Title:
XII.6 - Attorney-client privilege

Content:
No. XII.6 - Attorney-client privilege

Any communication between a client and his attorney which is made in the course of or in anticipation of legal proceedings or which relates to the giving of legal advice, i.e. the seeking of advice as to legal rights and obligations as opposed to general business matters, and which originates in a confidence that it will not be disclosed, is privileged and may not be introduced as evidence in court or arbitration proceedings.

Commentary:

1 This Principle is based on the idea that privileges are substantive in nature. A comparative qualification of evidentiary privileges will almost certainly lead to the conclusion that these issues have a substantive nature. This follows from the public policy judgements underlying these privileges. Very often, these judgements relate to the value of certain kinds of information or communication. Such judgements are substantive in nature, even if they are manifested in procedural law in certain jurisdictions because they relate to the taking of evidence.

2 The Principle may be referred to by international arbitral tribunals in lieu of applying complicated conflict-of-laws concepts related to the question of which domestic law applies to a privilege. Also, the tribunal's procedural discretion extends to the treatment of evidentiary privileges. Thus, privileges share the fate of arbitral decision making in this area. It is a general problem that, in the absence of clear evidentiary standards for international arbitration, the tribunal's rulings on evidence can appear unfair and arbitrary in certain cases.

3 By referring to the "confidence" of one side, the Principle makes reference to the reliance interest of the party which expects to be protected by the attorney-client privilege at the time when it makes the communication to his attorney. It is this reliance interest which must be protected by arbitral tribunals that deal with the issue of privileges.

4 The Principle does not answer the question whether the attorney-client privilege extends to communications with in-house counsel, a question that is treated differently in domestic legal systems around the world.