A REPORT BY THE
INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE

PROCEDURES FOR ASSERTING AND EVALUATING PRIVILEGE CLAIMS IN INTERNATIONAL ARBITRATION

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PROCEDURES FOR ASSERTING AND EVALUATING PRIVILEGE CLAIMS IN INTERNATIONAL ARBITRATION

Privilege claims often arise in international arbitration, particularly in document production. While much has been written on the choice of law governing privilege, the procedures parties should use to assert claims of privilege, and tribunals may use in evaluating those claims, have received little attention. Should tribunals call for or expect that privilege claims be set forth on a document-by-document basis (often called "privilege logs") or more categorically? Should tribunals examine *in camera* documents that are claimed to be privileged where the privilege is challenged? Should tribunals appoint a tribunal expert or consultant to make recommendations, or should the parties appoint a separate privilege arbitrator to rule on disputed privilege claims?

This Report seeks to fill the gap in the available literature on these and related questions. It attempts to present the range of alternatives available in asserting and evaluating privilege claims and to identify best practices. The Report also offers a brief overview of considerations and approaches to choosing the law that governs the substance of the privilege claim. Depending on the applicable law, there may be a number of privileges to which these procedures may apply—principally the attorney-client privilege, the litigation privilege or work product doctrine, and the settlement privilege. Other privileges may also be asserted (such as, in some jurisdictions, state-secret privilege, privilege over communications with accountants, and privileges over marital or familial communications). Privilege issues arise most frequently in arbitrations involving one or more parties from common law jurisdictions, because of the tradition of compelled production of documents in those countries' litigation practices, but such issues can arise in cases involving civil law parties as well.

The focus of this Report is international commercial and investor-state arbitration. We have not attempted to address procedures applicable to domestic arbitration in the United States or elsewhere in which the expectations of the parties and counsel may be more influenced by practice in domestic courts.

There are relatively few publicly available sources on current arbitral practice with respect to asserting and evaluating privilege claims. Arbitral tribunals typically deal with privilege issues in procedural orders rather than arbitral awards, and few procedural orders are published. We have cited certain publicly available awards and orders to illustrate points made in this Report. We have also drawn on United States domestic sources that have addressed the procedures for asserting and evaluating privilege, not to urge their adoption but simply to illustrate issues that arise and some of the possible benefits and pitfalls in various approaches.

Our principal conclusions are as follows:

A. *Procedures for asserting privilege claims.* Unless the parties agree to forgo notice from the opposing party if it withholds requested documents based on a privilege claim, an arbitral tribunal should usually address early in the arbitration—prior to the time when the parties will search for documents responsive to production requests—expectations respecting the assertion of privilege claims in connection with document production. At a minimum (and again, unless the parties have agreed otherwise), the tribunal should make clear to the parties that they must give

notice when withholding documents on the basis of privilege, but the extent to which the tribunal should prescribe further procedures for asserting claims of privilege, and what those further procedures should be, will vary with the circumstances of each arbitration. Unlike in domestic litigation practice in the United States and some other common law jurisdictions, there should be no presumption in favor of having the parties use detailed, document-by-document privilege logs to identify the documents being withheld and the basis of withholding. Rather, because the disputed privilege issues often arise based on attributes that are common to a large volume of documents (*e.g.*, whether communications with in-house counsel and communications with consultants assertedly assisting in rendering legal advice are protected), preparing document-by-document logs may be unnecessarily expensive and burdensome. It will often serve the goals of efficient and fair procedure for the parties—if they choose to dispute privilege issues at all—to seek to identify the key issues that the tribunal will need to resolve under the applicable law of privilege and then apply any resulting rulings to the set of documents presumptively withheld.

B. *Procedures for evaluating privilege claims.* The procedures used for evaluating privilege claims will depend to some extent on how the issues are presented. If the claims are "categorical," that is, they are presented for groups of documents that share a common basis for claiming privilege, the tribunal will usually resolve the claims through familiar processes for arguing legal issues. Where the validity of a privilege claim depends on the specific content of one or more documents, the tribunal may wish to make its rulings based on an examination of the documents at issue, in unredacted form. The Report identifies advantages of *in camera* review—principally efficiency and rulings based on full information—and disadvantages—including the potential intrusion on the privilege and—if the *in camera* review is done by the tribunal and the privilege claim is sustained—the potential prejudice to the withholding party from the tribunal's exposure to the privileged material. The Report outlines several alternatives, including (i) *in camera* review only of documents as to which a threshold showing has been made that a privilege claim should be overruled; (ii) *in camera* review of a sample of documents claimed to be privileged; (iii) appointment by the parties of a privilege arbitrator to decide privilege claims; and (iv) appointment by the tribunal of a tribunal consultant to review the documents and verify the contents of the documents or recommend a disposition of the privilege claim to the tribunal, without revealing the substance of protected material. The Report outlines the advantages and disadvantages of each approach.

