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# IBA Arbitration Committee Task Force on Privilege in International Arbitration



## Report on Uniform Guidelines on Privilege in International Arbitration

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In September 2021, the IBA Arbitration Committee launched a task force to address questions relating to privilege in international arbitration (the ‘Privilege Task Force’).<sup>1</sup> In particular, the Privilege Task Force was asked to determine whether uniform rules on privilege are desirable, or possible, for purposes of Article 9.2(b) of the 2020 IBA Rules on the Taking of Evidence in International Arbitration (the ‘**IBA Rules**’).

Article 9.2(b) of the IBA Rules foresees that ‘*legal impediment or privilege*’ can be a reason for an arbitral tribunal ‘*to exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part*’.

Article 9.2(b) of the IBA Rules foresees that such ‘*legal impediment or privilege*’ should be defined ‘*under the legal or ethical rules determined by the Arbitral Tribunal to be applicable [under] Article 9.4*’. Article 9.4, in turn, provides that an arbitral tribunal, ‘*insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable*’, may take into account various elements to determine what constitutes ‘*legal impediment or privilege*’,<sup>2</sup> although ‘*the standard to be applied is left to the discretion of the arbitral tribunal*’.<sup>3</sup>

This report sets forth the Privilege Task Force’s conclusions as to whether uniform guidelines are desirable (**I**) and possible (**II**) in international arbitration and, in light of those conclusions, proposes next steps (**III**).

In short, the Privilege Task Force concludes that uniform guidelines on privilege are indeed desirable and are also possible for three categories of privilege – namely, legal advice privilege, litigation privilege, and settlement privilege. The Privilege Task Force recommends that an expanded task force be constituted to develop uniform guidelines for those three categories of privilege, including exceptions to their application. The Privilege Task Force further recommends that the expanded task force develop a uniform choice-of-law guideline for other categories of privilege that may be asserted in international arbitration proceedings.

## **I. Whether Uniform Guidelines on Privilege Are Desirable**

The Privilege Task Force has concluded that it is indeed desirable for the IBA to promulgate a soft law instrument with uniform guidelines on privilege for at least two main reasons.

*First*, the current way privilege is managed in international arbitration lacks clarity and consistency, which has an impact on the fair and efficient running of arbitral proceedings.

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1 The members of the Privilege Task Force, in addition to its Chair Erica Stein, are the following, followed by the jurisdiction where they practice: (i) Ginta Ahrel (Sweden); (ii) Philippe Bärtsch (Switzerland); (iii) João Bosco Lee (Brazil); (iv) Tim Foden (U.K.); (v) Sun Huawei (China); (vi) Caline Mouawad (U.S.A.); (vii) Joseph Neuhaus (U.S.A.); (viii) Colin Ong (Singapore); (ix) Rachel O’Grady (U.K.); (x) Patricia Shaughnessy (Sweden); (xi) Charis Tan (Singapore); (xii) Thomas Voisin (France); (xiii) Claire Morel de Westgaver (U.K.). The Task Force is assisted by its Secretary, Quentin Muron.

2 Those elements are: ‘(a) any 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; (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations; (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen; (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules’.

3 ‘Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration’, 1999 IBA Working Party, 2010 IBA Rules of Evidence Review Subcommittee, 2020 IBA Rules of Evidence Review Task Force, <https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D>, last visited on 15 February 2024, p. 28.

To take the example of attorney-client privilege, different jurisdictions have very different approaches. As put by an author, ‘*it is absolutely mind boggling how the world’s attorney/client privilege rules are so different, with many nuances that attach to each country*’.<sup>4</sup> In the context of international arbitration, this means that the rules of any number of jurisdictions could apply simultaneously to account for parties in one or several jurisdictions represented by counsel in further jurisdictions still.

However, this ‘pick and mix’ approach is widely seen as inadequate in international arbitration because: (i) the arbitrators’ best efforts to maintain fairness in the face of the application of multiple, disparate privilege rules may not be enough to overcome the inherently unequal treatment that the situation creates, as tribunals cannot even out the uneven grants of privilege; and (ii) it is burdensome for the parties to argue, and the arbitrators to decide, on all of the potentially different privilege rules to apply across a case. Both of these issues go against the most basic tenets of international arbitration, namely, that the parties should be treated equally and be subject to a fair and efficient process (*see, e.g.*, Article 17 of the UNCITRAL Arbitration Rules (‘*[t]he parties are treated with equality*’ and the arbitrators ‘*shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute*’)).

What is more, these issues of fairness and efficiency are exacerbated by the fact that there is no consensus on how to choose the potentially applicable privilege rules.

