

ATTORNEY-CLIENT PRIVILEGE & INTERNATIONAL ARBITRATION

*Ibrahim Shehata**

ABSTRACT

This article attempts to offer a new perspective to the existing debate concerning the applicable standard of attorney-client privilege in international commercial and investment arbitration. This article starts by analyzing the main convergences and divergences in the concept of attorney-client privilege across four national jurisdictions. In this regard, this article sheds light upon the divergence of opinions between international arbitration scholars in the literature and how international arbitration operates in practice. For instance, the standard of the “most-protective law,” which most arbitration scholars vouch should be the right answer, is not actually the most featured standard in the published arbitral procedural decisions included in this survey (featured only three times out of forty-four published arbitral procedural decisions). Finally, the author acknowledges how the IBA Rules were successful in establishing an accepted norm of document production which most international arbitration practitioners adopt. Therefore, the main purpose of this article is in fact analyzing how far the relationship and interaction between attorney-client privilege and document production should play a role in shaping up an adequate standard of attorney-client privilege; a standard that can emerge as a best practice in international arbitration.

I. INTRODUCTION

A. *Introductory Remarks*

The concept of attorney-client privilege is a unique creation of the common-law jurisdictions which has influenced all types of legal regimes over the world. Common-law jurisdictions developed such a concept to curb the wide scope of document production and

* Ibrahim Shehata is a Senior Associate at Sharkawy & Sarhan Law Firm; Junior Faculty Member at Cairo University with an LL.M. from New York University School of Law.

discovery in litigation. As the name of the concept entails, it was created as a privilege for the client. The rationale was mainly fostering candid communications between the clients and their attorneys, which would typically improve the quality of legal advice across the spectrum.¹ On the other hand, civil-law jurisdictions view the issue from a different perspective. As a starting point, discovery and document production is very limited in civil-law jurisdictions. Accordingly, there was no reason to develop such a concept since the scope of document production is rather narrow.² However, civil-law jurisdictions developed a concept, which had similar attributes to the common-law concept of attorney-client privilege, namely the attorney's duty of confidentiality or the legal professional privilege. The rationale was rather similar as well,³ it was promoting the quality of legal advice. In sum, both civil-law and common-law notions are different in their nature, and scope, but share the same rationale which is enhancing the legal representation of clients.

Through the factors of globalization and the advent of the internet, corporations started to branch out in several national jurisdictions and the notion of multi-national corporations came to existence, and along with it, the rate of cross-border disputes increased exponentially. This has led to the further development in the field of conflict of laws. More importantly, international arbitration picked up its momentum and became recognized as the default norm for international dispute resolution of international commercial contracts, late in the 20th Century.⁴ Some scholars suggest that international arbitration became the default dispute resolution mechanism for cross-border commercial transactions.⁵ In this regard, international arbitration began to develop best practices and standards; it started to develop unique features that assemble various doctrines of law from both common-law and civil-

¹ ANNABELLE MÖCKESCH, *ATTORNEY-CLIENT PRIVILEGE IN INTERNATIONAL ARBITRATION* para. 6.04 (2017).

² 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, at 8.

³ MÖCKESCH, *supra* note 1, at para. 6.04.

⁴ Paul Friedland, *2018 International Arbitration Survey: The Evolution of International Arbitration*, WHITE & CASE LLP (May 9, 2018) (“97% of respondents indicate that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48%) or in conjunction with ADR (49%)”), <https://www.whitecase.com/publications/article/2018-international-arbitration-survey-evolution-international-arbitration>.

⁵ See G. Cuniberti, *Beyond Contract—The Case for Default Arbitration in International Commercial Disputes*, 32 *FORDHAM INT'L L.J.* 417 (2008).

law jurisdictions. For example, the International Bar Association (“IBA”) introduced its rules on the Taking of Evidence in 1999, which were further updated in 2010 (the “IBA Rules”) to offer guidance for arbitral tribunals when dealing with evidentiary issues in international arbitration. The IBA Rules delivered a standard of document production that could be considered to be broader than most civil-law jurisdictions, and narrower than most common-law jurisdictions.⁶

As attorney-client privilege interacted with international arbitration, scholars started to debate whether agreeing to arbitration would amount to a waiver of attorney-client privilege. In that respect, arbitration practitioners across the spectrum have recognized that agreeing to arbitration does not constitute an implied waiver of attorney-client privilege.⁷ In fact, attorney-client privilege has been widely recognized as a valid defense against requests for document production.⁸ However, there has not been a general consensus yet on the applicable standard of attorney-client privilege in International Arbitration.⁹ This opened up the debate between international arbitration scholars for the right answer to such a conundrum.

⁶ J. Ahdab & A. Bouchenaki, *Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?*, 15 ICCA CONGRESS SERIES 65, 94 (2011).

⁷ Von Schlabrendorff & Sheppard, *Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution*, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 766 (2005); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2379 (2d ed. 2014); Metzler, *The Arbitrator and the Arbitration Procedure, The Tension Between Document Disclosure and Legal Privilege in International Commercial Arbitration—An Austrian Perspective*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2015 275 (Klausegger et al. eds., 2015); Sindler & Wüstemann, *Privilege Across Borders in Arbitration: Multi-jurisdictional Nightmare or a Storm in a Teacup?*, 23 ASA BULLETIN 610, 618 (2005); Tom Ginsburg & Richard M. Mosk, *Evidentiary Privileges in International Arbitration*, 50 INT'L & COMP. L. Q. 345, 376 (2001); Bernhard F. Meyer-Hauser & Philipp Sieber, *Attorney Secrecy v Attorney-Client Privilege in International Commercial Arbitration*, 73 ARBITRATION 148, 182 (2007); Klaus Peter Berger, *Evidentiary Privileges: Best Practice Standards Versus/and Arbitral Discretion*, 22 ARB. INT'L 501, 504 (2006); Alvarez, *Evidentiary Privileges in International Arbitration*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 663, 676 (2007); Guido Santiago Tawil & Ignacio J. Mirorini Lima, *Privilege-Related Issues in International Arbitration*, in WRITTEN EVIDENCE AND DISCOVERY IN INTERNATIONAL ARBITRATION 29, 31 (Giovannini & Mourre eds., 2009); Patricia Shaughnessy, *Dealing with Privileges in International Commercial Arbitration*, 792 PLI/LIT 257, 259 (2009); Klaus Peter Berger, *Evidentiary Privileges Under the Revised IBA Rules on the Taking of Evidence in International Arbitration*, 13 INT'L ARB. L. REV. 171, 175 (2010); Rachel Reiser, *Applying Privilege in International Arbitration: The Case for a Uniform Rule*, 13 CARDOZO J. CONFLICT RESOL. 653, 659; Diana Kuitkowski, *The Law Applicable to Privilege Claims in International Arbitration*, 32 J. INT'L ARB. 65, 81 (2015).

⁸ BORN, *supra* note 7, at 187; Kuitkowski, *supra* note 7, at 80.

⁹ MÖCKESCH, *supra* note 1, at para. 8.01.

B. *The Purpose & Aim of This Research*

This article attempts to offer a new perspective to the existing debate concerning the applicable standard of attorney-client privilege in international arbitration. Part II of this article provides a general background that highlights the importance of this research through emphasizing the frequency of attorney-client privilege disputes in practice in international arbitration. Furthermore, Part II sheds light upon the interaction between international arbitration and private international law. Also, Part II proposes the ultimate solution to this conundrum in theory, namely, party autonomy; it analyzes how such a solution could be followed in practice. Then, Part III analyzes the main convergences and divergences in attorney-client privilege across four national jurisdictions. The author tries to identify the convergences and divergences between such jurisdictions that would be significant in practice in international arbitration. In this respect, Appendix I outlines a streamlined and modernized high-level comparison between these four national jurisdictions.

In addition, the author furnishes special attention in Part IV to the practical consequences of the arbitral tribunal “getting it wrong” and how this could affect the recognition and enforcement of international arbitral awards. Accordingly, Part IV analyzes the main approaches adopted in practice in international arbitration. In particular, this section sheds light on the divergence of opinions between international arbitration scholars in the literature and how international arbitration operates in practice. It seems that the standard of “most-protective law,” which most arbitration scholars vouch should be the right answer, is not actually the most featured solution in the published arbitral decisions (featured only three times explicitly). Furthermore, Appendix II digs deeper into the practice of international arbitration; both commercial and investment. The appendix gathers (forty-four) published arbitral awards or procedural decisions and categorizes them based on the standard which they adopted for attorney-client privilege. Moreover, this appendix highlights the reasoning of the arbitral tribunals behind choosing a specific standard in particular.

Finally, the author acknowledges in Part V how IBA Rules were successful in establishing an accepted norm of document production which most international arbitration practitioners adopt. The main purpose of this article is to analyze how far the relationship and interaction between attorney-client privilege and docu-

ment production should play a role in shaping up an adequate standard of attorney-client privilege; a standard that can emerge as a best practice in international arbitration. In particular, Part V aims to outline the guiding principles and the structure of an equally-acknowledged standard for attorney-client privilege that would be compatible with the IBA best practices in document production in international arbitration.

II. BACKGROUND

A. The Frequency of Attorney-Client Privilege Disputes in International Arbitration

Arbitral awards and decisions were in fact hard to come by in the field of international commercial arbitration (only 20% of the featured arbitral awards or procedural decisions in Appendix II pertain to international commercial arbitration; by contrast, the remaining 80% were concerned with international investment arbitration). At first glance, one could infer that attorney-client privilege disputes do not arise frequently in commercial arbitration or that such disputes arise in investment arbitration much more regularly than in commercial arbitration. This statistic, however, could be extremely misleading for a simple reason; we do not have access to all arbitral procedural decisions in international commercial arbitration. To the contrary, nearly all international investment arbitration awards and procedural decisions are published and publicly available. More importantly and as evident in our survey of international investment arbitration, attorney-client privileges are usually decided in the form of arbitral procedural decisions. In this regard, when commercial arbitral institutions decide to publish extracts, they do so usually with respect to awards rather than procedural decisions. Therefore, we can conclude—based on the frequency of this issue in international investment arbitration—that the issue of attorney-client privilege is exceptionally significant and is exceedingly frequent in both international commercial and investment arbitration.

B. *International Arbitration & Conflict of Laws*

International arbitration would usually by default involve a situation where there is a conflict between two or more potentially applicable laws. This raises the question: which conflict of laws rules should be applied by the arbitral tribunal or what has been termed as the “conflict of conflicts rules.”¹⁰ In this regard, many scholars agree that arbitration does not have a forum (*a lex fori*).¹¹ This means that arbitral tribunals are not bound to apply the conflict of laws rules of the seat of arbitration. In this regard, two main approaches were recognized in the practice of international arbitration, namely: (1) *voie directe*: whereby arbitral tribunals choose the applicable law(s) without delving into a conflict of laws analysis; and (2) *voie indirecte*: whereby arbitral tribunals choose the applicable law(s) after conducting a conflict of laws analysis; however, not necessarily applying the conflict of laws rules of the seat of arbitration.¹²

Nevertheless, such discretionary powers of arbitral tribunals are not without limits. In this respect, most arbitral institutions provide that arbitrators are under the duty of rendering enforceable awards.¹³ This means that arbitral tribunals are required to wisely take into consideration the potentially applicable overriding mandatory rules¹⁴ and the public policy of the jurisdictions that

¹⁰ Filip de Ly, *Conflicts of Law in International Arbitration—An Overview*, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 3 (Franco Ferrari & Stefan Kröll eds., 2010) (“The difficulties and complexities of the topic of private international law in international commercial arbitration (encompassing not only issues of applicable law but also of international jurisdiction and recognition and enforcement of judgments and arbitral awards) stem from the fact that arbitrators in international commercial cases are not only facing a conflict of laws question (which law applies) but also a conflict of conflicts of law question (which system of private international law applies).”).

¹¹ DOLORES BENTOLILA, *ARBITRATORS AS LAWMAKERS* 119 (2017).

¹² MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 79–81 (3d ed. 2017).

¹³ Arbitration Rules, art. 42 (ICC 2018) (“In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.”); Arbitration Rules, art. 32.2 (LCIA 2014) (“For all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognized and enforceable at the arbitral seat.”); see also Fernando Mantilla-Serrano, *Towards a Transnational Procedural Public Policy*, in TOWARDS A UNIFORM INTERNATIONAL ARBITRATION LAW? 191 (Schlaepfer et al. eds., 2005).

¹⁴ Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 *ARB. INT’L* 274, 275 (1986) (explaining that an overriding mandatory rule is “an imperative provision of law which

might have a sufficient connection with the dispute (for instance, the seat of arbitration, the potential places of enforcement, the place of performance of the contract, and the law applicable to the merits). Consequently, the author dedicates a special section in Part IV to inquire into the mandatory character of the national rules on attorney-client privilege to define the constraints on any standard for attorney-client privilege to be applied by arbitral tribunals.

C. *Party Autonomy is the Ultimate Solution in Theory*

The principle of party autonomy is enshrined in the New York Convention,¹⁵ as well as various national arbitration laws¹⁶ and international arbitral institutional rules.¹⁷ The principle of party autonomy provides the parties with the ability to freely agree on procedural, including evidentiary, matters.¹⁸ In other words, the parties to international arbitration could in theory freely agree on the law or standard applicable to attorney-client privilege.¹⁹ Such an agreement would be binding upon the arbitral tribunal.²⁰ This agreement would have the benefit of enabling the parties to conduct their future communications with their attorneys within a sphere of predictability and legal certainty whereby they can adjust their communications to the standard applicable to attorney-client privilege.²¹

On the other hand, agreeing in advance entails a risk that the agreed-upon standard might turn out to be adverse to one or both

must be applied to an international relationship irrespective of the law that governs that relationship.”).

¹⁵ MÖCKESCH, *supra* note 1, at para. 8.05.

¹⁶ See, e.g., Arbitration Act, Section 34(1) (1996) (Eng.); Code of Civil Procedure, Section 1042(3) (2005) (Ger.); Federal Code on Private International Law, art. 182(1) (1987) (Switz.); Code of Civil Procedure, art. 594(1) (1983) (Austria); French New Code of Civil Procedure, art. 1509 (2011) (Fr.); Belgian Judicial Code, art. 1693 (Belg.); Arbitration Act, art. 25(1) (2003) (Spain); Italian Code of Civil Procedure, art. 816 (It.); Arbitration Law, art. 26(1) (2003) (Japan); International Arbitration Act, Section 15A(1) (2002) (Sing.); The Mauritian International Arbitration Act, Section 24(2) (2016) (Mauritius); Arbitration Ordinance, Section 47 (art. 19 of UNCITRAL Model Law) (2014) (H.K.).

¹⁷ See, e.g., Arbitration Rules, art. 19 (ICC 2018); CIETAC Arbitration Rules [hereinafter CIETAC Rules], art. 35.1 (2015), available at www.cietac.org; DIS Arbitration Rules, Section 24.1 (2018) (Ger.); SCC Rules, art. 19(1) (2017) (Swed.).

¹⁸ MÖCKESCH, *supra* note 1, at para. 8.06.

¹⁹ *Id.*

²⁰ Shaughnessy, *supra* note 7, at 268.

