The Attorney-Client Privilege and International Arbitration

C. A PROPOSED ALTERNATIVE: APPLYING THE LAWS OF BOTH PARTIES TO ACHIEVE A COMMON DENOMINATOR

To achieve the greatest degree of predictability, and to avoid the prospect of defeated expectations, an arbitral tribunal could apply the laws of the home jurisdictions of both parties and select the law that accords the broadest protection to privileged information. So, for instance, in the hypothetical mentioned above, U.S. attorney-client privilege rules would otherwise govern communications and documents of the U.S. company, while the Swiss professional secret rules would govern the banks’s communications and documents. If one of these jurisdictions would accord greater protection to certain categories of privileged information than the other, that protection would be accorded equally to both parties. Moreover, if the laws of any of the jurisdictions would prohibit disclosure of certain categories of information because of ethical restrictions placed on a party's counsel, such categories of documents would be immune from disclosure for both parties.\(^{33}\)

The advantage of such a "most favored nation" rule would be that the parties would be confident knowing that they would never be required to produce information that is considered privileged under the law of their own country. As each party (or each counsel) would be protected by the traditional privileges to which it is accustomed, there would be no unfair surprises. Such a rule thus has some appeal because of its simplicity and its ability to guard parties’ expectations. It may, however, promote forum shopping by encouraging parties to select counsel from countries with more favorable privilege rules.\(^{34}\)

\(^{33}\)This solution has been suggested for the U.S. domestic context, in which courts must often choose which state’s law of privilege should apply to a particular communication. See Bradford, supra note 3, at 947-53. A similar solution - to hold each party's attorney to the ethical standards of the bars to which they are admitted - has been mentioned but ultimately rejected as inadequate in the international arbitration context. See Jan Paulsson, Standards of Conduct for Counsel in International Arbitration, 3 AM. REV. INT'L ARB. 214 (1992).
34 See Paulsson, supra note 33, at 214, (asking, in the context of professional ethics more generally, if parties would be encouraged to choose lawyers coming from jurisdictions where professional standards are less stringent in the hope of gaining tactical advantage over their adversaries).

**Referring Principles:**

- XII.7 - Most favorable privilege rule