are simple to apply because almost no disclosure obligations exist, typified by the Mainland China approach described in this newsletter. But in modern international arbitration, some form of disclosure or document production is regularly the norm. Standing against this trend are the Prague Rules, designed to offer a civil law approach to the arbitral process. The Prague Rules encourage the parties to avoid any form of document production, including e-discovery. However, the Prague Rules nevertheless reserve express power to the tribunal to make production orders against a party to the arbitration.

In many cases, matters of privilege end up being determined in a Redfern Schedule without any reasoning, or any real reasoning, accompanying the tribunal's decision. This often leaves the impression with users and their counsel that issues of privilege have been treated as matters of mere discretion by the tribunal.

In some jurisdictions, it seems that discretion may be the only touchstone. However, privilege should not be a question of mere discretion. Privilege is a pillar of the legal process, necessary for the full and frank application of the rule of law, and proper administration of justice. In international arbitration, it is deserving of the fullest, fairest and clearest treatment for the benefit of all participating stakeholders. Being clear and transparent as to what is or is not privileged should routinely assist in the search for a fair and efficient arbitral process, whatever evidential rules otherwise apply to that arbitral process.

We hope that you enjoy this latest edition of the Reed Smith international arbitration newsletter.

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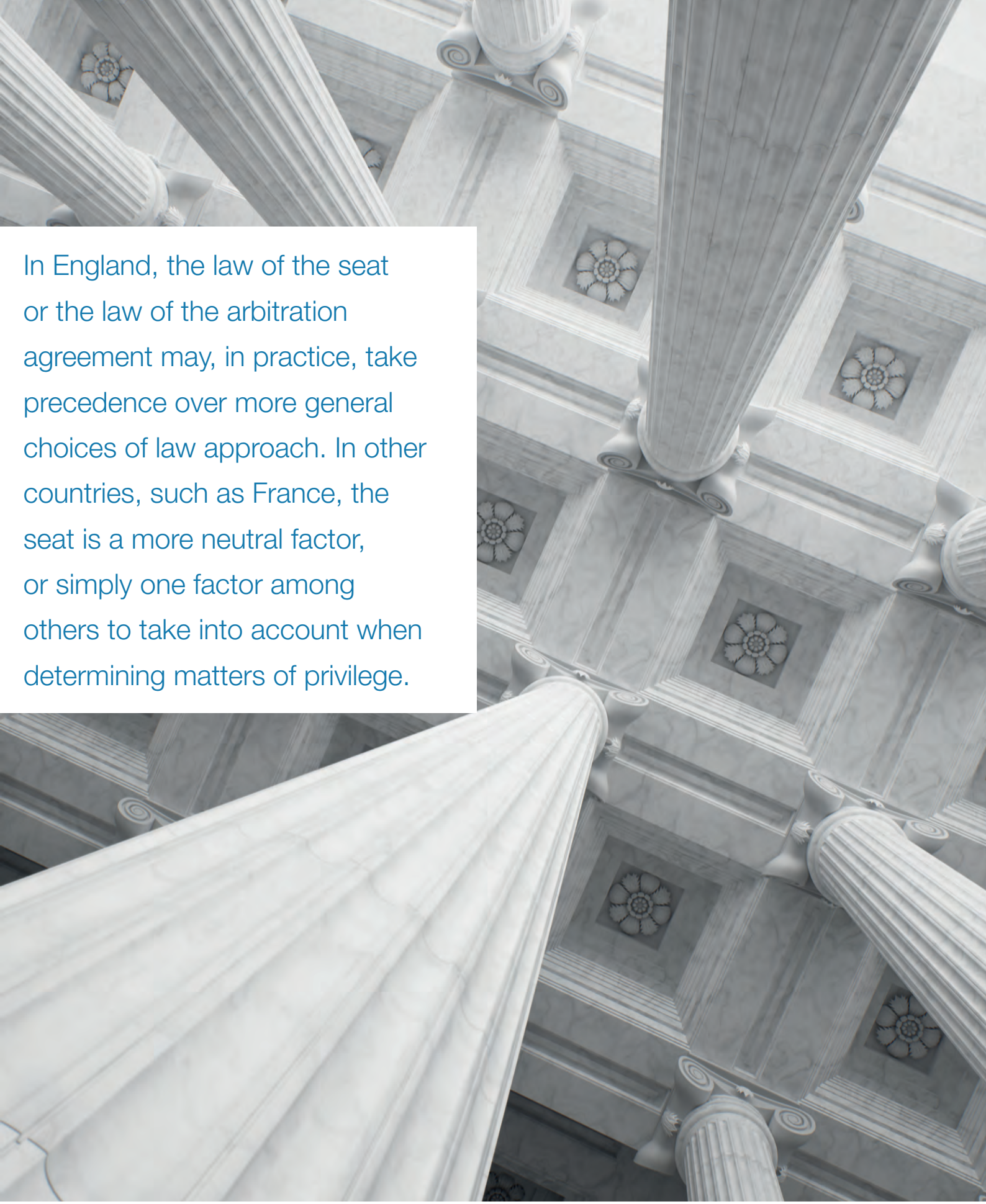

In England, the law of the seat or the law of the arbitration agreement may, in practice, take precedence over more general choices of law approach. In other countries, such as France, the seat is a more neutral factor, or simply one factor among others to take into account when determining matters of privilege.

Singapore

Arbitral tribunals seated in Singapore have discretion over the rules of privilege applicable in their respective arbitrations. When faced with a question of the applicable rules of privilege, Singaporean arbitral tribunals would take into account any choice or election by the parties in relation to the applicable rules. If no such election took place, the tribunal would analyze and decide the rules of privilege to be applied.

In order to determine the rules of privilege to be applied in a Singapore seated arbitration, the first step would be to consider the privilege rules (if any) of the seat in Singapore. If such rules exist in the seat, the next question would then be how the seat deals with conflicts of privilege rules with respect to arbitration at the seat.

Privilege under Singapore law

Privilege, or legal professional privilege as it is also known in Singapore, comprises legal advice privilege and litigation privilege. Both forms of privilege are similar to their counterparts under English law although there are differences in their sources of law.

The Singapore High Court has stated in *Ravi s/o Madasamy v. Attorney-General* [2020] SGHC 221 [12] as follows:

(a) Legal advice privilege "seeks to prevent the unauthorized disclosure of confidential communications between a legal professional and his client made for the purpose of seeking legal advice." This is provided for by statute under sections 128 and 131 of the Singapore Evidence Act 1893; however, the Singapore High Court has held that the common law of legal advice privilege is still relevant for the purposes of determining the scope of the Evidence Act 1893. For the purposes of this article, the Evidence Act 1893 is not considered as the Act is expressly disapplied to "proceedings before an arbitrator": see section 2(1). The law as to legal advice privilege in respect of arbitration is wholly circumscribed by common law.

(b) Litigation privilege "is concerned with protecting information and materials, confidential or otherwise, created and collected for the dominant purpose of litigation and at a time when there was a reasonable prospect of litigation, including communications between third parties and the legal professional and/or his client." Unlike legal advice privilege, litigation privilege is purely a creature of common law.

As a common law country, it is no surprise that Singapore law recognizes concepts of privilege. The question is what are the correct rules of privilege that should be applied in an arbitration?

In order to determine the rules of privilege to be applied in a Singapore seated arbitration, the first step would be to consider the privilege rules (if any) of the seat in Singapore.

In the Singapore High Court case of *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v. Polimet Pte Ltd and others* [2016] 1 SLR 1382 (CIFG) at [39] to [41], the court was faced with the question as to the applicable law governing privilege in relation to legal advice (not involving arbitration) provided in Malaysia by a Malaysian lawyer (and law firm) to the parties in the dispute. The court held that the "starting point" would be to determine if legal privilege were a matter of procedure or substance. If privilege were a procedural matter, it would "always be governed by the law of the forum"; however, if privilege were a substantive matter, a choice of law analysis would have to be conducted to determine the applicable law.

Under Singapore law, the "traditional common law approach" of distinguishing between the existence of a right (substantive) from the enforcement of a right (procedural) should be used to determine if privilege is a procedural or substantive matter. The High Court in CIFG held that while there is controversy over the nature of privilege, it is generally regarded to be governed by the law of the forum.

With regard to the admissibility of parole evidence (but not issues of privilege) in arbitrations, the Singapore High Court has in the case of *BQP v. BQQ* [2018] SGHC 55 (BQP) at [125] to [129] noted that parties sought to arbitrate disputes because they wished to avoid being "shackled" by national laws in their "quest for a speedy, commercial and practical outcome to their dispute, and to preclude the application of laws and procedures which may be alien to them." The court held that arbitral tribunals invariably retain control over the production of documents.

While the High Court's comments in *BQP* concerned discovery and not privilege, those comments are equally applicable. Although there is controversy over whether privilege is a substantive or procedural matter in Singapore, the better view is to treat legal privilege as a procedural matter that is governed by the law of the forum falling within the tribunal's discretion. This is consistent with the position in the Singapore International Arbitration Act which has given the Model Law the "force of law"1; this view has also been repeatedly affirmed by the Singapore courts who view arbitral tribunals as masters of their own procedure.2

It seems arguable that Singapore regards privilege as a procedural matter and therefore an arbitral tribunal seated in Singapore would have discretion over the applicable law of privilege and not be confined to applying a conflict of rules approach.

How would an arbitral tribunal exercise its discretion with respect to the rules of privilege?

In exercising its discretion, an arbitral tribunal would first determine whether the parties had selected the law to be applied to issues of privilege and/or if soft law containing broader principles on privilege, such as the IBA Rules on the Taking of Evidence in International Arbitration 2020 (IBA Rules), were adopted by the parties.

If the parties have expressly selected a set of laws or rules of privilege to apply, an arbitral tribunal will strive to give effect to the parties' agreement.

Where the parties have not selected any applicable law or broad principles of privilege, the arbitral tribunal would consider the potential laws that could apply to the arbitration, which include[3]:

1. The law of the seat
2. The governing law of the contract
3. The privilege rules applicable to the domicile of the parties or their lawyers
4. The privilege rules applicable to the jurisdiction where each document is created
5. The law of the state in which the award is to be enforced
6. The law of the state where the documents are created or the communication took place

There is no simple choice of law that can be adopted in all cases. For instance, parties rarely intend for the law of the seat, the governing law of the contract, or the law of the enforcing state to supply rules governing privilege. There are also issues with applying the law of the state where the documents or communications originate - not the least is that there may be multiple sets of rules of privilege to be applied which would complicate matters and may compromise equality and fairness, particularly if that means subjecting one party to a particular set of rules, and the other party to another.[4] If different rules are applied to different parties, this could lead to each party receiving different treatment, which would violate the rules of equal treatment prescribed by article 18 of the Model Law.

It seems arguable that Singapore regards privilege as a procedural matter and therefore an arbitral tribunal seated in Singapore would have discretion over the applicable law of privilege and not be confined to applying a conflict of rules approach.

The general consensus appears to be that identical privilege rules should be applied to all parties.[5] In practice, the most common approaches to determining the applicable privilege rules are[6]:

1. The closest connection test in which a number of different factors are assessed to determine the law applicable to issues of legal privilege. These factors include:
    b. Where the document was created or communication took place
    c. Where the document was kept
    d. Where the parties or lawyers resided
    e. The place where the attorney-client relationship has its predominant effect
    f. The place where the underlying cause of action arose
    g. The governing law of the contract
    h. The *lex arbitri*
2. The most favorable privilege approach where an arbitral tribunal selects from the potential laws in the closest connection test the set of rules that provides the greatest level of protection. This has the advantage of ensuring equal treatment between the parties.
3. The least favorable privilege approach where an arbitral tribunal selects from the potential laws in the closest connection test the set of rules that provides the lowest common denominator in terms of protection of privilege. While this is also arguably "equal treatment" of the parties, it could potentially cause one party to be denied protection that it could legitimately have expected under its local laws. The advantage of this approach, however, is that it causes the least interference with the availability of evidence before the arbitral tribunal.

Another consideration when determining the applicable rules of privilege would be the guiding principles contained in soft law such as the IBA Rules, which the parties often agree upon to incorporate into the arbitration and are expressly stated in the procedural order. The IBA Rules are

intended to help bridge the gap between the common law and civil law approaches to evidence and contain broad principles in relation to privilege.

