Navigating In-house Privilege in International Arbitration

Gailė Juozapaitytė

Associate Partner, Attorney-at-Law at TGS Baltic

INTRODUCTION

This article looks into issues arising in international arbitration proceedings in which the two parties coming from different legal backgrounds have diverging expectations about whether communications with their in-house lawyer would be treated as privileged and thus exempt from document production.

The first section below analyzes how different states regulate in-house privilege and allocate the states into three broad categories based on their in-house privilege approach. The impact of the European Union Court of Justice case law on the European Union Member States is also discussed in this section.

The second section discusses what issues the parties and the arbitrators face when arbitration proceedings involve parties from diverging in-house privilege regimes.

The third section looks into the regulation of in-house privilege in the context of international arbitration. The section looks into the procedural rules of several arbitral institutions as well as International Bar Association Rules on Taking of Evidence in International Arbitration.

The fourth section dives into ways of resolving conflicts arising from diverging in-house privilege regimes. The section analyzes how the party's individual expectations regarding the in-house privilege regime should be assessed, be it a company active in a single jurisdiction or multinational corporation, and then considers the options for finding principles to be applied to both parties in the arbitration proceedings.

The fifth section provides conclusions for this article.

I. DIVERSITY OF IN-HOUSE PRIVILEGE REGIMES

While attorney-client privilege is almost universally recognized by countries as a barrier to document production, the regimes applied to in-house privilege are far more diverse. Some countries recognize in-house privilege as equivalent to attorney-client privilege, whereas others provide no protections to communications with in-house lawyers. There are myriad mixed regimes that protect in-house privilege to only a certain extent. Various regimes concerning in-house privilege can be grouped into three broad categories.

1.1. FULL IN-HOUSE PRIVILEGE REGIME

In the full in-house privilege regime, in-house lawyers are equated to attorneys. In turn, legal advice provided by in-house lawyers is protected by privilege. This regime is typical of common law countries. For example, in the U.S. in-house privilege was recognized since the early 20th century.[1] One of the reasons for recognizing in-house privilege in the U.S. is that both attorneys and in-house lawyers are governed by the same codes of conduct and have identical

[1] Alison M. Hill, *A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community* (1995), 167.

confidentiality obligations toward their clients.[2] Functionally from the client's perspective, the two are equal.[3]

The United Kingdom has a similar approach to the U.S.[4] The United Kingdom however requires in-house lawyers to be formally admitted to the bar in order to enjoy legal professional privilege, the United Kingdom's equivalent of privilege.[5]

Only a small number of civil law tradition countries, in particular as regards the European Union countries, extend the attorney-client privilege to in-house lawyers.[6] For example, the Netherlands recognizes in-house privilege, *inter alias* because in-house lawyers are members of the bar and therefore have the same duties and professional obligations towards their clients as external attorneys do.[7] Portugal, Poland, and Spain fall in the same category.[8]

Even in those countries that recognize the in-house privilege in full, there are questions about delineating the functions of an in-house lawyer between legal advice and business advice.[9] These questions however are not the topic of this article. Instead, the article only looks into how to treat cases where in-house documents and communications contain genuine legal advice and therefore fall within the remit of privilege in these countries.

1.2. NO IN-HOUSE PRIVILEGE REGIME

In this regime, companies communicating with their in-house lawyers enjoy no privilege. Any work product prepared by an in-house lawyer, as an employee of the company, is considered a work product of the company and therefore not privileged. Many civil law countries adopt this approach.[10]

The rationale for excluding in-house lawyers from attorney-client privilege is based on the understanding that in-house lawyers lack independence from the company.[11] In addition, many civil law countries, like France, Belgium, Italy,[12] and Austria[13] prohibit attorneys admitted to the bar to have an employment relationship. In-house lawyers as employees of the company cannot be members of the bar whereas attorneys cannot be in-house lawyers. In turn, in-house lawyers are

[2] Alison M. Hill, *A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community* (1995), 168.

[3] *Renfield Corp. v E. Remy Martin & Co., S.A.*, 98 F.R.D. 442.

[4] *E.g.*, Case C550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010], Opinion Of AG Kokott, fn. 87.

[5] Lawton P. Cummings 'Globalization and the Evisceration of the Corporate Attorney-Client Privilege: a Re-Examination of the Privilege and a Proposal for Harmonization' (2008) Vol. 76, 1 Tennessee Law Review, 15-16.

[6] E.g. Case C550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010], Opinion Of AG Kokott, fn. 88.

[7] E.g. Case C550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010], Opinion Of AG Kokott, fn. 88.

[8] Case C550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010], Opinion Of AG Kokott, fn. 85, 88, 89; Sriranga Veeraraghavan VP 'Privilege in the International Corporate Context' (2017) Vol. 10 No. 40 International In-house Counsel Journal, 1, 14.

[9] Keith A. Call 'Focus On Ethics & Civility: In-House Counsel's Privilege Dilemma' (2019), 32 Utah Bar J. 42; Menapace v. Alaska Nat'l Ins. Co., 2020 U.S. District Court for the District of Colorado.

[10] Case C550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010], Opinion Of AG Kokott, para 101.

[11] Case 155/79, *AM & S Europe Limited v Commission of the European Communities* [1982] ECR, para 21.

[12] Lawton P. Cummings 'Globalization and the Evisceration of the Corporate Attorney-Client Privilege: a Re-Examination of the Privilege and a Proposal for Harmonization' (2008) Vol. 76, 1 Tennessee Law Review, 15-16; Sriranga Veeraraghavan VP, 'Privilege in the International Corporate Context' (2017) Vol. 10 No. 40 International In-house Counsel Journal, 1.

[13] 'National Rules on Privilege for In-House Counsel' (2005) Vol. 2 Issue 2, The In-House Perspective, 18.

not bound by the same codes of conduct that apply to attorneys.[14] As a result, in-house lawyers do not enjoy legal professional privilege like the one civil law tradition countries extend to attorneys.