I. OVERVIEW OF PRIVILEGE CLAIMS IN INTERNATIONAL ARBITRATION

Privileges that may be claimed as the basis for withholding documents that have been properly requested or ordered to be produced in international arbitration can include legal advice (attorney-client) privilege, litigation privilege (in the United States called the "work product doctrine"), accountant-client privilege, settlement privilege and others. Among these, legal advice

privilege is likely the most commonly invoked in international arbitration, but national laws differ on the extent to which the privilege is recognized and the scope of the protection.[1]

In common law jurisdictions, which generally have processes for discovery or disclosure requiring the production of relevant documents to the opposing party, the rules or laws around legal privilege have been extensively developed. Legal advice or attorney-client privilege typically protects, among other things, documents passing between a lawyer and client forming part of the chain of information provided in order to seek and receive legal advice. The privilege will often extend to communications relating to that legal advice with persons who share a common interest with the client with respect to the subject matter of the advice. Nevertheless, the precise parameters can vary significantly. In England and Wales, and in some U.S. states, for example, the privilege for communications with employees of an entity extends only to employees actually charged with seeking or receiving legal advice from the lawyer (sometimes called the "control group"), while in other jurisdictions the privilege protects communications with any employee or agent of the entity necessary for the purpose of obtaining legal advice.[2]

Many civil law countries have no process of discovery or disclosure in dispute resolution or a very limited process. Nevertheless, a concept of "professional secrecy" has developed that protects from subsequent use or exposure confidential information that passes to a lawyer when a client seeks advice.[3] In some civil law jurisdictions, this doctrine extends to documents in the hands of the client; in others, it does not. Also, civil law jurisdictions differ on the details of the protection, such as whether it extends to communications with in-house counsel.[4]

Given the differences in national law approaches to legal advice and other privileges, tribunals in international arbitration often are called upon to decide what rules of privilege to apply. Commentators and tribunals have typically rejected treating privilege questions as either completely a "procedural" matter governed by the applicable arbitral law—typically the law of the seat—or completely "substantive," governed by the law applicable to the underlying dispute.[5]

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[1] For a broad overview of legal advice privilege in various jurisdictions, see, for example, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 127-29, 136-37 (April 2018), *available at* cdn.arbitration-icca.org (All websites last accessed on Oct. 11, 2023) ("QUEEN MARY REPORT").

[2] *See, e.g., In Re The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) (holding that "the client" consisted only of those employees authorized to seek and receive legal advice from the lawyer); *Upjohn Co v. United States*, 449 U.S. 383 (1981) (in federal court (non-diversity cases), privilege extends to communications with employees of a corporate client for the purpose of providing legal advice to the corporation).

[3] *See, e.g.,* QUEEN MARY REPORT, *supra* n.1, at 127.

[4] *See, e.g., Akzo Nobel Chemicals Ltd. v. European Commission*, ECR 2010 I-08301 ¶ 72 (in holding that communications with in-house counsel are not protected from disclosure in EU competition law investigations, Court observes that "a large number of Member States still exclude correspondence with in-house lawyers from protection under legal professional privilege"), *available at* EUR-Lex - 62007CJ0550 - EN - EUR-Lex (europa.eu).

[5] *E.g.*, Olaf Meyer, *Time to Take a Closer Look: Privilege in International Arbitration*, 24 J. INT'L ARBITRATION 365, 368 (2007) ("[A] procedural classification will lead to the application of the lex fori no matter how tenuous the connection between the place of forum and the facts at issue. . . . Classifying privilege as a matter of substantive law is no more persuasive. . . . [T]he parties do not generally contemplate privilege issues when formulating contractual provisions on choice of law."); Richard M. Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 INT'L & COM;. L.Q. 345, 377 (2001) (Privilege rules "are not procedural rules that govern the arbitral

Beyond that, while it is common ground that the tribunal should apply any privilege rule that the parties have agreed upon,[6] commentators have suggested a range of approaches, including (i) applying the law of the jurisdiction with the "closest connection" to the communication in issue;[7] (ii) applying the "most protective" potentially applicable privilege rule to all communications or to any particular communication;[8] or (iii) distilling an "international standard" based on, for example, principles common to the competing rules.[9] This Report does not seek to address which approach a tribunal should use in choosing applicable privilege rules, but turns now to the procedures to be used by parties in asserting privilege claims and by tribunals in evaluating those claims if they are disputed.

II. PROCEDURES FOR ASSERTING PRIVILEGE CLAIMS

Privilege claims most often arise in the exchange of documents by the parties before the evidentiary hearing. If that is to be part of the process, then the parties and the tribunal should at

process and . . . are not addressed in most rules or law related to arbitration. On the other hand . . . . [i]t is unlikely that the parties consider privileges in their choice of substantive law or intend for that law to govern privilege claims when the evidence is connected with another jurisdiction."); George Burn & Zara Skelton, *The Problem with Legal Privilege in International Arbitration*, 72 ARBITRATION: THE INTERNATIONAL JOURNAL OF ARBITRATION, MEDIATION AND DISPUTE MANAGEMENT 124, 129 (2006).

[6] It may often serve the goals of efficiency and equality of treatment if the parties simply agree on the applicable rule of privilege.

[7] *E.g.*, Nigel Blackaby, Constantine Partasides, et al., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 3.251 (7th ed. 2015) ("In the absence of explicit or implied choice of law, tribunals may employ a closest connection test, looking at the law that has the closest connection to the relevant attorney-client relationship . . . ."); Klaus Peter Berger, *Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion*, 22 ARBITRATION INT'L 501, 511 (2006) ("Absent a choice of law by the parties, the tribunal must apply the law of the jurisdiction with which the events or the communication . . . are most closely connected."); Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION 338 (3d ed. 2020) ("As between the law of the lawyer's state of qualification and the client's domicile, the former is usually more sensible.").

[8] *E.g.*, ICDR International Dispute Resolution Procedures Art. 25 (2021) ("When the parties, their counsel, or their documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection."); Caroline Cavassin Klamas, *Finding a Balance Between Different Standards of Privilege to Enable Predictability, Fairness and Equality in International Arbitration,* 12 REVISTA BRASILIERA DE ARBITRAGEM 159, 176 (2015) ("[o]ne party [should] not be given more privilege advantage than the other just because its national laws formally entitle him of more protection"); Blackaby, Partasides, *supra* n.7, ¶ 3.252 (noting that some tribunals have adopted such an approach); Born, *supra* n.7, 339-42 (noting but criticizing the "most protective privilege" rule as "lack[ing] a satisfactory analytical basis").