With respect to determining the applicable privilege rules, the IBA Rules provide that "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable" (article 9.2(b)) may be a basis to resist the production of documents, and lists a number of factors to be considered at article 9.4. These include (i) the parties' and their advisors' expectations at the time that privilege was said to have arisen, and (ii) the need to maintain fairness and equality, particularly if the parties are subject to different legal and ethical rules. Therefore, the guidelines in the IBA Rules appear to be most aligned with the most favorable privilege approach set out above.

Conclusion

Given the variety of combinations of factors that could arise in arbitration, an arbitral tribunal seated in Singapore faced with a question of privilege would have to consider various factors (i.e., whether there were any agreed rules; the different potential laws and the scope of protection afforded to the parties; equality and fairness) to analyse and inform what is ultimately an exercise of its discretion to do justice in the case before it.

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Mexico

Attorney-client privilege arises from the need to recognize the protection of communications between lawyer and client. Yet the rules applicable to the disclosure – or rather non-disclosure - of information vary greatly by jurisdiction. Such variances are especially prevalent in the context of international arbitration where parties from different jurisdictions with distinct legal systems, and divergent procedural and substantive laws attempt to engage in information exchange.

What may be considered legally protected in one jurisdiction may not necessarily be so in another. Parties and panels must often grapple regarding whether and which privilege standards may apply to the underlying proceeding. Indefiniteness as to the existence, scope, and applicability of attorney-client privilege can result in procedural delays, unreliable risk assessments, and in some instances may even affect the viability and enforceability of the final award.

This article endeavors to examine how international panels applying Mexican law may treat assertions of attorney-client privilege. Of course, the actual outcome is impossible to predict with certainty and without a rigorous fact-specific analysis. In addition to considering factual elements, a fact finder's rulings will often vary based on legal training, background and personal experience.

In an attempt to predict variables that could prove most salient to analyzing this question, we have considered Mexican law (primarily through the lens of Supreme Court jurisprudence), Mexican arbitration law, principles derived from the Model Law, as well as the International Bar Association Rules on the Taking of Evidence in International Arbitration.

Although the above-referenced sources play a critical role in determining the breadth and applicability of attorney-client privilege in an international arbitration applying Mexican law, ultimately, the admissibility of a legal privilege will, in great part, be determined by the individual views and perspectives of the fact finder(s) overseeing the dispute. In cases where the enforceability of attorney-client privilege could play a dispositive outcome in the underlying dispute, parties should vet candidates and their respective backgrounds. We have been involved in multiple arbitrations under Mexican law where, ultimately, sophisticated panels found attorney-client privilege to apply given that communications had been exchanged to provide or obtain legal advice, and that different legal or ethical rules applied to the underlying communications.

Attorney-client privilege in Mexico

Contrary to common law legal traditions where attorney-client privilege is a right held by a client, under Mexican law (and indeed in many other Latin American civil law systems), legal privileges are far more restricted. To begin with, protection from disclosure in Mexico derives – not from a client's rights to maintain privilege – but rather from professional secrecy obligations. These secrecy obligations are protective measures deriving from the fundamental rights to intimacy, privacy, and secrecy of communications as recognized by article 6 of the Mexican Constitution.[7,8] , Article 36 of the Regulatory Law of Article 5º of the Mexican Constitution, states that "[e]very professional shall be obliged to keep strictly secret the matters entrusted to him/her by his/her clients, except for the reports mandatorily established by the respective laws."

Although Mexican law does not provide a concrete definition of professional secrecy, national courts have defined professional secrecy obligations within the lawyer-client relationship:

[T]he [lawyer] has a duty to preserve the confidentiality of information and documents that a [client] shares in order to be in a position to present its defense and, therefore, is exempted from an obligation to inform the authorities (whether administrative or jurisdictional) of facts that could be related to the commission of an illegal act, which have the constitutional and legal protection of being treated as professional secrets, and thus, as confidential.[9]

The Mexican Constitution therefore establishes a duty of professional secrecy, which springs from the right to privacy under Mexican law, and such protections extend to protect attorney-client communications.

Mexican proceedings (in line with civil law tradition) do not provide for a formal discovery phase - that is, one calling for the disclosure and/or production of information. While it is true that there are certain provisions allowing a party to request information, these are limited given that under the Mexican legal system, evidentiary materials are to be affirmatively presented by parties as part of their initial claim and/or defense. Only as an exemption may a party request information demonstrating that such request is justified and directly relevant to the requesting party's claims and/or defenses.[10]

Article 90 of Mexico City's Code of Civil Procedure requires that parties cooperate with judicial bodies (including arbitral tribunals).[11] However, Article 90 also makes clear that professional secrecy is an exception to the duty of cooperation. Mexico's Federal Code of Criminal Procedure likewise precludes the disclosure of privileged information by criminalizing it via the potential imposition of fines, revocation of a lawyer's license, and even imprisonment.

In sum, legal privileges, subsumed under the category of professional secrecy within Mexico's legal framework, involve both rights and obligations. Attorneys maintain a right to refuse to disclose client information, while at the same time maintaining an obligation – with limited exceptions – to not be required to testify, produce documents, or disclose information against client interests.[12] Professional secrecy can only be waived via the express consent of the clients themselves.[13]

Privilege within arbitration in Mexico

Commercial arbitration in Mexico is addressed within Title Four of the Commerce Code.[14] These arbitration-related provisions were added to the Code in 1993 and, among other things, incorporated international conventions ratified by Mexico while providing a relatively uniform set of rules akin to those found internationally.[15] The Model Law of the United Nations Commission on International Trade Law (UNCITRAL) likewise serves to regulate arbitration in Mexico albeit with certain adjustments to align with Mexican commercial law.[16]

Unfortunately, the above sources provide little guidance on the application of privilege in commercial arbitration. For its own part, the Model Law[17] merely provides that, in the absence of agreement between the parties, it is for the tribunal to determine procedural and evidentiary issues at its discretion, subject to the overriding principles of fairness and equality of treatment. When ruling on privilege issues, a tribunal seated in Mexico is likely to balance the application of Mexico's procedural law with international practices and the IBA Rules (to the extent applicable).

A common resource familiar to international arbitration practitioners is the International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules).[18] The IBA Rules, frequently applied in international arbitrations in Mexico, recognize legal privilege as a general concept preventing the disclosure of evidence on the basis of "legal estoppel or privilege under such legal or ethical rules as the Arbitral Tribunal determines to be applicable." In making such determinations, fact finders are directed to consider such factors as (i) the need to protect the confidentiality of a document or communication made for the purpose of negotiating an agreement or providing or obtaining legal advice; (ii) the expectations of the parties and their advisors at the time the legal impediment or privilege is said to have arisen; (iii) any possible waiver of privilege; and (iv) the need to maintain fairness and equality between the parties, particularly if they are subject to different legal or ethical rules.

Although not dispositive, international sources provide a central framework for fact finders adjudicating under Mexican law to determine whether and how attorney-client privilege questions should be adjudicated.

Conclusion: Without a binding and defined regulatory framework, parties must look elsewhere to predict the applicability of attorney-client privilege protections.

International arbitration proceedings applying Mexican law exist without a definitive answer to whether (and to what extent) attorney-client privileges apply, given that the rules applicable to disclosure – or rather non-disclosure - of information may vary from those found under Mexican law. Where counterparties to an arbitration – from distinct legal traditions - have competing expectations as to the applicability of attorney-client privilege, international treatises and guidelines provide a useful decision-making roadmap toward fair and equitable treatment of the parties. As such, parties are encouraged to incorporate the application of IBA Rules into their dispute resolution clauses or attempt to agree to their application once arbitration has been initiated.

The admissibility, extent and type of legal privilege applicable at arbitration will – in great part – be determined by the individual views and perspectives of the fact finder(s) overseeing the dispute. Devoid of defined and binding guidelines, parties to an international arbitration governed by Mexican law should carefully consider potential arbitrators' legal training and background (civil versus common law), breadth of international experience, and (where available) prior awards.

We have been involved in multiple arbitral proceedings under Mexican law requiring panel determination on whether or not attorney-client privilege applies. While these proceedings have sometimes required the creation of privilege logs tracking information withheld from disclosure, in our experience, sophisticated international arbitration panels have found privilege to apply particularly where there exists a need to protect communications made for the purpose of providing or obtaining legal advice as well as where communications are subject to different legal or ethical rules.

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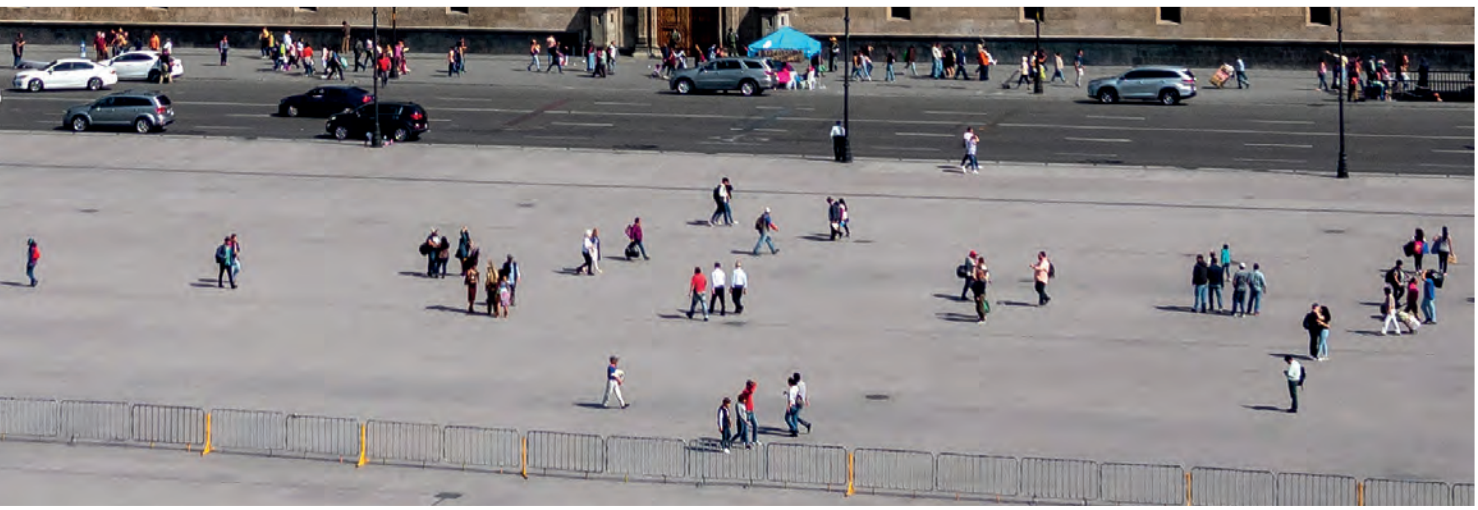

London

Disclosure in London arbitrations

The starting point under section 34(1) of the Arbitration Act 1996 (the AA 1996) is that it is for the tribunal to decide all procedural and evidential matters (subject to the right of the parties to agree any matter). This specifically includes what classes of documents should be disclosed between the parties (section 34(2)(d)).

This is reflected in many arbitral bodies' rules, for example:

1. LCIA Rules: "The Arbitral Tribunal shall have the power […] to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party or any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal." (Article 22.1(vi))

2. ICDR Rules: "The tribunal will determine admissibility, relevance, materiality and weight of evidence." (Article 22.7)

3. LMAA Rules: "It shall be for the tribunal to decide all procedural and evidential matters, but the tribunal will where appropriate have regard to any agreement reached by the parties on such matters." (Paragraph 15(a))

There is no automatic disclosure process in London-seated arbitrations, as opposed to English litigation, whereby each party is under an automatic duty to disclose documents they have relied upon, as well as any adverse documents. Where disclosure is not automatic, parties to an arbitration cannot assume that the other side will provide their adverse documents and, as is the case with English court proceedings, there is no right to see privileged documents.[19]

Privilege and conflict of laws

In the context of an arbitration seated in London/England where the only link with England is often the law governing the contract and/or the law governing the arbitration agreement, questions arise regarding what law applies to determine whether documents created in other jurisdictions are privileged if the laws of those other jurisdictions differ on privilege compared with English law (which is frequently the case).

