

MAYER • BROWN

The Ethics And Reality Of Protecting Communications Of In-House Lawyers

Fern C. Bomchill
Partner

+1 312 701 7331
fbomchill@mayerbrown.com

Michael Gill
Partner

+1 312 701 7128
mgill@mayerbrown.com

May 2011

Mayer Brown is a global legal services organization comprising legal practices that are separate entities ("Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; Mayer Brown JSM, a Hong Kong partnership, and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

Speakers



Fern Bomchill is a prominent litigator, mediator, and counselor whose practice deals with a broad spectrum of corporate, commercial, and financial matters. Since joining Mayer Brown in 1972, Fern has built a well-earned reputation as a skilled, knowledgeable trial lawyer and courtroom manager, and a proficient, well-informed mediator who masters case detail and achieves realistic, equitable, and timely solutions. In addition, she provides effective coordination and consultation regarding a wide variety of corporate concerns, including liability and exposure, consumer information and protection issues, and risk-management strategies. Fern has been recognized as an “Illinois Super Lawyer,” a “Top Lawyer in Illinois” and a “Leading Lawyer.” She will assume the presidency of the Federal Bar Association in the fall.



Michael Gill has three decades of experience (since 1987 with Mayer Brown) as a litigator in high-profile civil and criminal matters. He has been trial counsel in more than 40 jury and bench trials. Recently, Michael was trial counsel for Rahm Emanuel on the residency challenge to his candidacy for Mayor of Chicago. Michael is frequently called upon to evaluate, through internal investigations, companies’ criminal, regulatory and civil exposures and advise them on risks and remedies. He also teaches a course on Government and Internal Investigations at Northwestern University School of Law.

Overview

- 1. What Is the Attorney-Client Privilege?*
- 2. Scope of Privilege*
- 3. Privileges in Common Law Jurisdictions*
- 4. Confidentiality Obligations in Civil Law Jurisdictions*
- 5. EC Investigations*
- 6. Comity*
- 7. The Real World*
- 8. Strategies to Protect Confidentiality*

What Is The Attorney-Client Privilege?

- ◆ Communications
- ◆ Between “privileged” persons in confidence
- ◆ For purposes of seeking, obtaining or providing legal assistance to client



What Is The Attorney-Client Privilege?

Communication: Oral and/or written

“Privileged” persons:

- ◆ Client
- ◆ Attorney – including in-house counsel (“IHC”)
- ◆ Client ‘s Communicating agent
 - State law – control group vs. subject matter
 - Federal law – subject matter
- ◆ Lawyer’s Assisting agents

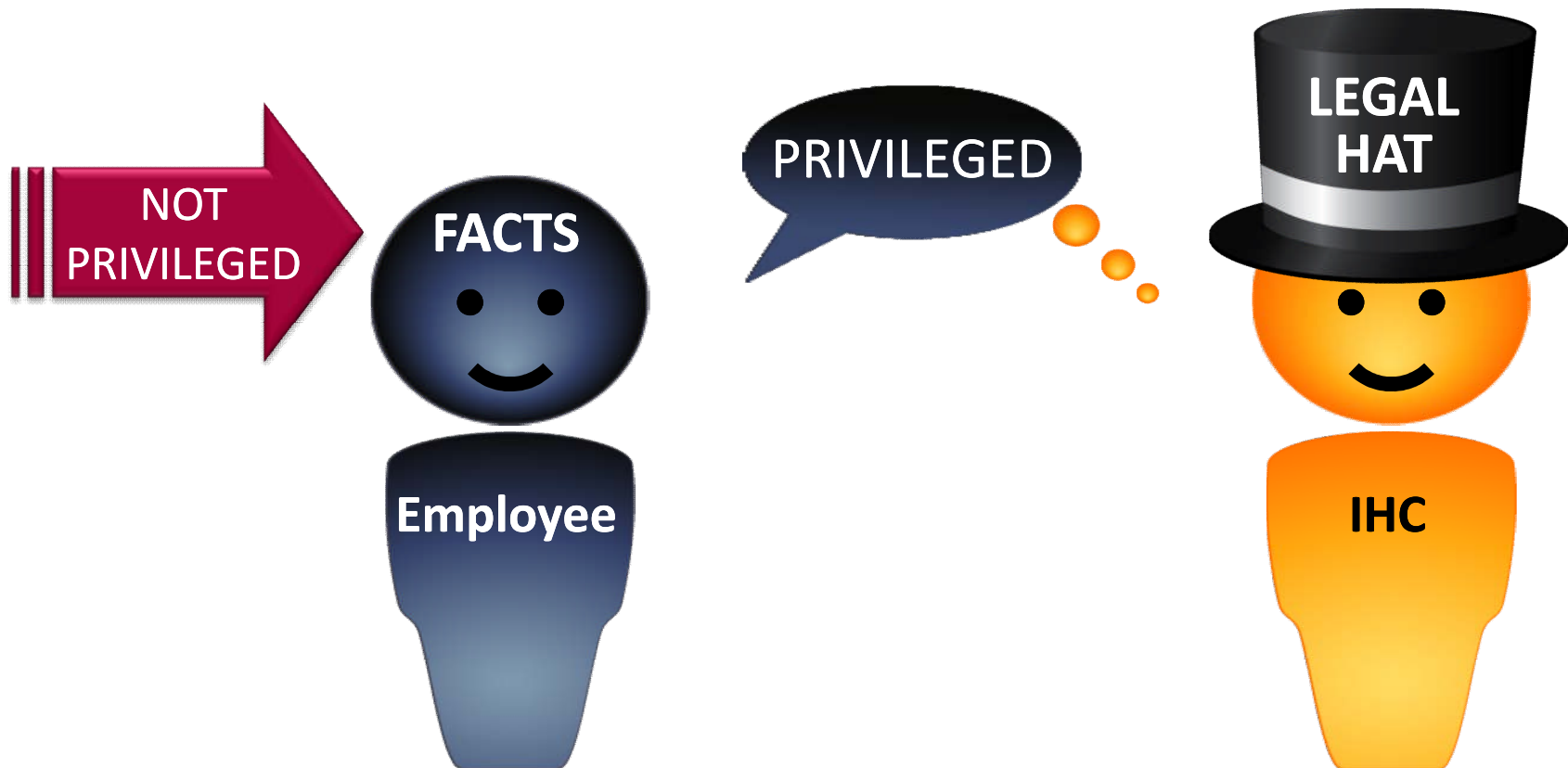
For purposes of seeking, obtaining or providing legal assistance to client:

