IPBA Guidelines

on Privilege and Attorney Secrecy in
International Arbitration

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FOREWORD

In September 2014, the then IPBA President William Scott, at the IPBA Mid-Year Council Meeting in Rio de Janeiro, appointed the undersigned to form a working group to look into the vexed area of the vastly different approaches to privilege and attorney secrecy adopted in common and civil law jurisdictions.

The team spent considerable time reviewing the prevailing position in different jurisdictions and formulated a working framework. Work on this project progressed with deliberations of the framework over several IPBA Annual Conferences (Auckland 2017, Manila 2018, Singapore 2019), with the helpful coordination of Eckart Brödermann (Germany) and Bernhard Meyer (Switzerland). We are thankful to the many lawyers from both legal traditions who contributed in the various substantive sessions and played a vital role in shaping the deliberations.[1]

The team considered various approaches to harmonising the divergent perspectives of privilege and attorney secrecy in international arbitration. The Guidelines seek to remove the grave uncertainty presently existing in the potential competing applicability of privilege or attorney secrecy in international

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[1] During the course of 5 years dedicated to the conception, discussion and drafting of the IPBA Guidelines on Privileges and Attorney Secrecy, **approximately 90 lawyers** have been involved worldwide. In addition to the 11 members of the Steering Committee and 4 members of the Resource Committee, more than 70 lawyers from 24 jurisdictions and 5 continents have contributed.

Beyond the Steering Committee and the Resource Committee, the following persons contributed to the discussions in Auckland, Manila and/or Singapore or generally (enumerated by jurisdiction):

(i) from civil law jurisdictions: **China:** Zhengzhi Wang; **Costa Rica:** Mauricio Salas; **Germany:** Björn Etgen; Sebastian Kühl; Torsten Lörcher; Lars Markert; Anton G Maurer; Axel Reeg; Dorothee Ruckteschler; **Indonesia:** Theodoor Bakker; **Japan:** Aoi Inoue; Yoshimasa Furuta; Hiroki Kodama; Masafumi Kodama; Shiro Kuniya; Miriam Rose Ivan L. Pereira; **Poland:** Justyna Szpara; **Switzerland:** Michael Cartier; Urs Weber-Stecher; **South Korea:** Sae Youn Kim; SeungMin Lee; **Spain:** Omar Puertas (practising in China); **Taiwan:** Angela Lin; Christopher Kao; **Vietnam:** Net Le; Tran Thai Binh; Bui Ngoc Hong; Huong Nguyen; Huyen Nguyen; Nguyen Xuan Thuy;

(ii) from common law jurisdictions: **Australia:** Paul Hayes; Wayne Martin; Robert Newlinds; **Bangladesh:** Arif Hyder Ali (practising in USA); **England:** Ravi Aswani; Jonathan Bellamy; Juliet Blanch (until 2016: Co-Chair, International Dispute Resolution and Arbitration Committee); Kushal Gandhi; Jeffrey Holt; Peter Leaver; Stephen Moriarty; Leigh-Ann Mulcahy; Stephen Nathan; Angus Rodger; David Brynmor Thomas; Jonathan Wood; **Hong Kong:** Peter Caldwell; Jonathan Crompton; Sumarsono Darsono; Robert Rhoda (as of 2018: Co-Chair, International Dispute Resolution and Arbitration Committee); David Smyth; **India:** Prateek Bagaria; Shweta Bharti; Vyapak Desai; Neerav Merchant; **Malaysia:** Cecil Abraham; Lam Ko Luen; **New Zealand:** Laura O'Gorman; **Singapore:** Allen Choong; Chen Han To; Lee Suet-Fern; Asya Jamaludin; Michael Hwang; Steven Y H Lim; Lok Vi Ming; Andrew Pullen; Ajinderpal Singh; Ong Boon Hwee William; Mohan Pillay (until 2018: Co-Chair, International Dispute Resolution and Arbitration Committee); **United States of America:** Thomas Allen; Dino T. De los Angeles; Susan Munro (practising in China); Patrick Norton;

(iii) from hybrid jurisdictions: **Brunei:** Colin Ong; the **Philippines:** Ben Dominic R Yap; **United Arab Emirates:** Alec Emmerson.

There are numerous others who contributed to the development of these Guidelines. We apologise for not being able to acknowledge all individually.

arbitrations having elements of both traditions. The uncertainty arises principally from the lack of clear guidance on how the choice of the applicable principles are to be made. Arbitral tribunals sometimes apply a conflict of law test to determine the particular privileges or attorney secrecy regime that should apply. Which conflict of law test should one apply?[2] The second level of uncertainty relates to how the tribunal will apply any given test in a particular case.[3]

The approach adopted by the Guidelines is to avoid a conflict of law approach and instead to promulgate a transnational standard acceptable to both common and civil law lawyers.

The Guidelines also allow a party to rely upon mandatory privileges or secrecy obligations applicable to it. Finally, the framework seeks to ensure that any regime is equally applicable to the other party (or parties) as well, in the interests of a level playing field.