Section 34(2) of the AA 1996 gives the tribunal discretion to decide all procedural and evidential matters (unless the parties agree otherwise), and section 34(2)(d) gives it the power to determine questions of privilege.

Most of the institutional rules remain silent on privilege and applicable laws. However, there is some reference in the IBA and ICDR Rules:

4. Under the IBA Rules, it is expressly stated that a tribunal shall exclude from evidence any document on the grounds of privilege under the legal or ethical rules determined by the tribunal to be applicable. When determining this, a tribunal should take into account, amongst other things, (a) the need to protect the confidentiality of documents connected with obtaining legal advice or settlement negotiations; (b) the expectations of the parties; and (c) the need to maintain fairness and equality between the parties (Article 9(2) and Article 9(4)).

5. The ICDR Rules state that a tribunal must take into account the applicable principles of privilege, such as confidentiality of communications between a lawyer and client. The most recent 2021 ICDR Rules further note "When the parties, their counsel, or their documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection." (Article 25)

Similar to the principles in the ICDR Rules, it has been suggested that in practice, parties would be able to claim privilege in accordance with the relevant jurisdiction with the most restrictive approach in question, so as to ensure both parties are treated the same whilst maintaining privilege over documents where a party had a fair expectation that it would be privileged.[20]

Privileged documents under English law

Where English law is the law to determine privilege, there are usually two kinds of privilege that are relevant: (i) litigation privilege, covering documents produced for anticipated or actual litigation (or arbitration) - these can include draft witness statements, surveyor's reports (if litigation is known), etc.; and (ii) legal advice privilege, covering most lawyer/client correspondence.

The dominant purpose of the document or communication must be either to obtain/receive legal advice or to gather evidence in circumstances where legal proceedings are in existence or are reasonably anticipated. Simply copying in an external or in-house lawyer will not be sufficient to make the document privileged, for example, if the dominant purpose of the correspondence is to assess the commercial views of a non-lawyer addressee (e.g., an accountant), and obtaining subsequent legal advice is only the subsidiary purpose *(Civil Aviation Authority v. R [2020] EWCA Civ 35).*

A party has the right to withhold a relevant document if it is privileged. In the event of a disagreement between the parties, it will be up to the tribunal to determine whether production of the document should be ordered. However, this can often be problematic to determine. In the English courts, the judge that will hear an interlocutory application (e.g., for specific disclosure) will be different from the judge appointed for the final hearing to determine the matter. This provides a safeguard against bias in light of viewing privileged documentation.[21]

A party has the right to withhold a relevant document if it is privileged.

Therefore, where in arbitration the tribunal oversees the matter from submissions to the final hearing, the arbitrators will be cautious about reviewing the document themselves, in case their neutrality is affected by reviewing a genuinely privileged document. In the context of an application for disclosure of a privileged document, the tribunal may:

1. Refuse disclosure on the grounds the application is a fishing expedition and not directly relevant to a pleaded issue in the case. Often, parties will seek memorandums or communications, etc., on the grounds they contain a "smoking gun," but many arbitral rules give the tribunal the power to limit requests to documents that are relevant and material to the outcome of the case.[22]

2. Engage a neutral third party (usually a KC) to review the document and rule on its admissibility. This allows the proceedings to continue without affecting the impartiality of the tribunal, but the parties' consent will be required.[23]

3. If the document is only partially privileged, order production but with redactions of the privileged sections. However, in *Al Sadeq v. Dechert LLP [2023] EWHC 795 (KB),* the High Court held that if privileged and non-privileged information are so "inter-twined" that redacting the privileged parts becomes "impractical or unfeasible," then the whole document can be withheld on the ground of privilege.

Commercially sensitive documents

We have also seen cases where one party applies for the disclosure of documents containing commercially sensitive information, which is fiercely contested. Although arbitration proceedings by their nature are confidential, where the two parties are commercial competitors, it may be detrimental to one party's business to disclose certain documents to their opponents. A further option available to a tribunal, although an unusual one, is to order a "Confidentiality Club" whereby only the opponent's lawyers can view the commercially sensitive document, thus reducing the risk of the confidential documents being used outside the arbitration.

Whilst this may break an impasse regarding the relevance of a document, it can then be very tricky to seek instructions from a client and amend their case as necessary if they have not been able to view the document themselves.

Options to appeal the tribunal's disclosure order

Unless the ruling amounts to a serious irregularity that results in substantial injustice, there are limited appeal options.[24] Further, where (i) disclosure is a matter within the tribunal's general discretion; and (ii) the decision is unlikely to be given in a formal, reasoned award, appeals are challenging. For example, in *The Anangel Peace [1981] 1 Lloyd's Rep 452 (Comm)*, the applicants challenged the tribunal's decision not to order disclosure of certain documents. It was held that "…although arbitrators were under an overriding duty to act fairly as between the parties, in all matters before them regarding the conduct of proceedings, basically they are the masters of their own procedure."[25]

Conclusion – why does this matter?

- The importance of documents and good record keeping/file management during the life of a contract or project rarely arises in the context of what may happen if a dispute arises or the parties end up in arbitration (or indeed litigation). However, it should not be forgotten that commercial cases are often won on the documents rather than legal niceties. In short, documents are often key, and therefore good record keeping is essential.
- Good record keeping (or the lack of it) can often be the difference between winning and losing a case, but it is not usually considered until after the dispute (or indeed any arbitration) has commenced. It also has a bearing on whether disputes such as those set out above are likely to arise and what the outcome may be.
- A tribunal will not order disclosure of a privileged document, but the dominant purpose of the document must be covered by legal advice or litigation privilege. Simply copying in a lawyer is not sufficient to meet this test. Care must also be taken that privilege is not lost (e.g., e-mails having numerous people in copy/being forwarded on within organizations).
- Tribunals are the masters of their own procedure, and so doing everything possible to avoid disputes such as those set out above - which good record keeping can largely avoid - is highly beneficial.

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Good record keeping (or the lack of it) can often be the difference between winning and losing a case, but it is not usually considered until after the dispute (or indeed any arbitration) has commenced.

People's Republic of China

The general position in PRC arbitration – disclosure

People's Republic of China (PRC) law and the rules of Chinese arbitral institutions do not provide for a mechanism equivalent to common law discovery or disclosure. According to Article 43(1) of the Arbitration Law of the People's Republic of China (PRC Arbitration Law), the parties concerned must provide evidence in support of their respective cases and claims (the principle of "he who claims must prove").

Meanwhile, Article 43(2) of the PRC Arbitration Law provides that where an arbitral tribunal deems it necessary, it may collect the evidence itself. Article 43 theoretically provides the tribunal with the power to collect evidence either on its initiative or upon the party's application. This power is also reflected under the rules of other PRC arbitral institutions, such as Articles 41 and 43 of the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules, Articles 33(1) and 34(1) of the Beijing Arbitration Commission Arbitration Rules, and Articles 42(2) and 44(1) of the Shenzhen Court of International Arbitration Rules.

There are a number of points to note with respect to the tribunal's power to collect evidence under the PRC Arbitration Law or PRC arbitral institutional rules.

First, the PRC Arbitration Law and the rules of the major arbitral institutions are silent on how the arbitral tribunal should exercise its power to collect evidence. The question arises as to when it is "necessary" for the tribunal to exercise the power to collect evidence. In the absence of other detailed guidelines, the arbitral tribunal appears to have wide discretion.

Second, in practice, tribunals rarely order document disclosure. According to Chinese judicial and arbitral practice, document disclosure orders might favor one side only and give rise to an imbalance between the parties and the impression that the tribunal is biased. Normally, a party's request for broad or voluminous categories of documents in the possession or custody of the other party will not be granted.

Third, neither PRC law nor the rules of Chinese arbitral institutions confer power on the arbitrators to compel a party or non-party to produce evidence or disclose documents. However, if the party ultimately refuses to produce documents, the tribunal might draw an adverse inference from such failure to produce documents.

Finally, in purely domestic arbitrations, if one party conceals evidence that is "material enough to affect the fair decision of the tribunal," the other party might have ground to set aside the award in accordance with Article 58 of the PRC Arbitration Law. Meanwhile, foreign-related arbitral awards may arguably fall under the ground of procedure unfairness under Article 281 of the Civil Procedure Laws.

It is also worth noting that PRC law recognizes the parties' autonomy in entitling parties to expressly agree that the arbitral process shall allow for document disclosure. This is typically done by agreeing in the arbitration clause or procedural order to the application of the IBA Guidelines on the Taking of Evidence in International Arbitration. On this basis, the authors have acted in PRC-seated arbitrations in which widespread disclosure has been ordered. Having said that, such cases are comparatively rare.

The general position in PRC arbitration – legal privilege

The concept of "privilege" is not recognized under Chinese law and is seldom asserted by counsel in Chinese arbitrations. As such, a tribunal seated in Mainland China may not afford the same protections to documents or communications that may be otherwise considered privileged in other jurisdictions.

In practice, if a party claims that certain communications are privileged, for instance, documents marked as "privileged and without prejudice," they can apply to the arbitral tribunal for permission not to disclose such information or request the arbitral tribunal not to admit such information as evidence. Arbitrators who are familiar with international arbitration practice may provide a degree of protection and neither require the production of such documents nor rely on such information in making their award. However, there is no consistent practice in PRC arbitration in this regard.

Additionally, although there is no legal advice privilege under PRC law, a PRC-qualified lawyer is required to keep confidential information acquired during the course of the engagement and not to divulge the private information of their clients (Article 38 of the Law of the People's Republic of China on Lawyers). In practice, it is unlikely that a PRC-based tribunal would order one party to disclose confidential communication between itself and its lawyer.

New document production rules in PRC arbitration

It is worth noting that CIETAC has introduced a document production procedure similar to document production in international arbitration.

Article 7 of the CIETAC Guidelines on Evidence 2015 (CIETAC Guidelines on Evidence) provides that for a specific application for disclosure made by one party, the tribunal will ask the other party to provide comments. The tribunal may deny such an application if, among other things, "the disclosure may result in a violation of law or practice ethics." This rule is similar to Article 9.2 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules), which clearly mention excluding evidence by reason of "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable."

Also, in Article 19(1) of the CIETAC Guidelines on Evidence, the tribunal may decide to exclude certain evidence submitted by a party, "particularly those relating to confidential communications between lawyers and clients or to settlement negotiations between the parties."

Having said that, the CIETAC Guidelines on Evidence are not binding rules and will only apply in the case of the express agreement of both parties. Furthermore, the CIETAC Guidelines on Evidence and other relevant rules need to be further elaborated and clarified, in particular with respect to the procedure for excluding evidence.

In practice, only a small number of requests for the production of documents have been made in CIETAC arbitrations. Most requests are denied, inter alia, on the basis of the general legal principle of evidentiary procedure of "he who claims must prove." Successful disclosure orders are more likely in arbitrations in which the parties have expressly agreed to disclosure, or else arbitrations with non-Chinese tribunal members and/or CIETAC arbitrations seated outside of Mainland China. It remains to be seen whether CIETAC users – and the Chinese arbitration community in general – will adopt the CIETAC Guidelines on Evidence and grant more requests for the production of documents.

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New York

Legal privilege can be one of the most important, yet difficult, issues to resolve in arbitration because while privilege rules themselves are often clear, determining which rules might apply when parties and their counsel hail from multiple jurisdictions often is not. This article examines how privilege issues are frequently resolved in New York-seated arbitrations.

Legal privilege can be one of the most important, yet difficult, issues to resolve in arbitration

1. Legal privilege in New York

New York law recognizes two forms of legal privilege: (1) attorney-client privilege; and (2) work product privilege. Both privileges are strongly enshrined in New York law.

Attorney-client privilege

The first legal privilege New York law recognizes is the attorney-client privilege. The attorney-client privilege protects communications between a lawyer and a client that are made for the purpose of seeking or providing legal advice.