²¹ Sindler & Wüstemann, *supra* note 7, at 622.

parties' interests.²² More importantly, it is highly unlikely in practice that the parties would spend time during the negotiations of a complex transaction on an issue as specific as the standard applicable to attorney-client privilege.²³ In practice, transactional lawyers are usually in charge of drafting the agreement, and they usually pay little attention to the dispute resolution clauses; that's why they are termed "midnight" clauses.²⁴ In particular, transactional lawyers regularly include in their main contracts a model arbitration clause prepared by an arbitral institution or recommended by UNCITRAL, which does not address the issue of attorney-client privilege.²⁵ Further, the IBA Guidelines for Drafting International Arbitration Clauses recommend including a provision on attorney-client privilege only if the parties "can foresee at the contract drafting stage that issues of privilege may arise and be of consequence."²⁶ It is in extremely rare cases that the parties will be able to predict the need for attorney-client privilege at such an early stage.

It might be more realistic to expect the parties to agree to the law or standard applicable to attorney-client privilege in an arbitration submission agreement or in the terms of reference in the case of an ICC arbitration. In fact, this was the case in an ICC arbitration where the parties agreed in the terms of reference that English law should govern attorney-client privilege despite the fact that neither party was English, neither lawyer was admitted to the bar in England, and the law governing the contract was not English

²² Craig Tevendale & Ula Cartwright-Finch, *Privilege in International Arbitration: Is It Time to Recognize the Consensus?*, 26 J. INT'L ARB. 823, 835 (2009).

²³ MÖCKESCH, *supra* note 1, at para. 8.06.

²⁴ Nancy Holtz, *Beware the Midnight Clause: Hold the Champagne?*, JAMS (Feb. 2016), <https://www.jamsadr.com/files/uploads/documents/articles/holtz-insidecounsel.com-beware-the-midnight-clause.pdf>.

²⁵ Matthieu de Boissésou, *Evidentiary Privileges in International Arbitration*, 13 ICCA CONGRESS SERIES 705, 713 (Van den Berg ed., 2007); the model arbitration clause suggested by UNCITRAL reads as follows: "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Rules." The standard arbitration clause suggested by the International Chamber of Commerce [hereinafter ICC] states that "[a]ll disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules." See generally JAN PAULSSON & NIGEL RAWDING, *THE FRESHFIELDS GUIDE TO ARBITRATION CLAUSES IN INTERNATIONAL CONTRACTS* (3d ed. 2011) (regarding the drafting of arbitration clauses).

²⁶ INTERNATIONAL BAR ASSOCIATION, *IBA GUIDELINES FOR DRAFTING INTERNATIONAL ARBITRATION CLAUSES* para. 57 (2010), www.ibanet.org.

law.²⁷ The reason for choosing English Law was because—according to the parties—it entailed the widest scope of protection.²⁸ (The author will discuss later in detail whether this opinion is accurate or just a myth). This case appears to be merely an exception.²⁹ In most cases, determining the applicable law or standard to attorney-client privilege would normally be left to the discretion of the arbitral tribunal.³⁰ In this respect, the author advocates that the parties should at least consider the option of agreeing on the law applicable to evidentiary matters and, in particular, attorney-client privilege as the latter could be outcome-determinative. This article will proceed by discussing the options available to arbitral tribunals to deal with this conundrum based on the assumption that the parties do not usually agree on the standard applicable to attorney-client privilege.

III. ATTORNEY-CLIENT PRIVILEGE LAWS: CONVERGENCES & DIVERGENCES

This section aims to determine the core elements of attorney-client privilege that would be significant in practice in international arbitration and how the laws of the surveyed four national jurisdictions converge or diverge in these areas. First, the author begins by specifying the reasons behind choosing these four national jurisdictions in particular.

A. *The Reasons for the Specific Choice of the Four National Jurisdictions*

The author tries to offer a new perspective by delving into the contours of attorney-client privilege across four different national jurisdictions, two common-law jurisdictions (U.S. and England), and two civil-law jurisdictions (Germany and Switzerland). The author chose these particular jurisdictions for several reasons. First, to identify the divergences between common-law jurisdiction and civil-law jurisdictions (U.S. and England versus Germany and

²⁷ NATHAN O'MALLEY, *RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION: AN ANNOTATED GUIDE* para. 9.64 (2012).

²⁸ *Id.*

²⁹ MÖCKESCH, *supra* note 1, at para. 8.11.

³⁰ *Id.*

Switzerland). Second, to determine how the concept of attorney-client privilege is divergent within common-law jurisdictions themselves (U.S. versus England) and within civil-law jurisdictions themselves (Germany versus Switzerland). Third, to choose jurisdictions which engage heavily in international trade. Fourth, to choose jurisdictions where secrecy and confidentiality are highly regarded and influential. And finally, to choose jurisdictions whose legal infrastructure, with respect to attorney-client privilege, is remarkably advanced.

B. *Main Convergences & Divergences that Would be Significant in International Arbitration*

We can derive the core convergences and divergences in attorney-client privilege by exploring the following list of five questions³¹:

1. First Question: Whether the Rationale for Attorney-Client Privilege is the Same?

All four national jurisdictions share the same rationale and purpose behind instituting the concept of attorney-client privilege, namely, promoting candid communications between clients and their attorneys, which improve the quality of legal advice.³² This issue is significant in international arbitration because it would ease the process of creating a transnational substantive rule applicable to all attorney-client privilege disputes in international arbitration.

2. Second Question: Whether the Privilege is Absolute or Qualified?

All four national jurisdictions recognize that attorney-client privilege is an absolute concept that should not be qualified by any public policy considerations.³³ This is definitely remarkable in the field of international arbitration because it paves the way for craft-

³¹ *Id.* at para. 10.30.

³² *Id.* at para. 6.04.

³³ Gerry Silver, *United States*, in *ATTORNEY-CLIENT PRIVILEGE IN THE AMERICAS: PROFESSIONAL SECRECY OF LAWYERS* 468, 472–74 (James R. Silkenat & Dirk Van Gerven eds., 2010); DAVID GREENWALD & MARC RUSSENBERGER, *PRIVILEGE AND CONFIDENTIALITY: AN INTERNATIONAL HANDBOOK* 96, 279 (2d ed. 2006); NICOLAS GRÉGOIRE, *EVIDENTIARY PRIVILEGES IN INTERNATIONAL ARBITRATION: A COMPARATIVE ANALYSIS UNDER ENGLISH, AMERICAN, SWISS AND FRENCH LAW* 53–54 (2016); MÖCKESCH, *supra* note 1, at para. 6.25.

ing a model standard for attorney-client privilege in international arbitration that provides for limited exceptions.

3. Third Question: Who is Considered as a Lawyer?

This is the first critical issue where the four national jurisdictions diverge. Here, there are three patterns: (1) Absolute inclusion of in-house counsels (U.S.³⁴ and England³⁵); (2) Qualified inclusion of in-house counsels (Germany)³⁶; and (3) Absolute exclusion of in-house counsels (Switzerland).³⁷ This is obviously a substantial issue in international arbitration, taking into consideration the rate of frequency of cross-border disputes between the above jurisdictions and other jurisdictions that follow the same patterns. Therefore, in our model, we try to select the pattern which fits best with the intricacies of international arbitration and the scope of document production under the IBA Rules.

4. Fourth Question: Whether the Privilege Attaches to Communications or the Underlying Information/Facts?

There are two main approaches under this question: (1) Common-law approach in which only communications are privileged and (2) civil-law approach in which underlying information and facts are privileged. This is one of the key attributes that must be determined in any transnational standard for attorney-client privilege in international arbitration. This is one of the muddy areas where civil-law jurisdictions are quite expansive in comparison with their counterpart common-law jurisdictions. In this regard, we first need to draw a fine line between what could be defined as communications and what could be defined as the underlying facts/information. The suggested transnational model standard would explore this issue thoroughly.

³⁴ Silver, *supra* note 33, at 472, 475 (stating that “as for the communications with a foreign in-house counsel providing legal advice on U.S. matters, they would be considered privileged only if presented with proof of the existence of a specific legal privilege governing the foreign in-house counsel under the law of the applicable foreign jurisdiction. The absence of such proof has led to the rejection of claims of attorney-client privilege with regard to foreign in-house lawyers in many countries, including France, India, the Netherlands, China and Russia.”); GRÉGOIRE, *supra* note 33, at 57.

³⁵ MÖCKESCH, *supra* note 1, at para. 3.56.

³⁶ MÖCKESCH, *supra* note 1, at para. 4.66.

³⁷ GRÉGOIRE, *supra* note 33, at 65; GREENWALD & RUSSENBERGER, *supra* note 33, at 285.

5. Fifth Question: What is the Required Purpose of Such Communications to Attach Privilege?

Under this issue, there are three main patterns: (1) solely legal advice (U.S.³⁸ and England³⁹); (2) predominantly legal advice (Switzerland);⁴⁰ and (3) both legal and business advice (Germany).⁴¹ This is noteworthy in international arbitration because the line separating the business and legal operations of an in-house counsel is usually quite vague. Thus, we need to take into consideration the potential abuses of any transnational rule that would be as expansive as the German pattern.

C. *Comparison Core Insights*

Based on our survey of the selected four national jurisdictions, we can deduce the following seven insights which shatter a few myths. First, the divide between common-law and civil-law countries in attorney-client privilege is utterly a myth. In fact, there is no uniform concept of attorney-client privilege, neither within common-law jurisdictions nor within civil-law jurisdictions. In the words of Möckesch, “[a]lthough the U.S. attorney-client privilege . . . [is] the approximate equivalent of the English legal advice privilege . . . the laws of the United States and England equally differ in many respects.”⁴² Second, there is another myth, namely that attorney-client privilege is broader in common-law jurisdictions than in civil-law jurisdictions. Our survey shows that such a statement is groundless. In fact, looking at German law in particular, one can easily argue that its scope of attorney-client privilege is far broader than any common-law jurisdiction. This is supported by the fact that German attorney-client privilege extends to business and financial advice. Also, both German and Swiss laws protect the underlying information/facts rather than the communications themselves, which could prove far more protective than common-law jurisdictions in several situations. Third, the idea that the development of attorney-client privilege laws in civil-law jurisdictions is generally lagging behind their common-law counterparts is yet another confounded myth. Based on our survey, it’s clear that

³⁸ GRÉGOIRE, *supra* note 33, at 57; MÖCKESCH, *supra* note 1, at para. 6.21.

³⁹ MÖCKESCH, *supra* note 1, at para. 6.22.

⁴⁰ GREENWALD & RUSSENBERGER, *supra* note 33, at 283.

⁴¹ MÖCKESCH, *supra* note 1, at para. 6.21.

⁴² MÖCKESCH, *supra* note 1, at para. 6.40.

civil-law jurisdictions are very sophisticated, at least when it comes to attorney-client privilege. It might be true that they are not as sophisticated when it comes to the work-product doctrine. This might be due to the fact that there is not much need for the work-product doctrine in civil-law jurisdictions since the scope of document production is already extremely narrow.

Fourth, attorney-client privilege and document production are, in fact, two sides of the same coin. In this regard, the extent and scope of document production in all the surveyed four national jurisdictions was a true player in shaping the contours of privilege rules in general, and especially the concept of attorney-client privilege. Fifth, one of the peculiar convergences that we discovered in our survey is the fact that all four national jurisdictions attach to any licensed lawyers, even if they are only registered with foreign bar associations. This cements our suggested transnational standard as the surveyed national jurisdictions would probably not interfere with the recognition and enforcement of arbitral awards or decisions that adopt our suggested transnational standard. Sixth, it seems that common-law jurisdictions pay more attention to the definition of a corporate client in attorney-client privilege communications despite the divergence between the U.S. and English laws on this issue. By contrast, this issue did not receive much attention in civil-law jurisdictions, namely Germany and Switzerland. Seventh and finally, in another peculiar instance, there was a partial convergence between a common-law jurisdiction (U.S.) and a civil-law jurisdiction (Switzerland). This is where both jurisdictions adopted a subjective criterion to determine how far the communication/underlying facts need to be confidential in order to attach attorney-client privilege. Such a convergence makes it easier to argue for the case of a transnational standard for attorney-client privilege in international arbitration.

IV. ATTORNEY-CLIENT PRIVILEGE & INTERNATIONAL ARBITRATION

A. *The Legal Framework of Attorney-Client Privilege in International Arbitration*

This section surveys the various arbitration rules and laws to determine how the issue of attorney-client privilege is conceptualized and how this could be beneficial to the arbitral tribunal when

determining the standard applicable to attorney-client privilege in international arbitration.

1. National Arbitration Laws & International Arbitral Institutional Rules

There is no express mention of the issue of attorney-client privilege under any national arbitration legislation.⁴³ To remedy this omission, many national arbitration laws provide the arbitral tribunal with substantial discretion with respect to the conduct of proceedings.⁴⁴ Under Article 19(2) of the UNCITRAL Model Law,⁴⁵ the arbitral tribunal has “the power to determine the admissibility, relevance, materiality, and weight of any evidence.”⁴⁶ Further, many European⁴⁷, Asian, and Latin American⁴⁸ national arbitration laws provide the arbitral tribunal with the same discretion. Moreover, the English Arbitration Act also provides the necessary powers to the arbitral tribunal to determine the applicable standard for attorney-client privilege.⁴⁹ As for the U.S., the Federal Arbitration Act (“FAA”) does not provide such powers to the arbitral tribunal. Nevertheless, U.S. courts have uniformly held that absent an agreement by the parties to the contrary, all issues of arbitral procedure are to be left to the arbitrators.⁵⁰

As for arbitration institutional rules, the UNCITRAL arbitration rules as well as most arbitral institutional rules are silent on this issue.⁵¹ Similar to national arbitration laws, they provide arbitral tribunals with substantial discretion regarding the conduct of

⁴³ JONAS VON GOELER, *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION AND ITS IMPACT ON PROCEDURE* 165 (2016); Kuitkowski, *supra* note 7, at 78.

⁴⁴ MÖCKESCH, *supra* note 1, at para. 8.28.

⁴⁵ To date, more than sixty jurisdictions have based their arbitration legislation on the UNCITRAL Model Law. These include, inter alia, Austria, Canada, Chile, Denmark, Germany, Hong Kong, Japan, Mauritius, Poland, Singapore, and Spain. For further information, see UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, *available at* www.uncitral.org.

⁴⁶ UNCITRAL Model Law on International Commercial Arbitration, art. 19(2) (1985).

⁴⁷ See Code of Civil Procedure, Section 1042(2) (2005) (Ger.); New French Code of Civil Procedure, art. 1464 (2011); Federal Code on Private International Law Act, art. 182 (1987) (Switz.); Italian Code of Civil Procedure art. 816-bis; Swedish Arbitration Act, Section 21; Austrian Arbitration Law, art. 594(1); Dutch Code of Civil Procedure, art. 1036.

⁴⁸ Arbitration Law, art. 26(2) (2003) (Japan); International Arbitration Act, Section 12 (2002) (Sing.); Arbitration Ordinance, Section 47(2) (2014) (H.K.); Mexican Commercial Code, art. 1435(2) (Mex.); Chilean International Commercial Arbitration Law, art. 19(2) (Chile).

⁴⁹ MÖCKESCH, *supra* note 1, at para. 8.29.

