The Standard of Attorney-Client Privilege In International Arbitration: Is The “Most Protective Law” The Right Answer?

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The concept of attorney-client privilege is a unique creation of common-law jurisdictions which has influenced all types of legal regimes over the world. Common-law regimes developed such a concept to curb the wide sphere of document production and 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 clients and their attorneys which would typically improve the quality of legal advice across the spectrum.

On the other hand, civil-law jurisdictions view the issue from a different perspective. As a starting point, discovery is very limited in civil-law countries as the purpose of document production is not the search for the truth. Accordingly, there was no reason to develop such a concept since the scope of document production is rather narrow. However, civil-law countries developed a concept which had similar attributes to attorney-client privilege, namely the attorney’s duty of confidentiality or the legal professional privilege. The rationale was rather similar as well; it was promoting the quality of legal advice. In sum, both concepts are different in their nature, and scope, but share the same purpose which is enhancing the legal representation of clients.

However, the divide between common-law and civil-law countries in attorney-client privilege is utterly a myth. In fact, there is not a uniform concept of attorney-client privilege even within common-law jurisdictions nor within civil-law jurisdictions. In the words of Möckesch, “[*a]lthough the US attorney-client privilege and the work-product protection are the approximate equivalents of the English legal advice privilege and litigation privilege, the laws of the United States and England equally differ in many respects*.”[fn]Möckesch, “Attorney-Client Privilege in International Arbitration”, at para 6.40.[/fn] There is another myth, namely,that attorney-client privilege is broader in common-law jurisdictions than civil-law jurisdictions. For instance, if you look at the German law in particular, you can easily argue that the scope of attorney-client privilege is far broader than common-law jurisdictions. In fact, German attorney-client privilege extends to business and financial advice. Also, German and Swiss laws protect information/facts rather than communications, which could prove far more protective in several situations. Shattering these myths complicates things even more when we face a conflict of laws situation, and especially in international arbitration.

In this respect, international arbitration began to develop best practices and standards by the end of

the 20th century; it started to develop unique features that gather various doctrines of law from both common-law and civil-law jurisdictions. For example, the International Bar Association 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. The IBA Rules have delivered a standard of document production that could be considered broader than most civil-law jurisdictions, and narrower than most common-law jurisdictions. As for attorney-client privilege, it has been widely recognized as a valid defense against requests for document production under the IBA Rules.[fn]Born, "International Arbitration", (Kluwer Law International 2012) 187; Kuitkowski, "The Law Applicable to Privilege Claims in International Arbitration", (2015) 32(1) J Int'l Arb 65, 80.[/fn] However, there has not been a general consensus yet on the applicable standard of attorney-client privilege in international arbitration.[fn]Möckesch, "Attorney-Client Privilege in International Arbitration", at para 8.01[/fn] This opened up the debate between international arbitration scholars for the right answer to such a bottleneck.

Most prominent scholars in international arbitration advocate for the adoption of a most protective or favored law approach. However, upon surveying approximately (40) published arbitral procedural decisions in international commercial and investment arbitration, this approach featured only once in an explicit manner in Poštová banka, a.s. and Istrokapital SE v. Greece (July 20, 2014). This could be due to one of two reasons; eitherthere is a wide gap between the literature and the practice on determining the applicable standard to attorney-client privilege in international arbitration. Otherwise, it might be in fact that such an approach has been impliedly embedded when arbitral tribunals craft an autonomous standard for attorney client privilege by applying general principles of attorney-client privilege that are highly protective of the parties or that favor the limitation of document production at the expense of expanding it.

However, I still think that the most protective law approach might not be adequate or feasible for international arbitration for three main reasons. (1) It requires a complex conflict of laws analysis: the arbitral tribunal needs first to determine the potential competing applicable laws and then determine which one is the most protective law. (2) It is not an easy task to determine the most protective law**:** at first glance, it may seem that attorney-client privilege in common-law countries is more expansive than the equivalent concept in civil-law countries. However, this is far from true for two reasons: First, there is no consensus within common-law countries or within civil-law countries to being with. Second, there are definitely some aspects where some civil-law countries provide for more protective features than in other common-law countries. (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 counsels. Imagine a dispute between German and Swiss parties where the arbitral tribunal decides to follow the IBA Rules. It seems that it would be rather unjust if the scope of attorney-client privilege is not aligned with the scope of document production.

In light of the inadequacy and infeasibility of the "most protective law" standard, we need to search for a superior approach. In this regard, I advocate for a transnational substantive and autonomous standard that could have three potential benefits. Firstly, this approach would comport with the discretion of the arbitral tribunals and would allow them enough leeway to cherry-pick the applicable standard to the parties. Secondly, this approach would align with the scope and purpose of document production under the IBA Rules. Finally, this approach would be able to eliminate the need to conduct any conflict of laws analysis which may prove problematic in several situations as highlighted above.