At an initial stage, it is rare – if not unheard of – for parties to provide expressly in their dispute resolution agreement which privilege rules apply. Arbitration laws and institutional rules agreed between the parties also provide little guidance.<sup>5</sup> The only institutional rules that provide guidance on privilege are the ICDR Rules, which state in Article 22 (‘Privilege’) that ‘*the arbitral tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between a lawyer and client. When the parties, their counsel, or the documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, apply the same rules to all parties, giving preference to the rules that provide the highest level of protection*’. The ICDR Rules thus provide an example of the content of potential privilege rules (attorney-client privilege) and the way to choose them (a most-favored nation approach).

Once the arbitration is underway, it is also rare for the parties to agree on applicable privilege rules (for instance, at the time of the matter’s first procedural order), and parties may be wary of thus waiving some or all of their privilege rights. In those cases when the parties and arbitrators have agreed to apply the IBA Rules, they are of no assistance since they provide no guidance in this respect. Of the 32 cases analyzed by the Task Force (see **Annex 1**), the parties agreed on the applicable privilege rules in only five cases, with

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4 R. Levin, ‘Privilege and International Arbitration’, Kluwer Arbitration Blog, 14 August 2017, <http://arbitrationblog.kluwerarbitration.com/2017/08/14/privilege-international-arbitration/>, last visited on 3 October 2023.

5 For example, the UNCITRAL Model Law (adopted by over 100 countries), UNCITRAL Arbitration Rules, ICC Rules and LCIA Rules are all silent on this question; they simply provide that, in the absence of an agreement between parties, it is for the tribunal to determine procedural and evidential matters at its discretion, subject to overriding principles of fairness and equality of treatment. The SIAC Rules expressly mention privilege in Article 27 (‘Additional Powers of the Tribunal’), paragraph (o), but only to affirm that, ‘*[u]nless otherwise agreed by the parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to [...] determine any claim of legal or other privilege*’. Similarly, the 2018 International Institute for Conflict Prevention and Resolution Rules for Non-Administered Arbitration (CPR Rules) give broad discretion to the arbitral tribunal to deal with issues surrounding legal privilege, but do not go farther than that. Article 12.2 provides, in pertinent part: ‘*The Tribunal is not required to apply the rules of evidence used in judicial proceedings. The Tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered*’.

three finding that there was an express or implied agreement on an applicable law on privilege,<sup>6</sup> and two with an express agreement on the way the tribunal should determine the applicable law to privilege.<sup>7</sup> We also know from practice that parties occasionally, but infrequently, agree and draft privilege rules on an *ad hoc* basis.

When no rules have been agreed, the arbitral tribunal must choose them. The materials reviewed by the Task Force indicate that arbitral tribunals do so by resorting to at least four approaches: (i) the ‘connecting factor’ test, which seeks to determine the most salient connection to the purportedly privileged situation and a relevant law (for example, the law of: the place of arbitration; the contract; where the document was created/exchanged/stored; the location of attorneys; the engagement letter between the attorney and client); (ii) the ‘closest connection test’, which tribunals can for instance apply to select a single law to govern all claims of privilege in a particular case; (iii) the ‘most-favored nation’ approach (also suggested by the ICDR Rules in the case of attorney-client privilege), which requires choosing the most protective privilege rules among those potentially applicable; and (iv) the least-favored nation approach, which requires choosing the least restrictive privilege rules.

While each of these choice-of-law approaches has its advantages and disadvantages, for present purposes, what is important is that the parties to an arbitration have no clear view, at least at the outset of the case, as to how arbitrators will select privilege rules and, therefore, which privilege rules will apply. This uncertainty is widely criticized, as it causes a series of problems: (i) it can disrupt attorney-client communications, including before the start of the proceedings, for fear of not knowing which communications are covered by privilege; (ii) the various choice-of-law approaches are often at risk of being arbitrary, for instance in proceedings where – as is often the case – reliance on one or several connecting factors can point to a variety of different jurisdictions or rules; (iii) applying one jurisdiction’s attorney-client privilege rules to attorneys from another jurisdiction may be contrary to the latter’s ethical rules; and (iv) because privilege issues are more documented in common law jurisdictions than in civil law ones, favoring one set of rules over the other can create an imbalance in proceedings involving parties and counsel from both types of jurisdictions. This issue’s importance is heightened by the fact that, as highlighted by commentators, an arbitral tribunal’s disregard of privilege rules may endanger the validity or enforceability of its award, for violation of a party’s due process rights, or of public policy (which can include certain privileges).<sup>8</sup> These problems are eliminated when parties agree to the applicable privilege rules, provided they satisfy the lawyers’ basic ethical obligations. While this seldom happens at present, the availability of uniform privilege guidelines may encourage parties and arbitrators to do so more readily.

