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# The IBA Task Force on Privilege in International Arbitration: Taking on the "Pick and Mix" Approach

Hélène Taberlet, Isabella Cannata (LALIVE) · Saturday, June 15th, 2024

In September 2021, the IBA Arbitration Committee launched a task force to assess whether uniform rules on privilege are desirable or feasible. The task force published its report in February 2024 (the "Report"). The Report concludes that uniform standards are indeed desirable, but only possible for some categories of privilege. For other categories, and as generally applicable, the task force recommends a uniform choice-of-law guideline.

Below, we examine the current state of play and how the task force's recommendations could have a positive impact, improving the fairness and efficiency of arbitration proceedings.

**A Brief Round-Up of the Current Position**

Issues of privilege are regulated in different ways in different legal traditions: the notion of privilege is typical of common law systems, but unknown, as such, in civil law systems. And within the two legal traditions, each jurisdiction has its own nuances on how privilege is dealt with.

In international arbitration, parties from different jurisdictions may have radically different expectations as to which documents are privileged and which are not. Moreover, in an international arbitration proceeding, where the documents, communications and players are from everywhere, it is not obvious which laws of privilege apply. This leads to what the Report describes as a "pick and mix approach."

Far-sighted parties may specify rules governing privilege in the underlying arbitration agreement. A tribunal might also try to define the rules of privilege in Procedural Order No. 1. However, the more likely scenario is that a tribunal must attempt to navigate the choppy waters of privilege (usually when called to decide on document production requests) without either of these frameworks.

As the task force points out, institutional rules and arbitration laws provide little guidance. None of the ICC, LCIA or UNCITRAL rules address the question of privilege, nor does the UNCITRAL Model Law. Indeed, in her 2017 book on "Attorney-Client Privilege in International Arbitration," Annabelle Möckesch observes that, "[t]here appears to be no national arbitration legislation which expressly mentions the issue of privilege." Only Article 25 of the ICDR Rules (2021) provides substantive guidance, stating that when parties are subject to different rules of privilege, the

Tribunal shall apply the rules that would give the highest level of protection. It has been suggested that this standard should always be applied when dealing with conflicting privilege regimes as it achieves fairness and protects the expectations of both parties.

The IBA Rules on the Taking of Evidence only include a handful of provisions on privilege. And, in the words of the IBA task force, "they are of no assistance since they provide no guidance in this respect." Although Article 9.2(b) states that tribunals may exclude from evidence or document production documents covered by privilege, it leaves the choice of the applicable rules to the discretion of the arbitral tribunal. Article 9.4 provides some guidance to tribunals in exercising such discretion, directing them to take into account, among other broad considerations, the "expectations of the Parties … at the time … privilege is said to have arisen" (Article 9.4(c)) and "the need to maintain fairness and equality between the Parties" (Article 9.5(e)).

Faced with such wide discretion, what do the tribunals do? The Report describes tribunals adopting varying approaches to determine which rules of privilege to apply. There is the "most favoured nation" approach, which resembles Article 25 of the ICDR rules and seeks to uniformly apply the most protective privilege rule. By contrast, the "least favoured nation" approach seeks to uniformly apply the least protective rules. The "connecting factor test," for its part, seeks to determine the closest connection between a situation of privilege and relevant laws. And, last, there is the "closest connection" test, which is used to determine one single law to govern all claims of privilege in a particular case.

The outcome of these various and contradicting approaches is a lack of certainty and predictability for tribunal decisions on privilege. Parties may not know where they stand and/or may have very different expectations when an arbitration starts, or when specific issues of privilege arise during the arbitration. To adopt the sporting analogy used by one commentator, teams risk turning up equipped to play altogether different sports, with the tribunal left attempting to act as referee.

## The IBA Task Force's Proposals

Based on this status quo and on the interest expressed by the arbitration community, the Report concludes that uniform privilege guidelines are desirable. It then embarks on the cumbersome task of assessing whether uniform guidelines are in fact possible, examining six categories of legal privilege. It concludes that three of them have enough in common across jurisdictions that they could be uniformed. These are legal advice privilege, legal proceedings/litigation privilege and without prejudice/settlement privilege. For each of these categories, the Report finds that there are no public order rules that would prevent uniform guidelines in international arbitration.

### *Legal Advice Privilege*

The task force reviewed information from 24 civil and common law jurisdictions and found that legal advice privilege is governed by universally accepted principles, albeit with some significant differences. On this basis, the Report determines that uniform guidelines on legal advice privilege are possible. It then identifies the questions that a future committee should address to create uniform guidelines, as well as possible carve-outs to account for irreconcilable discrepancies. The Report concludes that legal advice privilege is in fact already established practice in international arbitration (see Article 9.4(a) of the IBA Rules). The work required for uniform guidelines appears to be well on its way.

***Litigation Privilege***

The task force found common rationales for litigation privilege across jurisdictions, rooted in principles such as access to justice, proper administration of justice, fair trial, and equality of arms. The Report therefore concludes that, subject to further analysis, there are sufficient commonalities among jurisdictions to develop a uniform rule for litigation privilege, to at least embody a minimum standard (for example, an "arbitration privilege").

***Settlement Privilege***

The task force found that the notion of settlement privilege does not exist in civil law countries, although comparable mechanisms protect communications between opposing counsel. However, since settlement privilege is already an established notion in international arbitration (see Article 9.4(b) of the IBA Rules), the Report concludes that—despite the fundamental difference between civil and common law countries—uniform guidelines should be attempted.

***Further Categories of Privilege***

The task force considered three further categories of privilege—public interest immunity, common interest privilege and privilege against self-incrimination—but concluded that it is not currently feasible to create uniform guidelines. For these categories, the Report concludes that a uniform choice-of-law guideline is desirable as an alternative to uniform guidelines. This uniform choice-of-law guideline would also increase certainty and predictability where parties do not wish to refer to uniform guidelines in other areas.

**What Next?**

Uniform guidelines for the three categories of privilege are challenging to produce. While the creation of additional soft law instruments is not a silver bullet, the uniform rules that the IBA is proposing might well assist parties in navigating the complexity of privilege issues.

To remain practical and usable, the guidelines will need to be less exhaustive than national legislation, case law, or bar rules on privilege. As such, they will inevitably have gaps or, as the Report foresees in the case of legal advice privilege, contain important carve-outs. These will reflect the significant differences that will remain in how parties understand privilege.

Will these gaps or carve-outs diminish the usefulness of uniform guidelines?

This does not seem likely—especially as the Report suggests a solution to live with them while still improving the predictability of decisions. Indeed, the task force has flagged the need to create a uniform choice-of-law guideline, to cover categories of privilege not included in the uniform guidelines, or to apply where parties choose not to refer to the uniform guidelines. This uniform choice-of-law guideline could also be helpful in deciding specific questions that the privilege guidelines will not cover. For example, should a tribunal be called to decide whether in-house counsel communications are privileged, it could turn to a clear choice of law for resolving any uncertainty.

With more certainty on which law applies, specific issues of privilege could be decided in a more predictable, efficient, and (ultimately) fair way. We look forward to the IBA Arbitration Committee's next steps on this.

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