No. XII.7 - Most favorable privilege rule

If the standard of privilege protection granted to one party under the applicable law is different from the standard granted to the other party under the applicable law, the arbitral tribunal - in the interest of procedural fairness and equal treatment of the parties - shall grant to both parties the privilege standard of the law of that party which accords the broadest privilege protection.

Commentary:

1. The Principle is based on the understanding that the potential for arbitrary treatment of the parties in the application of evidentiary privileges of domestic law runs counter to a fundamental principle of arbitral due process: the tribunal’s duty to treat the parties fairly and equally. In fact, it is one of the principal functions of an arbitral tribunal to act as a guarantor and guardian of the parties’ fundamental procedural right for equal treatment and their right to be heard as the Magna Charta of arbitral procedure. A party may be treated unequally and unfairly when the tribunal applies different privilege standards to the parties resulting in different standards for the production of evidence. In exercising its discretionary powers in the taking and evaluation of evidence, the tribunal must therefore vary or modify the result reached when applying the conflict rule explained above in order to ensure fairness and equality in the taking of evidence and to avoid due process imbalances between the parties. It is for this reason that both “flexibility” and “equality” are regarded as the two fundamental principles of arbitral procedure.

2. Based on the above considerations, an international arbitral tribunal that is faced with conflicting privilege standards and sees “compelling” reasons to (re-)establish equality and fairness between the parties with respect to a concrete privilege issue can apply the “most favored nation rule” established by the Principle by applying to a given privilege issue only the law of that party that accords the broadest protection to privileged information. This means that a party is entitled to rely on the protection standard of its home jurisdiction as long as this standard is also granted to the other side and the privilege is not invoked mala fides. Such an approach does justice to the reliance interests of the parties because they could be confident that they would never be required to produce information that is considered privileged under their own laws. This is the concept underlying Art. 9 (2) (g) IBA Rules which allows the tribunal to exclude evidence based on considerations of equality and fairness between the parties. Such approach does not invite forum shopping by the parties, i.e. the search for counsel from countries with more favorable privilege rules. As shown above, it is not the law of the jurisdiction where counsel is admitted to the bar but the law of the country where the party has its residence or place of business that applies to the privilege.