⁵⁰ *Int'l Union et al. v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000); see BORN, *supra* note 7, at 2148.

⁵¹ MÖCKESCH, *supra* note 1, at para. 8.30.

the arbitration.⁵² The exceptions are the ICDR International Arbitration Rules of 2014, the CPR Rules for Administered Arbitration of International Disputes of 2014, and the CAMCA Arbitration Rules of 1996, which explicitly address privilege.⁵³ For instance, Article 22 of the ICDR Rules provides that:

The arbitral tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between a lawyer and client. 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 rules to all parties, giving preference to the rule that provides the highest level of protection.

However, these rules do not address the main question, which is determining the applicable standard for attorney-client privilege in international arbitration.⁵⁴ In sum, neither national arbitration laws nor arbitral institutional rules offer the guidance necessary to the arbitral tribunals to determine the applicable standard for attorney-client privilege.

2. The IBA Rules on the Taking of Evidence in International Arbitration (2010)

The IBA Rules introduced Article 9.3 in 2010, which aims to provide arbitral tribunals with some guidance in determining the applicable standard for attorney-client privilege. In this regard, Article 9.3(a) provides that the tribunal may consider “any need to protect the confidentiality of a document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice.” Further, Article 9.3(c) guides the tribunal to take into account the parties’ expectations at the time the privilege has arisen. More importantly, Article 9.3(e) emphasizes “the need to maintain fairness and equality between the parties, particularly if they are subject to different legal or ethical rules.” However, the IBA Rules did not address the crucial issue here, which is determining the applicable standard for attorney-client privilege in international arbitration. In conclusion, the conflict-of-laws problem remains the same after the introduction of Article 9.3 into the updated IBA Rules in 2010.

⁵² *Id.*

⁵³ *Id.* at para. 8.34.

⁵⁴ *Id.*

B. *The Constraints on the Arbitral Tribunals' Discretion*

As we mentioned above in Part II, arbitral tribunals enjoy discretionary powers when determining the potential applicable laws in general. Such discretionary powers are even wider in the realm of procedural and evidentiary standards of law, unless they constitute a mandatory rule or a public policy principle. In addition, the author analyzes the potential constraints on such discretion under the New York Convention.

1. Mandatory Rules & Public Policy

Procedural or evidentiary rules of law are not considered overriding mandatory rules because, by definition, overriding mandatory rules are substantive rules by nature and not procedural rules. Further, attorney-client privilege does not even constitute a simple mandatory provision of national arbitration legislation.⁵⁵ However, this does not mean that arbitral tribunals are free to determine the standard applicable to attorney-client privilege without any constraints. Arbitral tribunals still have a duty to uphold the right to present one's case and to provide equal treatment to the parties, which are considered public policy principles of most national arbitration laws when determining the applicable standard for attorney-client privilege in international arbitration.

2. The New York Convention

A key question is whether the arbitral tribunal's determination of the applicable standard to attorney-client privilege would be enforced under the New York Convention.⁵⁶ In this respect, several arbitral institutions, most notably the ICC, provide that the duty to render an enforceable award is part of the arbitral tribunal's mandate.⁵⁷ Möckesch identifies four scenarios whereby the enforcement of an arbitral award could be at stake for reasons relating to the arbitral tribunal's determination of the applicable standard to attorney-client privilege.⁵⁸

First Scenario: The arbitral tribunal totally rejects the application of attorney-client privilege. Some commentators view this scenario as a risky ground for the non-enforcement of arbitral

⁵⁵ *Id.* at para. 8.52.

⁵⁶ *Id.* at para. 8.53.

⁵⁷ Arbitration Rules, *supra* note 13.

⁵⁸ MÖCKESCH, *supra* note 1, at para. 8.53.

awards.⁵⁹ In this regard, arbitral tribunals should accept attorney-client privilege as a valid general legal defense when one or both parties invoke it in order to avoid risking the enforceability of the award either under Article V(1)(d) or Article V(2)(b) of the New York Convention.⁶⁰

Second Scenario: The arbitral tribunal applies such a high standard of attorney-client privilege that the parties are virtually unable to present their cases. It's highly unlikely that a national court would deny enforcement under this scenario provided that the arbitral tribunal applies national standards of attorney-client privilege.⁶¹ The problem might arise if the arbitral tribunal devises its own autonomous standard; then in this case, a national court might refuse the enforcement of an arbitral award that applies a highly protective standard, higher than most national standards to attorney-client privilege.⁶² (For instance, protecting documents or information that have already entered the public domain). According to Möckesch, as long as the complete exclusion of document production from arbitral proceedings does not violate a party's right to present its case,⁶³ then crafting such a high standard of protective attorney-client privilege would not violate due process nor international public policy, and hence would not endanger the enforceability of the arbitral award under the New York Convention.

Third Scenario: The arbitral tribunal adopts an attorney-client privilege standard different from that of the place of potential enforcement. Möckesch could not identify any cases in which a national court rejected the enforcement of an arbitral award because the arbitral tribunal had applied an attorney-client privilege standard other than that of the place of potential enforcement.⁶⁴ In any case, to safeguard the enforceability of the award, the arbitral tribunal should at least recognize the existence of the concept of attorney-client privilege in international arbitration.⁶⁵

⁵⁹ Olaf Meyer, *Time to Take a Closer Look: Privilege in International Arbitration*, 24 J. INT'L ARB. 365, 366 (2007); Amy Cohen, *Options for Approaching Evidentiary Privileges in International Arbitration*, in WRITTEN EVIDENCE AND DISCOVERY IN INTERNATIONAL ARBITRATION 423, 435 (Teresa Giovannini & Alexis Mourre eds., 2009).

⁶⁰ MÖCKESCH, *supra* note 1, at para. 8.68.

⁶¹ *Id.* at para. 8.70.

⁶² *Id.*

⁶³ *Contra* Meyer, *supra* note 59, at 371 (stating that “[e]xcluding too much evidence compromises the effectiveness of the arbitral proceedings and, in serious cases, can even endanger the enforcement of the arbitral award.”).

⁶⁴ MÖCKESCH, *supra* note 1, at para. 8.79.

⁶⁵ *Id.* at para. 8.82.

Fourth Scenario: The arbitral tribunal applies different attorney-client privilege standards to the parties. Most commentators view this scenario as potentially risky ground for the non-enforcement of the arbitral award under Articles V(1)(b) or V(2)(b) of the New York Convention.⁶⁶ The reasoning behind this view is the fact that applying different privilege standards to the parties could violate the principles of equal treatment of the parties and fairness.⁶⁷ Accordingly, equal treatment and fairness must be respected to ensure the enforceability of the award.⁶⁸ This makes the definition of equal treatment decisive. In this regard, Jean-François Poudret and Sébastien Besson provide that “[w]here objective differences so justify, separate [procedural] rules can be applied to each of the parties.”⁶⁹ Also, Gary Born amongst other commentators makes it clear that equal treatment and identical treatment are not synonyms.⁷⁰

In conclusion, arbitral tribunals should take into consideration the following factors to safeguard the recognition and enforcement of its arbitral awards/decisions under the New York Convention: (1) General recognition of the concept of attorney-client privilege as a valid legal defense against document production, and (2) The applicable standard to attorney-client privilege in international arbitration should: (a) consider the due process and international public policy of document production; (b) respect the right of the parties to present their cases; and (c) treat both parties equally and fairly, but not necessarily identically.

C. International Arbitration Main Approaches Towards Attorney-Client Privilege

Appendix II surveys forty-four published arbitral awards and procedural decisions dealing with evidentiary privileges and in particular attorney-client privilege in international commercial and investment arbitration. Appendix II categorizes the approaches

⁶⁶ William Park, *The Procedural Soft Law of International Arbitration: Non-Governmental Instruments*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 141, 151 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006).

⁶⁷ MÖCKESCH, *supra* note 1, at para. 8.184.

⁶⁸ *Id.*

⁶⁹ JEAN-FRANÇOIS POUURET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* para. 554 (2d ed. 2007).

⁷⁰ BORN, *supra* note 7, at 3233; Von Schlabrendorff & Sheppard, *supra* note 7, at 767; Reiser, *supra* note 7, at 663.

adopted by the arbitral awards and lists them in a hierarchy order based on their rate of adoption. From this survey, we can deduce the following five insightful remarks:

First, the practice of international arbitration generally does not conduct a streamlined or structural analysis when determining the applicable standard to attorney-client privilege. In fact, there are many instances where the arbitral tribunal decides this matter without giving any reasoning at all, as they just provide their ruling on a Redfern schedule by indicating whether the request for document production is approved or rejected. This is because “arbitrators are not particularly motivated by any desire to contribute to jurisprudence and accordingly tend to proceed by affirmation rather than persuasion.”⁷¹ Second, the practice of international arbitration does not differentiate between attorney-client privilege in the context of commercial arbitration than in investment arbitration.

Third, despite the fact that most prominent scholars in international arbitration advocate for the adoption of a most protective or favored law approach, such an approach featured explicitly only three times in our survey. This could be due to one of two reasons: (1) there is a wide gap between the literature and the practice on determining the applicable standard to attorney-client privilege in international arbitration, and (2) the most featured approach, the autonomous standard approach, might in fact be impliedly embedding the most protective or favored law approach by applying general principles of attorney-client privilege that are highly protective of the parties or that favor the limitation of document production. Fourth, the autonomous standard approach is by far the most used approach in this survey. This may be due to the fact that the autonomous standard approach: (1) Comports with the discretion of the arbitral tribunals and allows them enough leeway to cherry-pick the applicable standard to the parties; (2) aligns with the scope of document production; and (3) eliminates the need to conduct a conflict of laws analysis which might prove problematic in a situation, like the current issue, where the concept of attorney-client privilege is not uniformly recognized in all national jurisdictions.

Fifth and finally, the most protective or favorable law approach might not be adequate or desirable for international arbitration for three main reasons: (1) It requires a complex conflict of laws analysis, in that the arbitral tribunal needs first to determine

⁷¹ Mayer, *supra* note 14, at 276.

the potential competing applicable laws and then determine which one is the most protective law; and (2) it is not an easy task to determine the most protective law; at first glance, it might seem that attorney-client privilege in common-law jurisdictions is more expansive than the equivalent concept in civil-law jurisdictions. However, this is far from true based on our analysis in Appendix I for two reasons: (a) there is no consensus within common-law jurisdictions nor within civil-law jurisdictions on the concept of attorney-client privilege; and (b) there are definitely some aspects where some civil-law jurisdictions provide for more protective features than in other common-law jurisdictions. (3) It does not take into consideration the sphere of document production: For instance, Germany and Switzerland are quite restrictive when it comes to in-house counsel. Imagine a dispute between German and Swiss parties and lawyers where the arbitral tribunal decides to follow the IBA Rules on document production. If the arbitral tribunal follows the most protective or favored law approach in this case, then the arbitral tribunal will end up admitting all communications with in-house counsel even though the scope of document production is not narrow; this would be an unjust and an undesirable solution.

V. CONCLUSION: MODEL TRANSNATIONAL STANDARD FOR ATTORNEY-CLIENT PRIVILEGE IN INTERNATIONAL ARBITRATION

A. *Major Dilemmas*

1. Should the Suggested Standard be the Same for both Commercial & Investment Arbitration?⁷²

The starting point to answer this question is to determine whether the IBA Rules were crafted to apply to both international

⁷² This issue has been examined thoroughly by Möckesch where she acknowledges the fact that her survey of arbitral awards or procedural decisions in the field of investment arbitration is more focused on NAFTA disputes rather than investment arbitration generally (only referred to two awards that are not NAFTA awards). In other words, her comparison is between NAFTA investment arbitration and international commercial arbitration. In this regard, she proposes two different solutions: (1) For NAFTA arbitration: whereby the tribunals will decide upon attorney-client privileges based upon NAFTA arbitral precedents which have in most instances applied an autonomous standard approach; (2) for International commercial arbitration and Non-NAFTA investment arbitration: whereby Möckesch proposes a special standard comprising both elements of substantive rules and conflict rules. See MÖCKESCH, *supra* note 1, at paras. 9.72–9.83.

commercial arbitration and international investment arbitration; the answer is yes. In fact, the word “commercial” was dropped from the title of the IBA Rules after their recent update in 2010. This is an indication of the intention of the IBA to draft rules that can be applied in both commercial and investment arbitration. This answer does not settle our question. We need to further examine whether the IBA Rules—which were initially drafted solely for commercial arbitration—were updated in a manner that is compatible enough with investment arbitration as well. In this regard, it should be noted that investment arbitrators often refer to the IBA Rules in their procedural orders.⁷³ However, there are some specific issues in the IBA Rules that seem to be controversial solely with respect to investment arbitration. For instance, IBA Rule 9(f) excludes “evidence that has been classified as secret by a government” from the scope of document production.⁷⁴ This could be abused by the host State because its government could initiate criminal investigations to seize some material documents from the foreign investors and classify them as confidential secrets.⁷⁵ Also, the host State could simply issue a new decree deeming certain documents held by foreign investors as confidential and hence manipulate the process of document production in any potential investment arbitration.

Does this mean that there should be a separate transnational standard for investment arbitration? The author thinks that we should take into consideration the defining line between commercial and investment arbitration in practice. If this line is blurry, then crafting a separate standard for investment arbitration would not seem very fruitful. The fact that several disputes between foreign investors and States are actually adjudicated by commercial arbitrators and are administered by traditionally commercial arbitral institutions⁷⁶ may prompt us to try to craft a uniform transnational standard for both commercial and investment arbitration. Therefore, the author believes that, for the purposes of practicality,

However, our survey is more representative of investment arbitration generally. In this respect, fourteen out of eighteen Non-NAFTA Investment Arbitrations adopted an autonomous standard or a practical approach. This might suggest that the standard for investment arbitration should be the same.

⁷³ IBA Rules were referred to in precisely 34% of the surveyed investment arbitration awards/decisions (twelve out of thirty-five cases).

⁷⁴ Karl-Heinz Böckstiegel, *Commercial And Investment Arbitration: How Different Are They Today?*, 28 J. LONDON CT. INT'L ARB. 575, 585 (2012).

⁷⁵ *Id.* at 585–86.

⁷⁶ *Id.* at 578.

a uniform transnational standard for both commercial and investment arbitrations would be a sound approach in this respect. The practice of arbitral tribunals as illuminated in Appendix II gives support to this approach; the fact that the autonomous standard approach was adopted in more than half the cases in both commercial and investment arbitration is a clear indication that we should create a uniform attorney-client privilege standard for both commercial and investment arbitration.

2. Defining the Purpose of the Suggested Standard for Attorney-Client Privilege

Establishing a transnational standard could be extremely tricky. There must be a principled approach with a defined purpose to the process of creating such a standard. Otherwise, this standard would be easily and rightfully criticized. As has been reiterated by some prominent scholars, document production and attorney-client privilege are actually two sides of the same coin⁷⁷ or are Siamese twins.⁷⁸ In this regard, the author suggests that the purpose of the suggested approach for attorney-client privilege should align with the purpose of document production under the IBA Rules.