It is hoped that the adoption of these Guidelines will allow for certainty and predictability to this important area of arbitral practice.

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[2] There are various perspectives on choice of law tests — the closest connection test, the lowest common denominator in protective standards, or even broad-brush approaches based on equality and the reasonable expectations of parties. See Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at 802–805. The tests are fundamentally different. For example, the closest connection test contemplates a broad range of factual circumstances and factors in its decision, whereas the approach using the lowest common denominator in protective standards seeks to apply more normative justifications and rationales underlying the privilege to determine the applicable law. See Meyer, "Time to Take a Closer Look: Privilege in International Arbitration", *Journal of International Arbitration* (2007) 24(4).

[3] For example, there is an evident lack of clarity in the application of the closest connection test: the range of relevant factors (e.g. domicile of the party or counsel, place where document was drafted, etc.) varies among commentators, resulting in further inconsistency in the conflicts approach. See Waincymer at 802.

An example of such an approach is found in the ALI / UNIDROIT Principles of Transnational Civil Procedure, which are expressed to be "standards for adjudication of transnational commercial disputes" that can be adopted by the states. Article 18 provides that:

> *"Effect should be given to privileges, immunities, and similar protections of a party or nonparty concerning disclosure of evidence or other information. The court should consider whether these protections may justify a party's failure to disclose evidence or other information when deciding whether to draw adverse inferences or to impose other indirect sanctions. The court should recognize these protections when exercising authority to impose direct sanctions on a party or nonparty to compel disclosure of evidence or other information."*

The commentary to Article 18 recognises that *"in applying such rules choice-of-law problems may be presented"*.

The Working Committees

The IPBA Guidelines and Commentary are the product of the work of two committees, as well as of the deliberations during the IPBA Annual Conferences carried out with the participation and support of the IPBA Dispute Resolution and Arbitration Committee.

The Steering Committee

In the Steering Committee, there was balanced participation of practitioners from both civil and common law backgrounds.

1. Andrey Gorlenko (Russia)
2. Felix Dasser (Switzerland)
3. Gerhard Wegen (Germany)
4. Hiroyuki Tezuka (Japan)
5. Mohanadass Kanagasabai (Malaysia)
6. Nicholas Peacock (England & Wales)
7. Richard Briggs (United Arab Emirates)
8. Sumeet Kachwaha (India)
9. Bernhard Meyer (Switzerland) – Committee Coordinator
10. Eckart Brödermann (Germany) – Committee Coordinator
11. Francis Xavier SC (Singapore) – Chair

The Resource Committee

The Resource Committee prepared the working materials and first drafts of the IPBA Guidelines for the Steering Committee's review and comments. While the majority of the members of the Resource Committee are from common law jurisdictions, this was balanced by the Steering Committee comprising a majority of civil law practitioners.

1. Ching Meng Hang (Singapore)
2. Elisabeth Leimbacher (Switzerland)
3. Lee Chang Yang (Singapore)
4. Olga Boltenko (Hong Kong)

The Plenary Discussions

Great care was taken throughout to ensure that the discussions included equal contribution from civil and common law jurisdictions. At the extensive roundtable discussion during the 2017 IPBA Annual Conference in Auckland (organised by the Dispute Resolution and Arbitration Committee), each table was co-chaired by a common law and a civil law practitioner.[4] The results of the discussion in Auckland were published in the IPBA Journal, which opened the discussion to all IPBA members.[5] At the 2018 and 2019 IPBA Annual Conferences in Manila and Singapore, IPBA workshops were held on the draft IPBA Guidelines and Commentary. About fifty IPBA members were divided in groups of about equal size between common and civil law lawyers – sitting on opposing sides in the room – actively discussing drafts circulated during the weeks before the sessions.

I would like to acknowledge the contribution of the panellists and participants in the IPBA conferences which provided invaluable input on the issues and potential solutions which were considered in the Guidelines, others who submitted their comments in writing, and those who have assisted the Committee in various ways.[6]

Francis Xavier SC
President, IPBA
Singapore, 13 October 2019

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[4] A summary of the discussions in Auckland can be found in the IPBA Journal: Eckart Brödermann / Robert Rhoda, Overcoming Conflicts with regards to Privilege: is a Universal Approach Desirable or even Attainable?, IPBA Journal 2017 (no. 86), p. 21-27 (available online at https://ipba.org/media/normal/3326_IPBA_Jun17_Final.pdf).

[5] IPBA Journal 2017 (no. 86), p. 21, 27.

[6] Zara Shafruddin (Singapore), Saloua Ouchan (Netherlands), Jorian Hamster (Netherlands), Tee Su Mien (Singapore), Sarah Hew (Singapore), Ang Tze Phern (Singapore) and Jeremiah Lau (Singapore).