To establish that information is protected by the attorney-client privilege, a party must show: (1) the existence of an attorney-client relationship; (2) that a communication was confidential; and (3) that the confidential communication was made to (or from) an attorney for the purpose of obtaining (or providing) legal advice or services. See In re Priest v. Hennessy, 51 N.Y.2d 62, 67-68 (1980); *Brennan Ctr. for Justice at New York Univ. Sch. Of Law v. U.S. Dep't of Justice*, 697 F.3d 184, 207 (2d Cir. 2012). While there are exceptions to the rule, if those three elements are satisfied, a communication will generally be shielded from disclosure under New York law on grounds of the attorney-client privilege.

New York state codified the attorney-client privilege in its civil procedure rules, which govern state court proceedings in New York. Specifically, Civil Practice Law and Rules (C.P.L.R.) 4503 provides:

Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof.

New York's ethical rules, which bind New York-licensed attorneys, define what constitutes confidential information. Specifically, section 1.6 of the New York Rules of Professional Conduct provides that confidential information consists of information gained during or relating to the representation of a client that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested to be kept confidential.

Courts applying New York law have long viewed confidentiality as a pillar of the attorney-client privilege. In *re Priest*, 51 N.Y.2d at 68-69 ("one seeking legal advice will be able to confide fully and freely in [their] attorney, secure in the knowledge that their] confidences will not later be exposed to the public view to [their] embarrassment or legal detriment."). New York considers confidentiality to be a pillar of the attorney-client privilege because assuring the confidential treatment of matters discussed between an attorney and their client enables the attorney to act more effectively and expeditiously to safeguard the client's interests and provide candid advice, which "ultimately promot[es] the administration of justice." *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 592 (1989).

b. Work product privilege

The second legal privilege that New York law recognizes is the work product doctrine. The work product doctrine protects materials created by or at the direction of attorneys for use in a formal dispute.

Work product typically refers to written materials, such as notes, drafts, and related materials that are produced by or at the direction of attorneys. *See* C.P.L.R. 3101(c); *Venture v. Preferred Mut. Ins. Co.*, 180 A.D.3d 426 (1st Dep't 2020). Work product reaches only documents prepared by or at the direction of counsel acting in a legal capacity (and not, for example, in a business role), and to materials that are the product of the lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory, or strategy. *Brooklyn Union Gas Co. v. American Home Assur. Co.*, 23 A.D.3d 190, 190 (1st Dep't 2005).

2. New York Law affords arbitrators wide discretion to decide privilege issues

New York law generally affords arbitrators substantial discretion to decide whether communications or materials are privileged and shielded from disclosure. Arbitrators have crafted several solutions for exercising that discretion when faced with privilege issues.

a. Arbitral rules

When presented with privilege issues, arbitrators frequently look first at the arbitral rules to which the parties have agreed to determine if those rules provide any guidance. Frequently, however, those rules only state that arbitrators should recognize and respect legal privilege.

This article examines how privilege issues are frequently resolved in New York-seated arbitrations.

For instance, both article 25 of the ICDR Rules and section R-35 of the AAA Commercial Rules, each of which frequently govern in New York-seated arbitrations, provide that arbitrators "shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client." JAMS Rule 22(d) provides that arbitrators "shall apply applicable law relating to privileges and work product." Similarly, articles 9(2)(d) and 9(4) of the IBA Rules on the Taking of Evidence in International Arbitration, which frequently guide arbitrators in New York-seated arbitrations, obligate arbitrators to consider legal privileges when assessing evidentiary issues.

Accordingly, while arbitral rules frequently require arbitrators to consider privilege, they do not delineate the scope or limits of that privilege.

b. Privilege rules of the seat

To resolve questions regarding the scope and limits of privilege, arbitrators frequently look to the law of the seat. Under this approach, if the arbitration is seated in New York, the tribunal would follow the New York privilege rules set forth in New York case law, and would likely look to the codifications found in C.P.L.R. 4503 and 3101 as well, even though court rules of procedure do not govern or control in arbitration.

This approach has several advantages, including recognition of the supervisory primacy of the law of the seat, as well as predictability. The downside of this approach, however, is that this rule does not take into account the varying privilege rules that opposing parties may use.

A most favored nation approach

In an approach that is also gaining increasing acceptance, some tribunals look to the potentially applicable privilege laws that provide the most privilege protection. This approach is captured by article 25 of the ICDR Rules, which provides that

When the parties, their counsel, or their documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection. ICDR Rules article 25.

While this approach has the benefit of potentially providing the highest levels of privilege protection possible, it does not give guidance as to how that determination should be made, and it is axiomatic that one of the parties may well not want the highest levels of protection possible. Consequently, while the most favored nation approach is intuitively attractive, there may nevertheless be instances where parties oppose it.

c. Least favored nation

Under the least favored nation approach, the tribunal applies the privilege laws of the party that provides the **least** amount of privilege protection. Similar to most favored nation, this rule has the advantage of treating all parties equally. The least favored nation approach, however, will likely not be accepted by the party that typically enjoys a higher level of privilege protection.

d. Choice of law analysis

Under this approach, the tribunal conducts a full choice of law analysis and decides the proper privilege law to apply based on the specific privileged document or communication at issue. While this approach has the benefit of allowing the tribunal to decide what privileges should apply by considering factors such as the law of the jurisdiction with the closest connection to the privilege material, choice of law analyses are complicated, can be circular, and can produce inconsistent rulings with which neither party is happy.

Ultimately, arbitrators have relatively wide discretion to decide what approach to follow with a New York seat, and as the following section shows, that discretion will largely be respected by enforcement courts in New York.

3. Recent developments

While there is a relative dearth of case law in New York that specifically addresses privilege in arbitration, a recent decision from a federal court seated in New York provides some guidance as to how privilege issues in New York-seated arbitrations should be handled. This following case involves domestic arbitration but it is applicable to an international arbitration seated in New York.

Specifically, in *Turner v. CBS Broadcasting Inc*., 599 F. Supp. 3d 187, 190 (S.D.N.Y. 2022), a federal court charged with judicially enforcing an arbitral summons issued by an arbitrator held that section 7 of chapter 1 of the U.S. Federal Arbitration Act (which applies to any arbitration involving interstate commerce that is seated in New York) held that evidentiary rulings by arbitrators generally cannot be reviewed by enforcement courts, but that courts can review arbitral privilege decisions in the context of third-party arbitral summonses. *Id*. In short, the Turner court effectively found that arbitral privilege rulings are generally not reviewable, but that in those limited instances where judicial assistance is requested (which may not include award enforcement proceedings), courts may review privilege issues.

In Turner, a petitioner sought to have a federal district court enforce an arbitral summons issued by the arbitrator for internal investigation documents held by the arbitral respondent, which was the arbitral claimant's former employer. *Id*. at 195. The arbitral respondent argued that the documents were privileged because the internal investigation was conducted by in-house counsel and were therefore shielded from disclosure. *Id*.

On review, the court upheld the arbitrator's decision to enforce the arbitral subpoena and directed the employer to produce the documents. *Id*. at 196. The court reasoned that deference to an arbitrator's resolution of a privilege issue is particularly merited where the objecting respondent is a party to the contract that gave rise to the underlying arbitration. *Id*. at 195. That is because, in agreeing to arbitrate the underlying dispute, the parties "elected to have an arbitrator, rather than a court, resolve any discovery disputes that might ensue, including making decisions about [respondent's] assertions of legal privileges." *Id*.

The Turner decision is important because it highlights that arbitrators have wide discretion to decide privilege issues, and that those decisions will generally not be reviewed by enforcement courts. Turner is also a good reminder, however, that courts do retain some discretion to review arbitral privilege determinations in limited instances.

4. Steps parties should take when confronted with privilege issues

Given the broad discretion that arbitrators enjoy when deciding privilege issues in New York-seated arbitrations, parties should identify privilege issues as early as possible and should seek agreement with the opposing party as to how those issues should be resolved. Parties should also consider the level of confidentiality to which the arbitration will be subject – keeping in mind that arbitrations are not inherently confidential in the United States and that most arbitral rules do not impose robust confidentiality requirements either. The parties should also consider the level of confidentiality to which any award might be subject , which is generally none when judicial enforcement occurs.

Conclusion

Legal privilege is one of the more difficult issues to address in arbitration. Accordingly, careful consideration should be given to how legal privilege issues should be addressed by the arbitrator, as well as how to keep those issues confidential at all stages of the dispute.

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No guidelines or general rules governing whether a document or communications will attract privilege exist in international arbitration. Arbitral tribunals are left with wide discretion to determine the applicable law and apply it. However, even when the applicable law is applied, a number of factors may influence arbitral tribunals' decision on whether a document or communication is privileged, such as the nationality of the parties and of their counsel, as well as the parties' legitimate expectations and the legal culture of the members of the arbitral tribunal.

This article sets out French law relating to privilege, as well as addressing a number of issues that may arise under French law when an arbitral tribunal decides whether a document or communication is privileged.

French law relating to privilege

In France, privilege takes the form of professional secrecy attached to the person of a party's external counsel – a French avocat. In-house counsel are excluded from professional secrecy, which is limited to the French avocat who is a member of a French bar.

Professional secrecy pertains to public policy. It is general, unqualified and of unlimited duration. Its scope is not limited to legal opinions and communications with the client. Professional secrecy also extends to (i) exchanges between French avocats and their clients, irrespective of their nationality; (ii) exchanges between French avocats (such correspondence cannot be disclosed even to their respective clients); (iii) correspondence passing between French avocats admitted to the bars of other European countries, provided, for the latter, that it is expressly stated that they are confidential; and (iv) memoranda, letters of advice, and legal opinions sent by a French avocat to their client.

Defined as such, it is much more restrained in scope than the various types of privilege that can exist in other jurisdictions, particularly in common-law countries.

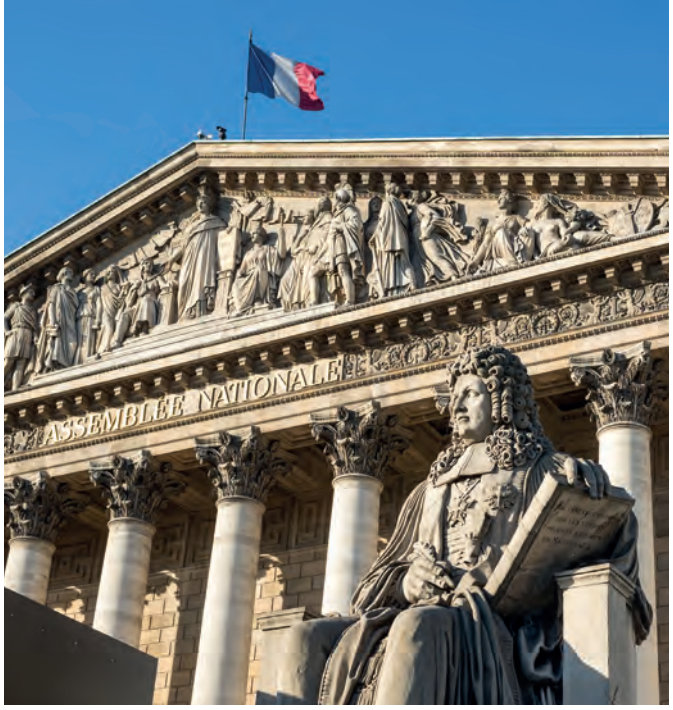
Professional secrecy is absolute. It is so absolute that even the client cannot discharge the French avocat of it. As a result, a French avocat cannot disclose any information regarding a matter even if instructed to do so by his client.

In-house lawyers are excluded from professional secrecy, even though the status of in-house lawyers, their obligations and duties have been hotly debated for years. This is because professional secrecy is attached to the person of the French avocat registered to the bar, and not to the content that is protected.

However, in a very recent decision, the Criminal Chamber of the French Supreme Court, the *Cour de Cassation*, extended the scope of protection. On January 26, 2022, it decided that emails exchanged between a company's in-house counsel, the content of which referred to confidential data communicated by a French avocat to its client for the purpose of the latter's defense, may be protected by the avocat's professional secrecy. In this case, the French competition authority had seized documents from a company it was investigating. Disputing the seizure, the company argued, inter alia, that certain documents concerned their defense, and as such, were privileged. The *Cour de Cassation* agreed, stating that the "[…] power given to the competition authority […] to seize documents and computer media finds its limit in the principle of freedom of defense, which commands the respect of confidentiality of correspondence exchanged between an avocat and its client and linked to the exercise of the rights of defense."