*Second*, uniform privilege guidelines seem to be expected from the international arbitration community. Academics and practitioners have consistently recognized that the IBA Rules only go so far in providing guidance on issues of legal impediment and privilege, thereby doing little to clarify a murky situation.

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6 *Glamis Gold v. United States of America*, UNCITRAL (U.S. law, though no agreement as to which State, which led tribunal to create an *ad hoc* standard on the basis of those laws); *SMT Ltd. v. Fremak Industries, Inc.*, ICC Case No. 19499/CYK (New York law); *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited* (‘Bapex’), ICSID Case No. ARB/10/11 (Canadian law).

7 The parties agreed on the test established by the tribunal in *Vito Gallo v. Canada: William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, and in *Lone Pine Resources Inc v. Canada*, ICSID Case No. UNCT/15/2.

8 K. P. Berger, ‘Chapter 13: Evidentiary Privileges’, in F. Ferrari and F. J. Rosenfeld (eds), *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues*, Kluwer Law International 2022, pp. 301-303, citing *inter alia* A. Möckesch, ‘Attorney-Client Privilege in International Arbitration’, Oxford University Press 2017, at 8.68.

As summarized by an author who has written repeatedly on this topic, when it comes to privilege in international arbitration, the ‘*only thing that is clear is that nothing is clear*’.<sup>9</sup> Citing experienced practitioners, Gary Born similarly concludes as follows: ‘*[t]here has historically been limited authority concerning the appropriate treatment of privileges in international arbitration*’, and ‘*[g]iven the frequency with which privilege issues arise, and their potential importance, this lack of authority is unfortunate*’.<sup>10</sup> Indeed, there is consensus to say that the issue of privilege, and in particular attorney-client privilege, ‘*is exceptionally significant and is exceedingly frequent in both international commercial and investment arbitration*’.<sup>11</sup>

Some have even specifically called on the IBA to update the IBA Rules to better regulate these issues.<sup>12</sup> For instance, one author has said that the ‘*IBA Rules are the most appropriate legal instrument*’ to do so because ‘*they are the most comprehensive instrument in international arbitration dealing with the taking of evidence, have an unlimited territorial reach, and have gained wide acceptance in the international community*’.<sup>13</sup>

In this regard, at the IBA Annual Conference in October 2022, the IBA Arbitration Committee organized a panel exploring the question ‘Is it time for uniform rules of privilege in international arbitration?’ The panel was composed of arbitrators, counsel, and in-house counsel, and was well-attended. During a poll taken at the end of the session, there was unanimity in the room that uniform guidelines on privilege developed by the IBA would be of assistance to the international arbitration community.

Further, while some practitioners have expressed reticence at the idea of uniform guidelines, their criticism can be readily addressed:

- ‘Uniform privilege guidelines or rules would unduly infringe on the arbitral tribunals’ capacity to choose the appropriate rules on a case-by-case basis, with enough flexibility to take into account the specificities and inequalities of an individual case.’ This criticism falls short for similar reasons. Establishing a suggested set of guidelines will not impede the ability of arbitral tribunals and parties to deviate from those guidelines as needed depending on the circumstance of their case. The same has proven true for the IBA Rules on the Taking of Evidence, which have been used flexibly by tribunals and parties for decades.
- ‘Uniform privilege rules would not be in keeping with the expectations of the parties at the time the privilege arose.’ The idea that privilege should be guided by the parties’ expectations is embodied in Article 9.4(c) of the IBA Rules.<sup>14</sup> The commentary to the IBA Rules explains that: ‘*Article 9.4(c) expresses the guiding principle that expectations of the parties and their advisors at the time the legal impediment or privilege is said to have arisen should be taken into consideration. Often, these expectations will be formed by the approach*

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9 K. P. Berger, ‘Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion’, *Arbitration International*, 22, 2006, at 501.

10 G. B. Born, *International Commercial Arbitration*, 3rd edition, Kluwer Law International 2022, §16.02[E][8].

11 I. Shehata, ‘Attorney-Client Privilege and International Arbitration’, *Cardozo J. Conflict Resolution*, 2019, at 363, 367.

12 A. Möckesch, ‘Attorney-Client Privilege in International Arbitration’, Oxford University Press 2017; T. Zuberbühler, D. Hofmann, et al., ‘IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration’, 2nd edition, Schulthess Juristische Medien AG 2022, p. 208; G. B. Born, ‘International Commercial Arbitration’, 3rd edition, Kluwer Law International 2022, §16.02[E][8].