IPBA GUIDELINES

ON PRIVILEGE AND ATTORNEY SECRECY

IN INTERNATIONAL ARBITRATION

Definitions

In these IPBA Guidelines on Privilege and Attorney Secrecy in International Arbitration, the following capitalised terms shall bear the meanings as follows:

Arbitral Tribunal	a single arbitrator or a panel of arbitrators, including an emergency arbitrator
Arbitration	any form of arbitration procedure
Attorney Secrecy	the civil law duty of a Legal Advisor to maintain full secrecy about a client's affairs, even in a Legal Proceeding
Claimant	the Party who commences an Arbitration, including any Party who becomes affiliated with the first-mentioned Party through joinder, consolidation or otherwise
Guidelines	the present IPBA Guidelines on Privilege and Attorney Secrecy in International Arbitration as revised or amended from time to time
Information	any type of oral or recorded information and/or communication, including but not limited to that which is contained in documents, reports, statements, memoranda, emails, letters, pictures, drawings, programs, tapes, films or other data of any kind, regardless of the medium on which it is recorded or maintained
Legal Advisor	(a) any natural or legal person (by whatever name called) admitted to the bar or a legal profession in any jurisdiction who at the material time was or is providing Legal Services; or (b) any Person (by whatever name called) who at the material time was or is employed by a Party to undertake the provision of Legal Services or assistance to that Party (such as in-house counsel); or (c) any public officer who at the material time was or is employed by a governmental body to undertake the provision of Legal Services or assistance; or

	(d) any Person (by whatever name called) not yet admitted to the bar or legal profession in any jurisdiction, but who at the material time was or is undergoing a course of training, under the supervision of persons as defined in (a), (b) or (c), for the purposes of admission to the bar or legal profession in any jurisdiction; or (e) any assistant and/or auxiliary person employed, mandated and/or used by the above defined categories of Legal Advisors (a)-(d) when providing Legal Services
Legal Proceeding	any type of legal, civil, administrative, regulatory or criminal proceeding, investigation or inquiry, including litigation, mediation, adjudication and arbitration
Legal Services	the provision of legal advice by a Legal Advisor to any Person, including a Party in a Legal Proceeding, with or without compensation
Master of the Privilege or the Attorney Secrecy	the person which owns and/or can dispose of a Privilege or Attorney Secrecy
Party	a party to an Arbitration
Person	a Party, Legal Advisor, or any other natural or legal person involved in any way in an Arbitration
Privilege	the common law right of a Party protecting certain information against disclosure, even in a Legal Proceeding
Respondent	the Party against whom the Claimant commences an Arbitration, including any Party who becomes affiliated with the first-mentioned Party through joinder, consolidation or otherwise

In the Guidelines:

a. Words denoting the neutral gender shall include any gender;
b. The singular shall include the plural and vice versa; and
c. References to "Article" are to the articles of the Guidelines.

Article 1
Applicability

1. Where the Parties have agreed to apply the Guidelines, the Guidelines shall apply to all matters of Privilege and Attorney Secrecy in the Arbitration. In such a case, the Parties and/or their Legal Advisors thereby waive, for the purposes of the Arbitration, any and all waivable contradicting legal rules to which they may be subject otherwise, in favour of the application of the Guidelines.

2. Where the Parties have agreed to apply the Guidelines, the Parties shall be deemed to have agreed, in the absence of contrary indication, to apply the version of the Guidelines that is current on the date of the Parties' agreement.

3. In the absence of agreement between the Parties, the Arbitral Tribunal may draw inspiration from these Guidelines within its discretion to resolve matters of Privilege and Attorney Secrecy.

Article 2
Transnational Privileges and Attorney Secrecy Protection

The transnational Privileges and Attorney Secrecy protections set out in Articles 3, 4 and 5 shall be afforded to all Parties in an Arbitration alike.

Article 3
Legal Advisor Privilege and Attorney Secrecy Protection

No Person shall be bound to disclose in an Arbitration any Information created by or communicated between any Persons in the course of obtaining or providing Legal Services.

Article 4
Legal Proceedings Privilege and Attorney Secrecy Protection

No Person shall be bound to disclose in an Arbitration any Information created or communicated for the purpose of a Legal Proceeding, whether pending or reasonably in prospect. For the avoidance of doubt, such Information may be created by or communicated as between any of the following: (i) a Party, (ii) a Legal Advisor, and (iii) a third party.

Article 5
Settlement Privilege and Attorney Secrecy Protection

No Person shall be permitted to disclose in an Arbitration any Information created and communicated in the course of negotiations for the purpose of arriving at a settlement of any dispute or differences, save (i) where there is a dispute on whether a settlement has been concluded or (ii) where all parties to the actual or intended settlement have consented to the disclosure.

Article 6
Mandatory Provisions of Law

No Party and/or its Legal Advisor shall be bound to disclose in an Arbitration any Information that is protected from disclosure or must be kept secret, due to a non-waivable legal impediment or a mandatory provision of any applicable law.

Article 7
Equality of Arms

1. The full scope of any right or protection afforded to and exercised by any Party and/or its Legal Advisor under Article 6 shall equally be extended to all other Parties and/or Legal Advisors.