[9] *E.g.*, Blackaby, Partasides, *supra* n.7, ¶ 3.252 (noting that "some tribunals have adopted a cumulative approach, applying all laws that might have a close connection to the arbitration and searching for commonalities between them" and that others have "adopted their own, autonomous standard"); Susan Franck, *International Arbitration and Attorney-Client Privilege: A Conflict of Laws Approach*, 51 Ariz. St. L.J. 935, 978 (2019) ("some tribunals have opted to develop an ad hoc 'international law' of privilege"); Born, *supra* n.7, at 342 (noting and criticizing as providing inadequate guidance authorities suggesting "that issues of privilege should be governed by international principles").

the outset give thought to when and how to assert privilege claims, what information should be provided about any privilege claim, and how to challenge and adjudicate a privilege claim.[10]

A. When and How To Assert Privilege

We are not aware of any institutional arbitration rules or practices that deal with the procedure for asserting privilege and the information to be provided when asserting it. Article 9.2(b) of the IBA Rules on the Taking of Evidence in International Arbitration, like some rules of arbitral institutions, simply states that privilege is to be recognized:

> The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons: . . . (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Article 9.4 below) . . . .[11]

The rules do not address how the parties should raise a privilege claim, nor do they specify what procedures the tribunal should follow to decide it.

Since the rules of the various arbitral institutions do not specify the timing and procedure for objecting to document requests, it falls to the parties and the tribunal to develop such procedures. In some cases, parties agree at the outset to forgo any procedure for raising privilege objections, either because they do not anticipate that document production will give rise to any such claims, or any significant claims, or because counsel trust that the opposing party will apply the same standards in making privilege claims and that litigation over such claims would be wasteful. Unless that is the case, however, we submit that a tribunal should, at a minimum, make clear in its first procedural order that, unless the parties subsequently otherwise agree, a party withholding information on the grounds of privilege must provide notice of the assertion.[12] That is not, to be sure, something unique to privilege claims: any objection to a document request should

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[10] Privilege claims can also arise in the course of witness testimony. This Report does not address how to assert and evaluate such privilege claims, which will generally be the subject of discussion at the hearing or in a final pre-hearing conference.

[11] IBA Rules on the Taking of Evidence in International Arbitration (2020). Article 9.4 provides a list of five factors "the Arbitral Tribunal may take into account" in ruling on a privilege claim, but does not specify the procedure for bringing those issues to the other party's or to the Tribunal's attention. Article 25 of the ICDR International Dispute Resolution Procedures similarly notes that a tribunal should "take into account applicable principles of privilege," but likewise does not address the procedures for asserting or deciding such claims.

[12] Just as a party must disclose when it withholds a document on the grounds of privilege, so too must it disclose when it has redacted certain parts of a document on those grounds. Any redaction should be clearly marked and its basis disclosed.

In practice, parties frequently give notice at the outset in responding to document requests that they will produce any "unprivileged responsive" documents. If the requesting party accepts that as a reformulation of its document requests, there will be no responsive documents that are privileged and no separate disclosure with respect to privileged documents will be necessary (other than identification of redactions).

be expressly stated with some explanation. We discuss what procedures may be appropriate in the sections that follow.

B. When Procedures for Resolving Privilege Disputes Should Be Discussed

An initial question is whether the parties or the tribunal should address the procedures for asserting and challenging privilege claims at the outset of the arbitration, such as at the first procedural conference or in the first prehearing order (typically Procedural Order No. 1). On the one hand, it may be said that privilege issues arise frequently enough to justify addressing these questions at the outset and setting explicit ground rules. On the other hand, as noted, parties sometimes choose to forgo any process for identifying privileged documents being withheld from production. Further, the parties at this early stage may not yet have a clear view as to whether privileged documents will fall within the scope of documents that may ultimately need to be produced, whether there will be any disputes about the nature of those claims, and whether those disputes will arise on a categorical or document-by-document basis. It thus may be premature at the first procedural conference to decide the procedures for asserting and challenging privilege claims in any detail.

Privilege disputes do, however, have the potential to impact the case management schedule for at least two reasons:

1. Privilege disputes are not likely to arise at the same time as disputes regarding the scope of document production (that is, disputes over objections to document requests), because parties often will not have identified the documents that are to be withheld as privileged at the time that initial objections to document requests are made. Privileged documents are usually identified only after a search for responsive documents has been undertaken, which often will occur only once the scope of document production has been settled.

2. Privilege disputes can be more time-consuming than disputes over what document requests to allow. If the privilege law in different jurisdictions that might apply could lead to a materially different scope of protection, the choice-of-law questions may be difficult and require more extensive briefing than most disputes over relevancy and materiality of requested documents. Privilege disputes therefore have the potential to disrupt and lengthen the schedule for a case to get to the merits hearing.

We therefore submit that in preparation for the initial scheduling conference, a sole arbitrator should carefully consider—and a tribunal discuss internally—the extent to which it is prudent to raise with the parties the likelihood that privilege claims will be asserted and disputed, and whether the timing and mechanism of resolving such potential disputes should be built into the initial schedule. That determination may be influenced by many factors, including whether the parties are likely to invoke the privilege law of different legal systems, whether the differences in such law are potentially material, the temperament of the parties, and the tribunal's own preferences about how to deal with such disputes. The downside of discussing and setting procedures for privilege disputes is the possibility that it may be seen as encouraging

contentiousness—that anticipating such disputes becomes a self-fulfilling prophecy. But if documents are to be exchanged, privilege claims are likely to arise, and it is better to anticipate them than risk significant disruption of the schedule. Anticipating problems in a thoughtful and methodical fashion should not encourage contentious behavior. It should simply signal that disputes concerning privilege will, like all other disputes that can arise in the course of the arbitration, be resolved expeditiously by the tribunal to avoid delaying or adjourning the ultimate merits hearing.