1.3. MIXED IN-HOUSE PRIVILEGE REGIME

Some countries have a mixed approach, extending the attorney-client privilege to in-house lawyers only to a limited extent or in specific circumstances. In these countries, in-house lawyers do not enjoy the privilege to the same extent as attorneys. There are many different approaches these countries have and they vary from country to country. A few examples of mixed regime countries are discussed below.

Lithuania extends litigation privilege to in-house lawyers. Documents prepared by an in-house lawyer, acting as a representative in civil, criminal, or administrative court proceedings, or in preparation thereof, are not discoverable.[15] No other legal advice of an in-house lawyer prepared outside of litigation context is protected.

Denmark and Ireland have a similar approach and also recognize only litigation privilege.[16] Other documents prepared by an in-house lawyer may not be considered privileged.[17]

Germany protects communications between an in-house lawyer and third parties, as long as the in-house lawyer represents the company, can act independently, and is the only person in possession of the documents.[18] As a result of the first condition, internal legal advice by an in-house lawyer that comprises her daily functions in the company, would not fall within the remit of in-house privilege in Germany. German courts also only recognize in-house privilege as regards internal consultations if there are "actual instructions for a specific case".[19] This means that in-house privilege in Germany is very limited.

There are different approaches and rules in this mixed category. This in and of itself causes clashes of different approaches towards in-house privilege even within the same category of mixed in-house privilege regime.

1.4. THE EUROPEAN UNION

The European Union, as a supranational organization currently uniting 26 Member States, adds an extra layer to the in-house privilege regime diversity. In two landmark decisions, the European Court of Justice ("ECJ") refused to recognize the in-house privilege in the European Union Member States even in cases where the Member State recognized in-house privilege.

First, in 1982, in case No 155/79, AM & S Europe Ltd. v. Commission, the ECJ considered the scope of a company's right to withhold documents from the European Commission investigating potential competition law infringements. The ECJ noted that the European Union itself has never adopted any formal rules concerning in-house privilege, therefore the ECJ decided to follow the approach adopted by the majority of Member States.[20] Since as the civil law countries most European Union Member States do not recognize in-house privilege, the ECJ adopted this approach for the entire European Union. In particular, the ECJ focused on the requirement by the many Member States that attorneys, who enjoy privilege, be independent of their clients

[14] Lawton P. Cummings 'Globalization and the Evisceration of the Corporate Attorney-Client Privilege: a Re-Examination of the Privilege and a Proposal for Harmonization' (2008) Vol. 76, 1 Tennessee Law Review, 15-16.

[15] Civil Procedure Code of the Republic of Lithuania, (2002, last amended 2022) Article 199.

[16] 'National Rules on Privilege for In-House Counsel' (2005) Vol. 2 Issue 2, The In-House Perspective, 18, 20.

[17] 'National Rules on Privilege for In-House Counsel' (2005) Vol. 2 Issue 2, The In-House Perspective, 18, 20.

[18] Sriranga Veeraraghavan VP, 'Privilege in the International Corporate Context' (2017) Vol. 10 No. 40 International In-house Counsel Journal, 1.

[19] Ashley Ramm 'It's the End of Privilege as We Know It, and I [Don't] Feel Fine: the Deterioration of the Corporate Attorney-Client Privilege and Work Product Protection in the European Union, United Kingdom, and Germany' (2018) 87 University of Cincinnati Law Review 301, 16.

[20] Case 155/79, *AM & S Europe Limited v Commission of the European Communities* [1982] ECR, para 18.

and "not bound to the client by a relationship of employment".[21]

Second, after nearly 30 years, in 2010, in a case No C-550/07 P Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission, the ECJ reaffirmed its position still maintaining that the lack of independence of an in-house lawyer prevents the application of privilege. This was true even though the in-house lawyer of Akzo Nobel was a member of the bar and therefore subject to the ethical codes applied to independent attorneys.[22]

In both cases, the plaintiff originated in a Member State that did recognize in-house privilege. In AM & S Europe Ltd case the company was incorporated, the in-house lawyer acted and the documents in dispute were located at the company's premises in the United Kingdom,[23] a common law country fully recognizing in-house privilege. Likewise, in the case of Akzo Nobel, the company was incorporated and the seizures took place in the United Kingdom, whereas Akzo Nobel's in-house lawyer in question was a member of the Netherlands Bar.[24] In both cases therefore the plaintiff could have expected the documents to be protected by in-house privilege in their home jurisdictions.

The European Union law has primacy over the laws of Member States.[25] However as mentioned, there is no official regulation in the EU defining attorney-client privilege or excluding in-house privilege. Therefore, the EU approach as regards in-house privilege relies exclusively on the ECJ precedents.

The EU dimension adds an extra layer of analysis of the party's expectations under the IBA Rules on Taking of Evidence as discussed below.

II. ISSUES IN INTERNATIONAL ARBITRATION ARISING FROM THE DIVERSITY OF INHOUSE PRIVILEGE REGIMES

By definition, in international arbitration, the parties to the dispute, as well as often the arbitrators themselves come from different States. As a result, parties to the arbitration proceeding may have a very different understanding of the scope of the in-house privilege.

The most profound differences will occur when parties to the dispute come from cardinally different systems, for example, the common law jurisdiction recognizing full inhouse privilege and the civil law jurisdiction completely excluding the possibility of any inhouse privilege. However, there may be differences even in cases where two parties from mixed in-house privilege regime group have different interpretations of what is and what is not covered by in-house privilege.

In the arbitration proceedings, matters of privilege, including as most relevant for the present paper, in-house privilege, will most likely arise during the document production phase. It is even more likely that differences will be revealed only after the Arbitral Tribunal orders the production of documents and the parties exchange their privilege logs. As procedural complaints ensue, the Arbitral Tribunal is faced with a decision of whether or not to uphold in-house privilege.