2. A Party which anticipates it will be subject to a non-waivable legal impediment or a mandatory provision of any applicable law in respect of a request or obligation to produce Information in the Arbitration:

    a. shall communicate this promptly to the Arbitral Tribunal and the other Party or Parties;

    b. shall not request such Information from the other Party even if the other Party at the outset would not be subject to such impediment or provision.

3. The Arbitral Tribunal may exclude any Information provided by a Party, or produced in response to a request to produce Information made by another Party, where the recipient is or would be subject to such an impediment or mandatory provision if a request to produce the Information was made to the recipient.

Article 8
Waiver

1. Subject to Article 6, any Privilege and Attorney Secrecy protection under Articles 3 and/or 4 may be waived, in total or partially, by the Master of the Privilege or the Attorney Secrecy by its express or implied consent.

2. For the purposes of Article 8(1), total or partial disclosure of protected Information shall not amount to a waiver of a Privilege or Attorney Secrecy protection, provided that:

   a. the disclosure is obviously inadvertent; and

   b. the Party and/or Legal Advisor claiming the Privilege and Attorney Secrecy protection takes reasonable steps to rectify the disclosure.

3. Any right or protection under Articles 6 and/or 7 may only be waived in accordance with the applicable law or rule giving rise to such mandatory right or protection.

Article 9
Illegality and Fraud

1. Privilege and Attorney Secrecy protection otherwise available under the Guidelines shall, by exception, not attach to Information created and/or communicated in furtherance of any illegal and/or fraudulent purpose.

2. Such exception may, however, only be considered by the Arbitral Tribunal if the requesting Party supports its application by prima facie evidence of such illegal and/or fraudulent purpose.

Article 10
Interpretation

These Guidelines should be interpreted autonomously, with due regard to their transnational character and to the need to promote uniformity in their application.

COMMENTARY

on the

IPBA GUIDELINES ON PRIVILEGE AND ATTORNEY SECRECY IN INTERNATIONAL ARBITRATION

This Commentary is to be read together with the IPBA Guidelines on Privilege and Attorney Secrecy in International Arbitration (**"IPBA Guidelines"**). Whenever a term is capitalised, it has the same meaning as defined in the IPBA Guidelines.

The issue of privilege and attorney secrecy in international arbitration has been described as a vexed one. Some of the issues arise from uncertainties in claims for privilege and attorney secrecy and considerations for equality of treatment in international arbitration. The IPBA Guidelines, published under the auspices of the Inter-Pacific Bar Association (**"IPBA"**), are intended to provide a practical and uniform solution to many of the problems faced by arbitration users by adopting a transnational standard replacing any non-mandatory and waivable local laws and rules of privilege and attorney secrecy.

Commentators have noted two competing policies that lie at the heart of the law of privilege and attorney secrecy. One is the promotion of the administration of justice, which requires that relevant and reliable evidence be placed before the tribunal; the other is the social interest in preserving and encouraging particular relationships, the viability of which is based on the confidentiality of communications. Clients, for instance, require the confidence that their instructions to their attorney will not be disclosed to adverse parties.[1]

Issues of privilege and attorney secrecy do not necessarily arise in an arbitration, but largely depend upon the extent to which document production, if any, is ordered. As has been aptly pointed out in the context of electronic document production:[2]

> *"There is no automatic duty to disclose documents, or right to request or obtain document production, in international arbitration, and the advent of electronic documents should not lead to any expansion of the traditional and prevailing approach to document production. Thus, requests for the production of electronic documents, like requests for the production of paper documents—to the extent they are deemed necessary and appropriate in any given arbitration—should remain limited, tailored to the specific circumstances of the case and subject to the general document production principles of specificity, relevance, materiality and proportionality."*

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[1] For example, see Reiser, "Applying Privilege in International Arbitration: The Case for a Uniform Rule", (2012) 13 Cardozo Journal of Conflict Resolution at 653, at 673-675; Shaughnessy, "Dealing with Privileges in International Commercial Arbitration", (1999-2012) Scandinavian Studies in Law 451 at 467.

[2] ICC Commission Report Managing E-Document Production, ICC Publ. 860-0, 2012, at 2.

There is a difference between the concepts of privilege and attorney secrecy on the one hand and confidentiality on the other. Confidentiality in international arbitration is not a question of document disclosure, but a question of ensuring that adequate safeguards are put in place, such that documents are not utilised outside the course of the arbitration or for collateral purposes. The IPBA Guidelines do not address the issue of confidentiality.

INTRODUCTION

An Uncertain Landscape

The current pitfall with privilege and attorney secrecy in international arbitration is the lack of clarity as to which of the potentially applicable concepts will be recognised and applied by arbitral tribunals.[3]

This uncertainty stems from characteristics of international arbitration as well as from the differences that exist in the concepts of disclosure and secrecy in countries around the globe.

