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Evidentiary Privilege in International Arbitration

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The issue of privilege in international arbitration raises two important questions. First, do international arbitral tribunals have the authority to order that evidence is inadmissible on the ground of privilege? Second, what jurisdiction's rules of privilege should apply when the parties to a dispute hail from different jurisdictions? This article addresses the emerging consensus that has developed in recent years to resolve these issues.

Introduction

The law of most jurisdictions recognizes some form of solicitor or attorney-client privilege. However, the scope and extent of this privilege varies from place to place. Because of these differences, two questions often arise in international arbitrations. First, do arbitral tribunals have the authority to order that evidence be withheld on the ground of privilege? Second, what jurisdiction's rules of privilege should arbitral tribunals apply?

These questions are particularly pertinent – and problematic – for arbitrations between parties from different jurisdictions. Consider a hypothetical arbitration between a U.S. party and a French party with the seat of the arbitration in Australia. Both parties have communications with their respective in-house counsel regarding the dispute. In the U.S., these communications are privileged; in France, they are not. Australian privilege law is again different from those in the U.S. and France. Should any of these communications be protected from disclosure on the ground of privilege and, if so, which jurisdiction's privilege laws should apply?

Do Arbitrators Have the Authority to Protect Evidence on the Ground of Privilege?

The nature and extent of privilege in international arbitration is substantially unsettled. Few authorities speak to the law of privilege in international arbitration and none of the UNCITRAL Arbitration Rules, the ICC Rules of Arbitration, the LCIA Arbitration Rules, the SCC Arbitration Rules, the National Arbitration Rules of the ADR Institute of Canada ("ADRIC Arbitration Rules"), or the WIPO Arbitration Rules makes any mention of privilege whatsoever.

Nevertheless, it is generally well established that international arbitral tribunals have the discretion to rule that evidence is inadmissible on the ground of privilege. This discretion flows from the tribunal's power to make determinations on the admissibility, weight, relevance, and materiality of evidence. For example, the UNCITRAL Arbitration Rules state "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." Nearly identical provisions exist in the LCIA Arbitration Rules, the ICDR Arbitration Rules, the SCC Arbitration Rules, the ICSID Arbitration Rules, the WIPO Arbitration Rules, and the ADRIC Arbitration Rules. Additionally, the IBA Rules on the Taking Evidence in International Arbitration, which have gained wide acceptance within the international arbitration community, state that international arbitral tribunals have the discretion to rule that evidence is inadmissible on the ground of privilege.

Yet, none of the foregoing provide guidance on which jurisdiction's rules of privilege a tribunal should apply. Thus, while it is well recognized that tribunals have the authority to decide whether evidence can be withheld on the basis of privilege, it is not well settled what jurisdiction's rules of privilege should be applied.

What Privilege Laws Should International Arbitration Tribunals Apply?

Although the law of privilege in international arbitration is still unsettled, a consensus appears to be emerging on the correct approach to determine which jurisdiction's rules of privilege should apply.

The prevailing approach is known as the "closest connection" test. Under this approach, the tribunal chooses the law with the closest connection to the evidence at issue. The tribunal considers the jurisdiction in which the relevant lawyer was qualified, the jurisdiction where the relevant communication was made, the jurisdiction in which the client was located, and so on. This analysis typically leads tribunals to apply the privilege law of the jurisdiction in which the client-lawyer relationship exists. Where the client and lawyer reside in different places, tribunals typically apply the privilege rules of the lawyer's jurisdiction.

However, the "closest connection" test is not appropriate for all circumstances. For instance, if there are a large number of parties with a large number of disputed pieces of evidence from a variety of jurisdictions, the "closest connection" approach can be unwieldy. More importantly, it can lead to the application of different standards of privilege between the parties, resulting in manifest unfairness that could be a ground upon which to resist enforcement of the resulting award.

In such circumstances, the emerging consensus is the application of what is commonly known as the "most-favoured-nation" rule. This approach requires the tribunal to assess the different standards of privilege asserted by the parties and to apply the most protective standard to all parties equally. This ensures that all parties are treated equally and that no party will be compelled to produce evidence that would be privileged under its own laws. However, this approach could jeopardize the effectiveness of an arbitration proceeding by permitting a party to withhold relevant and material evidence that would not otherwise be privileged in its home jurisdiction.

Conclusion

In the hypothetical arbitration between the U.S. party and French party described above, it is likely that a tribunal would first consider the "closest connection" test to the parties' communications with their respective in-house counsel. This would likely lead the tribunal to apply U.S. privilege law to the communications involving the U.S. party, and French privilege law to the communications involving the French party.

However, given that U.S. privilege law would protect such communications from disclosure while French law would not, this approach could require the French party to produce records that the U.S. party would be entitled to withhold, resulting in manifest unfairness. Accordingly, the tribunal would likely apply the "most-favoured-nation" rule to all of the communications at issue to ensure that each party is treated equally. As U.S. privilege law is more protective than the French law, the tribunal would likely apply U.S. privilege law to both parties equally, entitling both parties to withhold any communications with their in-house counsel from disclosure.

While a real consensus in respect of the law of privilege in international arbitration appears to be emerging, lawyers must still be cautious because the law in this area is still substantially unsettled. Ultimately, the law of privilege applied in an international arbitration is still very much within the discretion of the tribunal in any given case.

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