There has been some debate among international arbitration scholars about defining the purpose of document production in international arbitration and especially under the IBA Rules.⁷⁹ To be able to identify such a purpose, we need to take a look at the main requirements under the IBA Rules for document production. There are two main requirements under Article 3(3) of the IBA Rules: (1) the request should be specific and (2) that the document requested should be material to the outcome.⁸⁰ Furthermore, there are two additional requirements: (3) the requested documents are not in the possession or control of the requesting party or that it is unreasonably burdensome for the requesting party to produce the documents,⁸¹ and (4) the requested documents must be in the possession or control of the requested party.⁸² In addition, the IBA Rules do not exclude the production of internal doc-

⁷⁷ See, e.g., Meyer-Hauser & Sieber, *supra* note 7.

⁷⁸ See, e.g., RETO MARGHITOLA, *DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION* (2015).

⁷⁹ MARGHITOLA, *supra* note 78, at para. 3.04.

⁸⁰ MARGHITOLA, *supra* note 78, at para. 5.02.

⁸¹ Art. 3(3)(c)(i) IBA Rules.

⁸² Art. 3(3)(c)(ii) IBA Rules.

uments.⁸³ More importantly, the timing of document production is between the first and second round of submissions to allow both parties to develop their factual pleadings.⁸⁴

In light of the above, it seems that the purpose of document production under the IBA Rules is more inclined towards the search of truth (the purpose in common-law jurisdictions) than simply proving disputed allegations (the purpose in civil-law jurisdictions). This operates against the backdrop of prohibiting fishing expeditions as experienced in some common-law jurisdictions (notably, the U.S.). Therefore, the driving force and purpose behind crafting this transnational standard for attorney-client privilege should be the search for the truth within a clearly defined context that does not promote fishing expeditions of any sort.

B. *Structure of the Suggested Standard*

1. Which Solution: Substantive Rules v. Conflict of Laws Analysis?

As we mentioned above, arbitral tribunals are generally not bound to conduct a conflict of laws analysis, but they might as well do just that. The question is whether arbitral tribunals should adopt a conflict of law rule that would lead them to the applicable national law to the question, or simply adopt a substantive rule that offers the immediate solution to this dilemma.

The author is in favor of the substantive rules option for the following reasons: (a) Protecting the Reasonable Expectations of the Parties: Arbitrators should always take into consideration the expectations of the parties because arbitrators “are not organs of the State and that their primary responsibility remains to the parties.”⁸⁵ In comparison with traditional conflict of laws rules, applying transnational rules would “less likely . . . upset the parties’ expectations” as the tribunal would identify “the most generally accepted rule as opposed to a possibly idiosyncratic or outdated provision.”⁸⁶ In addition, Art. 9(3)(c) of the IBA Rules mentions

⁸³ MARGHITOLA, *supra* note 78, at para. 3.04.

⁸⁴ *Id.*

⁸⁵ Luca G. Radicati di Brozolo, *When, Why and How Must Arbitrators Apply Overriding Mandatory Provisions? The Problems and a Proposal*, in *THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* 381 (Franco Ferrari ed., 2017).

⁸⁶ Galliard, *General Principles of Law in International Commercial Arbitration*, 5 *WORLD ARB. MED. REV.* 161, 167–78.

this consideration as one of its guiding principles when considering the rules applicable to privilege issues.⁸⁷ (b) Predictability & Certainty: “Choice of law analysis is inherently unpredictable”⁸⁸ in the realm of privileges. Problems would arise if it were uncertain at the time of the communication whether such communication will be privileged or not. Such uncertainty would defeat the purposes underlying privileges in the first place.⁸⁹ The success of international arbitration depends to a large extent upon the predictability of its outcome; otherwise, international arbitration would be at risk of its own extinction.⁹⁰

(c) The Transnational Nature of International Arbitration: International arbitration usually involve parties from different countries. More likely parties will choose a neutral arbitral seat; accordingly, the arbitral tribunal might be expected to apply transnational rules rather than the national rules of any given country in particular.⁹¹ (d) Equal Treatment of the Parties: Applying transnational rules to attorney-client privilege would ensure the equal treatment of the parties as they will be subject to the same privilege standard.⁹² This does not mean that the transnational standard must treat both parties identically, but rather equally. (e) Rare Agreement of the Parties on the Applicable Law to Attorney-Client Privilege in International Arbitration: In practice, it’s rare that parties would agree *ex ante* in their arbitration agreement on the standard applicable to evidentiary claims (including privilege claims).⁹³ This might be because: (i) business managers would rarely wish to negotiate dispute resolution clauses; and (ii) transactional lawyers are usually the ones in charge of drafting the arbitration agreement and they usually have little interest in evidence law and usually do not have enough expertise about issues that might

⁸⁷ GRÉGOIRE, *supra* note 33, at 165.

⁸⁸ Cohen, *supra* note 59, at 437; Steven Bradford, *Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution*, 52 U. PITT. L. REV. 909, 936 (1991); KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE NEW LEX MERCATORIA* 21 (2010); GRÉGOIRE, *supra* note 33, at 166.

⁸⁹ GRÉGOIRE, *supra* note 33, at 166.

⁹⁰ Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 MELB. J. INT’L L. 205, 212; GRÉGOIRE, *supra* note 33, at 166–67.

⁹¹ GRÉGOIRE, *supra* note 33, at 168.

⁹² *Id.* at 170.

⁹³ Berger, *Evidentiary Privileges: Best Practice Standards Versus/and Arbitral Discretion*, 22 ARB. INT’L 501, 509; Meyer-Hauser & Sieber, *supra* note 7, at 183; Tawil & Lima, *supra* note 7, at 37; Javier H. Rubinstein & Britton B. Guerrina, *The Attorney-Client Privilege and International Arbitration*, 18 J. INT’L ARB. 587, 598; GRÉGOIRE, *supra* note 33, at 194.

arise in arbitral proceedings.⁹⁴ In this regard, the parties' aim during contract negotiations is "business success, not legal disputes."⁹⁵ In any case, even if the parties chose an applicable standard to privilege claims, this could be problematic because parties might choose the law of a third country whose laws they are not even familiar with.⁹⁶

2. How to Navigate the Divergences Across the National Jurisdictions?

The suggested transnational standard tries to navigate the three main divergences across the surveyed four national jurisdictions and provides for the following substantive rules: Firstly, only communications should be privileged rather than the underlying information or facts, regardless of the domicile of the parties or the lawyers, or any other closely connected law. The rationale behind this rule is aligning the attorney-client privilege with the predominant purpose of document production under the IBA Rules, namely, the search for the truth. If we follow the civil-law approach in this rule and allow for attorney-client privilege to extend to the underlying information, then we will be defying the search-for-truth purpose of document production under the IBA Rules. This proves that blindly applying the most protective rule could be in fact incompatible with the document production best practices under the IBA Rules in international arbitration. It's true that the civil-law approach (extending the protection to the underlying information) is easier for the arbitral tribunals to apply; however, the ease of application is secondary to the main objective behind crafting this standard, namely, aligning the scope and purpose of attorney-client privilege with the scope and purpose of document production under the IBA Rules.

Secondly, communications with in-house counsel should be considered as privileged in all cases, regardless of the domicile of the parties or the in-house counsel, or any other closely connected law. The premise of our argument lies within the surveyed arbitral awards. This issue was raised in three different arbitral awards⁹⁷

⁹⁴ William W. Park, *The 2002 Freshfields Lecture—Arbitration Protean Nature: The Value of Rules and the Risks of Discretion*, 19 *ARB. INT'L* 279, 295–96 (2014).

⁹⁵ Tawil & Lima, *supra* note 7, at 36.

⁹⁶ Meyer-Hauser & Sieber, *supra* note 7, at 183–84.

⁹⁷ The three cases are: (1) *Dr. Horst Reineccius et al. v. Bank for Int'l Settlements*, PCA Case No. 2000-4 (2003); (2) *Poštová Banka, A.S. & Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8; and (3) *Lone Pine Resources Inc. v. Gov't of Canada*, ICSID Case No. UNCT/15/2 (2017).

and in all such cases, the arbitral tribunals extended the attorney-client privilege protection to in-house counsel, regardless of the approach adopted by the tribunal in that case. Further, this approach finds robust support in the literature as both Marghitola⁹⁸ and Meyer⁹⁹ argue for the same rule. Also, from a practical perspective, the role of in-house counsel today has greatly expanded all over the world, and so there is no clear reason why parties who communicate with in-house counsel should be disadvantaged. Moreover, the rule concerning in-house counsel is not uniform across the civil-law jurisdictions; for instance, Germany extends attorney-client privilege to certain types of in-house counsel. In addition, there was a bill introduced in Switzerland to extend the protection of attorney-client privilege to in-house counsel (it was eventually rejected). This further proves that civil-law jurisdictions are probably on track to converge in this rule with their counterpart common-law jurisdictions.

Thirdly, attorney-client privilege should be extended to predominantly legal advice (the Swiss approach), regardless of the domicile of the parties or the lawyers, or any other closely connected law. This is usually an issue in the case of communications with the in-house counsel because the line separating the business and legal operations of an in-house counsel is usually ambiguous. In line with the search-for-the-truth purpose, we have eliminated the German approach (protecting both legal and business advice), as such an approach could be easily abused by the parties. Accordingly, we have to choose between the common-law approach (protection of legal advice only) and the Swiss approach (protecting predominantly legal advice). It's clear to us that the Swiss approach is far more practical. If we follow the common-law approach, then the arbitrator will be required to review each communication between the client and its in-house counsel and redact the legal advice portions. This could prove to be extremely difficult in practice, especially with the evolution of legal practice where lawyers support their legal advice by economic and business arguments. Therefore, it's far more practical if we limit the role of the arbitrator to determine whether the legal advice prevails over the business content in the communication or not. This does not in any way defy the search-for-the-truth purpose of document production under the IBA Rules.

⁹⁸ See, e.g., MARGHITOLA, *supra* note 78.

⁹⁹ See, e.g., Meyer-Hauser & Sieber, *supra* note 7.

C. *Comparison: Suggested Transnational Standard v. Most Protective Law Standard*

This comparison analyzes the distinctions between the two standards through examining two examples at both ends of the spectrum:

Client (A)	In-House Counsel (A)	Client (B)	In-House Counsel (B)
Switzerland	U.S.	U.K.	Germany

The first example highlights the key flaw with the most protective law standard; it does not work when all involved parties are from civil-law jurisdictions and their lawyers are in-house counsel. In this example, the arbitral tribunal will end up with a non-protective standard which will be at odds with the scope of document production under the IBA Rules. If the arbitral tribunal instead follows our suggested approach, the parties will end up with clear substantive transnational rules that are fully compatible with the sphere of document production under the IBA Rules.

Client (A)	In-House Counsel (A)	Client (B)	In-House Counsel (B)
Switzerland	U.S.	U.K.	Germany

In the second example, the arbitral tribunal will face a more complicated fact pattern. If the arbitral tribunal is sophisticated enough and realizes that the statement that common-law approach is more protective than the civil-law approach is just a myth. Then, the arbitral tribunal will most probably cherry-pick the most-protective rules and will extend the protection of the attorney-client privilege to: (1) in-house counsel (U.S. law approach); (2) the underlying information (German law approach); and (3) both legal and business advice (German law approach). This approach would be clearly defying the scope and purpose of document production under the IBA Rules. Therefore, our suggested transnational standard would be a better option for the arbitral tribunal.

In this regard, both examples show how the most protective law standard does not usually work as anticipated. Further, the most protective law standard is not an easy approach to apply in practice since it requires delving into a complex conflict of laws analysis, in addition to determining which is the most protective rule out of the competing rules which is not usually an easy task.

D. *Concluding Remarks: Advantages of the Suggested Transnational Approach*

We recommend that the arbitral tribunals, in both commercial and investment arbitration, follow the suggested transnational standard because it has the following advantages: First, the transnational standard aligns the sphere and purpose of attorney-client privilege with the sphere and purpose of document production under the IBA Rules. Second, the transnational standard creates certainty and predictability as it is easy to apply and is feasible in practice. In this regard, such a standard avoids delving into a complex conflict of laws analysis or in determining which is the most protective rule. Third, the transnational standard protects the parties' reasonable expectations. For instance, parties in common-law jurisdictions would expect that their confidential communications with their in-house counsel would be protected by attorney-client privilege. Also, parties in civil-law jurisdiction would have similar expectations but based on a different rationale; they would not be expecting internal documents to be subject to document production in the first place. In this regard, parties' reasonable expectations should be viewed against the background of the parties' general expectations with respect to document production.¹⁰⁰ Therefore, this suggested transnational standard has the benefit of protecting the reasonable expectations of parties belonging to both types of jurisdictions. Fourth, the transnational standard will assure the recognition and enforcement of international arbitral awards with respect to the issue of attorney-client privilege. This is because such a standard respects the right of the parties to fully present their cases and gives both parties equal footing.

In conclusion, our suggested transnational standard for attorney-client privilege is an upgrade on the autonomous standard approach which was the most used approach by arbitral tribunals as shown in Appendix II. Arbitral tribunals would actually find it easier to apply the suggested transnational standard than any other approach as demonstrated by the above-mentioned advantages. In this regard, the author hopes that the IBA will take this suggestion into consideration when revising the IBA Rules in the future.

¹⁰⁰ See, e.g., MARGHITOLA, *supra* note 78.

APPENDIX I:
COMPARISON BETWEEN ATTORNEY-CLIENT PRIVILEGE LAWS ACROSS
THE U.S., ENGLAND, GERMANY, & SWITZERLAND

Questions	U.S.	England	Germany	Switzerland
1. Is attorney-client privilege substantive or procedural?	Substantive in most jurisdictions, ¹⁰¹ however, some jurisdictions characterize it as procedural. ¹⁰²	Substantive. ¹⁰³	Procedural. ¹⁰⁴	
2. Is attorney-client privilege absolute?	Absolute. ¹⁰⁵			
3. Is document production extensive or narrow?	Extensive. ¹⁰⁶		Narrow. ¹⁰⁷ U.S. fishing expeditions are not allowed. ¹⁰⁸	
4. Who can invoke & waive the attorney-client privilege?	Client only, however, the attorney can invoke it on behalf of the client. ¹⁰⁹		Lawyer only can invoke it. ¹¹⁰ However, the client is the one in charge of waiving the privilege. ¹¹¹	
5. Can the	Attaches to in-house counsel. ¹¹²	As a first step we need to		In-house

¹⁰¹ Richard Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 INT'L COMP. L. Q. 345, 368; *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Joseph Warin et al., *Privilege: United States*, GLOBAL INVESTIGATIONS REV., (Nov. 2016), <https://www.gibsondunn.com/wp-content/uploads/documents/publications/Warin-Chung-Know-how-US-Privilege-GIR-November-2016.pdf>.

¹⁰² Warin et al., *supra* note 101.

¹⁰³ GREENWALD & RUSSENBERGER, *supra* note 33, at 96; DLA PIPER, LEGAL PROFESSIONAL PRIVILEGE GLOBAL GUIDE (4th ed. 2017).

¹⁰⁴ GREENWALD & RUSSENBERGER, *supra* note 33, at 154, 289.

¹⁰⁵ SILKENAT & VAN GERVEN, *supra* note 33, at 472, 474; GREENWALD & RUSSENBERGER, *supra* note 33, at 96, 279; GRÉGOIRE, *supra* note 33, at 53–54; MÖCKESCH, *supra* note 1, at para. 6.25;

¹⁰⁶ Meyer-Hauser & Sieber, *supra* note 7, at 159; GREENWALD & RUSSENBERGER, *supra* note 33, at 96.