Violation of a French avocat's professional secrecy is sanctioned by the French Criminal Code and professional bar rules of ethics. As a result, a French *avocat* breaching professional secrecy can be condemned to imprisonment for up to one year and to payment of a €15,000 fine, in addition to possible professional sanctions.

The rationale behind these sanctions is that professional secrecy is a component of fundamental rights such as the right to a private life, secrecy of correspondence and due process. It is also an indispensable tool to one of the French avocat's most important duties: independence. As a result, professional secrecy is often compared to that of a doctor or a priest - it is based on the idea that lawyers are "necessary confidants" who can only advise and defend their clients properly if the latter are assured that they can reveal confidential information without running risks.



Issues that may arise under French law when a tribunal determines an assertion of privilege

Faced with an argument that a document is privileged, an arbitral tribunal seated in France will have wide discretion. It can refer to the arbitration rules, although these are generally silent on the issue. It may also seek guidance in the law applicable to the dispute, that of the nationality of the parties, their counsel, or the seat of the arbitration. Several laws may thus enter into conflict, requiring the arbitral tribunal to adopt a particular approach. Several such approaches exist. For example, under the most favored nation approach, the arbitral tribunal applies the law that is more protective of privilege. Conversely, if it adopts the least favored nation approach, the arbitral tribunal will apply the law offering the least privilege protection. Finally, the arbitral tribunal may conduct a choice of law analysis. As there is no one set rule, and none of the approaches are totally satisfactory, arbitral tribunals generally tend to determine the law applicable to privilege on a case-by-case basis.

Notwithstanding the above, since under French law the scope of professional secrecy is less extensive than in other jurisdictions (and again, particularly common law jurisdictions), French arbitrators seated in France will likely be less inclined to refuse disclosure of documents on the basis of privilege.

Parties should bear this in mind in their exchanges with their in-house counsel, but also the experts acting in their arbitrations. This is notably one of the reasons for which it has become a habit for French avocats to deal with experts directly, and to report to their clients, rather than having the experts exchange directly with the clients. In addition to avoiding any potential attack on the expert's independence, it ensures confidentiality of the exchanges.

That being said, the limited scope of professional secrecy does not necessarily mean that disclosure of documents will be ordered. As in a number of countries with civil law traditions, French courts have little experience of disclosure. As a result, arbitral tribunals seated in France and composed of French members could be more likely to refuse disclosure, as they are less accustomed to ordering extensive disclosure of documents. For example, under French law, in principle, a party only has the obligation to submit the documents necessary to prove its case, as opposed to any document that could be relevant. As a result, a typical request for disclosure of documents made by party A aimed at proving (or rather, disproving) party B's case brought before such a tribunal may be dismissed on the grounds that party B carries the burden of proof of its case.

In addition, arbitral tribunals seated in France should be wary of the impact of the recent decision of the *Cour de Cassation* mentioned above, which has blurred the lines as to the extent to which privilege may be claimed. The *Cour de Cassation* decision appears to indicate the passing from an *in personam* criterion to a more substantive appreciation of privileged information. Although the facts of the case only concerned in-house counsel, one could arguably consider that the solution should also apply to exchanges between in-house counsel and experts or third-party funders, for example.

Finally, although this issue has to our knowledge not yet been addressed by French courts, an award that gives decisive weight to information obtained in breach of professional secrecy could arguably be annulled in France as contrary to public policy.

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No guidelines or general rules governing whether a document or communications will attract privilege exist in international arbitration.

Hong Kong

Legal professional privilege under Hong Kong law

The Hong Kong Special Administrative Region is part of the People's Republic of China but has its own common law legal system pursuant to the Basic Law. Article 35 of the Basic Law constitutionally entrenches legal professional privilege (LPP) as a basic right by which "Hong Kong residents shall have the right to confidential legal advice…."

LPP has two limbs: legal advice privilege and litigation privilege.

- Legal advice privilege (in other jurisdictions sometimes known as "attorney-client privilege" or "client legal privilege") applies to confidential communications between a lawyer and his client created for the dominant purpose of giving or receiving legal advice.
- Litigation privilege, on the other hand, applies to confidential communications between a lawyer and his client, or either of them and third parties, created for the dominant purpose of obtaining legal advice or assistance for litigation that is pending, reasonably contemplated or existing.

In turn, "litigation," in the context of litigation privilege, means adversarial proceedings, including court litigation, arbitration and disciplinary proceedings.

Privilege can be claimed in respect of a wide range of communications including email, memoranda or recordings and other written or oral communications. If LPP can be established, those claiming privilege have an absolute right to withhold such communications from disclosure. LPP belongs to the client, and the client's lawyer is obliged to assert this privilege unless his client waives it.

Disclosure in Hong Kong-seated arbitration

The procedural law governing Hong Kong-seated arbitrations is the Hong Kong Arbitration Ordinance (Cap. 609), or the "Ordinance." This provides for a light touch regime by which the tribunal has wide discretion to conduct the arbitration as it considers appropriate,[26] subject to its responsibilities to be fair and independent.[27]

Section 56 of the Ordinance permits the tribunal to make orders directing the discovery of documents. The tribunal also has the freedom to decide whether, and to what extent, it should itself take the initiative in ascertaining the facts and the law relevant to those arbitral proceedings.

Section 56(9) of the Ordinance empowers the tribunal to direct the parties to give evidence or produce documents in arbitral proceedings, subject to the requirement that a person is not required to produce "any document or other evidence that the person could not be required to produce in civil proceedings before a court." This means that the protection offered to parties engaged in Hong Kong-seated arbitration against disclosure of privileged documents matches that provided in the common law and the Basic Law.

Parties may further agree to the application of arbitration rules, or guidelines, such as the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules").[28]

Resisting disclosure on the basis of a claim to LPP

In practice, an international arbitral tribunal seated in Hong Kong will invariably recognize the parties' right to claim legal privilege over qualifying communications.

For example, a party may advance a claim of privilege during the course of a disclosure process in response to a request made in the opposing party's Redfern Schedule. The tribunal will scrutinize the objection in accordance with the agreed procedure, under the Ordinance and the applicable rules, and often with reference to international guidance such as the IBA Rules.[29]

The analysis will involve several stages: (i) identifying the type of privilege claimed; (ii) ascertaining whether the claim is justified; and (iii) deciding whether privilege has been waived. In cases where disclosure becomes heavily contested, it is not unusual to provide the document to the tribunal only (on a "tribunal eyes' only" basis) to aid the tribunal in determining if the claim to privilege is valid. In cases of particular sensitivity, the parties sometimes consider appointing an independent third party to consider the issue.

Subject to any applicable rules or procedures, the tribunal will, if it finds that privilege has not been established, order the party to produce the document. Where the party refuses to produce the document, the tribunal may also have power to draw adverse inferences from the failure to produce documents.

Managing privilege issues in arbitral proceedings

In Hong Kong-seated arbitrations, parties and their lawyers must be prepared to navigate the complexities of multi-jurisdictional privilege issues, which requires giving due regard to the applicable laws on the scope and application of privilege in the arbitration. They must also be mindful of the potential impact of LPP on case strategy, particularly in relation to the management of communications and the preparation of evidence.

To provide greater certainty regarding the legal privilege applicable to their communications, parties should seek to agree between themselves the specific set of procedural rules that apply to the arbitration. This should be done as early as possible, ideally in the course of agreeing to the arbitration agreement, or otherwise at the outset of the arbitral proceedings. In any event, the parties should seek to have the applicable framework for dealing with privileged documents memorialized in the first procedural order of the arbitration.

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In Hong Kong-seated arbitrations, parties and their lawyers must be prepared to navigate the complexities of multi-jurisdictional privilege issues, which requires giving due regard to the applicable laws on the scope and application of privilege in the arbitration.

United Arab Emirates

Whether a document attracts privilege depends on the applicable law. As mentioned elsewhere in this newsletter, in an international arbitration, a tribunal may have discretion to consider and/or apply multiple laws, including the substantive governing law; the law of the seat of the arbitration; the jurisdiction(s) of admission of counsel; the geographic location of counsel; and the geographic location of the party asserting privilege.

Arbitrations seated in the United Arab Emirates (UAE) may be subject to multiple laws, because multiple legal systems coexist within the UAE's legal framework. The Dubai and Abu Dhabi courts are part of so-called "onshore" UAE, that is, the legal system based on French and Egyptian civil law, as well as Islamic jurisprudence, with court proceedings conducted in Arabic. The Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM) courts are referred to as "offshore" UAE, that is, the two free zones that are legal jurisdictions in their own right, each of which has its own noncriminal laws and court system. The DIFC and ADGM are common law systems, with court proceedings conducted in English.

The UAE therefore hosts different legal systems that have different approaches to privilege. For this reason, the UAE's legal market and culture are diverse and encompass lawyers from both common-law and civil law backgrounds who may take different approaches to privilege.

UAE law relating to privilege

Onshore UAE law. There is no concept of privilege under onshore UAE law. Nonetheless, certain onshore UAE laws provide protections akin to privilege. These are significantly narrower than those in many common-law jurisdictions. This is not problematic in onshore UAE court proceedings, which do not feature document disclosure and hence do not oblige parties to disclose harmful documents. However, arbitrations seated in onshore UAE or subject to UAE law will typically involve a document production stage and hence require tribunals to grapple with privilege issues. Under UAE law, communications between a client and a lawyer are confidential because the lawyer is obliged to maintain confidentiality or "professional secrecy" (referred to as "client-lawyer confidentiality"). This obligation derives from several sources. Under the UAE Advocacy Law, lawyers cannot disclose secrets or information entrusted to them by clients (articles 44 and 45 of Federal Law No. 34 of 2022). Similarly, the UAE code of ethics prohibits lawyers from disclosing such information without a client's written consent or a court order (article 3(c) of Ministerial Decision No. 666 of 2015). These rules apply to lawyers practicing in the UAE, regardless of their jurisdiction of qualification.

In onshore UAE, in-house counsel do not appear to benefit from client-lawyer confidentiality. However, like all employees in the UAE, they are subject to a duty to "safeguard the industrial or commercial secrets" of their employer (article 905(5) of the UAE Civil Code) (referred to as "employee-employer confidentiality"). Moreover, article 434 of the Penal Code (Federal Law No. 31 of 2021) criminalizes the unlawful disclosure to a third party of information obtained during the course of one's "duty," which a tribunal may consider includes employment.

The onshore UAE confidentiality rules are also conceptually different from privilege rules in common-law jurisdictions and are treated elsewhere in this newsletter. As set out above, client-lawyer communications are confidential under UAE law on the basis of lawyers' professional and ethical obligations to maintain the confidentiality of such communications. The principal factor determining whether a document is subject to confidentiality is therefore whether the sender and recipient(s) are lawyer and client - not the contents of the communication or the purpose for which it was transmitted.

In order to limit uncertainty with respect to matters of privilege, parties in UAE-seated arbitrations often agree to be bound by or adopt as a guideline the International Bar Association, Rules on the Taking of Evidence in International Arbitration (the "IBA Rules). The IBA Rules attempt to combine aspects of both civil law and common-law practices for the taking of evidence in international arbitration proceedings, and include provisions with respect to issues of privilege. Certain sophisticated arbitration users in the Middle East region also choose to agree to rely on the IBA Rules in their arbitration agreements.

Offshore UAE law. Privilege in offshore UAE is akin to the position under English law, as described elsewhere in this newsletter. In the ADGM, English law applies directly. Although privilege is not defined in DIFC law, the DIFC court rules recognize parties' rights to withhold from disclosure documents on the basis of privilege. It is generally expected that the DIFC courts would be guided by English law and authority when determining contested assertions of privilege. Although lawyers registered with the DIFC and/or ADGM courts are required by the relevant codes of conduct to keep information shared by clients confidential (DIFC Courts' Order No. 4 of 2019, part C-19 and ADGM Rules of Conduct 2016, article 7(6)), whether such information is privileged and therefore protected from disclosure would be determined akin to the position under English law, as described elsewhere in this newsletter.