- ◆ Two-way street



What Is The Attorney-Client Privilege?

- ◆ Confidentiality obligations (e.g., Model Rule 1.6): Different from privilege
- ◆ Privilege Narrowly Construed: IHC's "Legal Hat"
- ◆ **Communications – not facts – are protected**



What Is The Attorney-Client Privilege?

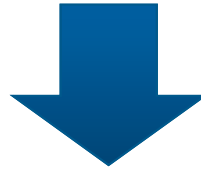
Policy Behind A-C Privilege



Lawyer needs all facts



Client needs to be comfortable in providing all facts



Effecting compliance with law

What Is The Attorney-Client Privilege?

The privilege and the ability to waive that privilege belong to client

- ◆ Who is client?
- ◆ Role of attorney
- ◆ Waiver
- ◆ Piercing the privilege

Scope of Privilege

- ◆ Participants to the communication
- ◆ Purpose of communication
- ◆ Where communication takes place



Privileges In Common Law Jurisdictions

- ◆ Similar to U.S.
 - Confidential communication
 - To/from attorney in professional capacity
 - Purpose to obtain/provide legal advice
 - Waiver belongs to client
 - Privilege available to IHC acting in legal capacity
- ◆ Common law may be displaced by statute
- ◆ Can be narrower than U.S.
- ◆ Can be broader than U.S.



Privileges In Common Law Jurisdictions

England/Wales - “Legal professional privilege”

- ◆ “Legal Advice” privilege
 - May not extend to agents/employees
 - Allows selective waiver
 - Protects advice as to what should be “prudently and sensibly done in relevant legal contract”
- ◆ “Litigation privilege”
- ◆ Expose Party to Criminal Proceedings/Penalty
- ◆ Against Public Policy

Australia - Requires “strict scrutiny” to prove IHC is independent and competent



Confidentiality Obligation In Civil Law Jurisdictions

- ◆ Not a privilege - An obligation not to disclose confidential information
 - By statute (codes of professional secrecy)
 - Professional conduct rules
 - Local bar rules
- ◆ Violation can lead to criminal sanctions
- ◆ Jurisdictional differences
 - Documents in client's possession discoverable
 - Attorney precluded from sharing information with client
 - Attorney – not judge – decides on disclosure



Confidentiality Obligation In Civil Law Jurisdictions

Some jurisdictions extend some protection to IHC under varying requirements/theories/restrictions, such as:

Argentina

- ◆ “Publicly” holds position
- ◆ Admitted to bar
- ◆ Communication relates to legal advice

Belgium

- ◆ Separate registration
- ◆ Legal opinion for benefit of employees or in course of employment (unclear if commercial/operational matters covered)
- ◆ Narrower privilege than independent counsel
- ◆ Privilege Can Be Lost By Wide Dissemination
- ◆ Unclear if IHC bound to secrecy codes

Denmark - IHC covered by secrecy codes, but court can order disclosure from IHC

Germany - IHC entitled to secrecy protection if authorized to practice in Germany, admitted to bar and “maintains a sufficient level of independence from employee”

