8.4 Parties' expectations

International arbitration should seek to meet the parties' expectations. For the purposes of our present discussion, this has three facets.

The first expectation is that communications which are privileged when made will remain privileged. This assumes that privileges recognised by a domestic court will likewise be recognised by foreign courts and international tribunals. Such an expectation is important because it affects the nature of the communication and relates to the underlying rationale for legal privilege (i.e. full and open communication between a client and his attorney).

Thus, when a client seeks advice from external counsel based in England or the United States, that client will most probably provide information to the lawyer assuming such communication to be privileged. Likewise, the lawyer will most probably write his advice assuming it to be privileged. Similar assumptions are also likely to be made in respect of communications with in-house counsel based in England or the United States. (Although, as this paper has shown, it might be a mistake to assume that such privileges will be recognised internationally, the assumption is often made in practice.) A communication between a client and a German or French external lawyer will also most probably be assumed to be confidential, and any advice will be written accordingly. On the other hand, a communication with a French (and possibly German) in-house lawyer will most probably be assumed not to be confidential, but it will equally be assumed that the advice will not be subject to involuntary disclosure.

It would defeat the expectation of the parties communicating with a US lawyer if those communications were not to remain privileged. It might not defeat the expectations of parties communicating with a French in-house lawyer if they were told that the communication was not privileged, but it might nevertheless surprise them - if they had not thought about the possibility of non-voluntary disclosure - if the in-house lawyer's advice had to be produced in legal proceedings.

[...]

Referring Principles:

XII.6 - Attorney-client privilege