Issues that may arise under UAE law when an arbitral tribunal determines an assertion of privilege

A tribunal in an onshore UAE-seated arbitration considering a claim that a document is privileged will likely consider the same factors that a tribunal seated elsewhere would also consider - for example, assessing the applicable law(s), as set out above; the IBA Rules; the expectations of the client and the lawyer at the time the document was created; whether the document was created in connection with providing or obtaining legal advice; and whether there has been any waiver of privilege by the party invoking privilege. Tribunals in UAE-seated arbitrations may also consider certain specific issues that can arise under UAE law, which we describe below.

First, with respect to client-lawyer confidentiality, a tribunal may have to consider the identity of the "client" and the "lawyer," because the existence of such a relationship founds a claim to confidentiality. As to the "client," for a UAE-incorporated company, the company's manager named on its trade license would typically be the company's authorized representative and would likely constitute the client. Other individuals possessing key decision-making power at a company, such as directors, may also constitute the client. The tribunal may have to observe and determine whether employees or officers of a company beyond the above categories would suffice for this purpose.

Under UAE law, communications between a client and a lawyer are confidential because the lawyer is obliged to maintain confidentiality or "professional secrecy" (referred to as "client-lawyer confidentiality").

The UAE provisions may stand in contrast to other applicable rules or guidelines, and hence require tribunals to make complex determinations as to which privilege test applies in a particular scenario.

As to the "lawyer," it is generally accepted that client-lawyer confidentiality obligations do not apply to in-house lawyers in the UAE. This is different from the position in common-law systems, which (in most cases) do not draw a distinction between in-house counsel and lawyers in private practice. In-house counsel subject to DIFC- or ADGM-seated proceedings and/or physically based in offshore UAE may therefore have stronger claims to privilege compared to their onshore counterparts. However, a party could rely on employee-employer confidentiality obligations to resist the disclosure of communications with in-house counsel. A tribunal may have to determine how compelling a claim to withhold documents based on employer-employee confidentiality is as compared to a claim based on client-lawyer confidentiality, including with respect to public policy considerations that arise (such as the importance of maintaining confidentiality).

Second, with respect to employee-employer confidentiality, a tribunal may have to consider UAE commercial secrecy provisions and how far these provide privilege protections to in-house counsel or, more controversially, to directors or managers of the organization. The UAE provisions may stand in contrast to other applicable rules or guidelines, and hence require tribunals to make complex determinations as to which privilege test applies in a particular scenario. Arguably, tribunals may also have to consider whether criminal liabilities may arise in certain egregious circumstances (even though tribunals do not have any criminal jurisdiction).

A tribunal may have to determine how compelling a claim to withhold documents based on employer-employee confidentiality is as compared to a claim based on client-lawyer confidentiality, including with respect to public policy considerations that arise (such as the importance of maintaining confidentiality).

Finally, outside of mediations (pursuant to article 14 of the UAE's law on mediation, Federal Law No. 6 of 2021), UAE onshore law does not recognize without prejudice privilege. Parties should therefore be careful making written settlement offers during or related to arbitration proceedings. Such offers may not be protected from disclosure under UAE law. Parties unfamiliar with UAE law may find their written settlement offers being used to obtain interim measures before onshore UAE courts (such as an attachment order if the offering party has admitted all or part of a debt). To limit such risks, parties should obtain a written undertaking that without prejudice communications (written and/or verbal) will be kept confidential. By contrast, DIFC and ADGM laws recognize without prejudice privilege, and settlement offers should be protected from disclosure if a tribunal determines that DIFC or ADGM law applies to the disclosure application.

Concluding remarks

The outcome of an assertion to privilege can be uncertain in international arbitration. That uncertainty may be greater in UAE-seated arbitrations compared to other jurisdictions.

To a significant extent, the outcome of any privilege application will also depend upon the appointed arbitrators and instructed lawyers. Selecting the right arbitrators and counsel for the particular arbitration is therefore essential.

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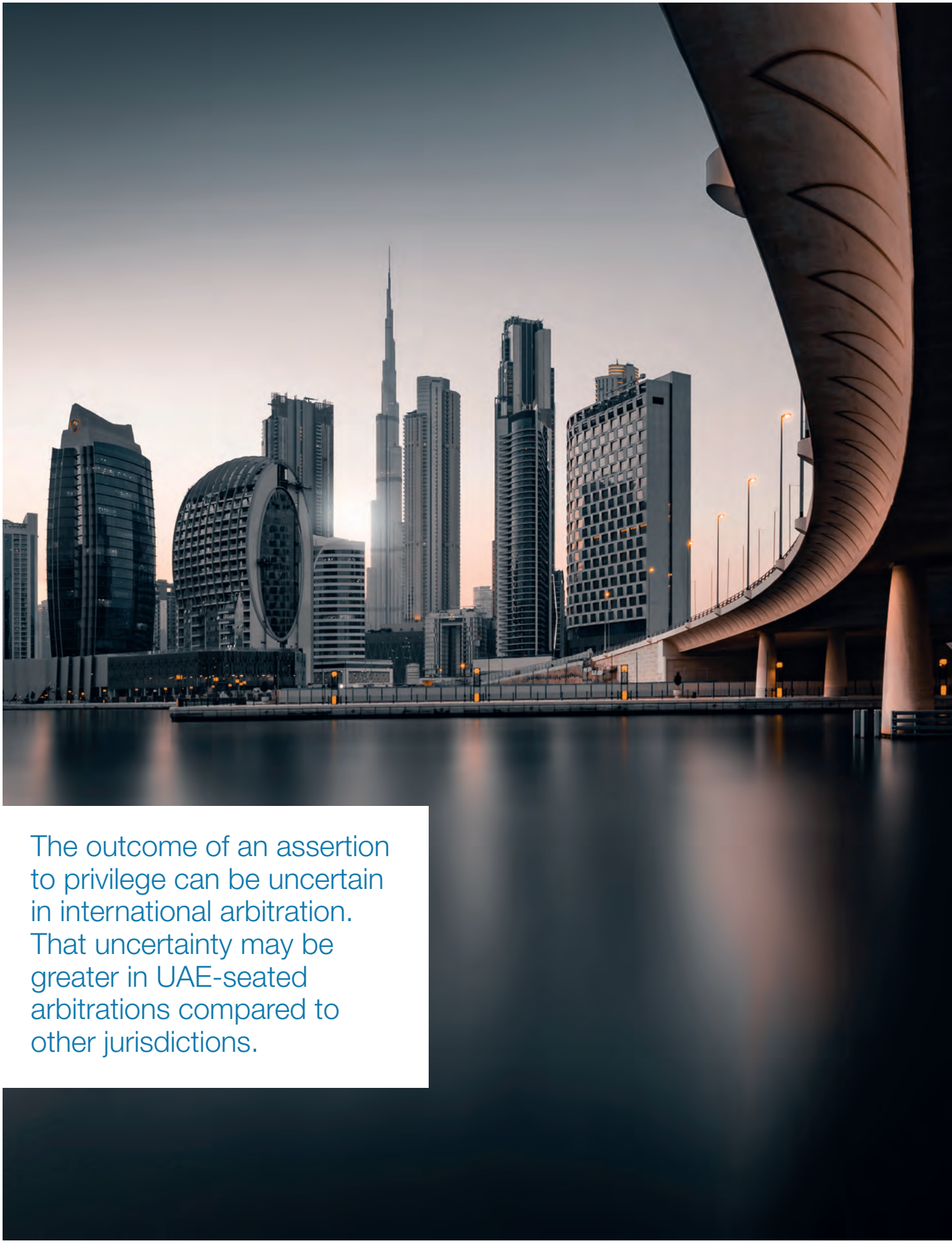


The outcome of an assertion to privilege can be uncertain in international arbitration. That uncertainty may be greater in UAE-seated arbitrations compared to other jurisdictions.

Investor-State arbitration

Document production presents similar legal, logistical, and practical challenges for counsel and arbitrators in investor-state arbitration as it does in international commercial arbitration. However, the fact that in investor-state arbitration the respondent is a sovereign state while the claimant is a private individual or corporate investor, means that the dynamics in investor-state arbitration can be different from international commercial arbitration.

Document production serves as an important opportunity for parties to gather relevant documents that may be in the other party's possession, custody, or control. However, there is often an imbalance in the parties' access to information in investor-state arbitration, especially in cases of expropriation where the investor no longer holds or no longer has access to their investment. Further, the respondent state may gain access to additional information through its various departments (tax, social, etc.) as well as through coercive measures such as criminal or regulatory investigations. For these reasons, document production is often a critical issue in investor-state arbitration, especially for the investor.

Sources of evidentiary rules

As with all procedural issues in arbitration, the parties to investor-state arbitration can agree on whether to have document production and, if so, the scope and process of that document production, including what evidentiary privileges apply. However, it is often difficult for parties to agree on this because of the differences in each country's practice, especially between common and civil law jurisdictions.

Investment treaties and arbitration rules

Absent express agreement between the parties (as is more often the case than not), the starting point is to consider what provision relating to evidentiary issues is made in any applicable investment treaties.

Investment treaties do not typically contain detailed procedural rules on document production let alone evidentiary privileges;[30] in keeping with the principle of party autonomy, neither do the most commonly used rules in investment arbitration, such as the ICSID Arbitration Rules[31] and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.[32]

The ICSID Convention empowers the tribunal to call on the parties to produce documents or other evidence at any stage of the proceedings.[33] Rule 36(3) of the 2022 ICSID Arbitration Rules provides that the tribunal may call upon the parties to produce documents if it deems it necessary at any stage of the proceeding. Rule 37 allows the tribunal, when deciding a dispute arising out of a party's objection to the other party's request for production of documents, to take account of the basis of such objection, which may include any asserted evidentiary privileges.

The 2021 UNCITRAL Arbitration Rules provide that the tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings, each party is given a reasonable opportunity to present its case (article 17.1). Like the 2022 ICSID Arbitration Rules, the tribunal is entitled to require the parties to produce documents, exhibits, or other evidence, and is empowered to decide on the admissibility, relevance, materiality, and weight of the evidence offered (articles 27.3-4).

IBA Rules on the Taking of Evidence

Given the limited scope of these provisions, parties in investor-state arbitrations often agree to adopt the IBA Rules on the Taking of Evidence[34] (IBA Rules), which also include provisions on document production. When the IBA Rules were revised in 2010, the word "commercial" in the 1999 IBA Rules was deleted to clarify that the IBA Rules may also be adopted in investor-state arbitration.

Article 9.2(b) of the IBA Rules explicitly recognizes the potential application of evidentiary privileges (including attorney-client privilege or professional privilege) or other legal impediments to producing documents. As detailed below, other provisions from the IBA Rules are of particular interest in the context of investor-state arbitration, such as article 9.2(f) in relation to state secrets.

In this article, we do not address attorney-client privilege or other legal privileges in detail, nor do we discuss how tribunals have sought to reconcile both the common law understanding of attorney-client privilege and the civil law understanding of the duty of professional secrecy when applying the IBA Rules. These matters are discussed elsewhere in this newsletter and are treated broadly and similarly in commercial and investor-state arbitration.

Issues addressed

In this article we focus on:

- Two evidentiary privileges commonly relied on by states, by virtue of their status as such, to exclude evidence and how these have been dealt with by investor-state tribunals - namely, confidentiality and political sensitivity/state secrets.
- The differing approaches by tribunals in investor-state arbitration to determine the law applicable to issues of legal privilege, which is discussed elsewhere in this newsletter and also below (for example, the "autonomous" approach, the "closest connection" approach, the "most protective law" approach, and the "practical" approach) and which is most commonly adopted in practice.

Confidentiality

States may rely on confidentiality in various contexts, for example, ongoing criminal investigations, tax secrecy, banking secrecy, medical secrecy, or other similar domestic rules.

The IBA Rules recognize various grounds on which an arbitral tribunal may exclude from evidence or production any document, statement, oral testimony, or inspection.[35] Two such grounds are relevant when considering confidentiality:

- Legal impediment or privilege (IBA Rules article 9.2(b))
- Commercial or technical confidentiality that the arbitral tribunal determines to be compelling (IBA Rules article 9.2(e))

Tribunals have accepted both grounds as the basis for a claim of confidentiality precluding document production.