13 A. Möckesch, ‘Attorney-Client Privilege in International Arbitration’, Oxford University Press 2017, at 11.21.

14 See fn. 1.



to *privilege prevailing in the home jurisdiction of such persons*<sup>15</sup> (emphasis added). However, it may be time to look at the question of expectations differently in international arbitration. When parties agree to arbitrate their disputes in an international forum, they specifically remove themselves from their home jurisdiction. As a result, it may be more accurate to assume that the expectations surrounding privilege are, in fact, not linked to any jurisdiction but rather to the international forum agreed by the parties.

- ‘Uniform privilege rules would be unnecessary due to the emerging consensus on how to treat the issue, and would only contribute to an unhelpful inflation of soft law rules.’ However, this consensus is far from certain. Further, even assuming that such consensus exists – at least with respect to choosing applicable privilege rules – each of the techniques has flaws and can lead to uncertainty and arbitrariness, as explained above.

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In summary, **uniform guidelines on privilege are desirable**, among other reasons because parties to an arbitration currently have no clear and consistent view as to what privilege rules will apply in a given case, which has an impact on the fair and efficient running of arbitral proceedings.

However, the Privilege Task Force is of the view that uniform privilege guidelines may not be enough, and that the IBA Arbitration Committee should also develop a uniform choice-of-law guideline. This uniform choice-of-law guideline would also increase certainty and predictability in international arbitration in circumstances where: (i) uniform guidelines for certain categories of privilege may not be possible (see Section II below); and/or (ii) parties, counsel and arbitrators want a clearer and more efficient path to deciding privilege issues but do not wish to refer to uniform guidelines. (The proposal to develop a uniform choice-of-law guideline is discussed further in Section III below.)

## II. Whether Uniform Guidelines on Privilege Are Possible

Having concluded that uniform guidelines on privilege are desirable, the Privilege Task Force has also sought to determine whether uniform guidelines on privilege are possible.

To do so, the Privilege Task Force carried out studies of six categories of privilege, namely: legal advice privilege (**A**); legal proceedings/litigation privilege (**B**); public interest immunity/deliberative and cabinet privilege/national security (**C**); without prejudice privilege/settlement privilege (**D**); common interest privilege (**E**); and privilege against self-incrimination (**F**).

The Privilege Task Force acknowledges that the categories of privilege identified are influenced by the legal definition given to them in the legal system from which they originate (United States, England and Wales, etc.) and are by no means universally recognized. Further, those categories of privilege may take different names from one jurisdiction to another or may have a different normative source (ethical rules, confidentiality obligations, procedural rules, etc.). Indeed, it may well be that, in any given jurisdiction, (i) the category or categories of privilege identified do not exist; (ii) the category or categories of privilege

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15 ‘Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration’, 1999 IBA Working Party, 2010 IBA Rules of Evidence Review Subcommittee, 2020 IBA Rules of Evidence Review Task Force, <https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D>, last visited on 15 February 2024, p. 30.

exist under another name; or (iii) the category or categories of privilege do not exist, or are defined differently, but local laws, regulations and rules offers protections which are similar or are intended to achieve the same purpose.

For this reason, for each of the categories of privilege identified, the Privilege Task Force considered the following issues in relation to the (i) scope of the category of privilege considered (who can benefit from it), (ii) content of the category of privilege considered (what rules apply to it), and (iii) exceptions to the category of privilege (*e.g.*, waiver<sup>16</sup>):

1. Whether common rules of privilege apply across jurisdictions in the category of privilege considered?
2. Whether idiosyncratic rules of privilege apply in some jurisdictions in the category of privilege considered?
3. Whether rules of public order (or international public order, as the case may be) apply in some jurisdictions in relation to the category or privilege considered?
4. In light of the above, whether uniform rules of privilege would be desirable in relation to the category considered, and what form these rules of privilege could take?

The reports of the Task Force setting forth their conclusions on these matters are attached to this Report at **Annexes 2 through 7**. Research on privilege in individual jurisdictions and subject matters, which are referenced in several of the Privilege Task Force's reports, are attached at **Annexes 8 through 13**. Based on those reports, the Privilege Task Force sets forth below its conclusions as to whether uniform guidelines may be possible for each category of privilege studied.

### ***A. Legal Advice Privilege***

This category of privilege generally refers to a confidential communication between a client and his/her professional legal adviser, made for the purpose of seeking, obtaining, or providing legal advice or related legal assistance. The related notions of, for instance, attorney-client privilege and work-product doctrine would also be included in this category.

The IBA Rules acknowledge that legal advice privilege may be relevant in arbitration proceedings. Specifically, the IBA Rules provide in Article 9.4(a) that, '*[i]n 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 [...] any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of obtaining legal advice*' (emphasis added).

The Privilege Task Force's study on legal advice privilege is attached at **Annex 2**.

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<sup>16</sup> The IBA Rules acknowledge that the question of waiver may be of relevance for tribunals managing questions of privilege. Specifically, the IBA rules provide in Article 9.4(d) that '*[i]n 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 [...] any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise*'.