C. Information a Tribunal Might Require Beyond the Initial Notice

As stated above, the tribunal should require that the parties give clear notice when producing documents in response to document requests if any documents are being withheld based on a privilege claim. The initial procedural order might also call for the parties to simultaneously disclose the approximate number of documents withheld, and the nature of the privilege claim, to enable the opposing party to evaluate what further procedures may be appropriate.[13]

The opposing party may assert that information beyond that provided in the initial notice is necessary to make its own assessment of the potential validity of the assertion and whether to accept it. The extent of additional information sought may depend on the volume of documents under discussion. If a party is withholding only a handful of documents, then it might make sense, if any further procedures are called for, simply to identify them on a document-by-document basis; if the number of documents is substantial, it might be more reasonable to discuss a categorical approach to substantiating the claims, as discussed below. In either case, if the party asserting privilege resists, the tribunal will need to decide what information it considers necessary to resolve the dispute.

The additional information should be sufficient information to enable the other party—and the tribunal if necessary—to assess the validity of the claim. We do not recommend any hard-and-fast rules on what that information should consist of. Although the parties may agree to—or the tribunal may consider it appropriate to require—the production of the sort of detailed privilege logs customary in American and other common law litigation, that level of detail and burden should not be the default in international arbitration. The optimal process should instead be one that is flexible and fact-specific.

1. The American Approach

In United States federal courts, Federal Rule of Civil Procedure 26(b)(5)(A)(ii) requires that a party claiming privilege

> describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

[13] Sample language for such a provision in the initial procedural order appears in the Appendix to this Report.

The Advisory Committee Notes to that rule state that "[t]he rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege," and additionally cautions that

> [d]etails concerning time, persons, general subject matter, etc. may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.

Local U.S. district court rules and custom, however, have tilted toward a rigidity—presenting specific document-by-document information embodied in what are called "privilege logs" as a default in the absence of contrary agreement—that the Advisory Committee Notes disclaimed. The rules of the Southern and Eastern Districts of New York, for example, require that, unless otherwise agreed by the parties or ordered by the court, a party asserting privilege state for each document:

> (i) the type of document, e.g., letter or memorandum; (ii) the general subject matter of the document; (iii) the date of the document; and (iv) the author of the document, the addressees of the document, and any other recipients, and, where not apparent, the relationship of the author, addressees, and recipients to each other.[14]

After establishing that default requirement, however, the same local rule encourages the parties to find more

> [e]fficient means of providing information regarding claims of privilege. . . . For example, when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category.[15]

As discussed further below, the approach viewed in its totality may be reasonable, but its enunciated priorities should, especially in the context of arbitration and its emphasis on practicality, be more aligned with the original Advisory Committee Notes: the parties should first look to efficient ways to describe the privilege claim they are making in, for example, groups or categories, before resorting to privilege logs.[16]

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[14] Local Civil Rule 26.2(a)(2)(A) of the Joint Local Rules of the Southern and Eastern Districts of New York.

[15] *Id.* Local Civil Rule 26.2(c).

[16] The Procedural Order on Document Production Regarding the Parties' Respective Claims to Privilege and Privilege Logs in *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1 ¶¶ 34-61 (July 5, 2013), *available at* icsidfiles.worldbank, illustrates this point. In that international arbitration, governed by U.S. law, the parties produced lengthy, detailed privilege logs. The Claimants' log had detailed information on 700 documents withheld.

We also note that the presumption in American litigation that a party withholding documents under a privilege claim should, at the outset, support it with an extensive privilege log is not without controversy even within the American court system. Some consider it to be often-unnecessary drudgery, while others consider it essential to giving the other side a fair opportunity to appropriately evaluate the claim. Whether to adopt American-style procedures in international arbitration is also, of course, controversial.

2. A Recommended Approach in International Arbitration

The following is a non-exhaustive sample of the type of additional information that a party might request in any given situation, whether requested on a document-by-document or categorical basis:

a) What type of privilege is being claimed—e.g., attorney-client communication, attorney work product or litigation privilege?

b) What jurisdiction's law applies to the privilege claim?

c) Who are the persons claimed to be lawyers—either individually or in categories—and thereby give rise to an assertion of privilege on grounds of attorney-client confidentiality?

d) In what jurisdiction are those lawyers authorized to practice?

e) In what jurisdiction or jurisdictions did the communication or communications occur?

f) What is the title and role of that person vis-a-vis the party asserting privilege?

g) If it can be disclosed without invading the asserted privilege, what was the nature or topic of the advice requested or given?

h) Who are the authors, addressees, and copy recipients of the document or documents, and who otherwise saw them?

The tribunal began its analysis, however, by noting that there were two controversial categories: "The Claimants invoked two forms of privilege to exclude the 353 documents enumerated in their privilege log: (i) attorney-client privilege as to 41 documents and (ii) work product doctrine as to all 353 documents." *Id.* ¶ 18. The issues decided by the tribunal were two very general legal issues: (1) whether consultants hired by Claimant's lawyers were covered by the attorney-client privilege and (2) whether materials "prepared at times when a litigious dispute against the Respondent or its agencies was more than a possibility, but (as transpired) a substantial probability" and therefore within attorney work product, rather than prepared to respond to the agency's regulatory requirements. *Id*. ¶ 45. It appears that considerable savings might have been achieved if the parties had identified, presented, and argued the general legal issues without a privilege log.

i) When did the communications occur?