As regards the second ground, tribunals have recognized confidentiality interests beyond commercial or technical confidentiality. In *BSG Resources Ltd., BSG Resources (Guinea) Ltd., and BSG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. ARB/14/22, the claimants made a document production request concerning criminal investigations into two of its employees. Production of the documents was resisted on the basis of IBA Rules article 9.2(e) - "commercial or technical confidentiality" notwithstanding that the confidentiality claimed did not fall within this description. The tribunal accepted the claim to confidentiality and denied the request on the basis of "the secrecy of ongoing investigations" and because the claimants had not "made allegations and claims based on the arrest and detention of [the] two employees."[36]

Confidentiality of criminal investigations was also recognized in *Elliott Associates LP v. Republic of Korea*. In that case, the claim to confidentiality was made on the basis of IBA Rules article 9.2(b) – "legal impediment or privilege." The requests were rejected given the importance of the requested documents to ongoing criminal proceedings, notwithstanding that they were relevant to the arbitration and material to its outcome.[37]

A tribunal has also concluded that the private medical records of a state's president are protected by confidentiality, even when the medical records were, arguably, relevant and material to the claims asserted by the claimant in the arbitration.[38]

Where a party claims confidentiality, that party has the burden of proving the existence of an identifiable and recognizable confidentiality interest. In this regard, the IBA Rules require that the arbitral tribunal must find the confidentiality concerns to be "compelling" in order to exclude the evidence.[39]

Political sensitivity/state secrets

Of particular relevance to investor-state arbitration are claims by states that evidence or production should be excluded on grounds of political sensitivity and on grounds that the requested documents are classified as state secrets.

Governments obviously need to communicate internally in a frank and open manner as part of their decision-making process. Various documents will be generated in the course of such internal discussions. These discussions can involve the desirability and implications of internal policy choices (sometimes referred to as "deliberative process privilege"), foreign relations, and highly sensitive issues of national security. The context of investor-state claims, where the conduct of governments (or conduct otherwise attributable to the state) is at issue means that private parties often seek disclosure of such documents from states.

Documents for which political sensitivity might be claimed include those relating to diplomatic relations and international comity; cabinet papers and other workings of central government; and those relating to the proper functioning of the public service.

Some investment treaties expressly limit access to information that is contrary to the state's essential security interests[40] or would otherwise be contrary to the public interest.[41] However, they are exceptions. For this reason, article 9.2(f) of the IBA Rules, which allows a party to resist document production on the "grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling"[42] is regularly invoked by states as an impediment to disclosure.

State secrets

State secrets have been held to comprise "information the release of which would compromise national security."[43] The existence of a national security privilege has been acknowledged by many international arbitral tribunals.[44]

Where the claim to state secrecy is upheld, it is likely to be an absolute bar to production such that the tribunal is not required to balance the request against the relevance and materiality of the documents sought in light of the claims advanced in the arbitration.[45] This is justified on the basis that any danger to the national interest stemming from disclosure outweighs the public interest in truthful fact-finding.

However, this does not give a respondent state carte blanche to classify any documents or information it is reluctant to produce as a state secret. The state party asserting such a privilege must explain in detail how disclosure would be injurious to its national security instead of asserting the national security as a blanket refusal.[46]

Political sensitivity

Documents for which political sensitivity might be claimed include those relating to diplomatic relations and international comity; cabinet papers and other workings of central government; and those relating to the proper functioning of the public service.

States' claims to special political or institutional sensitivity are usually based on what information is privileged under its national law.[47] Several tribunals have held that such national laws are not directly applicable in investor-state arbitration and cannot provide a basis for the tribunal's decision or be otherwise determinative,[48] although they may be taken into account.

In contrast to state secrets, claims of political sensitivity as a ground for withholding production give rise to a qualified privilege. Thus, the tribunal is required to weigh the state's interest in nondisclosure against the extent to which the disclosure would advance the requesting party's case.[49]

The specific considerations that are relevant in the balancing process will depend on the nature of the privilege claimed and the circumstances of each case, but include:[50]

i. The availability of alternative means of safeguarding confidentiality while allowing production

ii. Whether any part of the sensitive information is already in the public domain

iii. Availability of nonprivileged sources with related content

iv. The length of time since the creation of the document

Frequency with which various approaches to evidentiary privileges are adopted by tribunals

Regularly confronted with privilege issues in the context of document production requests and corresponding objections (in particular, but not limited to, questions of confidentiality and political sensitivity/state secrets), arbitral tribunals have developed different methods or approaches to determine whether the privilege should be upheld.

Before delving into the analysis of the arbitration case law and the different approaches followed, it is worth making two preliminary comments: First, in practice, international tribunals often fail to conduct a comprehensive analysis when determining the applicable standard for attorney-client privilege.

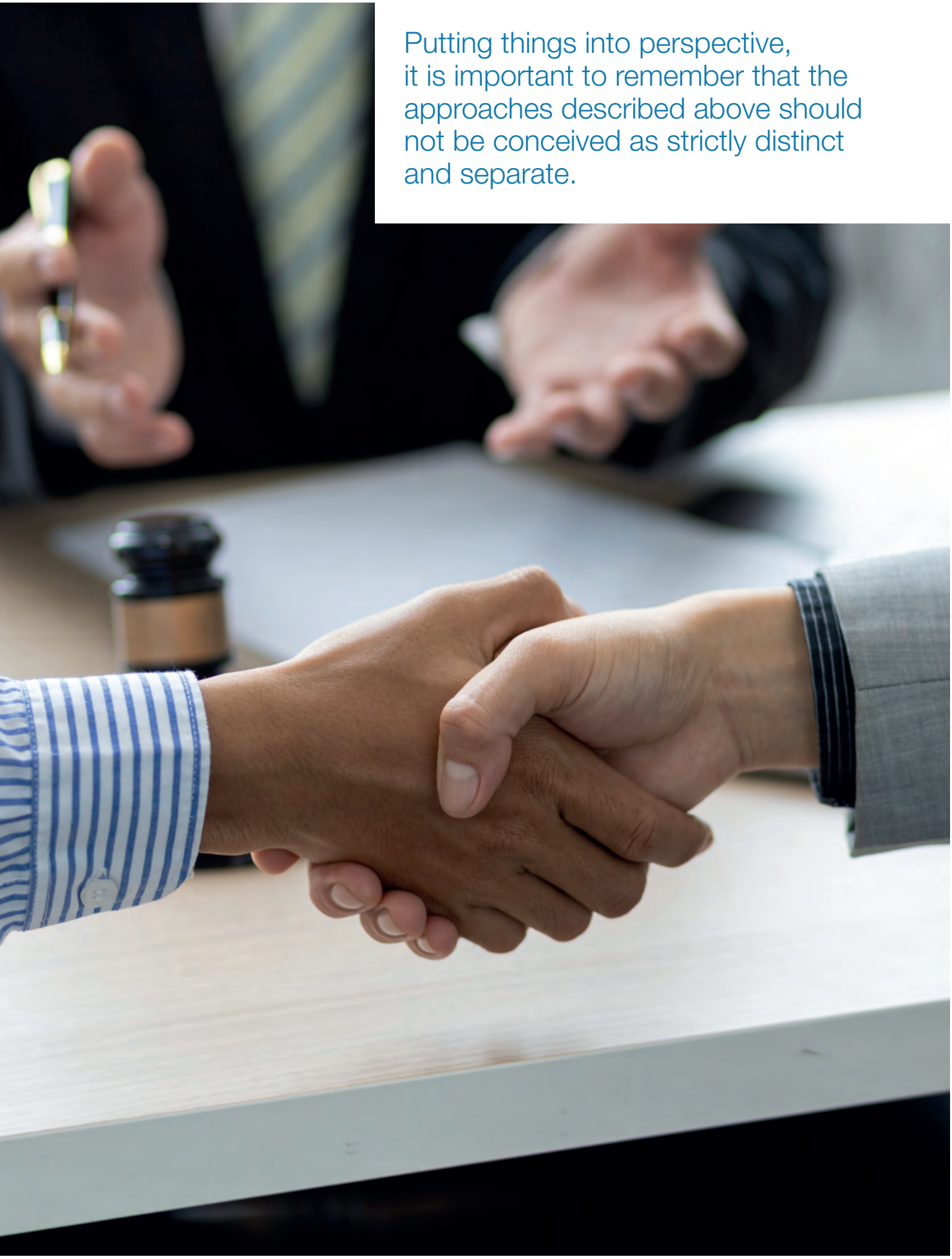
Indeed, it is not rare to see an absence of reasoning by arbitral tribunals when determining document production requests who, instead, simply indicate whether a request is approved or rejected in the Redfern schedule (or the Stern schedule, etc.). Second, there is a distinct gap between the approach favored by many leading scholars in international arbitration, i.e., the "most protective" approach and the approach that is most commonly used in practice where tribunals do not refer to a particular national law but rather rely on general principles applicable to legal privileges and international law. This method has been described as the "autonomous" approach.

A review of investor-state arbitration case law on the issue of evidentiary privileges shows a great diversity of methods used in determining or dealing with the issue:[51]

1. The majority of investment arbitration tribunals tend not to rely on any specific national law but instead apply the general principles of attorney-client privilege that exist across various jurisdictions or under international law. This approach, known as the "Autonomous Approach," is based on the idea that evidentiary privileges in international arbitration should be governed by internationally shared standards. A striking example is found in the Caratube v. Kazakhstan case.[52] The arbitral tribunal ruled that it has discretion to determine attorney-client privilege claims based on the ICSID Convention and ICSID Arbitration Rules, not just French law (law of the seat), due to the international nature of the arbitration. The tribunal considered general principles of attorney-client privilege and the laws of France, the United States, and Kazakhstan, which are the three states most closely connected to the case. Given the broad disparity of rules and principles across jurisdictions, tribunals also refer to article 9.2(b) of the IBA Rules[53] as well as arbitral precedents such as the *NAFTA Vito G Gallo v. Canada* case.[54] While the autonomous approach does not, by its nature, rely on a specific national law, the notion of attorney-client privilege adopted in common-law countries tends to be preferred over that of civil law jurisdictions.[55]

2. Another approach adopted by tribunals (although less frequently than the first approach) is the "Most Closely Connected Law Approach." This is a conflict of laws approach where tribunals determine which law is most closely connected with the dispute and apply it. The criteria used to determine the most closely connected law may include factors such as the location of the parties and the place of the transaction or investigation.[56] Another criterion is when the parties have chosen a specific set of rules to govern attorney-client and other evidentiary privileges (being a national law or a broader standard that encompasses multiple jurisdictions). In these cases, tribunals defer to party autonomy to determine the applicable standard.[57]

Putting things into perspective, it is important to remember that the approaches described above should not be conceived as strictly distinct and separate.



3. In other instances, when faced with issues of attorney-client privilege, tribunals may resort to practical measures to protect the interests underlying the privilege. These measures often involve redaction or *ex parte* review of documents to remove sensitive information while still allowing relevant evidence to be presented.[58] In *St. Marys VCNA, LLC v. Canada*, the tribunal decided to have the disputed documents reviewed by a neutral third party to determine whether any privilege in relation to these documents had been waived.[59]

4. Tribunals may also balance the competing interests of the parties and apply general principles of equity and fairness to resolve issues of attorney-client privilege. This approach recognizes that the application of rigid rules may not always be appropriate in situations where multiple interests are at stake. This approach led the tribunal in *Canfor Corp. v. USA* to rule that the communications, the explication notes, and the position papers and memorandum exchanged between the NAFTA member states were not privileged so as to ensure that "the parties to the arbitration would have had equal access to the negotiating history of the Agreement as well as equal opportunity to resort to those documents."[60] In *Methanex v. USA*, the tribunal ruled that the acquisition of documents by trespassing into the office of the head of a lobbying organization and searching through waste bins was unlawful, and it would be wrong to introduce such evidential material obtained unlawfully.[61]

Finally, the "Most Protective (Favorable) Law Approach" praised by scholars is in fact rarely applied by tribunals. Tribunals using this approach compare the outcome under different potential applicable laws and apply the law that provides the most protection to both parties. This approach is based on the principle that attorney-client privilege should be protected to the fullest extent possible, even if it means applying a more protective standard than the one that would normally apply. In *Blanco v Mexico*, the tribunal considered that the highest protective standard was contained in the United States' rules on attorney-client privilege and work product doctrine.62 The limited success of this approach is probably due to the fact that determining the most protective law requires a complex conflict of laws analysis as well as a comprehensive understanding of the substantive protections offered by the competing laws.