As is often pointed out, international arbitration frequently involves parties, experts, lawyers and arbitrators from diverse legal traditions, cultures and backgrounds. Common law lawyers are accustomed to dealing with discovery issues and privilege in their home countries. Their civil law counterparts are generally not subject to disclosure duties, though they need to observe attorney secrecy obligations, arising from relevant statutory provisions, that are often unfamiliar to common law lawyers. As such, the expectations of parties in an arbitration as to discovery, privilege and secrecy may often be out of sync due to the lack of harmonisation. National rules on privilege and attorney secrecy protection are usually tailored to fit domestic disclosure regimes.

In addition, the mindset and focus behind the issue of legal protection may be different for common and civil law lawyers. What is regarded as a "privilege" (namely a right of a party) in common law jurisdictions tends to be regarded as a "duty

[3] As an illustration, see an arbitration case governed by the rules of arbitration of the Austrian Federal Economic Chamber, cited in Meyer-Hauser and Sieber "Attorney-Secrecy v Attorney-Client Privilege in International Commercial Arbitration" (2007) 73 Arbitration 148 at 169-170, where one party relied on common law privilege, the tribunal rejected the applicability of the common law privilege on the basis that there was no sufficient connection to common law, and applied civil law principles of disclosure and due process instead.

of secrecy" (namely the obligation of an attorney) in civil law jurisdictions. For common law trained lawyers the *client* owns the privilege. In contrast, civil law trained lawyers tend to concentrate on the secrecy obligation of the *attorney*. Furthermore, the ambit of protection (e.g. the position of in-house counsel) and the concepts regarding the level of optimal disclosure in proceedings differ greatly.

It has been observed by civil law commentators that:[4]

> *"The issue of evidentiary privileges, in particular the conflict between different national concepts of attorney-related confidentiality, is almost natural in the context as multi-jurisdictional as international arbitration... the debate on the nature of evidentiary privileges may not be expected to lead to unanimous results in the near future."*

International arbitrations involve multiple sets of laws and/or rules, which may treat the issue of privilege and attorney secrecy very differently. There is the lex arbitri, the substantive law of the contract, the ethics and legal professional rules of the home states of the parties and their legal advisors, the procedural laws that the parties have agreed to apply to the arbitration, the law of the country of enforcement, and so on. There also exist very different approaches on how to determine which mandatory law(s) or rules are to be considered or applied when such an issue arise.

Take for instance the position of in-house counsel, for which divergent approaches are taken in civil and common law jurisdictions. The issue is illustrated in the following hypothetical scenario of an international arbitration which has been raised in legal literature,[5] where a US company refuses to produce documents prepared by its in-house counsel in response to a disclosure request by a Swiss company. Such an objection will be regarded as justified and commonplace at common law. Swiss parties and arbitrators, however, will take the view that there is no reason to refuse production since documents prepared by in-house counsel are not to be distinguished from documents prepared by other employees. This conflict is of immense practical relevance.

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[4] See Meyer-Hauser and Sieber at 171.

[5] See Meyer-Hauser and Sieber at 168–169.

Despite this significant difference in approach, arbitration users and tribunals have little guidance on which rules of privilege or attorney secrecy should be applied. They may look to the limited treatment of this subject in existing rules such as the IBA Rules on the Taking of Evidence (**"IBA Rules"**) for guidance. Article 9(2)(b) of the IBA Rules permits objections based on a "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable." As is apparent, the IBA Rules do not specify the rules that arbitral tribunals may or should apply when considering such objections.

Thus, it has been said that issues of privilege and attorney secrecy are often resolved by reference to conflict of law rules. This presents further problems – which conflict rules should the arbitral tribunal apply? Again, there is no consensus on this, and the answer is not always found in the arbitration law of the seat. For instance, it has been proposed that applying the law of the jurisdiction with which the document or communication is most "closely connected" is most likely to give effect to parties' expectations. This approach is not without its shortcomings. A case-by-case examination may be burdensome and cause practical difficulties especially if a large number of disputed documents are involved. There will also likely be a number of different connections resulting in multiple laws being considered within a single arbitral proceeding.[6]

A further question that is often raised is whether privilege should be treated as a matter of substance or procedure. Debate on this has been rife, and it is safe to say that there is no academic or judicial consensus on this matter.[7] The approach differs from jurisdiction to jurisdiction. Some even adopt the position that privilege or attorney secrecy is both a matter of substance and procedure, which does little to advance the debate either way.

For the purposes of the IPBA Guidelines, it is unnecessary to delve into this debate.

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[6] Reiser at pp 672-673.

[7] Sindler and Wüstemann, "Privilege across borders in arbitration: multi-jurisdictional nightmare or a storm in a teacup?" ASA Bulletin 23(4) (Association Suisse de l'Arbitrage, Kluwer Law International, 2005) 610 at 614–615, 623.

Equality of Arms and Mandatory Rules

It is universally recognised that parties to an arbitration must be treated with equality.[8]

The issue is, how do we maintain the equality of arms where the parties lay claim to different privileges or attorney secrecy protection under different applicable laws.

Further, how is the tribunal to preserve the integrity of the award and to prevent it from being successfully challenged at the enforcement stage, due to a failure to afford a party a certain privilege or attorney secrecy protection that may be deemed mandatory? This failure may be perceived as giving rise to a breach of public policy.