The Privilege Task Force undertook a survey of national laws on legal advice privilege and related concepts in 24 jurisdictions from civil and common law countries. Based on that survey, there appears to be near universal agreement across jurisdictions that:

1. Communications between attorneys and clients deserve some protection;
2. Protection should not extend to communications that involve criminal or wrongful activity;
3. Protection can be waived by disclosing what would otherwise be a protected communication; and
4. Questions of public order would not be a bar to the application of a privilege rule different from those existing in national jurisdictions.

While the Privilege Task Force's study has concluded that significant differences exist between jurisdictions on certain points (*e.g.*, in respect of whether the protection extends to communications in the hands of the client as well as those in the hands of the lawyer; whether the protection extends to in-house counsel and foreign lawyers practicing in a jurisdiction; and the circumstances under which protection can be waived), it has also concluded that those differences are not so fundamental as to prevent the development of a uniform guideline for this category of privilege in international arbitration.

**The Privilege Task Force thus considers that the commonalities across jurisdictions – in particular, that communications between attorneys and clients deserve some protection and uniform rules would not be contrary to public order – lead to the conclusion that a uniform privilege guideline with respect to legal advice privilege is possible.**

The caveat to this conclusion, as set forth in the Privilege Task Force's report at **Annex 2**, is that legal advice privilege may need to be limited where disclosure or testimony is sought directly from law offices or lawyers, to avoid conflict with national laws that give counsel the right and obligation to preserve professional secrecy even when their clients have consented to disclosure. Limitations may also need to be foreseen for the case of crime or fraud, and in situations where the lawyer may also have a business role (for instance, by sitting on the company's board) and is not providing legal advice.

Further, considering that there are significant differences between jurisdictions with respect to the way legal advice is protected from disclosure, the Privilege Task Force has identified 16 questions that will likely need to be studied to develop uniform guidelines on legal advice privilege. Those questions speak to the potential: (i) applicability of the uniform guidelines; (ii) scope of their protection; (iii) circumstances constituting waiver of their protection; and (iv) use of privileged documents obtained elsewhere.

## ***B. Legal Proceedings/Litigation Privilege***

This category of privilege generally refers to a confidential communication made between either the client or his/her legal adviser and a third-party (such as a factual witness or expert), where such communication is made in connection with pending or contemplated litigation – for example, to assist with providing legal advice in relation to the proceedings or obtaining evidence to be used therein.

Even though the IBA Rules do not expressly refer to litigation privilege, the rationale for this privilege in national litigation applies equally in international arbitration, namely: to further access to justice; to ensure

the proper administration of justice; to facilitate a fair trial; and to promote equality of arms. The Privilege Task Force has thus considered it relevant to study this category of privilege for purposes of this report.

The Privilege Task Force's study on litigation privilege is attached at **Annex 3**.

The Privilege Task Force's study confirms that litigation privilege is recognized across many jurisdictions, with a common trait in all studied jurisdictions being its rationale: a litigant or prospective litigant should be able to prepare properly for legal proceedings by having confidence that it can rely on third party communications without others subsequently examining those communications and, potentially, using them against the litigant.

Four conditions appear to be shared across jurisdictions to define when this privilege is applicable. Specifically, there must be a communication:

1. Between the counsel (acting in a professional capacity) and the client, or between them and a third party (or be a document created by or on behalf of the client or the client's lawyer);
2. Made for the dominant purpose of legal proceedings;
3. Related to legal proceedings that are either pending (commenced) or reasonably contemplated; and
4. That is confidential (either expressly or presumed).

In addition, as with legal advice privilege (discussed above), there also appears to be a common view that, in the case of litigation privilege:

1. Protection should not extend to communications that involve criminal or wrongful activity;
2. Protection can be waived by disclosing what would otherwise be a protected communication; and
3. Questions of public order would not be a bar to the application of a privilege rule different from those existing in national jurisdictions.

The Task Force considers that there are sufficient commonalities between jurisdictions to conclude that a uniform privilege guideline with respect to litigation privilege is possible, particularly as there appears to be no public policy bar to adopting such a guideline.

At this stage, the Privilege Task Force's analysis was focused on England and Wales, Singapore, the United States, Sweden, and India. Further analysis would need to be carried out to consider whether other jurisdictions follow *prima facie* the same rules as those discussed above, and to confirm the scope that those rules should have in international arbitration.<sup>17</sup> The Privilege Task Force thus recommends that an expanded task force carry out this work, with a view towards developing a uniform rule for litigation (arbitration) privilege.