The fact that problems usually only come to light after the parties exchange privilege logs in document production may have a more profound influence on the parties. If the question is only addressed after the initial production took place, one of the parties may have already

[21] Case 155/79, *AM & S Europe Limited v Commission of the European Communities* [1982] ECR, para 21.

[22] Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010] ECR, para 45.

[23] Case 155/79, *AM & S Europe Limited v Commission of the European Communities* [1982] ECR, 1579.

[24] Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010] ECR, para 14.

[25] E.g. Case 26/62, *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. Reference for a preliminary ruling* [1963] ECR, 12.

produced in-house documents that are not privileged under its home jurisdiction but are privileged under the jurisdiction of the opposing party. The former party is then at a disadvantage.

In addition, the party itself may have difficulty determining the applicable legal regime if it is not determined in advance before document production takes place. This is particularly the case if one of the parties to the arbitration is a multinational corporation. Imagine a hypothetical situation in which an employee of a company active in the U.S. and France sends an email asking for legal advice to in-house counsels in both countries and both in-house lawyers respond. Is correspondence privileged? What expectations could this company be said to have as regards in-house privilege if it operates in two different jurisdictions?

There may also be a question of the admissibility of evidence. While often this will be related to document production, there may be situations where one of the parties obtained in-house lawyer documents through other means. In-house privilege, if applicable, in such situations could prevent admittance of documents onto the record.[26]

There may be a question of whether the privilege was waived if a third party obtained in-house lawyer's documents, but this is not the topic of this paper. Assuming that privilege was not waived, IBA Rules on Taking of Evidence prohibits admitting such evidence on record. In other words, if there is an in-house privilege for the purposes of documents production, there is also a privilege for the purposes of evidentiary record under IBA Rules. Therefore, in this article, the two issues are treated identically and considered jointly.

In sum, to avoid unfairness between the parties in the document production phase, matters of in-house privilege should be determined as early as possible and certainly no later than in the procedural order concerning document production.

III. APPROACH TO IN-HOUSE PRIVILEGE IN INTERNATIONAL ARBITRATION RULES

3.1. RULES OF INSTITUTIONAL ARBITRATION

When looking for guidance on in-house privilege for the purpose of international arbitration one inevitably first looks at the rules governing that particular arbitration. If it is an *ad hoc* arbitration, the parties may have discussed privilege and the matters will be settled. However, if the parties are using institutional arbitration, the parties and the tribunal will turn to the appropriate procedural rules adopted by that institution.

As regards in-house privilege, there is little to no guidance from the commonly used rules of arbitration. For example, the Arbitration Rules adopted by the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC Rules"), most recently updated on January 1, 2020, accord the right to the Arbitral Tribunal to decide matters of "[t]he admissibility, relevance, materiality and weight of evidence".[27] Article 31(3) of the Rules also enables the Tribunal to order production of "any documents or other evidence that may be relevant to the case and material to its outcome".[28] In the absence of the parties' agreement, the Rules direct the Tribunal to "apply the law or rules of law that it considers most appropriate"[29] The SCC Rules make no mention of privilege, less so how matters of in-house privilege should be decided.

The exact same wording is used in the UNCITRAL Model Law on International Commercial Arbitration[30] and UNCITRAL Arbitration Rules.[31]

[26] IBA Rules on the Taking of Evidence in International Arbitration, 2020, Article 9(2)(b).
[27] Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules (2017) Article 31(1).
[28] Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules (2017) Article 31(3).
[29] Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules (2017) Article 27(1).
[30] UNCITRAL Model Law on International Commercial Arbitration, (1985, with amendments of 2006) Article 19(2).
[31] UNCITRAL Arbitration Rules and Rules on Transparency in Treaty-based Investor-State Arbitration (2013) Article 1(4).

The International Chamber of Commerce ("ICC") Arbitration Rules, last updated on January 1, 2021, also make no mention of the impact of privilege in arbitration proceedings.[32] Contrary to the SCC or the UNCITRAL, the ICC Arbitration Rules also make no mention of the tribunal's power to decide on the admissibility of evidence. However, the commentary of the ICC Arbitration Rules explains that this power is inherent in the role of the Arbitrator.[33] At the same time, Article 22 of the ICC Arbitration Rules states that "[u]pon the request of any party, the arbitral tribunal […] may take measures for protecting trade secrets and confidential information."[34] ICC Arbitration Rules provide no explanations about what is confidential information. However, commentary of the rules does not consider it related to attorney-client privilege.[35] It is therefore questionable whether a tribunal could exclude in-house lawyer documents from production on this basis.

The American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures, as last amended on October 1, 2013, is one of the rare examples that contemplate matters of privilege. The Rules consider privilege as an impediment to document production and admissibility of evidence. Article R-34 states:

> "The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client."[36]

The language, in particular the use of the word "lawyer" as opposed to "attorney", taken together with the U.S.' general approach of recognizing in-house privilege, suggests that a tribunal may uphold in-house privilege. However, academics are uncertain what those "applicable principles of legal privilege" are.[37] If diverging principles on in-house privilege compete, the American Arbitration Association's Commercial Arbitration Rules do not define which principle should prevail.

3.2. IBA RULES ON TAKING OF EVIDENCE

In the absence of clear provisions in the rules of arbitral proceedings in institutional arbitration, the International Bas Association ("IBA") Rules on Taking of Evidence in International Arbitration ("IBA Rules of Evidence" or the "IBA Rules") may offer guidance.[38] IBA Rules of Evidence, prepared and updated by prominent arbitration practitioners across the world, are said to be a tool for parties and arbitrators to bridge the divide between conflicting views on procedures in international arbitration.[39] In-house privilege with its various regimes across the world presents just such a case.

IBA Rules of Evidence, last revised in 2020, still do not provide a unified solution as regards in-house privilege. In fact, when it comes to protecting legal privilege the IBA Rules do not make any distinction between attorneys, in-house lawyers, or others providing legal

[32] International Chamber of Commerce Rules of Arbitration (2021).