One can understand why the autonomous standard approach appears to be the preferred approach. First, it provides arbitral tribunals with the flexibility to choose the applicable standard that best suits the parties involved. Second, this approach eliminates the need to conduct a conflict of laws analysis that may be challenging in cases where attorney-client privilege is not uniformly recognized across various jurisdictions. Finally, the autonomous standard approach implicitly incorporates the most protective law approach by applying general principles of attorney-client privilege that offer robust protection for the parties or support the limitation of document production.

Putting things into perspective, it is important to remember that the approaches described above should not be conceived as strictly distinct and separate. In practice, and as indicated above, the determination of evidentiary privileges is not always properly reasoned, and the solutions remain fact-dependant and pragmatic. This means that tribunals also combine different approaches.

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Endnotes

1. See section 3(1) of the IAA of the UNCITRAL Model Law on International Commercial Arbitration
2. See [29] of *Republic of India v. Vedanta Resources plc* [2021] SGCA 50
3. see Jeffrey Waincymer, *Procedure and Evidence in International Arbitration,* Chapter 10: "Approaches to Evidence and Fact Finding" (Kluwer Law International 2012) at [10.17.3]
4. see, for example, Jeffrey Waincymer, *Procedure and Evidence in International Arbitration*, Chapter 10: "Approaches to Evidence and Fact Finding" (Kluwer Law International 2012) at [10.17.7]
5. See Albert Monichino QC, The *ACICA Review – December 2016*, 'Privilege disputes in international arbitration.'
6. See Thomas Stouten and Denise Jansen, "Legal privilege issues: at the mercy of the arbitral tribunal," < https://www.ibanet.org/legal-privilege-arbitral-tribunal> last accessed on 22 May 2023
7. **Supreme Court of Justice of the Nation**. *"PROFESSIONAL SECRECY. EXEMPTION FROM THE OBLIGATION TO TESTIFY ABOUT THIRD PARTY FACTS."* Digital record: 168790. Collegiate Circuit Courts; Ninth Epoch; Judicial Weekly of the Federation and its Gazette.

   "Linked to the right to privacy is professional secrecy, which is the obligation of certain persons (doctors, lawyers, financial institutions, accountants, priests, among others), who may not disclose information, the knowledge of which they have obtained in the exercise of their professional activities, with respect to others. In this sense, whoever has knowledge of certain information in the course of his professional practice, cannot be obliged to testify about such information, unless the owner of such information authorizes him to do so...."
8. **Political Constitution of the United Mexican States**. Diario Oficial de la Federación, February 5, 1917, free translation.

   "Private communications are unbreachable. The law will criminally punish any act that violates the freedom and privacy of the same, except when they are provided voluntarily by any of the individuals involved in them. The judge will evaluate the scope of such communications, as long as they contain information related to the commission of a crime. In no case will communications that violate the duty of confidentiality established by law be admitted.

   Only the federal judicial authority, at the request of the federal authority authorized by law or the head of the Public Prosecutor's Office of the corresponding federal entity, may authorize the interception of any private communication. For this purpose, the competent authority must justify the legal grounds for the request, expressing, in addition, the type of intervention, the subjects of the same and its duration. A federal judicial authority may not grant these authorizations when dealing with matters of an electoral, fiscal, mercantile, civil, labor or administrative nature, nor in the case of communications of the detainee with his defense counsel...."
9. **Supreme Court of Justice of the Nation.** "SECRECY OF COMMUNICATIONS BETWEEN A LAWYER AND HIS CLIENT. IT IS APPLICABLE TO ADMINISTRATIVE PROCEEDINGS OF LIABILITY IN MATTERS OF ECONOMIC COMPETITION." Digital Registry 2013587. Collegiate Circuit Courts; 10th Epoch; Judicial Weekly of the Federation.
10. Article 1061 of the Commercial Code states: (i) both, the plaintiff and the defendant shall present the documents on which they base their claims or defenses; (ii) if the parties do not have at their disposal or are unable to produce said documents, they shall declare to the judge, under oath, the reason why they are unable to produce them; (iii) the judge shall order the person responsible to produce the document at the expense of the interested party; and (iv) documentary evidence not in their possession at the time of filing the claim or defiance will not be accepted.
11. **Supreme Court of Justice of the Nation**. "EVIDENCE IN THE AMPARO (JUDICIAL INSPECTION OF BOOKS AND PAPERS OF STRANGERS TO THE TRIAL)." Digital record: 350403. Collegiate Circuit Courts. 5th Epoch; Judicial Weekly of the Federation.
12. **Fautsch, Pablo**. "*Legal Privilege and Professional Secrecy.*" Law Business Research. 2018. Pages 39-40.
13. Article 210 of the Federal Criminal Code.
14. **Code of Commerce**. Federation Official Gazette, October 7, 1889. By virtue of the final part of Article 1415, the Model Law is applicable to national and international commercial arbitration, when the latter has its seat in Mexican territory.
15. **Treviño, Julio**. "*The new Mexican legislation on commercial arbitration.*" Private Law Review. Institute of Legal Research. National Autonomous University of Mexico. Mexico, 1995. Page 36.
16. **Pereznieto Castro, Leonel**. *"The United Nations Commission on International Trade Law.*" Mexico, 1995. Page 97.
17. **Model Law on International Commercial Arbitration**. United Nations Commission on International Trade Law, 1985. Article 19. See: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration
18. **IBA Rules on the Taking of Evidence in International Arbitration**. Adopted by a resolution of the International Bar Association Council, 17 December 2020. See: https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b
19. *Merkin and Flannery on the Arbitration Act 1996*, 6th Edition (2020), p. 385.
20. *Russell on Arbitration*, 24th Edition, David St John Sutton, Judith Gill and Matthew Gearing (2015) 5-146.
21. Ibid.
22. See, for example, the ICC Rules at Appendix IV(d).
23. *London Maritime Arbitration*, 4th Edition, Clare Ambrose, Karen Maxwell and Michael Collet KC (2017) p. 204. See also footnote 1.
24. Ibid, p. 205.
25. Pages 453-454.
26. Section 47(2) of the Ordinance.
27. Section 46 of the Ordinance.
28. The Ordinance unified the international arbitration regime, founded on the basis of the UNCITRAL Model Law and the previous domestic regime based on the English Arbitration Act 1950.
29. Some arbitral rules such as the IBA Rules allow for independent experts to consider whether or not to admit disputed documents: see article 3.8.

30. An exception is the more modern Model Bilateral Investment Treaties, such as the 2022 Italy Model BIT, 2021 Canada Model BIT, and the 2012 U.S. Model BIT, which provide that nothing in the treaty shall be construed to allow access to any information the disclosure of which the government determines to be contrary to its essential security interests (articles 16(a), 22(4), and 18(1) respectively). In addition, the 2022 Italy Model BIT and 2021 Canada Model BIT provide that nothing in the treaty shall require a party to furnish or allow access to information the disclosure of which would be contrary to domestic laws, including those protecting confidentiality (articles 12(2) and 22(5) respectively).
31. 2022 ICSID Arbitration Rules.
32. 2021 UNCITRAL Arbitration Rules.
33. Article 43(a) 1966 Convention on The Settlement of Investment Disputes Between States and Nationals of Other States.
34. IBA Rules on the Taking of Evidence in International Arbitration 2020 (2020 IBA Rules).
35. IBA Rules article 9.2(a-g).
36. *BSG Resources Ltd., BSG Resources (Guinea) Ltd., and BSG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 7 (Sept. 5, 2016), Annex A, Request No 34.
37. E*lliott Associates L.P. v. Republic of Korea,* PCA Case No. 2018-51, Procedural Order No. 14 (June 24, 2020), paragraph 72
38. *BSG Resources Ltd., BSG Resources (Guinea) Ltd., and BSG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 7 (Sept. 5, 2016), Annex A, Request No 3.
39. IBA Rules article 9.2(e).
40. 2022 Italy Model BIT article 16(a), 2021 Canada Model BIT article 22(4), and the 2012 U.S. Model BIT article 18(1).
41. 2012 U.S. Model BIT article 19.
42. IBA Rules article 9.2(f).
43. *United Parcel Service of America Inc. v. Government of Canada*, Case No. UNCT/02/1, Decision of the Tribunal relating to Canada's Claim of Cabinet Privilege (Oct. 8, 2004), paragraph 8.
44. *Pope & Talbot Inc. v. Government of Canada*, Decision by the Tribunal, NAFTA (UNCITRAL) (Sept. 6, 2000), paragraph 1.4; Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 2 (May 24, 2006), pages 8–9.
45. *United Parcel Service of America Inc. v. Government of Canada*, Case No. UNCT/02/1, Decision of the Tribunal relating to Canada's Claim of Cabinet Privilege (Oct. 8, 2004), paragraph 9.
46. Global Telecom Holding S.A.E. v. Canada (ICSID Case No. ARB/16/16), Procedural Order No. 4 (Nov. 3, 2018), paragraph 43.
47. Examples of such laws include: s. 28(2) of the Crown Proceedings Act 1947 in the UK, which provides that the existence of a document will not have to be disclosed if, in the opinion of a minister of the Crown, it would be injurious to the public interest to disclose the existence thereof; s. 39(2) Canada Evidence Act 1985, which provides that disclosure will be refused where a minister of the Crown or the Clerk of the Privy Council certifies that the information constitutes a confidence of the Privy Council for Canada.
48. *Pope & Talbot, Inc. v. Government of Canada*, UNCITRAL, Decision by the Tribunal (Sept. 6, 2000), paragraph 1.3; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2 (May 24, 2006), pages 8-9; *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 12 Regarding the Parties' Privilege Claims (Nov. 14, 2014), paragraph 4.6.
49. *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Procedural Order No. 13 (July 11, 2012), paragraph 22.
50. *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Procedural Order No. 13 (July 11, 2012), paragraph 26.
51. I. Shehata, Attorney-Client Privilege and International Arbitration, Cardozo Journal of Conflict Resolution, volume 20.2: Winter 2019, pages 363-415.
52. *Caratube International Oil Co. LLP v. The Republic of Kazakhstan* ICSID Case No. ARB/13/13, Decision on the Claimants' Request for Production of Leaked Documents (July 27, 2015).
53. See, for instance, *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11 (Nov. 1, 2021); *Lion Mexico Consol. L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2 (Sept. 20, 2021).
54. *Vito G. Gallo v. Canada*, UNCITRAL, PCA Case No. 55798, Procedural Order No. 3 (Apr. 8, 2009).
55. *CME Czech Republic B.V. et al. v. The Czech Republic*, UNCITRAL, para. 64 (June 3, 2002); Gramercy Funds Management LLC & Gramercy Peru Holdings LLC v. Republic of Peru, ICSID Case No. UNCT/18/2.
56. *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Expl. & Prod. Co. Ltd. ("Bapex") & Bangladesh Oil Gas & Mineral Corp. ("Petrobangla"),* ICSID Case No. ARB/10/18, Procedural Order No. 22 (27 July 27, 2017).
57. *Apotex Holdings Inc. & Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on Document Production Regarding Parties' Respective Claims to Privilege and Privilege Logs, paragraphs 20-21 (July 5, 2013); Windstream Energy LLC v. Gov't of Canada, UNCITRAL, PCA Case No. 2013-22, Procedural Order No. 4 (Feb. 23, 2015).
58. See, for instance, *Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland (Chagos Marine Protected Area Arbitration)*, PCA Case No. 2011-03, Ad Hoc Award (Mar. 18, 2015).
59. *St. Marys VCNA, LLC v. Gov't of Canada*, Report on Inadvertent Disclosure of Privileged Documents, at 13 (Dec. 27, 2012).
60. *Canfor Corporation v. United States*, UNCITRAL, Procedural Order No. 5 (May 28, 2004).
61. *Methanex v. United States*, NAFTA, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 7, 2002).
62. *Jorge Luis Blanco, Joshua Dean Nelson & Tele Fácil México, S.A. de C.V. v. United Mexican States*, ICSID Case No. UNCT/17/1. See also Postová Banka, A.S. & Istrokapital SE v. Hellenic Republic, ICSID Case No. ARB/13/8, Procedural Order No. 6 (July 20, 2014), where Greek law was preferred over Slovak law.

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