### **C. Public Interest Immunity**

Public interest immunity generally allows the government or other public authorities to withhold certain information from disclosure in court or other legal proceedings if its release would be contrary to the

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<sup>17</sup> For instance, the scope of this privilege could include or exclude regulatory and other contentious administrative proceedings, and advice given in the context of internal compliance investigations and efforts.

public interest. Deliberative/cabinet privilege generally protects communications of high-level decision makers entrusted with determining and implementing policy decisions on behalf of the government or other functions associated with the drafting or implementation of laws.

The Privilege Task Force notes that this category of privilege, to a certain degree, overlaps with Article 9(2)(f) of the IBA Rules, which provides that evidence can be excluded from production on ‘*(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling*’. However, certain privilege rules in relation to public interest, national security, etc., may equally fall under Article 9(2)(b) of the IBA Rules, and it therefore seems appropriate to consider them under that category, as well.

The Privilege Task Force’s study on public interest immunity is attached at **Annex 4**.

The study suggests that while public interest privilege almost always exists in some form across jurisdictions, it varies widely as to its scope and applicability. In this respect, the Privilege Task Force has found that the differences between jurisdictions are often fundamental with respect to: (i) who can assert this privilege (in some jurisdictions, it is only the head of the relevant Government department that can assert the privilege; in other jurisdictions, it can be the Government official themselves who can assert this privilege); (ii) who determines whether the privilege can be asserted (in some jurisdictions, it is the court that assesses the information/ document before determining whether the privilege can be asserted; in other jurisdictions, the Government official themselves cannot be compelled to disclose communications); and (iii) what categories of public interest are covered (for example, affairs of the State; cabinet confidences; communications made in official confidence; communications on national security, political or institutional sensitivity; police matters, such as protection of threatened individuals).

Not only are there wide differences in the scope and application of the privilege across jurisdictions, but there are also significant public policy considerations at play. The Privilege Task Force’s study has noted that States consider public interest immunity to be such a crucial protection that it is mostly enacted through legislation/statute. In light of these public policy concerns, the Privilege Task Force has noted that arbitral tribunals generally evaluate claims of public interest immunity on a case-by-case basis, taking into account the relevant governing laws, the significance of the information and the competing social interests involved, leading to the Task Force to query whether the privilege should simply follow the applicable law of the relevant State to which the document/information belongs.

**The Task Force thus concludes that while it may be desirable to develop a uniform privilege guideline with respect to public interest immunity because the concept generally exists across jurisdictions, doing so would be difficult because of the wide differences in its scope and application, if not impossible due to public policy concerns. The Task Force thus recommends that uniform guidelines not be elaborated on this category of privilege.**

#### ***D. Without Prejudice/Settlement Privilege***

This category of privilege generally excludes evidence of negotiations containing admissions against a party’s interests when those negotiations were aimed at the settlement of a dispute between the parties to those negotiations.

The IBA Rules acknowledge that settlement privilege may be relevant in international arbitration proceedings. Specifically, the IBA Rules provide in Article 9.4(b) that, '[i]n 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 [...] **any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations**' (emphasis added).

The Privilege Task Force's study on settlement privilege is attached at **Annex 5**.

The study suggests that settlement privilege is desirable, in that it may serve a useful purpose in prompting parties to engage in good-faith settlement negotiations and avoid protracted and expensive arbitrations.

However, after analyzing the national laws on settlement in eight jurisdictions from civil and common law backgrounds (England and Wales, Singapore, France, Germany, Switzerland, Italy, and Japan), the study reaches the conclusion that a uniform rule on settlement privilege may not be possible because, as a creature of common law systems originating from England and Wales, it is rarely addressed and developed in civil law jurisdictions.

This being said, the study points out that certain civil law jurisdictions have mechanisms akin to settlement privilege. For instance, in France, the Netherlands, Portugal, Russia and, in rare circumstances, Germany, communications between opposing attorneys are subject to privilege and protection from disclosure – in some circumstances, even to their client.

Further, although settlement privilege may not exist as a concept across civil law jurisdictions, it is arguably already a well-established concept in international arbitration. This is reflected in the IBA Rules' express reference to settlement privilege (set forth above).

Accordingly, **considering that (i) a uniform privilege guideline with respect to settlement privilege is desirable, (ii) settlement privilege is recognized in international arbitration, and (iii) there appears to be no public policy bar to adopting a guideline on settlement privilege, the Task Force recommends that uniform guidelines be developed with respect to settlement privilege**, subject to the reservations/suggestions set forth in the study attached at **Annex 5**.

### ***E. Common Interest Privilege***

This category of privilege generally allows parties with a shared legal interest to share information with each other without waiving other types of pre-existing privilege (*e.g.*, attorney-client privilege). Where the information shared is concerned either with the subject matter of the common interest or a litigation related to the common interest, the party sharing the information does not lose the right to assert privilege over it (except against the party with whom it is shared). The party with whom the communication is shared can also assert the same privilege against a third party.