We emphasize that the above list is simply a non-exhaustive list of the type of information that ***might*** be useful in any given case; it is not an itemization of information to be provided in all or even in most cases. A party disputing privilege is not necessarily entitled to obtain, and a tribunal called upon to decide whether to uphold a privilege claim need not require disclosure of, any or all of this information.

Items (a)-(e) in the list above will often be provided for all the documents being withheld on any particular ground and will allow the opposing party to determine whether the privilege claim is one that is recognized under the applicable law; specific information as to each document may not be required or even helpful. Items (f)-(i), concerning the title and role of a recipients of documents, the subject matter and the dates, may also not require specificity as to each document, but could be specified in categories (e.g., a date range, an identification of all recipients of a set of documents, or simply a statement that all were employees of client or the law firm involved).

A tribunal can choose from many options in deciding how much and what information is deemed appropriate to determine a privilege claim. The options could include any or all of the following:

a) Requiring certification by a lawyer authorized to practice in the applicable jurisdiction to a well-founded belief that the documents withheld are indeed privileged. This involves a high degree of trust in the good faith of counsel.[17]

b) Requiring an American-style privilege log stating, for each document withheld, or each category of documents withheld, some or all of the information listed above.[18]

c) Where the crux of the privilege dispute is what jurisdiction's law of privilege applies, or where there is disagreement as to whether that jurisdiction's law makes a category of documents privileged, briefing on the legal issues will tend to be more helpful than an extensive privilege log.

D. Procedures for Challenging Privilege Claims

If the parties are unable to resolve a dispute over privilege, they will need to present that dispute to the tribunal (or possibly, as discussed below, a designated privilege claim adjudicator who is not a member of the tribunal). There are several ways to do so. Schedules in graphic form called Redfern or Stern schedules are often used in international arbitration to simplify the information provided to the tribunal in arguing disputes about discovery, and they may be an appropriate means of presenting the disputes to the tribunal in circumstances in which the arguments regarding privilege assertions can be simply stated and differ from document to

[17] Sample language for an order calling for this level of support for a privilege claim appears in the Appendix.

[18] Sample language for an order calling for a privilege log appears in the Appendix.

document. Privilege claims often, however, raise categorical issues as to which a document-by-document Redfern or Stern schedule or privilege log will be duplicative and inefficient.

Decisions about what jurisdiction's privilege law applies, what the law of a specific jurisdiction is, whether a specific person is a lawyer who is within the privilege, whether that person is involved in business decisions rather than strictly legal advice, and whether the privilege has somehow been waived, will generally best be argued in letters. There should be no presumption that any specific, rigidly applied manner of presenting the issues will be optimal in all situations. Before any such presentations are made, counsel should ask the tribunal to indicate the format that will be most helpful for the tribunal.[19]

III. PROCEDURES FOR EVALUATING PRIVILEGE CLAIMS

Where the parties have presented their dispute to the tribunal on a categorical level, the method of resolving the claims, at least as an initial matter, is straightforward. The tribunal presumably will resolve the categorical legal or factual issue and issue a decision, directing the withholding party to apply that decision to the documents at issue. Typically, there will be no need for the tribunal to consider review of the documents themselves to resolve the question presented.

If the parties have presented privilege claims that vary on a document-by-document basis, however, the tribunal has several procedural options. In this section, we survey the range of methods tribunals may use to evaluate document-by-document privilege claims, and the points in favor and against each method. These considerations will also apply where the tribunal is reviewing categorical privilege claims and has concluded that review of the documents in more detail is needed to resolve the question presented.[20]

A question that arises with respect to all methodologies for resolving privilege claims is the extent to which the tribunal should explain its rulings on privilege claims. To the extent the tribunal is deciding on issues of general applicability, it will almost always provide some explanation to guide the parties in any future privilege claims. Whether the tribunal provides detailed explanations where the tribunal has made a document-by-document determination will depend on, among other things: (i) the number of documents at issue; (ii) the expressed preferences of the parties; (iii) the amount in dispute in the arbitration; (iv) the time available to make the privilege decisions; and (v) possibly, the risks that the privilege decisions may give rise to a challenge to the award in which an explanation may be useful.

[19] Parties may agree on a procedure to "clawback" a privileged document that was inadvertently produced. Such agreements can specify how to present disputes over whether the clawed back document is in fact privileged, which raise special issues that are beyond the scope of this Report.

[20] Decisions with respect to privilege in an arbitration may be made by courts rather than the arbitral tribunal in situations involving summonses addressed to non-parties to the arbitration. *See, e.g., Turner v. CBS Broadcasting Inc.*, 599 F. Supp. 3d 187 (S.D.N.Y. 2022).

A. Privilege Logs, Certificates of Counsel, and Redfern or Stern Schedules

As noted above, tribunals may make privilege decisions based on descriptions of privileged documents contained in privilege logs, Redfern or Stern Schedules, or letter submissions from the parties, possibly combined with certifications from counsel, without any *in camera* review.[21]

1. **Pros**:

The principal advantages of a tribunal relying on privilege logs, schedules, or other submissions accompanied by certificates of counsel are that the procedure may be more efficient than a review of the actual documents and the procedure avoids exposing to review documents that are properly claimed as privileged. As discussed further below, *in camera* review of privileged documents to determine that they are in fact privileged is itself an intrusion on the privilege—a concern that points toward using a privilege expert/consultant or other neutral (other than the tribunal) to protect the content of the documents from influencing the tribunal's decision-making.