Moreover, how is the arbitral tribunal to ensure that counsel, being legal practitioners, do not fall foul of any legal or ethical duties in their home jurisdictions, by being compelled to disclose documents that should not be disclosed under mandatory provisions of law, or applicable professional or ethical rules? Swiss attorneys for instance are bound by Article 321 of the Swiss Criminal Code 1937 as well as ethical rules under Article 15 of the Swiss Rules of Professional Conduct 2005 to desist from disclosing any information entrusted to them by their clients whilst carrying out their professional duties unless relieved from their secrecy obligations by the client himself or the attorneys' supervisory authority.

The IPBA Guidelines are designed to resolve the issues outlined above and to provide an equal level playing field in the area of privilege and attorney secrecy.

Goal of the IPBA Guidelines

The IPBA Guidelines seek to provide a common perspective on privilege and attorney secrecy bridging both the civil and common law traditions.

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[8] For example, Article 18 of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) provides that, "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

While there is some criticism of an over-proliferation of para-regulatory texts (or soft laws as they are generally called), it has been recognised that such texts have a role in providing procedural predictability to parties and counsel in international arbitration.[9]

The Approach

It is recognised that the development of a uniform approach to privilege and attorney secrecy would be desirable in the light of the challenges described above. A 3-step approach is adopted in the IPBA Guidelines.

First, a set of transnational privileges and attorney secrecy guidelines acceptable to both common and civil law jurisdictions is proposed. These guidelines operate as independent grounds upon which parties can rely. It is hoped that this approach will engender clarity and predictability. The set of transnational privileges and attorney secrecy rules includes a Legal Advisor privilege/secrecy, a Legal Proceedings privilege/secrecy and a Settlement privilege/secrecy (Articles 3, 4 and 5 of the IPBA Guidelines).

Second, protection is extended to information that is not protected under the transnational privilege and attorney secrecy rules, but for which there is an imperative (non-waivable) legal impediment or mandatory provision of law preventing disclosure.

Third, where one of the parties avails itself of a privilege not otherwise available to the other party under the IPBA Guidelines (pursuant to the second step outlined above), the other party is allowed to avail itself of the same type and ambit of protection.

[9] Pitkowitz and Fremuth-Wolf, "Chapter VI. The Vienna Repositioning Propositions, The Vienna Repositioning Propositions Repositioning Actors And Actions In International Arbitration", in Klausegger, Klein, et al (eds), Austrian Yearbook on International Arbitration 2018 (Manz'sche Verlags- und Universitätsbuchhandlung, 2018) 209–266 at 213.

A REVIEW OF THE PROVISIONS

Article 1
Applicability

At the 2017 IPBA Annual Conference in Auckland, there appeared to be a broad consensus from participants from multiple continents and jurisdictions – both common and civil law – that every legal system has a form of privilege or attorney secrecy protecting from disclosure (i) communications passing between a lawyer and his client in the provision or consumption of legal services; and (ii) documents created for the purposes of legal proceedings. The civil law members involved were also of the view that the privileges provided under common law, while not articulated as such in civil law jurisdictions, have a functional equivalent in appropriate attorney secrecy protection in civil law jurisdictions.

Article 1 of the IPBA Guidelines therefore establishes the principle that where the Parties have agreed to apply the IPBA Guidelines, it shall replace any waivable rules on privilege and/or attorney secrecy to which the Parties and/or their Legal Advisors may otherwise be subject. For the avoidance of doubt, such waiver has no effect outside the arbitration proceedings or vis-à-vis other parties.

The decision to apply the IPBA Guidelines lies with the Parties. The Arbitral Tribunal is also free to propose the application of the IPBA Guidelines at the commencement of the arbitration. It is recommended that its adoption be raised at the procedural management conference which sets the scene of most international arbitrations.

In the absence of an agreement as between the Parties, the Arbitral Tribunal may nevertheless draw inspiration from the IPBA Guidelines in exercising its discretion to resolve matters of privilege and/or attorney secrecy in an international arbitration.

Article 2
Transnational Privilege and Attorney Secrecy Protection

Article 2 aims at ensuring that all Parties in an Arbitration are treated alike and thus enjoy a level playing field.

Articles 3, 4 and 5 set out the transnational Privilege and Attorney Secrecy protection that the Parties are entitled to rely upon in the Arbitration. Bearing this in mind, the aim is 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.

The Party in question will need to establish that one or more of the transnational Privileges and Attorney Secrecy protection set out apply on the particular facts of the case.

The IPBA Guidelines do not include a privilege against self-incrimination. It has been observed that:[10]

> *"The self-incrimination privilege is unlikely to be invoked outside the criminal context, unless it is on the basis that testifying in a proceeding could lead to a criminal prosecution elsewhere. This is unlikely to arise in international arbitrations as compulsory testimony is rare."*

As for common interest privilege, it may be seen as a subset of legal professional privilege and is addressed in Articles 3 and 4 of the IPBA Guidelines. As pointed out by a commentator:[11]

> *"...the doctrine of common interest privilege merely gives effect to the law's recognition that, in certain circumstances, the legal professional privilege of one party should be capable of being asserted by another party when those two parties share a common interest."*

[10] Ginsburg & Mosk, "Evidentiary Privileges in International Arbitration" in The International and Comparative Law Quarterly, vol. 50, no. 2 (April 2001), 345 at 383–384.