[33] Eric A. Schwartz and Yves Derains *A guide to the ICC rules of arbitration (2nd ed.)* (Kluwer Law International 2005) fn. 207.

[34] International Chamber of Commerce Rules of Arbitration (2021) Article 22.

[35] Eric A. Schwartz and Yves Derains *A guide to the ICC rules of arbitration (2nd ed.)* (Kluwer Law International 2005) 284-286.

[36] American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures (2013) Article R-34.

[37] Javier H. Rubinstein and Britton B. Guerrina 'The Attorney-Client Privilege and International Arbitration' (2001) *18*(6) Journal of International Arbitration, 587, 593.

[38] IBA Rules on the Taking of Evidence in International Arbitration, 2020.

[39] 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration', IBA, p. 1 <https://www.ibanet.org/MediaHandler?id=DD240932-0E08-40D4-9866-309A635487C0> accessed 9 April 2022.

services.[40] This is an intentional and long-term practice. The authors of IBA Rules of Evidence specifically considered that in-house privilege is treated differently across jurisdictions and may create unfairness between the parties if different rules are applied:

> "For example, one jurisdiction may recognize the settlement privilege, whereas another may not, or one jurisdiction may extend the attorney-client privilege to in-house counsel, whereas another may not. In such cases, applying different rules to the parties could create unfairness by shielding the documents of one party from production but not those of the other."[41]

As a result, the IBA Rules of Evidence provide general principles that an arbitral tribunal should consider when deciding whether privilege, including in-house privilege, applies. In other words, there is no one pre-described solution on how to treat in-house privilege.

The general rule in Article 9(2)(b) of the IBA Rules states that the arbitral tribunal should exclude documents or other materials from evidence or document production for „legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable."[42] The same provision refers to Article 9(4) of the IBA Rules, which in turn provides a list of aspects, that arbitral tribunal should consider for the purposes of determining privilege. As regards in-house privilege, three items are most relevant:

- Article 9(4)(a) "[A]ny need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice"[43]
- Article 9(4)(c) "The expectations of the parties and their advisors at the time the legal impediment or privilege is said to have arisen"[44]
- Article 9(4)(e) "[F]airness and equality as between the Parties"[45]

These aspects are in no way binding and the application of the specific privilege regime is left to the discretion of the arbitral tribunal.[46]

The commentary of the IBA Rules on Evidence explains that applicable privileges in Article 9(4)(a) seek „to encompass both the common law understanding of attorney-client privilege and the civil law understanding of the duty of professional secrecy."[47] As discussed above, common law jurisdictions predominantly recognize in-house privilege, whereas civil law jurisdictions do not. Therefore, as regards in-house privilege, this provision means that the standard is flexible and can be adapted depending on the regimes from which the parties to the dispute are coming.

Here the second relevant criterion comes into play—parties' and their advisors' expec-

[40] Roman Khodykin and Carol Mulcahy *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (2019, Oxford University Press), para 12.171.

[41] 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration', IBA, p. 25 <https://www.ibanet.org/MediaHandler?id=DD240932-0E08-40D4-9866-309A635487C0> accessed 9 April 2022.

[42] IBA Rules on the Taking of Evidence in International Arbitration, 2020, Article 9(2)(b).

[43] IBA Rules on the Taking of Evidence in International Arbitration, 2020, Article 9(4)(a).

[44] IBA Rules on the Taking of Evidence in International Arbitration, 2020, Article 9(4)(c).

[45] IBA Rules on the Taking of Evidence in International Arbitration, 2020, Article 9(4)(e).

[46] 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration', IBA, p. 25 <https://www.ibanet.org/MediaHandler?id=DD240932-0E08-40D4-9866-309A635487C0> accessed 9 April 2022.

[47] 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration', IBA, p. 25 <https://www.ibanet.org/MediaHandler?id=DD240932-0E08-40D4-9866-309A635487C0> accessed 9 April 2022.

tations at the time in-house privilege is said to have arisen. The commentary explains that "[o]ften, these expectations will be formed by the approach to privilege prevailing in the home jurisdiction of such persons." In other words, when determining whether an in-house privilege should be applied, arbitral tribunals should look into the in-house privilege regime applicable to that party at the time the document was prepared or the legal advice provided.

Finally, the arbitral tribunal should look into fairness and equality. The second step is individualistic to the party and even, potentially, to specific documents, if different regimes apply for example to a multinational corporation. As a result of this potential divergence between the parties, the commentary of the Rules acknowledges that applying different regimes to the parties would be contrary to the equality of arms principle.[48] This implies that the common denominator should be applied to both parties. However, neither the Rules nor the commentary, offer any guidance on how the common in-house privilege regime should be selected, when the parties have different expectations.

Summarizing the above, it appears that IBA Rules on Evidence call for a two-tier approach in determining which in-house privilege regime should be applied. Step 1 would be determining what in-house privilege regime would be applicable to each of the parties to the arbitration, *i.e.*, what each of the parties individually expected the in-house privilege regime to be at the time privilege is said to have arisen. Step 2 would be to find fair and equitable common ground between all the participants in the arbitration.

IV. RESOLVING DIVERGENCE BETWEEN DIFFERENT IN-HOUSE PRIVILEGE REGIMES IN INTERNATIONAL ARBITRATION WITH A TWO-TIER APPROACH

4.1. DETERMINING EXPECTATIONS INDIVIDUALLY FOR EACH OF THE PARTIES TO THE ARBITRATION

The first step in resolving conflicts regarding in-house privilege regimes will be understanding the expectations of all the parties to the arbitration individually hold. What a company expects may differ a lot depending on the structure of the company, where the in-house lawyers of the company are located, and where communications have occurred. Therefore, this article analyzes separately situations for a relatively simple company active in one jurisdiction and a multinational corporation.

4.1.1. SINGLE JURISDICTION COMPANIES

For a company incorporated and operating in a single jurisdiction determining expectations will require weighing at least the following issues.