¹⁰⁷ GREENWALD & RUSSENBERGER, *supra* note 33, at 134, 280.

¹⁰⁸ *See generally* MÖCKESCH, *supra* note 1.

¹⁰⁹ GRÉGOIRE, *supra* note 33, at 59; MÖCKESCH, *supra* note 1, at paras. 2.47, 2.70.

¹¹⁰ MÖCKESCH, *supra* note 1, at para. 6.05; GRÉGOIRE, *supra* note 33, at 66.

¹¹¹ MÖCKESCH, *supra* note 1, at para. 6.26; GREENWALD & RUSSENBERGER, *supra* note 33, at 287.

¹¹² GRÉGOIRE, *supra* note 33, at 59; MÖCKESCH, *supra* note 1, at para. 3.56; SILKENAT & VAN GERVEN, *supra* note 33, at 472, 475. As for the communications with a foreign in-house counsel providing legal advice on U.S. matters, they would be considered privileged only if presented with proof of the existence of a specific legal privilege governing the foreign in-house counsel

Questions	U.S.	England	Germany	Switzerland
lawyer protected by the privilege be an in-house counsel?			<p>make a distinction between two types of in-house counsel: (1) the so-called <i>Syndikusanwalt</i>, who is understood to be a lawyer who is admitted to the bar in Germany and at the same time is a permanent legal advisor receiving fixed remuneration under a contract of employment; and (2) a fully trained lawyer who is not admitted to the bar and permanently works as in-house counsel to a company.¹¹³ The second type does not attract attorney-client privilege because he would not be considered a lawyer within the meaning of the Federal Lawyers' Act as long as he is not admitted to the bar.¹¹⁴ As a second step, one needs to differentiate between the <i>Syndikusanwalt's</i> work carried out for: (1) the employer's corporation and (2) his work carried out for third persons. If a <i>Syndikusanwalt</i> works for third persons, he would undeniably attract attorney-client privilege.¹¹⁵</p> <p>On the other hand, when a <i>Syndikusanwalt</i> acts for his employer, this has been an unsettled issue under German law.¹¹⁶ The prevailing view¹¹⁷ has</p>	<p>counsel are not under the protection of attorney-client privilege even if they are admitted to the Swiss bar.¹¹⁸ However, this does not mean that in-house counsel are allowed to disclose secrets confided to them by their corporations.¹¹⁹ The in-house counsel is still under a duty to keep such information secret, but his obligation is based on their contractual duty of secrecy as stipulated by their employment contract.¹²⁰</p>

under the law of the applicable foreign jurisdiction. The absence of such proof has led to the rejection of claims of attorney-client privilege with regard to foreign in-house lawyers in many countries, including France, India, the Netherlands, China, and Russia.

¹¹³ MÖCKESCH, *supra* note 1, at para. 4.66.

¹¹⁴ *Id.*

¹¹⁵ MÖCKESCH, *supra* note 1, at para. 4.67.

¹¹⁶ MÖCKESCH, *supra* note 1, at para. 4.67. In this respect, it has been stressed that a *Syndikusanwalt* is tied to his employer by a contract of employment and due to the close ties with his employer, the typical features of independent occupation would not exist and therefore the *Syndikusanwalt* should not attract attorney-client privilege.

¹¹⁷ MÖCKESCH, *supra* note 1, at para. 4.68.

¹¹⁸ GRÉGOIRE, *supra* note 33, at 65; GREENWALD & RUSSENBERGER, *supra* note 33, at 285.

¹¹⁹ Meyer-Hauser & Sieber, *supra* note 7, at 150.

¹²⁰ *Id.*

Questions	U.S.	England	Germany	Switzerland
			dismissed these concerns and has accorded the <i>Syndikusanwalt</i> attorney-client privilege even if he is working for his employer.	
6. Can the lawyer be registered with foreign bars?	Attaches to lawyers registered with foreign bars. ¹²¹			
7. Who qualifies as a client in the case of corporations?	Middle and lower level employees of the corporation. ¹²²	Only the employees authorized to act on behalf of the corporation in relation to its communications with its lawyers. ¹²³	It does not matter whether an employee or an officer of a corporation communicates with the lawyer on behalf of the corporation. ¹²⁴	Any employee of the corporation provided that these communications relate to the typical professional activity of the attorney. ¹²⁵
8. Does the communications made via an agent attach privilege?	Yes. ¹²⁶	Yes, as long as the agent merely acts as an intermediary and does not provide his own input. ¹²⁷	Yes, "provided that the information relates to the mandate" of the client. ¹²⁸	Yes. ¹²⁹
9. Do communications between lawyers and	Yes, however, they would attract only work-product privilege. ¹³⁰		Communications are not privileged in the first place. ¹³¹	

¹²¹ MÖCKESCH, *supra* note 1, at paras. 2.50, 2.52, 3.56, 6.07 (discussing that the communications between the client and a non-lawyer would still be privileged provided that the client reasonably believes that the person he communicates with is a lawyer). GRÉGOIRE, *supra* note 33, at 65; GREENWALD & RUSSENBERGER, *supra* note 33, at 284.

¹²² MÖCKESCH, *supra* note 1, at para. 6.11; *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

¹²³ MÖCKESCH, *supra* note 1, at para. 6.11; GREENWALD & RUSSENBERGER, *supra* note 33, at 102.

¹²⁴ MÖCKESCH, *supra* note 1, at para. 6.13; Thomas Schuerlle & Friedrich Popp, *Privilege: Germany*, GLOBAL INVESTIGATIONS REV., Nov. 15, 2016.

¹²⁵ GREENWALD & RUSSENBERGER, *supra* note 33, at 284; *Legal Privilege & Professional Secrecy, Switzerland*, GETTING THE DEAL THROUGH (May 2018), <https://gettingthedealthrough.com/area/86/jurisdiction/29/legal-privilege-professional-secrecy-switzerland/>.

¹²⁶ MÖCKESCH, *supra* note 1, at para. 6.15.

¹²⁷ MÖCKESCH, *supra* note 1, at para. 3.61.

¹²⁸ MÖCKESCH, *supra* note 1, at para. 6.15.

¹²⁹ *Legal Privilege & Professional Secrecy, Switzerland*, *supra* note 125.

¹³⁰ MÖCKESCH, *supra* note 1, at para. 6.15.

¹³¹ MÖCKESCH, *supra* note 1, at para. 6.16; GREENWALD & RUSSENBERGER, *supra* note 33, at 284.

Questions	U.S.	England	Germany	Switzerland
third persons attach privilege?				
10. Does attorney-client privilege protect communications or information/facts?	Communications only. ¹³²		Facts only. ¹³³	
11. How far does the communication or facts need to be confidential?	The client must have the intention that the communications with his lawyer would be confidential. ¹³⁴ However, in case the client discloses the communication to a third-party, the attorney-client privilege would be lost. ¹³⁵	The communication must be made in confidence where no third-party should be present. ¹³⁶ However, if the communication was made in confidence, but then revealed to a limited number of third parties, communication would still attract the privilege; only when the communication ¹³⁷ is	Confidentiality of information rather than confidentiality of the communications is required because the privilege attaches to the information or the underlying facts rather than the communication. ¹³⁸ The information must be obvious, trivial, or in the public domain for the attorney-client privilege not to apply. ¹³⁹ Further, protection would not be lost if documents are revealed to third parties, except if they are revealed to the adverse party and its counsel. ¹⁴⁰	There are two tests employed for confidentiality as follows: (a) Objective Test: Information would be considered objectively as a secret and confidential if the information is neither widely known nor generally available, or in other words did not enter the public domain. ¹⁴¹ (b) Subjective Test: This test ¹⁴²

¹³² MÖCKESCH, *supra* note 1, at para. 6.16; Meyer-Hauser & Sieber, *supra* note 7, at 157; Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830 (E.D. Pa. 1962).

¹³³ MÖCKESCH, *supra* note 1, at para. 6.16; GREENWALD & RUSSENBERGER, *supra* note 33, at 284.

¹³⁴ MÖCKESCH, *supra* note 1, at para. 2.62; GRÉGOIRE, *supra* note 33, at 59.

¹³⁵ GRÉGOIRE, *supra* note 33, at 59; U.S. v. Ary, 518 F.3d 775, 782 (10th Cir. 2008); see Muro v. Target Corp., 243 F.R.D. 301, 306 (N.D. Ill. 2007) (stating that, for instance, attorney-client privilege would be lost if the legal advice is disclosed to employees in the corporation who are not directly concerned with the subject matter of the legal advice); MÖCKESCH, *supra* note 1, at para. 6.20 (stating that, on the other hand, the same facts could be communicated to a third-party without losing the attorney-client privilege).

¹³⁶ MÖCKESCH, *supra* note 1, at para. 3.66.

¹³⁷ *Id.* at para. 6.20.

¹³⁸ *Id.* at para. 6.18.

¹³⁹ *Id.* at para. 6.20.

¹⁴⁰ *Id.* at para. 6.36.

¹⁴¹ GREENWALD & RUSSENBERGER, *supra* note 33, at 282; Meyer-Hauser & Sieber, *supra* note 7, at 149.

¹⁴² GREENWALD & RUSSENBERGER, *supra* note 33, at 283.

Questions	U.S.	England	Germany	Switzerland
		revealed to a considerable number of third-parties or enters the public domain would the communication not attach any privilege.		further narrows down the scope of Swiss attorney-client privilege as it requires that the client to whom confidentiality is owed has a clear interest in the non-disclosure of the information and/or wishes that the piece of information/fact in question be treated by his lawyer as confidential.
12. What is the required purpose for the communication to attach attorney-client privilege?	Privilege only attaches to legal advice; hence, attorney-client privilege does not protect business advice, financial advice, accounting advice, and advice of personal nature. ¹⁴³ If the advice has more than one purpose, the U.S. Courts would apply the dominant purpose test. ¹⁴⁴	Only legal advice rather than business or financial advice. ¹⁴⁵ However, legal advice can still attach privilege if it includes advising on commercial, strategic, and presentational matters, as long as such aspects are within a relevant "legal context." ¹⁴⁶	German law does not distinguish between legal, economic, business, or financial advice; it only requires that the client contact the lawyer in his capacity as a lawyer and not as a private individual. This is because German law protects business advice rendered by professionals other than lawyers. ¹⁴⁷	The client must contact the attorney in his capacity as a professional legal advisor. In this regard, the Swiss Federal Court has held that where the business, rather than the legal, element of an attorney's professional activity prevails, the attorney-client privilege would not attach to such activity. ¹⁴⁸

¹⁴³ GRÉGOIRE, *supra* note 33, at 57; MÖCKESCH, *supra* note 1, at para. 6.21; U.S. v. Knoll, 16 F.3d 1313, 1322 (holding that documents relating purely to business transactions and communicated with an attorney were found to fall outside the realm of attorney-client privilege).

¹⁴⁴ MÖCKESCH, *supra* note 1, at para. 6.21; SILKENAT & VAN GERVEN, *supra* note 33, at 471.

¹⁴⁵ MÖCKESCH, *supra* note 1, at para. 6.22.

¹⁴⁶ GREENWALD & RUSSENBERGER, *supra* note 33, at 99.

¹⁴⁷ MÖCKESCH, *supra* note 1, at para. 6.21.

¹⁴⁸ GREENWALD & RUSSENBERGER, *supra* note 33, at 283; Claudio Bazzani & Roman Richers, *Switzerland, in PROFESSIONAL SECRECY OF LAWYERS IN EUROPE* 568–69 (Cambridge Univ. Press 2013) (“Confidential information is, however, only protected if the lawyer learnt the information in his/her genuine capacity as a lawyer, which includes, amongst other things: (i)

Questions	U.S.	England	Germany	Switzerland
13. What is the <i>scope ratione temporis</i> of the attorney-client privilege?	Attorney-client privilege does not cease to exist after the attorney-client relationship has ended or the client has died, except in the case that the testator's heirs contest the will. ¹⁴⁹	Privilege does not cease to exist after the attorney-client relationship has ended or the client has died. ¹⁵⁰ After the death of the client, the privilege may still be invoked by his successor. ¹⁵¹	Attorney-client privilege does not cease to exist after the attorney-client relationship has ended or the client has died. ¹⁵² However, the information would no longer be privileged if the interest of the deceased in maintaining the privilege has come to an end with his death. ¹⁵³	Attorney-client privilege does not end when the attorney's mandate is accomplished or terminated but lasts as long as the attorney lives. ¹⁵⁴
14. What are the exceptions for attorney-client privilege?	Crime-fraud exception and a fiduciary exception. ¹⁵⁵	Crime-fraud exception and a statutory exception. ¹⁵⁶	There are statutory exceptions for specific severe offenses such as murder. However, none of these are equivalent to a U.S. fiduciary exception. ¹⁵⁷	There are several exceptions, for instance, an attorney would be able to disclose a secret with the consent of the client or of the supervisory authority without being liable to prosecution. ¹⁵⁸ Furthermore, attorneys cannot be punished when federal or cantonal (state) laws provide for a duty to

representing and defending clients before courts and authorities; (ii) counselling clients on legal issues; (iii) negotiating and concluding legal transactions; (iv) drafting legal documents and legal opinions; (v) providing legal advice; and (vi) acting as an escrow agent or mediator. By contrast, not covered by professional secrecy is information the lawyer learnt in connection with his/her non-legal business activities. This includes, amongst other things, information he/she learnt in his/her capacity as: (i) a member of a board of directors; (ii) an asset manager or ?nancial adviser; (iii) an arbitrator; (iv) an adviser on non-legal matters; (v) a ?duciary or ?nancial controller; (vi) a ?nancial intermediary; and (vii) a real-estate agent.”)

¹⁴⁹ MÖCKESCH, *supra* note 1, at para. 6.24.

¹⁵⁰ *Id.* at para. 6.24.

¹⁵¹ MÖCKESCH, *supra* note 1, at para. 3.81.

¹⁵² MÖCKESCH, *supra* note 1, at para. 6.24.

¹⁵³ *Id.* at para. 6.24.

¹⁵⁴ Meyer-Hauser & Sieber, *supra* note 7, at 150.

¹⁵⁵ MÖCKESCH, *supra* note 1, at para. 6.25.

¹⁵⁶ *Id.* at para. 6.25.

¹⁵⁷ *Id.* at para. 6.25.

¹⁵⁸ SCC, art. 321, no. 2.

Questions	U.S.	England	Germany	Switzerland
				disclose or testify before public authorities. ¹⁵⁹ In-house counsel or external counsel acting in a business capacity might be subject to a reporting duty under the Federal Statute on Combatting Money Laundering and Terrorist Financing. ¹⁶⁰
15. Does judicially compelled disclosure of privileged documents constitute a waiver?	No. ¹⁶¹		N/A	
16. Does inadvertent disclosure of privileged documents constitute a waiver?	Inadvertent disclosure does not constitute waiver of attorney-client privilege provided that the client proves that: “(1) the disclosure was inadvertent or unintentional; (2) an intent to keep the document or	Inadvertent disclosure of privileged documents does not entail waiver of the privilege of such documents depending on whether inspection has taken place or not. ¹⁶³ If inspection did not take place:	N/A	
				Inadvertent disclosure of privileged information does not generally constitute a waiver of attorney-client privilege, unless the information itself enters the public domain as a result of such

¹⁵⁹ SCC, art. 321, no. 3.