2. **Con**:

The principal disadvantage of a tribunal relying on privilege logs, schedules, and certificates of counsel is that the procedure requires the tribunal and opposing counsel to trust that the party claiming privilege has correctly and accurately determined whether the privilege applies to each given document. That trust may be particularly difficult to sustain where counsel are from very different legal systems and where the number of privilege claims, or the proportion of documents claimed to be protected by privilege, or the absence of produced documents on a subject on which such documents would be expected, appear inconsistent with common experience. Some tribunals have suggested that, in the absence of specific evidence undermining the integrity of the privilege log descriptions, a tribunal is justified in relying on counsel's express or implied certificate of compliance.[22] Nonetheless, some parties and tribunals may conclude that such trust is not satisfactory in the particular circumstances of a given case.

B. *In Camera* Review by the Tribunal

As an alternative, or supplement, to review only of privilege log entries and submissions of counsel, the tribunal may decide to review the documents *in camera*. Before embarking on *in camera* review, it would be prudent for the tribunal, if there is any question, to determine that the

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[21] *See*, *e.g.*, Procedural Order on Document Production Regarding the Parties' Respective Claims to Privilege and Privilege Logs, *Apotex*, *supra* n.16, ¶¶ 34-61 (relying on privilege logs and objections thereto); Decision on Annulment, *In the annulment proceeding between Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6 ¶ 356 (Sept. 22, 2021), *available at* icsidfiles.worldbank/icsid/GlencoreInternational (describing use of Redfern schedules to decide privilege claims).

[22] *See*, *e.g.*, Decision on Annulment, *Glencore*, *supra* n.21, ¶ 358 ("It is not unusual for a tribunal to accept a certificate from the leading counsel of a party that a particular document is subject to legal privilege (although the Committee appreciates that this practice involves assumptions regarding supervision by a national court of local ethical duties which is not always present in international commercial or investor-state arbitration."); Proc. Order No. 5 Decision on Outstanding Issues of Legal Privilege, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16 (Dec. 13, 2018) Annex A p. 28, *available at* italaw/case-documents.pdf (calling for "[s]pecific evidence . . . to override" privilege claims).

law at the seat and in potential enforcement jurisdictions would uphold an award in which the tribunal reviewed documents that then were found to be privileged and excluded from the record. In any case, it is always better to proceed with the consent of the parties.

There are several variations for tribunal review of documents, each with pluses and minuses:

1. *In camera review of all challenged or all privileged documents*

The tribunal may direct that all challenged documents be submitted to it (or to one member of the tribunal, such as the chair) for review.[23]

a) **Pros:**

Reviewing all documents *in camera* provides a high level of assurance that the tribunal will fully understand the nature and content of the privilege claims, thereby ensuring greater accuracy in the resulting decisions. *In camera* review of all the documents can be very efficient, as compared to, for example, engaging a privilege arbitrator or consultant or first culling through privilege logs to identify potentially problematic claims, particularly if the tribunal is familiar enough with the parties, the participants in the privileged communications and their roles, and the context of the documents, so as not to require explanation to make the privilege determinations.

b) **Cons:**

The principal disadvantage of *in camera* review by the tribunal is that it is a significant intrusion into the privilege. The prospect of such intrusion, if systematically done, may have a chilling effect on communications with counsel. Further, as the finder of fact, the tribunal may find it difficult not to be influenced by what it has read in documents that ultimately were properly claimed to be privileged.[24] And once the tribunal has ruled that the documents were properly privileged, the parties will have no opportunity to attempt to explain the documents or put them in context. While in the Committee's view it would be unlikely under U.S. law that *in camera* review would be found to be a due process violation in the absence of evidence that a tribunal actually was influenced by privileged documents that it reviewed *in camera*, the Committee cannot exclude that, if the review takes place without party consent, *in camera* review could be found to deprive a party of the right to present its case under the law of another jurisdiction.

Another disadvantage of *in camera* review is that privilege claims can be very fact intensive. Whether the disclosure of a particular email or other document would reveal the substance of legal advice can depend on understanding a great deal about the factual context, including the roles of the parties to the communication (who is a lawyer, whether the lawyer has

[23] *E.g.*, *Hawaiian Host, Inc. v. Citadel Pac. Ltd*., Civ. No. 22-00077 JMS-RT, 2022 WL 16554080, *14-15 (D. Haw. Oct. 31, 2022) (in confirming arbitral award, court noted (without ruling on propriety) that arbitrator had reviewed documents from privilege log *in camera*).

[24] *See, e.g.*, Procedural Order on Document Production Regarding the Parties' Respective Claims to Privilege and Privilege Logs, *Apotex*, *supra* n.16, ¶ 16 ("the Tribunal being a final judge of factual issues in these arbitration proceedings, it is inappropriate for the Tribunal to examine for itself, *ex parte*, any document or part of a document for which privilege is invoked by a responding Party, quite apart from any question of due process").

business functions, the business functions of the nonlawyers), the issues being discussed, and the back-and-forth before (and sometimes after) the communication. The tribunal may need to find a way to receive that background from the proponent of the privilege in a way that does not itself reveal privileged information, and that effort may take time.

2. *In camera review of particular documents where there is reason to believe those documents are not privileged*

As an alternative to reviewing all documents, the tribunal may first make an initial determination as to whether the facts suggest that *in camera* review of certain documents or certain categories of documents may reveal that the privilege claim is unfounded.[25] Under this approach, the party challenging the privilege claim might point, for example, to particular privilege log entries or other documents that have been produced to argue that the documents are not privileged.

a) **Pro:**

The primary advantage of review under such a standard is that it limits the intrusion on the privilege to documents where there is a reason to doubt the privilege claim. Such an intrusion is more justifiable than a wholesale examination of all documents as to which privilege is claimed or that the other party challenges.

b) **Cons:**

The primary disadvantages of requiring a showing of reason to believe the privilege claim is invalid before embarking on *in camera* review are: (a) it inserts a further procedural step in the privilege determination, which adds time and cost, and (b) it can be very difficult for the challenging party to make a showing that a privilege claim is unfounded based on nonprivileged facts.