Japan/Poland - Privilege only extends to communication from client to lawyer

Spain

- ◆ Fiduciary duty as employee
- ◆ Covered by secrecy laws if registered with bar

Confidentiality Obligation In Civil Law Jurisdictions

Some jurisdictions do not recognize any privilege between IHC and client:

- ◆ IHC not independent – bound by employment relationship
- ◆ IHC not entitled to bar membership or allowed to appear in court

Czech Republic - IHC not covered by confidential obligations

France

- ◆ IHC profession separate
- ◆ Court can order disclosure from IHC

Italy - Only salaried professionals who work for public entities can claim title and protections of full attorney

Luxembourg

- ◆ IHC cannot be members of the bar
- ◆ No privilege from disclosure

Sweden - IHC must relinquish bar membership

EC Investigations

No regulations covering privilege

Case law: no recognition of privilege for IHC or non EU qualified lawyers --

- ◆ Even if communication made in jurisdiction that recognizes privilege or confidentiality



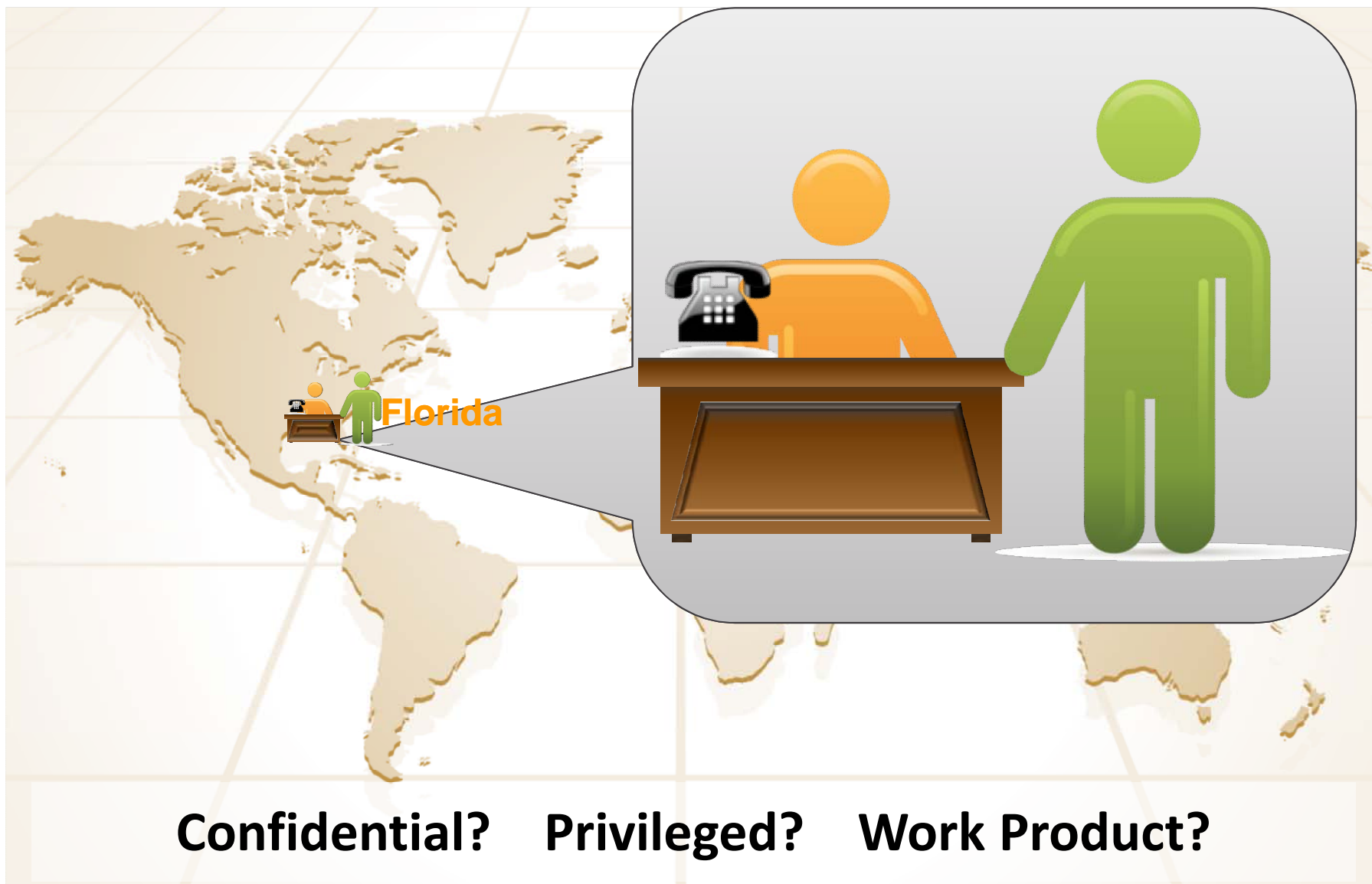
Comity

- ◆ U.S. requires reciprocity

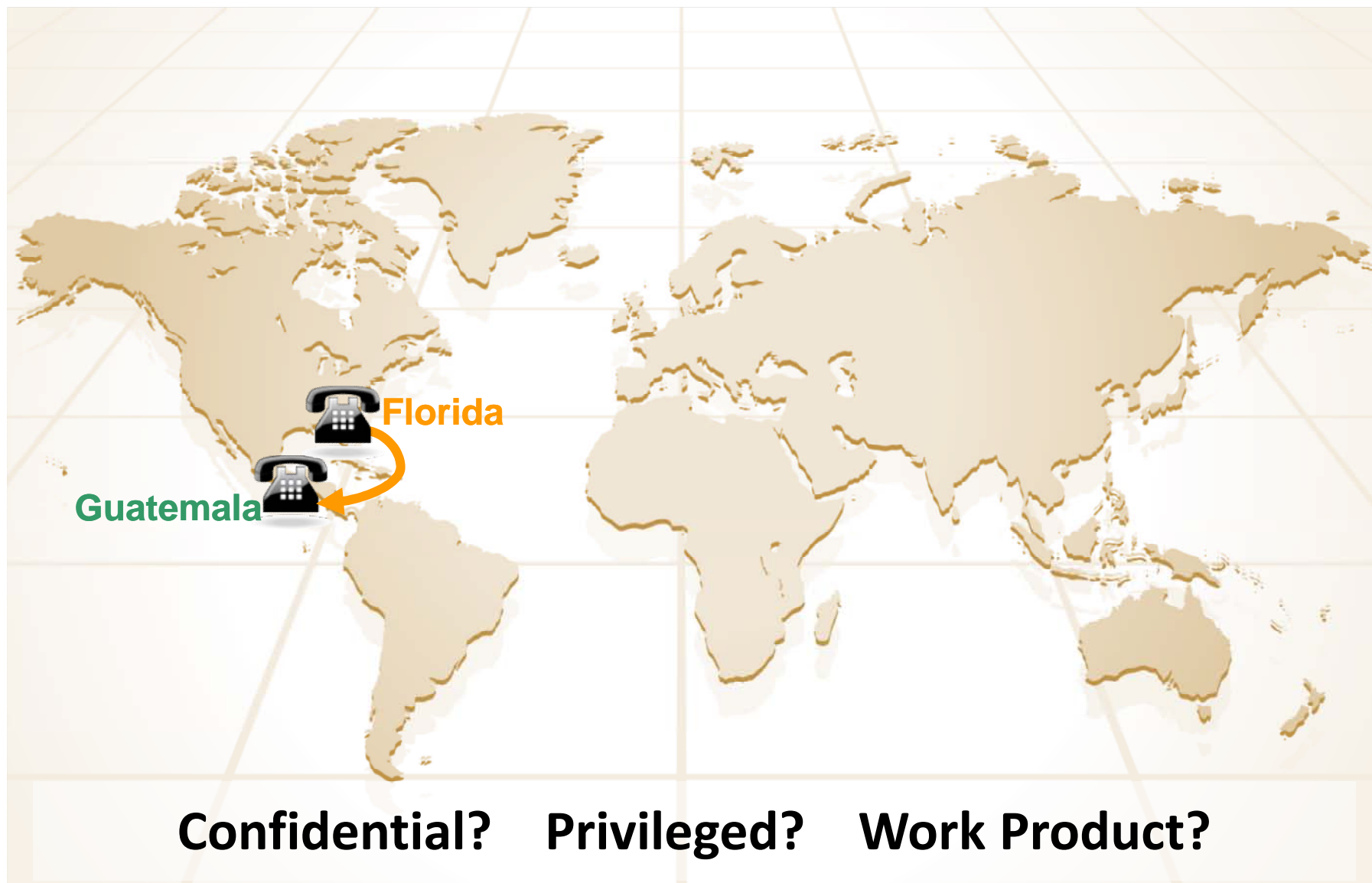


Secrecy laws not generally viewed same as A-C privilege

The Real World



The Real World



The Real World:



The Real World: EU Investigation



Strategies To Protect Confidentiality

- ◆ Know local law
- ◆ Full bar membership if possible
- ◆ Oral advice
- ◆ Documents in attorney's hands only
- ◆ Use outside counsel for sensitive investigations and risk opinions
- ◆ Provide for recognition of privilege in arbitration clauses in international contracts
- ◆ Hague Convention benefits



Questions

Thank You!

Fern C. Bomchill

Partner

+1 312 701 7331

fbomchill@mayerbrown.com

Michael Gill

Partner

+1 312 701 7128

mgill@mayerbrown.com