¹⁶⁰ GREENWALD & RUSSENBERGER, *supra* note 33, at 285; Bazzani & Richers, *supra* note 148, at 578 (“Lawyers are explicitly exempt from the notification duties stipulated in the Swiss anti-money laundering legislation. This exemption applies, however, only to the extent the lawyer is subject to the confidentiality obligation when acting in a genuine professional capacity as a lawyer. This exemption does not apply, however, to the extent the lawyer acts outside the scope of his/her actual professional capacity as a lawyer, e.g., when acting as a board member, a financial intermediary, a trustee, an attorney-in fact, and the like. In such a case, no special privilege applies, and the lawyer has the same notification duties as any other intermediary in the sense of the anti-money laundering legislation.”).

¹⁶¹ MÖCKESCH, *supra* note 1, at para. 6.27.

Questions	U.S.	England	Germany	Switzerland
	communication confidential; (3) that the disclosure occurred despite the existence of reasonable precautions to prevent disclosure; (4) a prompt objection to the use of the document or communication was made; and (5) reinstating the privilege will not prejudice the adverse party. ¹⁶²	the inadvertent disclosure could be corrected by modifying the disclosure list. If inspection took place: the privileged document may be used only with the permission of the court.		inadvertent disclosure; in this regard, ¹⁶⁴ the Swiss Federal Supreme Court held that an attorney can invoke the attorney-client privilege to oppose the disclosure of privileged documents which have been stolen from his office.
17. Is the work-product doctrine absolute?	Qualified. ¹⁶⁵	Absolute. ¹⁶⁶	N/A	
18. What is the scope of the work-product doctrine?	Work-product privileged materials can be categorized into two categories ¹⁶⁷ : (i) Opinion work product which includes mental	It extends to materials prepared by the lawyer, the client, and third-parties. ¹⁶⁸	Protection extends only to materials prepared by the lawyer and this is limited to cases where revealing such materials would be a violation of the lawyer's mandate towards his client. ¹⁶⁹ Further, materials are only protected if	Attorney-client privilege's protection would cover work-product prepared by external counsel, and also work-

¹⁶² SILKENAT & VAN GERVEN, *supra* note 33, at 474; CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* 450 (4th ed. 2015); JOHN T. NOONAN, JR. & RICHARD W. PAINTER, *PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER* 107 (2d ed. 2001) (stating that, on the other hand, several commentators believe that the legal practice and judicial decisions are rather inconsistent and controversial on this point in particular because there are three different approaches by the U.S. judiciary in that regard: (a) some decisions put inadvertent disclosure on par with voluntary waiver, which leads to a total loss of attorney-client privilege; (b) other decisions do not assume that inadvertent disclosure constitute waiver; and (c) a third approach assesses the importance of the client's fault leading to the inadvertent disclosure).

¹⁶³ MÖCKESCH, *supra* note 1, at para. 6.28; GRÉGOIRE, *supra* note 33, at 54.

¹⁶⁴ GREENWALD & RUSSENBERGER, *supra* note 33, at 287.

¹⁶⁵ SILKENAT & VAN GERVEN, *supra* note 33, at 472, 474.

¹⁶⁶ MÖCKESCH, *supra* note 1, at para. 6.37.

¹⁶⁷ MÖCKESCH, *supra* note 1, at paras. 6.37, 6.38.

¹⁶⁸ MÖCKESCH, *supra* note 1, at para. 6.33.

¹⁶⁹ *Id.* at para. 6.33.

Questions	U.S.	England	Germany	Switzerland
	<p>impressions, conclusions, opinions, and legal theories of the lawyer; and (ii) Ordinary work product which can be defined as any non-opinion work product. Opinion work product enjoys higher protection than ordinary work product. The work product doctrine belongs to both the client and the lawyer and can be waived by both of them.</p>		<p>created at the direction of the lawyer.¹⁷⁰ In any case, the work materials do not need to be prepared for pending or contemplated litigation,¹⁷¹ which means that this would constitute a broader protection than English and U.S. Laws in that aspect. As for invoking the work-product protection, it can be invoked by either the client, the lawyer, or both; however, only the client can waive the work product protection, unless the lawyer can assert an exceptional interest.¹⁷²</p>	<p>product prepared by the client or third parties at the direction of an attorney in connection with his or her typical professional activity.¹⁷³</p>
<p>19. What is the main requirement for attaching privilege under the work-product doctrine?</p>	<p>The work-product doctrine is provided for in Rule 26(b)(3) of the Federal Rules of Civil Procedure which provides, with certain exceptions, that materials¹⁷⁴ “prepared in anticipation of litigation or for</p>	<p>English law requires that the preparation of materials in view of litigation be the predominant purpose.¹⁷⁵</p>	<p>There is no separate privilege for work-product doctrine under German law; however, German law provides protection similar to the work-product doctrine, provided that the disclosure of the advice revealed information that the client disclosed to the lawyer.¹⁷⁶</p>	<p>The requirements for conferring attorney-client privilege over the work-product are the same as for attorney-client communications.¹⁷⁷ In particular, the work-product must relate to the attorney’s</p>

¹⁷⁰ *Legal Privilege & Professional Secrecy, Germany*, GETTING THE DEAL THROUGH (May 2018), <https://gettingthedealthrough.com/area/86/jurisdiction/11/legal-privilege-professional-secrecy-germany/>.

¹⁷¹ MÖCKESCH, *supra* note 1, at para. 6.34.

¹⁷² *Legal Privilege & Professional Secrecy, Germany*, *supra* note 170 (“The privilege does not always extend to documents prepared by the attorney during an attorney-led internal investigation. The interview notes are protected to the extent that they have been produced as part of the lawyer’s work in conducting the case for the client and communicating accordingly.”); an “exceptional interest” may include defending himself or herself against criminal allegations.

¹⁷³ *Legal Privilege & Professional Secrecy, Switzerland*, *supra* note 125.

¹⁷⁴ Fed. R. Civ. P. 26(b)(3)(A) & (B); MUELLER & KIRKPATRICK, *supra* note 162, at 463.

¹⁷⁵ MÖCKESCH, *supra* note 1, at para. 6.35.

¹⁷⁶ MÖCKESCH, *supra* note 1, at para. 6.31.

¹⁷⁷ *Legal Privilege & Professional Secrecy, Switzerland*, *supra* note 125.

Questions	U.S.	England	Germany	Switzerland
	<p>trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent)” and “mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation” are protected from disclosure. Rule 26(b)(3) applies also to photographs, diagrams, drawings, and computer files.</p>			<p>typical professional activity, which includes legal representation and legal advice.¹⁷⁸ This means that it’s not necessary that work-product be prepared in anticipation of litigation. As for invoking the protection for the work-product, it can be done by either the client, the attorney, or any third party with custody or control of the protected work-product; waiving the protection for the work-product would follow the same rules for waiver of protection of attorney-client communications.¹⁷⁹</p>
<p>20. What are the recent landmark decisions in this jurisdiction?</p>	<p><i>In re Kellogg Brown & Root Inc.</i>, 756 F.3d 754 (D.C. Cir. 2014),¹⁸⁰ the Federal Court of Appeals ruled the investigation materials in question were privileged. Also, the court</p>	<p><i>R (Prudential Plc) v. Special Commissioner of Income Tax</i> (2010): The court declined to extend the legal advice privilege to legal advice on tax law given by accountants even where</p>	<p><i>The Regional Court Mannheim</i> (24 Qs 1/12–3 July 2012)¹⁸³ ruled that documents produced in an internal investigation are protected if they are in possession, no matter from whom such information was collected. <i>The Regional Court Braunschweig</i> (6 Qs 116/15–21 July 2015)¹⁸⁴ ruled that documents prepared in an</p>	<p>On September 20, 2016, the Swiss Federal Supreme Court held that certain parts of a law firm’s work product (certain sections of the investigative report and the minutes</p>

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Legal Privilege & Professional Secrecy, United States*, GETTING THE DEAL THROUGH (May 2018), <https://gettingthedealthrough.com/area/86/jurisdiction/23/legal-privilege-professional-secrecy-2018-united-states/>.

Questions	U.S.	England	Germany	Switzerland
	held that attorney-client privilege can attach even if the company has a regulatory duty to investigate. As for work product, the court held that concerned documents could be protected from disclosure when they incorporate an investigator's mental impressions. In <i>Harleysville</i> , the court held that privilege claims are considered to be waived with respect to information posted to a publicly-accessible, non-password protected cloud account. ¹⁸⁶	the tax professional was qualified to give such advice. ¹⁸¹ <i>Astex Therapeutics Ltd. v. AstraZeneca</i> (2016) ¹⁸² ; The court decided that legal advice privilege would not cover attendance notes created during an information-gathering exercise involving lawyers, employees, and former employees of a corporation. <i>The RBS Rights Issue Litigation</i> (2016) ¹⁸⁷ ; The court held that the client, in the context of legal advice privilege,	internal investigation to prepare the corporation for a defense are protected whether or not there are potential criminal or administrative proceedings against the corporation and whether the documents are in the possession of the lawyer or the corporation. <i>The German Constitutional Court (Bundesverfassungsgericht)</i> Decision on July 6, 2018 held that the raid of a law firm (Jones Day) and the seizure of certain documents pertaining to an internal investigation by the Munich Prosecutor's Office was in fact constitutional under German law. ¹⁸⁸	regarding the interrogation of bank employees) were not privileged under attorney-client privilege. ¹⁸⁵ The reasoning behind such a decision was the fact that the Supreme Court considered that conducting such an investigation is primarily the obligation of the bank itself (the client in this case) under the Swiss Anti-Money Laundering regulations; hence, the bank could not avail itself of the protection of attorney-client privilege by instead delegating this obligation to a law firm and

¹⁸¹ *Legal Privilege & Professional Secrecy, England & Wales*, GETTING THE DEAL THROUGH (May 2018), <https://gettingthedealthrough.com/area/86/jurisdiction/23/legal-privilege-professional-secrecy-2018-england-&-wales/>.

¹⁸² *Id.*

¹⁸³ *Legal Privilege & Professional Secrecy, Germany*, *supra* note 170.

¹⁸⁴ *Legal Privilege & Professional Secrecy, Germany*, *supra* note 170 (“The aforesaid decision spells a fundamental extension of the protection. However, the vast majority of the legal literature has not (yet) adopted this stance but is either disapproving or undecided. Whether or not the Hamburg decision no longer reflects the prevailing opinion of prosecutors and the respectively competent courts, remains to be seen.”).

¹⁸⁵ *Legal Privilege & Professional Secrecy, Switzerland*, *supra* note 125.

¹⁸⁶ *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, No 1:15CV00057 (W.D. Va. Feb. 9, 2017). For more information on this court decision, see Jessica Marroquin, *Share With Care: US Court Finds Attorney Client Privilege Waived Through Use of Cloud Sharing Site*, GLOBAL ARB. NEWS (Apr. 24, 2017), <https://globalarbitrationnews.com/share-care-us-court-finds-attorney-client-privilege-waived-use-cloud-sharing-site-04252017/>.

¹⁸⁷ *Legal Privilege & Professional Secrecy, England & Wales*, *supra* note 181.

¹⁸⁸ *Legal Privilege & Professional Secrecy, Germany*, *supra* note 170.

Questions	U.S.	England	Germany	Switzerland
		consists only of those employees authorized to seek and receive legal advice from the lawyer, and that the legal advice privilege does not extend to information provided by employees and ex-employees to or for the purpose of being placed before a lawyer.		having an attorney conduct the investigation on the bank's behalf. ¹⁸⁹ In this context, the Court held that the conduct of such internal investigation by an attorney was beyond an attorney's typical professional activity, and therefore would not be protected under the attorney-client privilege. ¹⁹⁰

¹⁸⁹ *Legal Privilege & Professional Secrecy, Switzerland, supra* note 125.

¹⁹⁰ *Legal Privilege & Professional Secrecy, Switzerland, supra* note 125 (stating that the Supreme Court's decision has drawn "widespread criticism from attorneys as its broad language may be read as relativizing attorney-client privilege in the context of internal investigations or fact-finding conducted by an attorney.").

APPENDIX II:
 SURVEY OF INTERNATIONAL ARBITRATION PRACTICE TOWARDS
 EVIDENTIARY PRIVILEGES IN INTERNATIONAL COMMERCIAL
 & INVESTMENT ARBITRATION

AWARD	STANDARD	EXCERPTS
A. International Commercial Arbitration Awards & Procedural Decisions ¹⁹¹		
1. Dr. Horst Reineccius (Germany), First Eagle SoGen Funds, Inc. (USA), and others v. Bank for International Settlements (Switzerland), (June 11, 2002) ¹⁹²	Autonomous Standard Approach	The tribunal adopted an autonomous standard where it did not refer to any national law in particular. The adopted standard can be considered to have been closer to the concept of attorney-client privilege under English law, especially with respect to the narrow control group test. ¹⁹³
2. ICC Case No. 7262 ¹⁹⁴	Autonomous Standard Approach	The arbitral tribunal decided that neither the rules of English evidence (the seat of arbitration) or the rules of Indian evidence (the law applicable to the dispute) apply to this case. The tribunal did not articulate the differences between English and Indian laws in that respect. Hence, the tribunal might have reached the same result if it had adopted the cumulative approach, since Indian law is similar in many respects to English law.
3. ICC Case No. 13054 ¹⁹⁵	Cumulative Approach	The tribunal simultaneously applied the laws of the countries having the closest connection to this arbitration. ¹⁹⁶

¹⁹¹ See generally Meyer-Hauser & Sieber, *supra* note 7.

¹⁹² U.N. Reports of Int'l Arbitral Awards, Bank for Int'l Settlements, Procedural Order No. 6, at 169 (June 11, 2002) (The tribunal defined attorney-client privilege as "ratione materiae," where the legal communications which are entitled to an attorney-client privilege must be related to making a decision that is in contemplation of legal contention; and "ratione personae," where the legal communication must be between an attorney (whether in-house or outside) and those who are afforded his or her professional advice for the purpose of making or in contemplation of that decision." The tribunal then held that attorney-client privilege would be considered waived if the communications are disclosed "beyond the circle of those who are authorized to make or participate in the making of the decision for which legal advice was asked.").

¹⁹³ U.N. Reports of Int'l Arbitral Awards, Bank for Int'l Settlements, Procedural Order No. 6, at 169 (June 11, 2002).

¹⁹⁴ JEAN-JACQUES ARNALDEZ, YVES DERAIS & DOMINIQUE HASCHER, COLLECTION OF ICC ARBITRAL AWARDS 1996-2000, 121-22 (2003).

¹⁹⁵ 25 ICC BULLETIN, PROCEDURAL DECISIONS IN ICC ARBITRATION: PRIVILEGE AS A DEFENCE AGAINST DOCUMENT DISCLOSURE 14-16 (2014).

¹⁹⁶ The tribunal applied the laws of the following countries: (1) England, where the documents were created; (2) Switzerland, where the arbitration was seated; and (3) Lebanon, whose law was applicable to the merits of the dispute. The tribunal ruled that the result is the same under all three laws.