First, the in-house privilege rules in the jurisdiction in which the company is registered and acting. The commentary to the IBA Rules on Evidence points to this as a primary criterion that forms the party's expectations.[49] In other words, a party cannot be said to expect more protection of an in-house lawyer's legal advice than the party's home jurisdiction allows. If a party operates in a jurisdiction that does not recognize in-house privilege, it cannot have any expectations of in-house privilege. If the jurisdiction recognizes limited in-house privilege, the expectations should also be limited.

Second, European Union Member States pose a specific question regarding applicable jurisdictional rules. In light of the ECJ decisions

[48] 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration', IBA, p. 25 <https://www.ibanet.org/MediaHandler?id=DD240932-0E08-40D4-9866-309A635487C0> accessed 9 April 2022.

[49] 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration', IBA, p. 25 <https://www.ibanet.org/MediaHandler?id=DD240932-0E08-40D4-9866-309A635487C0> accessed 9 April 2022; Roman Khodykin and Carol Mulcahy *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (2019, Oxford University Press), paras 12.87, 12.192.

refusing to uphold in-house privilege even when the party came from a country recognizing in-house privilege, casts doubt whether parties to arbitration coming from European Union member states can reasonably expect in-house privilege. The answer requires consideration of two inter-related aspects (i) the scope of the ECJ precedents and (ii) the relationship between the European Union law and the law of member states.

Both ECJ precedents were adopted in the context of the European Commission's right to enforce competition law rules across the European Union.[50] In other words, the scope of the precedents is limited. It, therefore, could be argued that the ECJ decisions do not affect the party's expectations formed by the rules of its home jurisdiction, to the extent that the issues do not concern the EU competition law.

The precedents also do not abolish national laws of those Member States that do extend in-house privilege in their jurisdictions. In their home jurisdictions, questions of privilege are still enforced vis-à-vis private parties and parties could still expect the protection of communications with an in-house lawyer. Therefore, it may be argued that these precedents do not impact considerations in international arbitration where no questions of EU law are touched upon.

Third, agreements of the parties regarding the applicable law. One potential exception to the party's expectations being determined by the law of its home jurisdiction could be agreements on applicable law. When concluding an arbitration clause or when the dispute arises, the parties will select the seat of arbitration. Scholars debate whether or not the selection of *lex arbitri* impacts expectations for the in-house privilege.[51]

Some scholars suggest that in common law jurisdictions, the choice of law may constitute a waiver of privilege (if a regime with no in-house privilege is selected), but that in civil law countries choice of law will not affect privilege.[52] This argument, however, seems to be constructed on the understanding that in civil law tradition countries privilege belongs to the lawyer.[53] This premise is not universally accurate across civil law jurisdictions. Many civil law jurisdictions also recognize that privilege belongs to the client and the client therefore can waive privilege.[54] Therefore, in both common law and civil law jurisdictions, the same argument could be made that choice of *lex arbitri* can transplant the expectations of a party as regards in-house privilege to the rules of a different jurisdiction.

The argument is heavily criticized arguing that the parties select the seat of arbitration for its neutrality, *i.e.*, specifically because the parties have no connection to the law of the seat.[55] Moreover, when the seat of arbitration is determined by the arbitral tribunal or the default rules of institutional arbitration, the parties may have no expectations as regards privilege.[56] In both these cases, the parties do not intentionally

[50] Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010] ECR; Case 155/79, *AM & S Europe Limited v Commission of the European Communities* [1982] ECR.

[51] Javier H. Rubinstein and Britton B. Guerrina 'The Attorney-Client Privilege and International Arbitration' (2001) *18*(6) Journal of International Arbitration, 587, 598; Roman Khodykin and Carol Mulcahy *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (2019, Oxford University Press), para 12.195.

[52] Javier H. Rubinstein and Britton B. Guerrina 'The Attorney-Client Privilege and International Arbitration' (2001) *18*(6) Journal of International Arbitration, 587, 594.

[53] Javier H. Rubinstein and Britton B. Guerrina 'The Attorney-Client Privilege and International Arbitration' (2001) *18*(6) Journal of International Arbitration, 587, 594.

[54] Haitao Zhang 'Attorney-Client Privilege for In-house Counsel' (2018) Vol.11, No. 44 International In-house Counsel Journal, 1, 4 (quoting 'Privilege: A World Tour' Practical Law UK Articles 2-103-2508 (2004), 2018 Thomson Reuters).

[55] Roman Khodykin and Carol Mulcahy *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (2019, Oxford University Press), para 12.195 (quoting Möckesch (n 104) para 8.118).

[56] Roman Khodykin and Carol Mulcahy *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (2019, Oxford University Press), para 12.197.

select the rules regulating in-house privilege, in some cases, they may not even be aware of how specifically the *lex arbitri* regulates this niche point. This is in particular the case taking into account that IBA Rules on Evidence direct the assessment of expectations at the time privilege arose and not when the seat of arbitration was selected. Finally, there are no settled rules in national jurisdictions on whether privileges are part of procedural or substantive law and approaches between countries can differ.[57] *Lex arbitri* is mostly understood as a reference to procedural law as well as the law defining interaction between the arbitrators and the courts and the public law of the seat of arbitration.[58] As a result, absent specific agreement on in-house privilege, it would be difficult to claim a party had any expectations on in-house privilege arising from the selection of *lex arbitri*.

In sum, the in-house privilege regime where privilege arises is the main criteria to determine the party's expectations. Absent specific circumstances, the ECJ case law or agreements on *lex arbitri* should not impact the party's expectations of privilege.

4.1.2. MULTINATIONAL CORPORATIONS

For a multinational corporation with a complex corporate structure and multiple in-house counsels scattered across different jurisdictions, determining a party's expectations is more complicated than for a company located in a single State. For example, what expectations would a party have concerning its communications between in-house counsel in the U.K. (full in-house privilege regime) and France (no in-house privilege regime) about business conducted in Germany (mixed in-house privilege regime)?