[11] Thanki QC, The Law of Privilege (2nd ed), at [6.36].

Article 3
Legal Advisor Privilege and Attorney Secrecy Protection

Article 3 sets out a transnational protection for Information communicated between Legal Advisors and the Parties they act for.

At the 2017 IPBA Annual Conference in Auckland, it became clear that each system of law has a version of privilege and/or attorney secrecy to protect from disclosure to the other side (i) advice from lawyers (and the documents created for getting that advice) and (ii) the documents created in a litigation passing between a lawyer and his client. This is also recognised in several commentaries.[12]

The beneficiary of the protection is a "Person", who is "*a Party, Legal Advisor, or any other natural or legal person involved in any way in an Arbitration*". Generally, in common law jurisdictions, the lawyer as well as his client may invoke the attorney-client privilege, whereas in civil law jurisdictions, only the lawyer and his support staff are subject to and must invoke attorney secrecy. The client normally has no right to refuse testimony or withhold a document, unless otherwise decided by the judge upon request. In light of the widely accepted scheme of document disclosure, particularly in common law, the view taken is that it is appropriate to confer protection on both the lawyer and the client, and to avoid the discretion permitted to some civil law judges in this regard, in the interest of certainty.

The protection from disclosure is not limited to legal advice in the narrow sense, but also applies to Information passing between a Legal Advisor and its client, provided that such communication is made in the course of providing or obtaining Legal Services. The protection provides confidence to the client to freely exchange information with the lawyer, so that the latter, being supplied with all necessary Information, may render appropriate legal advice and effective representation in furtherance of the administration of justice. In this context, regard has to be given to the purpose of the exchange of the Information as compared to the formality of whether Information was explicitly marked as "Privileged".

Only Information created or communicated in the course and for the purpose of providing or obtaining Legal Services would fall within the scope of Article 3. The protection does not extend to

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[12] Waincymer, Procedure and Evidence in International Arbitration (Kluwer Law International, 2012) at page 811 footnote 246, citing Hunter & Travaini, "Electronically Stored Information and Privilege in International Arbitration", in Ballesteros & Arias eds, Liber Amicorum Bernardo Cremades (La Ley, 2010), 615; Berger, "Evidentiary Privileges under the Revised IBA Rules on the Taking of Evidence in International Arbitration", International Arbitration Law Review 13(5) (2010), 173.

circumstances, for instance, where a Legal Advisor is consulted as a personal friend, or if the communications between a Party and its Legal Advisor are unrelated to the matters for which the Legal Advisor is engaged. A party may not shield documents in its possession merely on the ground that such documents had also been sent or copied to a Legal Advisor. Article 3 would, however, apply to a Legal Advisor who is not employed or retained by a Party if he has been consulted in a professional capacity and the Information in question relates to the attorney-client relationship.

The term "Legal Advisor" is defined to include lawyers in various capacities such as private practitioners, public officers, trainees, and their assistants. In-house counsels are also included in this definition independent of whether they are or have been admitted to the bar, as long as their position within an organisation identifies them as legal counsel as opposed to, e.g., business managers or directors. A large number of (predominantly, but not only, common law) jurisdictions recognise such a privilege, while civil law jurisdictions are less inclined to do so.[13] To not recognise such rights would unfairly defeat parties' expectations from the common law sphere.[14] It was recognized at the working deliberations at the Auckland Conference that the work of in-house counsel should be universally protected. This also contributes to a level playing field in international arbitration.

Article 4

Legal Proceedings Privilege and Attorney Secrecy Protection

Article 4 deals with protection that shields Information created or communicated by or to a Party, a Legal Advisor or a third party for the purpose of an anticipated or pending Legal Proceeding, which is defined as *"any type of legal, civil, administrative, regulatory or criminal proceeding, investigation or inquiry, including litigation, mediation, adjudication and arbitration"*. This enables a Party to communicate candidly with its Legal Advisor and third parties in preparing for the Legal Proceeding thus facilitating effective legal representation.

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[13] Waincymer at 810–811. Examples of jurisdictions that recognise legal privilege or attorney secrecy for in-house counsel are England & Wales and the United States. Several civil law jurisdictions recognise such privilege for inhouse counsels if they are registered practitioners, such as Argentina, Brazil, Japan, the Netherlands and Portugal. See Reinhard and Murphy-Johnson (eds), Legal Privilege & Professional Secrecy 2019 (Law Business Research, 2019).

[14] Meyer, "Time to Take a Closer Look: Privilege in International Arbitration", Journal of International Arbitration (2007) 24(4) 365 at 377.