4. ICC Case No. 13176 ¹⁹⁷	Autonomous Standard Approach	The tribunal considered the nationality of the parties and the seat of arbitration (France) and decided to construct the attorney-client privilege in line with the criteria prevailing in the civil-law countries.
5. ICC Arbitration ¹⁹⁸	Party Autonomy Approach	The parties in this case agreed to the terms of reference that English law should govern attorney-client privilege. The parties made their choice of English law despite the fact that neither party was English, neither lawyer was admitted to the bar in England, and the law governing the contract was not English law. ¹⁹⁹
6. ICC Arbitration Seated in New York ²⁰⁰	Practical Approach	The arbitral tribunal decided to consult the parties with respect to the privilege claim in this case. The tribunal asked whether the party—whose French lawyer was required to produce the report in question ²⁰¹ —would be willing to produce the requested report himself. This party accepted such a request and the arbitral tribunal decided to review the report <i>in camera</i> . The tribunal redacted only the parts which contained legal advice and then sent the redacted version to the opposing party. ²⁰²
7. ICC Arbitration: German Party v. Cypriot Party ²⁰³	Most Closely Connected Law Approach	The tribunal decided to apply the closest connection test on the basis that such test is widely recognized. ²⁰⁴ The tribunal determined that the most closely connected jurisdiction is the law applicable at the place where the party has its place of business at the moment the relevant communication took place. ²⁰⁵ In this regard, the arbitral tribunal applied both German and Cypriot laws as the parties were domiciled in those countries. ²⁰⁶
8. Vienna Arbitration ²⁰⁷	Autonomous Standard Approach	The tribunal decided to apply general principles developed by Civil-law and Common-law arbitrations. ²⁰⁸

¹⁹⁷ ICC BULLETIN, *supra* note 195, at 16–17.

¹⁹⁸ O'MALLEY, *supra* note 27, at para. 9.64.

¹⁹⁹ *Id.*

²⁰⁰ Pierre Heitzmann, *Confidentiality and Privileges in Cross-Border Legal Practice: The Need for a Global Standard?*, 26 ASA BULL. 205, 229–30 (2008).

²⁰¹ The French lawyer refused to hand in such report based on his ethical obligations under French Law.

²⁰² Heitzmann believes that this could set an example for other arbitral tribunals so that they would not hesitate to consider flexible ways to resolve disputes raising issues of attorney-client privilege.

²⁰³ MÖCKESCH, *supra* note 1, at para. 8.110.

²⁰⁴ *Id.*

²⁰⁵ MÖCKESCH, *supra* note 1, at para. 8.144.

²⁰⁶ *Id.*

²⁰⁷ Heitzmann, *supra* note 200, at 236.

9. NAI, Kort Geding (February 28, 2007) ²⁰⁹	Most Closely Connected Law Approach	The tribunal applied Dutch law because the exchange was between two Dutch counsel which made the Dutch law the most closely connected law to such an exchange.
B. International Investment Arbitration Awards & Procedural Decisions		
1. Edgar Protiva, Eric Protiva v. Iran (July 14, 1995) ²¹⁰	Autonomous Standard Approach	The tribunal here seems to have adopted general principles common to civil-law and common-law countries without conducting any conflict of laws analysis. ²¹¹
2. Pope & Talbot v. Canada (September 6, 2000) ²¹²	Autonomous Standard Approach	The tribunal held that the Canadian Evidence Act did not apply to this case; nevertheless, in principle, if the requested documents contained State secrets, then they would be privileged. ²¹³ The tribunal required Canada to produce further information as to the nature of the documents. However, Canada refused to cooperate. ²¹⁴

²⁰⁸ MÖCKESCH, *supra* note 1, at para. 8.92 (stating that Möckesch does not agree with the arbitral tribunal’s approach since this was not a clear-cut case for the application of a general principles approach to the standard of attorney-client privilege).

²⁰⁹ O’MALLEY, *supra* note 27, at paras. 9.45–9.46.

²¹⁰ Edgar Protiva & Eric Protiva v. Iran, Award, IUSCT Case No. 316 (Award No. 566-316-2) (July 14, 1995).

²¹¹ The respondent here argues that his witness’s affidavit should be admitted despite being submitted late. The respondent contends that they were not able to secure such affidavit before due to the attorney-client privilege created by the relation between the witness and the claimants. The tribunal, however, did not accept the respondent’s argument for two main reasons: 1) The duty of confidentiality would in fact only bind the witness and not the respondent. Therefore, the claimant or the claimant’s attorney should be the one asserting such a privilege in response to a timely request for information from the respondent; and 2) attorney-client privilege only protects information an attorney has gained from his client in confidence. Hence, mere events witnessed by the witness in 1979 and 1980 in Iran does not represent privileged information.

²¹² Pope & Talbot, Inc. v. Canada, UNCITRAL, Decision by the Tribunal (Sept. 6, 2000).

²¹³ Pope & Talbot, Inc. v. Canada, UNCITRAL, n.48 paras. 6–8, 11, 13. In another incident in the same arbitration, the tribunal heavily criticized the claimant’s counsel for releasing to the press a letter faxed inadvertently by Canada to the claimant’s counsel. The tribunal penalized the claimant’s counsel by requiring that the counsel personally pay the costs of US \$10,000 awarded against the claimant for such conduct.

²¹⁴ Pope & Talbot Inc. v. Canada, UNCITRAL, Award on the Merits of Phase 2, para. 193 (Apr. 10, 2001). The tribunal found that Canada’s refusal might not prejudice the investor; however, such refusal was a derogation from the “overriding principle” of equal treatment found in Article 15 of the UNCITRAL Arbitration Rules and Article 1115 of NAFTA.

<p>3. Loewen Group, Inc. & Raymond L. Loewen v. USA (January 5, 2001)²¹⁵</p>	<p>Autonomous Standard Approach</p>	<p>The tribunal rejected the U.S. submission that there had been a waiver by the claimants of attorney-client privilege. However, the tribunal ruled that the U.S. was entitled to discovery of the attorney-client communications of the claimants or either of them which relate directly to the issue of duress. The tribunal did not clarify the basis of its decision.</p>
<p>4. CME Czech Republic BV et al. v. The Czech Republic (June 3, 2002)²¹⁶</p>	<p>Autonomous Standard Approach</p>	<p>The tribunal did not refer to any national law in particular. The adopted standard seems to have been based upon the notion of attorney-client privilege as adopted by common-law countries rather than civil-law countries.</p>
<p>5. Canfor Corporation v. USA (May 28, 2004)²¹⁷</p>	<p>General Principles of Equity & Fairness Approach</p>	<p>The tribunal ruled that the communications, explication notes, position papers or memoranda shared among the three NAFTA parties with respect to the relevant portions of the NAFTA are not privileged.²¹⁸</p>
<p>6. United Parcel Service of America, Inc. v. Canada (October 8, 2004)²¹⁹</p>	<p>Autonomous Standard Approach</p>	<p>The tribunal ruled that Cabinet privilege cannot be assessed under Canadian law but rather under the law governing the tribunal which is not a national law in any case.²²⁰ Therefore, the tribunal rather relied on general principles applicable to Cabinet privilege under International Law.</p>

²¹⁵ Loewen Group, Inc. & Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, para. 27 (Jan. 5, 2001) (referring to a decision by the Tribunal on Dec. 9, 1999). In subsequent proceedings, the claimants waived privilege over some of their legal advice concerning settlement. Loewen Group, Inc. & Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Decision on Respondent’s Request for a Supplementary Decision (Sept. 6, 2004).

²¹⁶ O’MALLEY, *supra* note 27, at para. 9.27 n.41; CME Czech Republic B.V. et al. v. The Czech Republic, UNCITRAL, para. 64 (June 3, 2002).

²¹⁷ Canfor Corp. v. United States of America, UNCITRAL, Procedural Order No. 5 (May 28, 2004).

²¹⁸ *Id.* at para. 21.

²¹⁹ United Parcel Service of America, Inc. v. Canada, ICSID Case No. UNCT/02/1, Decision Relating to Canada’s Claim of Cabinet Privilege (Oct. 8, 2004).

²²⁰ United Parcel Service of America, Inc. v. Canada, ICSID Case No. UNCT/02/1, Decision Relating to Canada’s Claim of Cabinet Privilege, para. 7 (Oct. 8, 2004) (The tribunal ruled that Cabinet privilege is qualified and in this regard, there is no evidence that the official conducted the necessary analysis of weighing the public interest in confidentiality with the competing interest of disclosure in this arbitration. Accordingly, the tribunal invited Canada to provide the missing information in case it wished to maintain its Cabinet privilege claims).

<p>7. Methanex v. USA (August 3, 2005)²²¹</p>	<p>General Principles of Equity & Fairness Approach</p>	<p>The tribunal determined this attorney-client privilege claim by relying upon the notion that the parties owed each other and the tribunal a general duty to conduct themselves in good faith and to respect the equality of arms between them.</p>
<p>8. OKO Osuuspankkien Keskuspankki v. Estonia (September 9, 2005)²²²</p>	<p>Practical Approach</p>	<p>The tribunal adopted a different approach as it requested an explanation from the party asserting the privilege to clarify why at least a redacted version of the minutes could not be disclosed, by redacting only those passages that are said to be privileged from document production in these proceedings.</p>
<p>9. Glamis Gold, Ltd. v. USA (November 17, 2005)²²³</p>	<p>Mixed Approach (Autonomous Standard Approach & Party Autonomy Approach)</p>	<p>In this case, it appeared that the parties agreed to have the privilege law of the U.S. applicable to the case, but they disagreed as to which U.S. jurisdiction the tribunal should refer to. The tribunal reacted to this agreement by reviewing numerous U.S. jurisdictions and attempting to identify a general consensus between U.S. courts to define what the parties would reasonably expect to apply. The tribunal then combined this information with its knowledge of the peculiarities of international arbitration and how it differs from court proceedings to craft an autonomous standard for the privilege claims.²²⁴</p>
<p>10. Biwater Gauff (Tanzania) Ltd v. Tanzania (May 24, 2006)²²⁵</p>	<p>Autonomous Standard Approach</p>	<p>The tribunal ruled that national doctrines of privilege did not apply under the ICSID regime or under international law. The tribunal further relied upon Article 9(2)(f) of the IBA Rules on Taking of Evidence in deciding this claim.</p>

²²¹ Brigitta John, *Admissibility of Improperly Obtained Data as Evidence in International Arbitration Proceedings*, KLUWER ARB. BLOG (Sept. 28, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/09/28/admissibility-of-improperly-obtained-data-as-evidence-in-international-arbitration-proceedings/> (discussing that in this case, which is rather peculiar, the claimant trespassed into the office of the head of a lobbying organization and searched through internal trashcans and dumpsters; the claimant obtained through this search personal notes, private correspondence, and material expressly subjected to legal professional privilege).

²²² O'MALLEY, *supra* note 27, at para. 9.29.

²²³ Glamis Gold, Ltd. v. United States of America, Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege (Nov. 17, 2005).

²²⁴ Audley Sheppard, *The Approach of Investment Treaty Tribunals to Evidentiary Privileges*, 31 ICSID REV. 670, 678 (2016).

²²⁵ Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 2 (May 24, 2006).

<p>11. Merrill & Ring Forestry LP v. Canada (February 18, 2008)²²⁶</p>	<p>Mixed Approach (Most Closely Connected Law Approach & Party Autonomy Approach)</p>	<p>The tribunal decided to apply the Canadian provincial law to determine the applicable standard in this arbitration. As for the scope of the privilege, the tribunal recognized that both parties agreed that the privilege is qualified and therefore needed to conduct a balancing test weighing the competing interests of the parties.²²⁷</p>
<p>12. Libananco Holdings Co. Limited v. Turkey (June 23, 2008)²²⁸</p>	<p>General Principles of Equity & Fairness Approach</p>	<p>The tribunal conducted a balancing test to weigh the importance of confidentiality and attorney-client privilege and the obligation of all parties to arbitrate fairly and in good faith to determine this privilege claim.²²⁹</p>
<p>13. Vito G Gallo v. Canada (April 8, 2009)²³⁰</p>	<p>Autonomous Standard Approach</p>	<p>The tribunal held that international law applies by virtue of Article 1131(1) 63 of the NAFTA to attorney-client privilege claims. In addition, the tribunal decided to take into consideration Article 9.2(b) and (f) of the IBA Rules of 1999 as the parties had agreed before to have such rules serving as guidelines. In this regard, the tribunal pointed out that this is a NAFTA dispute between a U.S. citizen and Canada and hence the tribunal should not only rely upon Canadian case law but also other Common-Law jurisdictions. In this respect, the tribunal referred to a decision by the Court of Appeal of England.</p>
<p>14. Abaclat v. Argentina (January 27, 2010)²³¹</p>	<p>Autonomous Standard Approach</p>	<p>The tribunal held that information privileged under a party's domestic law should not be disclosed even at the expense of transparency considerations in international investment arbitration.²³² The tribunal did not clarify its approach exactly in this case.</p>

²²⁶ Merrill & Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Amended Confidentiality Order (Feb. 18, 2008).

²²⁷ In this respect, the tribunal reached the result that eight out of nine documents were not privileged and therefore had to be produced.

²²⁸ Libananco Holdings Co. Ltd. v. Republic of Turkey, ICSID Case No. ARB/06/08, Decision on Preliminary Issues (June 23, 2008).

²²⁹ See John, *supra* note 221.

²³⁰ Vito G. Gallo v. Gov't of Canada, UNCITRAL, PCA Case No. 55798, Procedural Order No. 3 (Apr. 8, 2009).

²³¹ Abaclat & Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna Beccara & Others v. The Argentine Republic), Procedural Order No. 3, Confidentiality Order (Jan. 27, 2010).

²³² *Id.* at para. 121.

<p>15. Tidewater v. Venezuela (March 29, 2011)²³³</p>	<p>Autonomous Standard Approach</p>	<p>The tribunal relied on the IBA Rules on Taking of Evidence and concluded that in principle documents which might be necessary to the case may be legitimately privileged from production if they comprise confidential documents made for the purpose of providing or obtaining legal advice.</p>
<p>16. GEA v. Ukraine (6 April 2010)²³⁴</p>	<p>Most Protective (Favorable) Law Approach</p>	<p>The tribunal stated that the legal professional privilege may be claimed as long as it satisfies the test for legal professional privilege under either or both of the relevant German rules and the international rules set out in the OSPAR²³⁵ case.</p>
<p>17. Bilcon of Delaware et al. v. Canada (July 11, 2012)²³⁶</p>	<p>Mixed Approach (Autonomous Standard Approach & Most Closely Connected Law Approach)</p>	<p>The tribunal decided to take into account any relevant rules of international law, as evidenced in the practice of international courts and tribunals when deciding on the law applicable to privilege claims.²³⁷ Further, both parties agreed that in light of the cases decided by prior NAFTA tribunals, any refusal to produce documents based on their political sensitivity requires a balancing process, through weighing, on the one hand, the compelling nature of the requested party's sensitivities and, on the other hand, the extent to which disclosure would advance the requesting party's case. Accordingly, the tribunal relied in its finding on previous NAFTA cases such as Gallo and Glamis Gold. However, not every issue was previously dealt with by NAFTA tribunals. In this case, the tribunal decided to refer to Canadian domestic law.</p>
<p>18. Cambodia Power Company v. Cambodia (February 14, 2012)²³⁸</p>	<p>Mixed Approach (Autonomous Standard Approach & Most Closely Connected Law Approach)</p>	<p>The tribunal held that the question of admissibility of a witness's evidence was governed by international law, and in applying international law, questions of privilege were governed by Californian law. The tribunal also took into consideration the IBA Rules on taking of Evidence based on the agreement of the parties.</p>

²³³ Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Procedural Order No. 1, Production of Documents (Mar. 29, 2011).