3. *In camera review of a limited number of documents selected by challenger or at random*

Another technique that a tribunal may use to select documents to review *in camera* is to allow the party challenging the assertions of privilege to select a set number of documents to be reviewed, or for the tribunal to select a set number randomly. This technique is particularly suited to cases in which the challenger argues that the sheer number of privilege claims suggests that the privilege proponent is over-using the privilege.[26]

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[25] *See, e.g., United States v. Zolin*, 491 U.S. 554, 572 (1989) (before reviewing assertedly privileged documents *in camera*, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish" that the privilege claim was unfounded because of ongoing crime or fraud) (*quoting Caldwell v. District Court*, 644 P.2d 26, 33 (Colo. 1982)) (internal quotation marks and citation omitted); *Wisk Aero LLC v. Archer Aviation Inc.*, 21 vc-02450-WHO (DMR), 2023 WL 2699971, at *3 (N.D. Cal. Mar. 28, 2023) (applying same test to whether primary purpose of document was business purpose rather than to obtain legal advice).

[26] *See, e.g., Dyson, Inc. v. SharkNinja Operating LLC*, 2017 U.S. Dist. LEXIS 52074, at *2 (N.D. Ill. Apr. 5, 2017) (court ordered challenger of privilege to select a sample of 5% of the claimed privileged documents for *in camera*

a) **Pros:**

Having the opponent select a sample of privileged documents, or selecting them randomly, reduces the burden of *in camera* review. It also lessens the intrusion on the privilege as compared to reviewing all of the challenged documents.

b) **Con:**

Even if only a sample is selected, this approach continues to subject potentially privileged documents to review by the tribunal that will also be deciding the facts, which intrudes on the privilege and may be said to be a due process violation as suggested above.

C. *In Camera* Review by Privilege Arbitrator or Privilege Consultant/Expert

An alternative to *in camera* review by the tribunal itself is to engage a neutral person to evaluate the privilege claims. This procedure can take two forms: (1) appointment of a privilege arbitrator to decide the privilege claims, or (2) designation of a tribunal-appointed expert or consultant to review the documents and advise as to the privilege claims. Where an expert or consultant is appointed, the expert/consultant reviews the documents and opines on whether the privilege claim is consistent with the law that the tribunal has decided is applicable to privilege claims, explaining the conclusion in sufficient detail to allow the tribunal to review the decision without revealing the content of the assertedly privileged documents.[27]

The appointment of a privilege arbitrator to *decide* the privilege claim presumably requires action by or consent of the parties. The parties in most cases will have appointed the tribunal to decide the dispute and all subsidiary procedural questions (such as the privilege). Subcontracting that power to another will typically require a new consent or new appointment.[28] The appointment of a tribunal-appointed expert or consultant will not generally require the parties' consent, because tribunals typically have the power, after consulting with the parties, to appoint experts,[29] although

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review and noted, "If, after review, the Court believed that there was sufficient over-designation, it would appoint a special master to review all the documents on the privilege logs.").

[27] *E.g.*, Procedural Order No. 17 & Annex A, *B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3 (Nov. 9, 2021), *available at* icsidfiles.worldbank/icsid/B-Mex & icsidfiles.worldbank./icsid/B-Mex_Annex_A (accepting observations of Privilege Expert on various documents, e.g., "Taking into account the observation by the Privilege Expert that the QE Claimants' description of the document as reflecting legal advice from outside corporate counsel is fair, the Tribunal upholds the QE Claimants' privilege claim."); Procedural Order No. 8 & Annex, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16 ¶¶ 11-16 (Mar. 14, 2019), *available at* icsidfiles.worldbank/Global_Telecom (recounting procedure for appointment of privilege expert and adopting her determinations); Consent Award, *St. Marys VCNA, LLC v. The Government of Canada*, PCA Case No. 2012-19, ¶¶ 13-14 (Apr. 12, 2013), *available at* pcacases/St.Marys (reporting on use of privilege expert prior to settlement).

[28] We use the term "privilege arbitrator" because the third-party is delegated authority by the parties to finally decide an issue within the arbitration, but the privilege arbitrator would presumably not issue an enforceable award but simply an order or decision with the same force as any procedural order or decision issued by the tribunal itself.

[29] *E.g.*, IBA Rules on the Taking of Evidence in International Arbitration Art. 6 (2020); ICDR Rules Art. 28 (2021); ICC Rules of Arbitration Art. 25(3) (2021); LCIA Arbitration Rules Art. 21 (2020); SIAC Rules Art. 26 (2016). The JAMS Comprehensive Rules & Procedures for domestic cases, but sometimes chosen by parties in international

for reasons noted below it is advisable for the tribunal to obtain the parties' consent to the appointment of an expert as well.

Appointment of a privilege arbitrator or privilege expert can be used with any of the processes for selecting the subject documents referred to in Section B above, that is, (i) reviewing all assertedly privileged documents as to which the opposing party raises a challenge; (ii) reviewing documents as to which a preliminary showing that a privilege claim may be invalid has been made;[30] and (iii) reviewing a sample of assertedly privileged documents selected either by the opposing party or randomly.

a) **Pros:**

Appointing an additional neutral to review the assertedly privileged documents *in camera* has the advantage of avoiding exposure of the tribunal to documents that may in fact be properly claimed as privileged, thereby lessening the due process concerns noted above. Where the documents reviewed are numerous, this procedure also relieves the tribunal of the burden of that review, and of reviewing any accompanying explanatory submissions of the background and context of the documents.

b) **Con:**

The principal disadvantage of appointing an additional neutral to review privileged documents *in camera* is that it likely will result in some increased cost and some additional time as opposed to the tribunal doing the review itself, because of the time needed to select the neutral, get party input on the selection and on the terms of reference for the neutral, and obtain that person's agreement. The actual review of the documents can proceed relatively expeditiously.[31] In addition, it may be objected that, if an expert is appointed without party consent, the tribunal has in fact delegated its decision-making powers to the expert, because the tribunal's ability to review the expert's determination without reviewing the documents themselves is limited.