As such, common interest privilege is not as much a freestanding form of privilege, as it is an exception to the general rule that disclosure of a privileged document shall result in the waiver of privilege over that document. In other words, more than a new category of privilege, common interest privilege is a development in case law in certain jurisdictions that enables parties to share material that is already

privileged with third parties with whom they have a requisite common interest, and to do so without waiving privilege.

The Privilege Task Force's study on common interest privilege is attached at **Annex 6**.

The Privilege Task Force has found that, in the jurisdictions where it operates, common interest privilege is usually justified by the same rationale, which is to improve the free flow of communication and the quality of legal advice. In particular, common interest privilege enables the free flow of information in situations where persons wish to, for example: (i) ensure that mutually beneficial advertising is not misleading; (ii) apply for patents; (iii) conduct due diligence; (iv) avoid liability to prevent a lawsuit; (v) ease interactions between principals / agents, (re)insurers / (re) insureds, creditors / liquidators, and entities within a group of company structure; or (v) in the context of a litigation, exchange documents between one group of clients and their counsel and another group of clients and their separate counsel.

However, and crucially, those commonalities are overshadowed by vast differences between jurisdictions. Common interest privilege is not uniformly applied across jurisdictions, and appears to be confined to common law jurisdictions. Its presence in these jurisdictions appears to be, at least in part, a balance to the broad approach to adversarial document production often featured in those same jurisdictions; in particular, the existence of common interest privilege may be seen to counteract the chilling effect that such document production processes could otherwise have on dissemination of information.

In jurisdictions in which common interest privilege is not found, it is frequently the case that privilege exists pursuant to the *obligations* and / or *rights* of the custodians of information. In such jurisdictions, third parties generally cannot assert privilege over information even if it is shared with them (i) by a person who can assert privilege, (ii) confidentially, (iii) pursuant to a common interest.

Defining rules for common interest privilege in international arbitration that would meet users' expectations across jurisdictions would therefore prove difficult. The interplay between any rules applicable in international arbitration and local regulations applying to attorneys would also likely raise complex issues.<sup>18</sup>

**In this context, the Task Force's conclusion is that while it may be desirable to ensure that there is some kind of level playing field in relation to common interest privilege in international arbitration, it is currently difficult to conclude that there should be a stand-alone uniform rule applicable to common interest privilege.**

However, it may be worthwhile to carry out further study as to whether and to what extent the concept should be addressed in the context of exceptions to the application of the uniform guidelines. As such, the uniform guidelines could provide, for instance, that privilege in relation to privileged documents will not be deemed to be waived for the purpose of the arbitration, or related arbitrations, in circumstances where they are shared with third parties with a common interest.

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18 The Task Force's study has also pointed out that the IPBA Guidelines on Privilege and Attorney Secrecy in International Arbitration did adopt rules in relation to common interest privilege, noting that the common interest privilege 'may be seen as a subset of legal professional privilege', and stating that their aim was to prescribe a '*minimum norm or set of rules which not only is workable and certain, but also acceptable to the large majority of arbitration users across the world*' (IPBA Guidelines on Privilege and Attorney Secrecy in International Arbitration, <https://ipba.org/publications/ipba-privilege-guidelines/211/>, last visited on 3 October 2023; the quoted language appears in the Commentary to Article 2, on p. 24).

## *F. Privilege against Self-Incrimination*

This category of privilege generally allows individuals to refuse to answer questions or provide evidence that could incriminate them. Most commonly, this privilege prevents criminal defendants from being compelled to testify against themselves and allows a witness not to answer a question that may subject them to criminal prosecution.

Although this category of privilege is mainly concerned with criminal proceedings, in recent years, the privilege against self-incrimination has been used by parties to international commercial and investment arbitrations to defend claims involving criminal offences (such as bribery, corruption, fraud and money laundering) and proceedings before regulatory authorities. As this category of privilege has become relevant in international arbitration, the Privilege Task Force has decided to study it for purposes of this report, even though the IBA Rules do not mention it.

The Privilege Task Force's study on privilege against self-incrimination is attached at **Annex 7**.

The Privilege Task Force's study confirms that, while the right to remain silent is widely known across jurisdictions in the context of criminal proceedings, attitudes among jurisdictions on the availability of the privilege against self-incrimination in civil procedures and arbitrations are far from unanimous.