It is difficult to rely on IBA Rules on Evidence in a similar manner as for simple structure companies because the IBA Rules contain no provisions on how "home jurisdiction" should be determined for a complex structure corporation. The Commentary to the Rules also provides no guidance on the subject.

Various scholars suggested taking into account the following criteria when determining the expectations of a multinational corporation.

First, the closest connection also called the most significant relationship or proximity principle.[59] The principle is widely used in arbitration to determine parties' expectations of other privileges.[60] Therefore, it is well suited to determine multinational corporations' expectations concerning in-house privilege regimes as well.

The principle of closest connection requires the tribunal to apply the privilege regime of a jurisdiction with which the document is most closely related.[61] As regards legal advice, the closest connection usually means the jurisdiction regulating the attorney-client relationship.[62] If the jurisdictions of the attorney and the client are different—the jurisdiction of the attorney should determine the privilege regime.[63] Priv-

[57] Javier H. Rubinstein and Britton B. Guerrina 'The Attorney-Client Privilege and International Arbitration' (2001) *18*(6) Journal of International Arbitration, 587, 589.

[58] Alastair Henderson 'Lex Arbitri, Procedural Law and the Seat of Arbitration' (2014) 26 SAcLJ Singapore Academy of Law Journal, 886, para 5.

[59] Javier H. Rubinstein and Britton B. Guerrina 'The Attorney-Client Privilege and International Arbitration' (2001) *18*(6) Journal of International Arbitration, 587, 598.

[60] Ula Cartwright-Finch and Craig Tevendale 'Privilege in International Arbitration: Is It Time to Recognize the Consensus?' (2009) Issue 6, Journal of International Arbitration, 823, 831; Richard M. Mosk and Tom Ginsburg 'Evidentiary Privileges in International Arbitration' (2001) Vol 50 International and Comparative Law Quarterly, 345, 381.

[61] Ula Cartwright-Finch and Craig Tevendale 'Privilege in International Arbitration: Is It Time to Recognize the Consensus?' (2009) Issue 6, Journal of International Arbitration, 823, 831.

[62] Ula Cartwright-Finch and Craig Tevendale 'Privilege in International Arbitration: Is It Time to Recognize the Consensus?' (2009) Issue 6, Journal of International Arbitration, 823, 831.

[63] Ula Cartwright-Finch and Craig Tevendale 'Privilege in International Arbitration: Is It Time to Recognize the Consensus?' (2009) Issue 6, Journal of International Arbitration, 823, 831.

ilege is said to be determined by the attorney because it is the participation of the attorney that gives raise to privilege.[64] Translating the principle directly to in-house privilege, the closest connection doctrine would mean that the in-house privilege regime of the jurisdiction where either (i) both the officer seeking legal advice and the in-house lawyer or, (ii) if different, where the in-house lawyer is located, would apply.

The equivalent principle of closest connection, in this case, called the most significant relationship, is also used in the U.S. and is codified in the American Law Institute's Restatement (2d) of Conflicts of Laws. The Restatement is meant to deal with differences in the regulation of privileges in the U.S states.[65]

Second, and relatedly, the location where an in-house lawyer is admitted to the bar or the rules of jurisdiction that regulate the in-house lawyer.[66] The "home jurisdiction" rules of the in-house lawyer impact directly the behavior and expectations of the lawyer as regards privilege.

While the first part of the criterion, *i.e.*, the location where an in-house lawyer is admitted to the bar may be helpful to determine expectations there are also specific cases where it may be tricky to apply this criterion. For example, this may be the case when an in-house lawyer is admitted to several bars in different countries that have cardinally opposing in-house privilege regimes. Even in this case jurisdictions in which a lawyer is admitted to the bar may nonetheless assist in determining expectations in conjunction with the closest connection criterion. In other words, if the in-house lawyer is admitted to the bar of a jurisdiction to which the communication is closely related, it can be assumed that the in-house lawyer would know and expect the rules of that jurisdiction to apply to the closely related communication.

If an in-house lawyer is not a member of the bar because, for example, the country in which in-house lawyer practices does not require or even prohibit in-house lawyers to be members of the bar,[67] the in-house lawyer will nonetheless be bound by the rules of the jurisdiction in which she practices. This will include the in-house privilege regime and in turn, will determine the expectations of the in-house lawyer.

Notably, the fact of whether the in-house lawyer is admitted to the bar or not can have a significant impact on whether there is an expectation of privilege at all. For example, the U.S. courts have diverging case law on whether or not to recognize in-house privilege from foreign countries depending on the status of the in-house lawyer. For example in the 1982 decision *Renfield Corp. v. E. Remy Martin & Co. S.A* the U.S. court extended in-house privilege as recognized in the U.S. to communications between a company's employees and in-house lawyer in France, a country that does not recognize in-house privilege at all.[68] The decision was based on the fact that an in-house lawyer in France provided equivalent functions as an attorney even though he was not a member of any bar. The court noted that France does not allow in-house lawyers to be members of the bar. On the other hand in a more recent decision of 2006 *Louis Vuitton Malletier v. Dooney & Bourke, the fact that an in-house lawyer in France was not a member of the bar was dispositive for the court not to recognize in-house privilege for communications*

[64] Ula Cartwright-Finch and Craig Tevendale 'Privilege in International Arbitration: Is It Time to Recognize the Consensus?' (2009) Issue 6, Journal of International Arbitration, 823, 831.

[65] Restatement (Second) of Conflict of Laws Sec. 139 (1971).

[66] Javier H. Rubinstein and Britton B. Guerrina 'The Attorney-Client Privilege and International Arbitration' (2001) *18*(6) Journal of International Arbitration, 587, 598.

[67] This includes for example Bulgaria, the Czech Republic, Estonia, Greece, France, Italy, Cyprus, Luxembourg, Hungary, Austria, Romania, Slovenia, the Slovak Republic, Finland and Sweden; Case C550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010], Opinion Of AG Kokott, para 101.