In choosing whether to engage in an *in camera* review or to involve an additional neutral in the *in camera* review, the tribunal may wish to offer several options to the parties, to allow them to weigh the benefits and costs of each procedure. It may also be useful to assure the parties that the tribunal will draw no inference from a party's preference for review by an additional neutral,

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cases, provide in Rule 17(d) for the arbitral tribunal, with the written consent of all parties and in accordance with an agreed written procedure, to appoint "a special master to assist in resolving a discovery dispute."

[30] The tribunal can make that determination itself or delegate that determination, either initially or conclusively, to the privilege arbitrator or expert.

[31] *See, e.g.*, Procedural Order No. 8 & Annex, *Global Telecom*, *supra* n. 27, ¶ 15 (noting that expert completed her assessment 8 days after receiving the disputed documents); Consent Award, *St. Marys VCNA, LLC v. The Government of Canada*, PCA Case No. 2012-19, ¶¶ 12-13 (Apr. 12, 2013), *available at* pcacases/St.Marys (reporting that privilege arbitrator took briefing and issued report in 20 days).

rather than review by the arbitrators themselves, of potentially privileged documents, to blunt the fear that the tribunal will think that a party expressing such a preference has "something to hide."[32]

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[32] Sample language for an order providing parties with alternative options for *in camera* review appears in the Appendix.

* The Arbitration Committee has reviewed and endorses this report.

APPENDIX

Sample Language for Tribunal Orders Regarding Procedures for Asserting Privilege Claims and for *In Camera* Review of Assertedly Privileged Documents

1. Sample Language for the Initial Procedural Order Regarding Disclosure that Documents Have Been Withheld on Grounds of Privilege

> Unless the parties agree that no notice is necessary, the parties shall disclose when producing documents whether they have withheld responsive documents on grounds of privilege or otherwise, [the approximate number of documents withheld and the nature of the privilege asserted]. The parties are urged to agree on procedures for identifying any disputes as to privilege claims.

2. Sample Language for an Order Requiring Certification by Counsel that Privilege Claims Are Proper

> Counsel authorized to practice in [x] jurisdiction shall provide a certification that said counsel has reviewed the documents being withheld, or has supervised other lawyers authorized to practice in said jurisdiction, and has determined that the privilege claims are made in good faith and are justified under the law of that jurisdiction.

3. Sample Language for an Order Requiring a Document-by-Document or Categorical Privilege Log

> Each party that has withheld responsive documents on grounds of privilege shall state, for each document, or any group of documents, the (i) date of the document, or date range of the documents, (ii) the author(s) of the document(s), (iii) the identified recipients of the document(s), (iv) any other recipients of the document(s), (v) the general subject matter of the document(s), and (vi) the privilege(s) on the basis of which the document(s) is/are being withheld.

4. Sample Language for an Order Setting Forth Alternative Procedures for *In Camera* Review

1. The Tribunal has concluded that Respondent's/Claimant's objections to Claimant's/Respondent's privilege claims will most reliably and efficiently be resolved by *in camera* review of [certain of] the documents subject to the objections. [In particular, based on the submissions to date, the Tribunal has determined that, as to the documents identified in Attachment A to this Order, there is a factual basis adequate to support a reasonable belief that *in camera* review of the materials may reveal evidence to establish that the privilege claim was unfounded.]

2. The Tribunal invites the parties to express their views with respect to the following possible approaches to *in camera* review within [x] days of this Order:

a. The Tribunal will itself review the documents in order to rule on the privilege claims.

or

b. The Tribunal will itself review a sample of the documents selected by Respondent/Claimant [the objecting party], or selected randomly, in order to rule on the privilege claims. The Tribunal invites the parties' views on the size of the sample to be reviewed if this alternative is selected.[33]

or

c. The Tribunal will appoint a privilege expert to review the documents or a sample of the documents and report on whether the

[33] This alternative is not likely to make sense if there has been a selection of documents as to which the privilege claim is questioned (see the bracketed language in para. 1 of the Sample Order) or where the number of documents at issue is not substantial.

privilege claim is well-founded, providing reasons for that conclusion but without revealing the information subject to privilege. The Tribunal invites the parties' views on the size of the sample to be reviewed if that alternative is selected. If this alternative is selected, the Tribunal will provide the parties with the opportunity to comment on the privilege expert's report, and an opportunity to reply to the opposing party's comments, before ruling on the privilege claims.

or

d. The Tribunal will nominate a privilege arbitrator to review the documents, based on whatever submissions the privilege arbitrator considers appropriate, and decide whether the privilege claims are well-founded. The Tribunal will pursue this alternative only if all parties consent. If the parties agree to this procedure but do not all agree to appointment of the nominated privilege arbitrator, and do not agree on an alternative arbitrator within [x] days of the Tribunal's nomination, the Tribunal would ask [the arbitral institution] to appoint a privilege arbitrator. The privilege arbitrator will not issue an enforceable award, but rather a procedural order with the same force and effect as a procedural order of the Tribunal.

3. The Tribunal will draw no inference from a party's preference for review of potentially privileged documents by an additional neutral, rather than review by the Tribunal itself.