²³⁴ GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16 (Mar. 31, 2011).

²³⁵ Ireland v. United Kingdom (OSPAR Arbitration), PCA Case No. 2001-03 (July 2, 2003).

²³⁶ William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton & Bilcon of Delaware Inc. v. Gov't of Canada, UNCITRAL, PCA Case No. 2009-04, Procedural Order No. 13, paras. 20–23 (July 11, 2012).

²³⁷ *Id.* at paras. 20–23.

²³⁸ Cambodia Power Co. v. Kingdom of Cambodia, ICSID Case No. ARB/09/18, Amended Decision on the Claimant's Application to Exclude Mr. Lobit's Witness Statement and Derivative Evidence (Feb. 14, 2012).

<p>19. <i>St Marys VCNA, LLC v. Canada</i> (December 27, 2012)²³⁹</p>	<p>Mixed Approach (Practical Approach & Autonomous Standard Approach)</p>	<p>The tribunal decided to have the documents in question to be reviewed by a neutral third party to consider whether any privilege in relation to these documents had been waived. Justice James Spigelman was appointed in this regard. Spigelman relied in his analysis on prior NAFTA cases as both parties had referred to NAFTA tribunals’ decisions such as <i>Glamis Gold</i> and <i>Bilcon</i>.</p>
<p>20. <i>OPIC Karimun Corporation v. Venezuela</i> (May 28, 2013)²⁴⁰</p>	<p>Autonomous Standard Approach</p>	<p>The tribunal decided to draw adverse inferences from Venezuela’s failure to produce requested documents that the requested documents do not assist the Venezuela in support of its arguments. However, the tribunal held that these adverse inferences alone would not constitute direct evidence that would be sufficient to establish Venezuela’s intention of granting consent to ICSID jurisdiction under its Investment Law.</p>
<p>21. <i>Apotex Holdings Inc. and Apotex Inc. v. USA</i> (July 5, 2013)²⁴¹</p>	<p>Most Closely Connected Law Approach</p>	<p>Under this case, both parties had relied heavily in their arguments on U.S. legal sources, which suggest that both parties had an expectation that U.S. law would apply. Despite this perceived agreement, the Tribunal pointed out that IBA Rules and the ICSID Arbitration Rules rather than national rules of law apply. However, it seems that the tribunal determined the scope of attorney-client privilege and work-product protection by mainly relying upon U.S. case law. The only non-U.S. decision cited by the tribunal was the decision in <i>Glamis Gold</i> and this was only with regard to the burden of proof.</p>

²³⁹ *St. Marys VCNA, LLC v. Gov’t of Canada*, Report on Inadvertent Disclosure of Privileged Documents, at 13 (Dec. 27, 2012).

²⁴⁰ *OPIC Karimum Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Award & Dissenting Opinion of Professor Dr. Guido Santiago Tawil (May 28, 2013).

²⁴¹ *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, paras. 20–21 (July 5, 2013).

<p>22. Poštová Banka, A.S. and Istrokapital SE v. Greece (July 20, 2014)²⁴²</p>	<p>Most Protective (Favorable) Law Approach</p>	<p>The tribunal recognized the differences between the laws governing attorney-client privilege in the countries of both parties (Slovakia and Greece), especially with respect to in-house lawyers. Further, the tribunal noted that the commentary on the IBA Rules on taking of Evidence suggests that applying different rules to the parties could create unfairness by shielding the documents of one party from production but not those of the other. In this regard, the tribunal pointed out that Greek law provides a broader protection than the Slovak law. Therefore, the tribunal applied the most protective privilege to both parties.</p>
<p>23. Philip Morris Asia Limited v. Australia (November 14, 2014)²⁴³</p>	<p>Autonomous Standard Approach</p>	<p>This tribunal relied upon Article 9 of the IBA Rules on taking of Evidence and Article 17 of the UNCITRAL Rules to rule that it has substantial discretion in determining the applicable privilege standard. The tribunal remarked that it is aware of the prior investment treaty decisions which were relied upon by both parties. However, the tribunal decided that determining the applicable standard of attorney-client privilege should be made in line with the specific factual and legal circumstances of the current case. Further, the tribunal stated that the home rules of either party cannot be rather determinative in this case. Accordingly, the arbitral tribunal refused to apply the domestic laws of either party on attorney-client privilege and rather adopted an autonomous standard.</p>
<p>24. Windstream Energy LLC v. Canada (February 23, 2015)²⁴⁴</p>	<p>Most Closely Connected Law Approach</p>	<p>In this case, the arbitral tribunal applied Canadian law on parliamentary privileges. In this regard, the tribunal held that the respondent did not prove that under Canadian law parliamentary privilege can be relied upon in circumstances other than those presented by the claimant.</p>

²⁴² Poštová Banka, A.S. & Istrokapital SE v. Hellenic Republic, ICSID Case No. ARB/13/8, Procedural Order No. 6 (July 20, 2014).

²⁴³ Philip Morris Asia Ltd. v. Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 12 Regarding the Parties’ Privilege Claims (Nov. 14, 2014).

²⁴⁴ Windstream Energy LLC v. Gov’t of Canada, UNCITRAL, PCA Case No. 2013-22, Procedural Order No. 4 (Feb. 23, 2015).

<p>25. <i>Mauritius v. The UK</i> (March 18, 2015)²⁴⁵</p>	<p>Practical Approach</p>	<p>This case involved documents that were redacted by the UK on the grounds of attorney-client privilege. The UK offered that it could provide unredacted versions of such documents to be reviewed ex parte by the arbitral tribunal. The arbitral tribunal accepted the UK's offer and had the president of the tribunal review the unredacted versions ex parte.</p>
<p>26. <i>Eli Lilly and Company v. Canada</i> (April 6, 2015)²⁴⁶</p>	<p>Autonomous Standard Approach</p>	<p>The arbitral tribunal was guided by Article 9 of the IBA Rules on taking of Evidence. In this regard, the tribunal decided to weigh a disputing party's document requests against the legitimate interests of the other disputing party, including any unreasonable burden likely to be caused to such disputing party. The tribunal would take into account all the surrounding circumstances, including the breadth and relevance of the request when conducting such a balancing test.</p>
<p>27. <i>Caratube International Oil Company LLP and Devincci Salah Hourani v. Kazakhstan</i> (July 27, 2015)</p>	<p>Autonomous Standard Approach</p>	<p>The arbitral tribunal held that it has substantial discretion in determining attorney-client privilege claims based on the provisions of the ICSID convention and the ICSID Arbitration Rules and therefore is not bound to apply the law of the seat (France) to such claims. The tribunal also held that this arbitration was an international one between two non-French parties and accordingly the tribunal has to apply general principles of attorney-client privilege. The tribunal took into account principles of the three states which had the closest connection with the case; France, U.S., and Kazakhstan.</p>
<p>28. <i>Lone Pine Resources Inc. v. Canada</i> (February 24, 2017)²⁴⁷</p>	<p>Mixed Approach (Party Autonomy Approach & Autonomous Standard Approach)</p>	<p>The parties agreed on applying the general test expressed by the decision in <i>Gallo</i> with respect to attorney-client privilege claims. Further the tribunal considered that the same general test applies to both in-house and out-house counsel, within the private and public sector.²⁴⁸ Therefore, the tribunal adopted a common-law approach to attorney-client privilege.</p>

²⁴⁵ 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).

²⁴⁶ *Eli Lilly & Co. v. Gov't of Canada*, ICSID Case No. UNCT/14/2, Procedural Order No. 5 (Apr. 6, 2015).

²⁴⁷ *Lone Pine Resources Inc. v. Gov't of Canada*, ICSID Case No. UNCT/15/2, Procedural Order on Withheld & Redacted Documentation, para. 5 (Feb. 24, 2017).

²⁴⁸ *Id.* at para. 5.

<p>29. ACP Axos Capital GmbH v. Kosovo (March 6 & July 5, 2017)²⁴⁹</p>	<p>Mixed Approach (Practical Approach & Autonomous Standard Approach)</p>	<p>The tribunal did not specify the adopted approach or the applicable law or standard to attorney-client privilege claims. The tribunal rather stated that it accepts the widely recognized principle that legal advice provided by an external legal counsel is privileged.²⁵⁰ Further, the tribunal remarked that documents containing partially privileged information may be redacted with the claimed privilege clearly indicated.²⁵¹</p>
<p>30. Niko Resources (Bangladesh) Ltd. v. Bapex And Petrobangla (Bangladesh) (July 27, 2017)²⁵²</p>	<p>Most Closely Connected Law Approach</p>	<p>The tribunal determined that the question of privilege should be governed by Canadian law because the investigation in question was conducted in Canada for a Canadian client who is represented by a Canadian law firm.</p>
<p>31. Blanco v. Mexico (February 13, 2018)²⁵³</p>	<p>Most Protective Law Approach</p>	<p>The Tribunal based its decision on Article 9(3) of the IBA Rules and the Commentary on the IBA Rules (without specifying which Commentary in Particular). The Tribunal applied the most protective law approach and considered that the highest protective standard for the purposes of this case are the U.S.'s rules on attorney-client privilege and work product doctrine.</p>
<p>32. Gramercy v. Peru (July 12, 2018)²⁵⁴</p>	<p>Autonomous Standard Approach</p>	<p>The Tribunal relied in defining the parameters of the standard of attorney-client privilege on the same analysis adopted by Gallo v. Canada. Also, the tribunal referred to Article 9.2(b) of the IBA Rules. In this regard, the tribunal's analysis was heavily influenced by the standard of attorney-client privilege in common-law jurisdictions.</p>

²⁴⁹ ACP Axos Capital GmbH v. Republic of Kosovo, ICSID Case No. ARB/15/22, Procedural Order No. 3 (July 5, 2017); *see also* ACP Axos Capital GmbH v. Republic of Kosovo, ICSID Case No. ARB/15/22, Procedural Order No. 2 (Mar. 6, 2017).

²⁵⁰ ACP Axos Capital GmbH v. Republic of Kosovo, ICSID Case No. ARB/15/22, Procedural Order No. 2, at 2 (Mar. 6, 2017).

²⁵¹ *Id.* at 3.

²⁵² Niko Res. (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 (July 27, 2017); Jarrod Hepburn, *In a New Ruling, Arbitrators Reject Respondent’s Bid to Obtain Documents From Internal Corruption Investigation; Deloitte Report is Deemed Privileged Under Local Law*, INVESTMENT ARB. REP. (Aug. 3, 2017), <https://www.iareporter.com/articles/in-a-new-ruling-arbitrators-reject-respondents-bid-to-obtain-documents-from-internal-corruption-investigation-deloitte-report-is-deemed-privileged-under-local-law/>.

²⁵³ Jorge Luis Blanco, Joshua Dean Nelson & Tele Fácil México, S.A. de C.V. v. United Mexican States, ICSID Case No. UNCT/17/1.

²⁵⁴ Gramercy Funds Management LLC & Gramercy Peru Holdings LLC v. Republic of Peru, ICSID Case No. UNCT/18/2.

<p>33. <i>Pawlowski v. Czech Republic</i> (July 14, 2018)²⁵⁵</p>	<p>Autonomous Standard Approach</p>	<p>The Tribunal relied in defining the parameters of the standard of attorney-client privilege on the same analysis adopted by <i>Gallo v. Canada</i>. Also, the tribunal referred to Article 9.2(b) of the IBA Rules. In this regard, the tribunal’s analysis was heavily influenced by the standard of attorney-client privilege in common-law jurisdictions.</p>
<p>34. <i>LMC. v. Mexico</i> (September 3, 2018)²⁵⁶</p>	<p>Autonomous Standard Approach</p>	<p>The Tribunal relied in defining the parameters of the standard of attorney-client privilege on the same analysis adopted by <i>Gallo v. Canada</i>. Also, the tribunal referred to Article 9.2(b) of the IBA Rules. In this regard, the tribunal’s analysis was heavily influenced by the standard of attorney-client privilege in common-law jurisdictions.</p>
<p>35. <i>Ballantine v. The Dominican Republic</i> (October 2, 2018)²⁵⁷</p>	<p>Practical Approach</p>	<p>The Respondent State requested the Claimants to disclose their third-party funding agreement. The Claimants in response claimed that such agreement is covered by attorney-client privilege. However, the tribunal ordered the Claimants to disclose the agreement only to the Tribunal to assess whether there is a conflict of interest that exists between the tribunal and the third-party funder. The tribunal found none exists.</p>

SURVEY OUTCOME

APPROACH	EXPLANATION	STATISTICS		
		Total Cases	Investment Cases	Commercial Cases
<p>1. Autonomous Standard Approach</p>	<p>Tribunals do not refer in this approach to any national law in particular but rather rely on the general principles of attorney-client privilege across all or some national jurisdictions or under international law.</p>	<p>26</p>	<p>22</p>	<p>4</p>
<p>2. Most Closely Connected Law Approach</p>	<p>This is a conflict of laws approach whereby tribunals apply the law that is most closely connected to the dispute. Tribunals have different criteria to determine which law is the most closely connected law.</p>	<p>8</p>	<p>6</p>	<p>2</p>

²⁵⁵ *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11.

²⁵⁶ *Lion Mexico Consol. L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2.

²⁵⁷ *Michael Ballantine & Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17.

<p>3. Practical Approach</p>	<p>Tribunals fall back on practical approaches to protect the considerations underlying attorney-client privilege. These approaches usually take the form of redaction and <i>ex parte</i> review.</p>	<p>6</p>	<p>5</p>	<p>1</p>
<p>4. Party Autonomy Approach</p>	<p>Tribunals rely in this approach on the agreement of the parties on the application of a certain standard. Parties can agree solely on a certain national federal jurisdiction without choosing the state jurisdiction.</p>	<p>4</p>	<p>3</p>	<p>1</p>
<p>5. General Principles of Equity & Fairness Approach</p>	<p>This approach entails that tribunals apply general principles of equity and fairness and balances the different considerations of the parties rather than applying a certain rule in particular.</p>	<p>3</p>	<p>3</p>	<p>0</p>
<p>6. Most Protective (Favorable) Law Approach</p>	<p>Tribunals also here compare the outcome under different potential applicable laws. Then, if the outcome is different, the tribunals apply the most protective standard to both parties equally.</p>	<p>3</p>	<p>3</p>	<p>0</p>
<p>7. Cumulative Approach</p>	<p>This is a creative approach whereby tribunals compare the outcome under different potential applicable laws. Tribunals seek to identify if there is a consensus among such laws. If such consensus exists, the tribunals do not delve into a conflict of laws analysis.</p>	<p>1</p>	<p>0</p>	<p>1</p>