[68] *Renfield Corp. v E. Remy Martin & Co., S.A.*, 98 F.R.D. 442, 444.

with an in-house lawyer located in France.[69] *As regards international arbitration, it seems to be more reasonable to adopt the functional approach used in Renfield Corp. v. E. Remy Martin & Co. S.A to determine in-house privilege. Given how many different approaches countries have as regards in-house privilege, formal criteria such as admission to the bar should not be determinative.*

Third, the location where the communication took place.[70] This criterion may also overlap with the closest connection criterion and support the connection of the document to a particular jurisdiction where the client-attorney relationship exists. However, the location where the communication took place may also be distinct. The literature points out that "[i]t might be unfair to apply privilege rules of the governing law of the transaction if an allegedly privileged communication took place outside that jurisdiction and had no relationship with that jurisdiction."[71] Therefore, the location where the communication took place may have an independent impact on the applicable in-house regime.

There is an inherent danger in giving this last criterion too broad of a significance. The parties may be encouraged to conduct communication in locations that provide the broadest in-house privilege protection. In other words, this would create a similar situation to forum shopping and engaging attorneys in the most favorable jurisdiction, as discussed above. Therefore the location criteria should be used sparingly in determining the party's expectations.

The three criteria discussed above may provide an indication to arbitrators of what expectations a multinational corporation had as regards in-house privilege. The determination however will always be context-specific and relevant only to an individual dispute. In other words, determination of expectation cannot be done in relation to the multinational corporation as a whole, but only with respect to particular communications. Whether it is the closest connection principle; the location/jurisdiction where the in-house lawyer is admitted to the bar or practices; or the location of the communication, the criteria should only be applied to the particular situation.

4.2. DETERMINING COMMON APPLICABLE PRINCIPLES FOR BOTH PARTIES TO THE ARBITRATION

Once the arbitral tribunal determines the expectations of individual parties to the dispute, the next step is finding common denominators of the applicable in-house privilege regime. Obviously, if the principles as determined by the party's individual expectations are similar, the tribunal can proceed to order the production of documents on the basis of common principles on in-house privilege between the parties. The situation requires more analysis if the expectations are significantly different.

If the parties are coming from significantly different regimes and have diverging expectations as to what should or should not be covered by in-house privilege, Article 9(2)(g) of the IBA Rules on Evidence directs arbitral tribunals to apply the principle of fairness.[72] The commentators on IBA Rules specifically in relation to diverging privilege regimes further elaborate:

[69] *Louis Vuitton Malletier v Dooney & Bourke, Inc* 2006 U.S. Dist.

[70] Javier H. Rubinstein and Britton B. Guerrina 'The Attorney-Client Privilege and International Arbitration' (2001) *18*(6) Journal of International Arbitration, 587, 598.

[71] Richard M. Mosk and Tom Ginsburg 'Evidentiary Privileges in International Arbitration' (2001) Vol 50 International and Comparative Law Quarterly, 345, 382.

[72] IBA Rules on the Taking of Evidence in International Arbitration, 2020, Article 9(2)(g); Roman Khodykin and Carol Mulcahy *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (2019, Oxford University Press), para 12.141 ("For example, in a dispute between French and English companies, the tribunal could take note of the fact that privilege does not attach (p. 446) to communications between a French in-house lawyer and his employer, whereas similar communications between an English in-house lawyer and his employer will attract privilege. If the tribunal were to treat the two situations as being subject to different rules, this would be consistent with the parties' expectations as contemplated by paragraph (c), but would arguably result in a lack of equality or fairness between the parties as contemplated by paragraph (e).").

> "Article 9.2(g) is a catch-all provision, intended to assure procedural economy, proportionality, fairness and equality in the case. For example, documents that might be considered to be privileged within one national legal system may not be considered to be privileged within another. […] In general, it is hoped that this provision will help ensure that the arbitral tribunal provides the parties with a fair, as well as an effective and efficient, hearing."[73]

Other scholars also in relation to in-house privilege considerations support this view, for example:

> "We suggest that the overriding consideration must always be to maintain fairness and equality between the parties. This is an express obligation of the tribunal under many national arbitration laws and the majority of institutional rules, as well as being one of the principles of the IBA rules."[74]

But what is fair in a situation where one party expects its communications with an in-house lawyer to be fully privileged and the other has no expectations of privilege? Two extreme positions are possible—the broadest protection (also known as the "most-favored nation"[75]) and the narrowest protection. Many points are possible between these two opposites but examining the two extremes will give a good indication of the problems each approach faces.

Generally, the two extremes are on the opposite sides as regards how they balance the tension between a party's expectation to obtain documents in document production and the party's expectations that in-house lawyer documents will be protected by privilege.[76] The most favored regime applies the broadest protection to in-house lawyer communications whereas the narrowest protection will provide the greatest opportunity to obtain documents in document production.

The most favorable regime is defined in literature as one not lower than that in the party's "local laws":

> "In the context of privilege, there exists a strong case that consideration of a party's expectations must encompass a recognition of the desirability of ensuring that the protection afforded to 'privileged' documents should generally not be a lower level of protection than a party enjoys under its local laws."[77]

The term "local laws" itself may be too limiting in particular in relation to multinational corporations. A more accurate description would be to say that the regime should not give lower protection than that determined under the party's individual expectations as discussed in section 4.1 of this article.

Understanding of fairness under the IBA Rules of Evidence requires that the same standard of privilege would be applied to both parties.[78] Therefore, if this approach is adopted, the most favorable regime will create a situation where one party to the arbitration would

[73] 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration', IBA, p. 26 <https://www.ibanet.org/MediaHandler?id=DD240932-0E08-40D4-9866-309A635487C0> accessed 9 April 2022.

[74] Roman Khodykin and Carol Mulcahy *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (2019, Oxford University Press), para 12.142.