What is more, to the extent that attitudes converge across jurisdictions regarding the privilege in civil proceedings, it is normally to limit the privilege's application. For instance: (1) when witnesses refuse to answer an incriminating question, they may be required to make explicitly clear that they are claiming the privilege, and mere silence may be insufficient to establish so; (2) a blanket assertion of privilege is not sufficient to refuse producing any documents or testimony, as the privilege against self-incrimination applies only where there is a risk of incrimination, which risk does not depend on the witness's assertion but on the judge's review; (3) the privilege against self-incrimination is not absolute and may be abrogated by statute; and (4) the privilege against self-incrimination does not prevent the adjudicator from considering a witness's refusal to answer probative evidence offered against him in assessing the evidence and drawing adverse inferences against the witness as a result.

Further, privilege against self-incrimination is considered a fundamental constitutional right in certain jurisdictions. It follows that an arbitral tribunal that ignores or fails to apply the local rules of the privilege against self-incrimination may run the risk of jeopardizing enforceability of an award if a domestic court determines that local public policy requires the application of privilege law in relation to the privilege against self-incrimination.

**The Task Force concludes that it is not possible to formulate uniform rules of the privilege against self-incrimination in the context of international arbitration, considering the disparate views taken across jurisdictions and public policy concerns that may bar their application.**

\* \* \*

In conclusion, the Privilege Task Force is of the view that **uniform privilege guidelines are possible with respect to three categories of privilege**: legal advice privilege, legal proceedings privilege, and settlement privilege. However, other categories of privilege – *e.g.*, public interest privilege or privilege against self-



incrimination – do not lend themselves to uniform privilege rules or may better be examined in the context of waiver (*e.g.*, common interest privilege).

With respect to those categories of privilege that do not lend themselves to uniform guidelines, the Privilege Task Force reiterates its conclusion at the end of Section I above, namely, that **a uniform choice-of-law guideline should be developed**, so that the rules applicable to those categories of privilege may be determined with increased clarity and consistency.

### III. Next Steps: Need for the Constitution of an Expanded Task Force

In light of the discussion in the preceding sections, the Privilege Task Force concludes that the IBA Arbitration Committee should consider adopting:

1. Uniform guidelines with respect to three categories of privilege, along with exceptions to their application; and
2. A uniform choice-of-law guideline to:
  - Complement the uniform guidelines when dealing with categories of privilege beyond the uniform guidelines; and/or
  - Serve as an alternative to the uniform guidelines, if and when parties prefer clarity on a choice-of-law mechanism, rather than systematically referring to a standalone set of rules.

With respect to (1) – adopting uniform guidelines on, and exceptions to, legal advice, litigation, and settlement privilege – the Privilege Task Force notes that other studies on privilege have also led to the recognition of these three categories of privilege.<sup>19</sup> However, the IBA Arbitration Committee should carry out its own assessment of the application, scope, content, and exceptions to those three categories of privilege. Indeed, the issues addressed and questions raised in the studies annexed to this report may lead to different conclusions and approaches.

With respect to (2) – adopting a uniform choice-of-law guideline – the Privilege Task Force carried out studies of how arbitral tribunals choose applicable privilege rules in international commercial and investment arbitrations (attached at **Annexes 12** and **13**). These studies have confirmed that the current manner in which choice-of-law is approached lacks clarity and consistency. The Privilege Task Force is thus of the view that the IBA Arbitration Committee should analyze whether one of the choice-of-law rules commonly used to date (see Section I above and **Annexes 12** and **13**) provides the most clarity and consistency on this issue, or whether a new rule, for instance combining several common tests,<sup>20</sup> might be best suited. Of course, other options could also be possible, such as different choice-of-law rules for different categories of privilege, or soft guidelines to aid arbitrators and parties to determine a particular privilege’s applicability. (For instance, in the study attached at **Annex 7**, the Privilege Task Force has suggested that it might be of interest to formulate soft guidelines for arbitral tribunals to consider when

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19 See, for instance, IPBA Guidelines on Privilege and Attorney Secrecy in International Arbitration, <https://ipba.org/publications/ipba-privilege-guidelines/211/>, last visited on 3 October 2023.

20 See, for instance, K. P. Berger, ‘Chapter 13: Evidentiary Privileges’, in F. Ferrari and F. J. Rosenfeld (eds), *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues*, Kluwer Law International 2022, pp. 301-303.

seized of a privilege against self-incrimination claim (*e.g.*, employing a balance of interest test to determine the privilege's applicability).)

To carry out the work necessary to accomplish points (1) and (2), the Privilege Task Force suggests constituting an expanded task force. The current Privilege Task Force consists of 15 people from the major arbitration centers. We recommend enlarging the task force to have more manpower, diversity of thought, and regional diversity. As a benchmark for recent IBA Arbitration Committee projects, the task force constituted to revise the 2014 Guidelines on Conflicts of Interest was composed of over 50 people from all continents and areas of arbitral practice (counsel, arbitrators, academics, experts, third-party funders, in-house counsel).



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