[75] Roman Khodykin and Carol Mulcahy *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (2019, Oxford University Press), para 12.142.

[76] Roman Khodykin and Carol Mulcahy *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (2019, Oxford University Press), para 12.201.

[77] Roman Khodykin and Carol Mulcahy *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (2019, Oxford University Press), para 12.199.

[78] 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration', IBA, p. 26 <https://www.ibanet.org/MediaHandler?id=DD240932-0E08-40D4-9866-309A635487C0> accessed 9 April 2022. ("For example, documents that might be considered to be privileged within one national legal system may not be considered to be privileged within another. If this situation were to create an unfairness, the arbitral tribunal may exclude production of the technically non-privileged documents pursuant to this provision.").

enjoy the exact protections it expected, whereas the other party would receive protection of in-house privilege documents that exceed its expectations.

The two main downsides are the following. First, the second party in the example would lose on its expectations to receive documents in document production. This may have a significant evidentiary impact on that party. Second, this approach may encourage forum shopping.[79] The parties may seek to connect the documents, hire in-house lawyers or conduct communications in countries that recognize the broadest in-house privilege.

The narrowest protection approach would be the opposite and would set the expectations on in-house privilege based on the party that expected the least protection.

Most scholars as well as drafters of the IBA Rules on Evidence lean towards safeguarding privilege and not the opposing party's right to obtain documents. In other words, the most favorable regime is preferred. For example, commentary of IBA Rules suggests excluding the production of non-privileged documents (such as communications with in-house lawyers in a jurisdiction that does not recognize in-house privilege) to safeguard fairness,[80] and presumably protect the expectation of a party that comes from a full in-house privilege regime.

This approach of the broadest protection would also conform to the requirement of the IBA Rules on Evidence. Namely, the heading paragraph of Article 9(4) requires that any decisions on privilege would not infringe upon the "Mandatory legal or ethical rules":

> "In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account."[81]

The underlined wording of Article 9(4) appears to allow discretion to the arbitral tribunal on matters of privilege only to the extent the protection is not lower than any applicable mandatory legal or ethical rules.

Taking this into consideration, in international arbitration, the answer to which approach—the broadest or the narrowest protection—should be applied is likely to be a matter of pragmatism rather than fairness. The broadest protection approach is the safer option from an enforceability point of view. Scholars pointed out that "[a]n arbitral tribunal that ignores a privilege may run the risk of jeopardizing enforceability of the award if a domestic court determines that local public policy requires the application of privilege law."[82] In other words, if one of the parties receives even slightly lower protection of privilege than what its expectations were, the arbitral award may become unenforceable on public policy grounds. The broadest protection approach where one party enjoys privileges equal to expectations and the other receives enhanced protection minimizes this risk, as there is no way to claim the privilege regime was breached.

There seems to be no evidence that the failure of a party to obtain documents in document production due to extended privilege protection could result in an unenforceable arbitral award.

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[79] Javier H. Rubinstein and Britton B. Guerrina 'The Attorney-Client Privilege and International Arbitration' (2001) *18*(6) Journal of International Arbitration, 587, 599.

[80] 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration', IBA, p. 26 <https://www.ibanet.org/MediaHandler?id=DD240932-0E08-40D4-9866-309A635487C0> accessed 9 April 2022 ("For example, documents that might be considered to be privileged within one national legal system may not be considered to be privileged within another. If this situation were to create an unfairness, the arbitral tribunal may exclude production of the technically non-privileged documents pursuant to this provision.").

[81] IBA Rules on the Taking of Evidence in International Arbitration, 2020, Article 9(4), (Emphasis added.)

[82] Richard M. Mosk and Tom Ginsburg 'Evidentiary Privileges in International Arbitration' (2001) Vol 50 International and Comparative Law Quarterly, 345, 383.

This again means that arbitrators erring on the side of broader privilege are safer as regards enforcement procedures of the award.

All in all, arbitrators should aim to apply in-house privilege understanding of a party that has the broadest expectations, thus safeguarding its legitimate expectations and providing broader than expected protection to the other party.

CONCLUSIONS

The different in-house privilege regimes can broadly be categorized into three categories: (1) Full in-house privilege regime, typical to common law jurisdictions, in which an in-house lawyer enjoys the same protections as an attorney; (2) no in-house privilege regime, typical to civil law jurisdictions, in which in-house lawyer has no protections against discovery or document production; and (3) mixed regime, in which in-house lawyer enjoys protections only in limited cases, such as for example in the context of litigation.

The diverging approaches between the states create difficulties in finding a single in-house privilege regime in international arbitration. The issues most commonly will arise during the document production stage. If not resolved before the production of documents occur it may create inequality between the parties as one party would produce communications with an in-house lawyer and the other would not. It is therefore important to consider these issues before the document production order is issued.

The institutional arbitration rules, with exception of the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures, provide no guidance on how arbitrators should handle privilege questions. No procedural arbitration rules contemplate the approaches to be employed to address diverging regimes of in-house privilege. The IBA Rules on Evidence provide non-mandatory guidance on how divergence in privilege regimes could be addressed in international arbitration.

IBA Rules on Evidence call for a two-tier approach in determining which in-house privilege regime should be applied.

The first step is determining individual expectations on in-house privilege for each party. For companies conducting their activity in a single jurisdiction, the rules of home jurisdiction will play the most important role in determining expectations. For multinational corporations, other criteria such as the closest connection, the location of an in-house lawyer, or the location where the communication took place will play a significant role in determining expectations.

The second step is determining a regime applicable to both parties. In case the parties have diverging expectations on in-house privilege, applying the broadest protection regime, *i.e.*, protection not lower than what the party with higher expectations could reasonably have expected, to both parties, would be the most prudent option. The approach would satisfy the requirements of the IBA Rules to uphold applicable mandatory legal or ethical rules.

In sum, an award that followed the broadest protection approach for the in-house privilege would minimize annulment risk relating to public policy reasons for the breach of privilege rules.