Generally, in civil law jurisdictions, only information communicated by a lawyer or their staff is protected by attorney secrecy and may not be disclosed, whereas other information, for instance information exchanged with an expert, litigation service provider or a third-party funder, is not so protected. At the Auckland Conference, several civil law lawyers noted that this limitation may easily be circumvented by having the lawyers engage the experts (or the litigation or forensic service provider) instead. The working deliberations acknowledged however that there is a clear and valid interest in directly protecting the advice or support provided by non-lawyers for the purpose of a pending or anticipated Legal Proceeding and there appears to be consensus about this in the international arbitration community.

Article 5

Settlement Privilege and Attorney Secrecy Protection

The transnational concept of a settlement privilege provided under Article 5 is generally recognised in common law jurisdictions, but not in all civil law jurisdictions. However, it is recognised that settlement privilege is a firmly established rule in international arbitration.[15] Parties should not be allowed to rely on communications and admissions made during settlement negotiations. The object is to ensure that Parties will not be discouraged from genuinely attempting to resolve their disputes for fear of their words being held against them subsequently and thus facilitate efficient and amicable dispute settlement. Also, this form of privilege is well established in a significant number of jurisdictions (albeit mostly common law).[16]

The operation of this transnational protection does not depend on the labels given to the communication in question. While the use of certain words, such as "privileged" or "without prejudice", generally accompanies communications aimed at resolving a dispute, the Arbitral Tribunal should examine all the circumstances of the case to determine whether or not the Information in question is indeed covered and protected by Article 5.

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[15] Born, International Commercial Arbitration (Kluwer Law International, 2014, 2nd ed) at 2382 footnote 297 citing Frontier Dispute Between Burkina Faso and Mali, [1986] ICJ Rep. 632 (ICJ) and other authorities.

[16] Marghitola, "Document Production in International Arbitration", International Arbitration Law Library (33) (Kluwer Law International, 2015) 84–85.

There are exceptions to the protection of settlement negotiations as provided under Article 5 – (i) where there is a dispute on whether a settlement has been concluded, or (ii) where all parties to the actual or intended settlement have consented to the disclosure.

It is common in some jurisdictions for parties to enter into settlement negotiations "without prejudice save as to costs", such that the settlement negotiations may be disclosed to the Arbitral Tribunal to determine the question of costs of the Arbitration. In such a situation, the parties' intention may be given effect to under exception (ii) to Article 5.

Article 6
Mandatory Provisions of Law

Article 6 is inspired by Article 1.4 of the UNIDROIT Principles of International Commercial Contracts 2016. There was a concern that the denial of any protection arising out of mandatory provisions of any applicable law may lead to problems when it comes to enforcing the arbitral award. Article 6 therefore addresses the situation where a Party claims protection from disclosure or relies on attorney secrecy, based on a non-waivable legal impediment or mandatory provision of any applicable law not subsumed by Articles 3 to 5.

A Party seeking to rely on Article 6 should notify the other Party of its intention to do so as soon as it has reasonable grounds to believe that it will rely on the protection. This is to ensure that the other Party would not be deprived of its right to exercise the same ambit of protection (pursuant to Article 7) in a timely fashion. The notification should be made before disclosure is provided by the parties, not after (as by then, the other party may have already disclosed documents covered by the protection in question). As the master of procedure, the Arbitral Tribunal should act against any abuse in this regard.

Article 7
Equality of Arms

Articles 3 to 5 provide the same level of protection for all Parties. The concern therefore is with protection under Article 6. Consequently, where a Party successfully claims a transnational Privilege and Attorney Secrecy protection under Article 6, the other Party is able to invoke the same privilege and/or protection. Article 7 is designed to overcome

differences due to diverging legal and/or cultural backgrounds of the Parties. It also provides a level playing field – a key concern in international arbitration.

Belated notification or inconsistent conduct by a Party pursuant to Article 7(2) may lead to the other Party making disclosure in spite of a right to withhold under Article 7(1). Article 7(3) allows the Arbitral Tribunal to exclude such disclosure to ensure that a Party's right under Article 7(1) is not defeated. Please also refer to the commentary to Article 6 above.

Article 8
Waiver

A transnational test of waiver for the IPBA Guidelines is employed for the protection conferred by Articles 3 and/or 4.

Unlike in some jurisdictions, a waiver may also be merely partial, e.g. by a Party allowing its attorney to testify on certain issues but not on others. Depending upon the circumstances, such limited waivers might, however, impact the weight that the Arbitral Tribunal attributes to the disclosed evidence within its discretion to assess the evidence (e.g. if it considers the partial waiver to be potentially misleading).

Reasonable steps to rectify inadvertent disclosure of protected Information might involve timely notification to the receiving party with (i) sufficient specification allowing the receiving party to identify the relevant Information and (ii) an appropriate explanation why the disclosure was inadvertent.

As for the protection arising out of Articles 6 and 7, the applicable test of waiver will be that prescribed by the applicable law or rule giving rise to such a privilege or secrecy protection in the first place.

Waiver of a transnational protection, even if implied, must be voluntary. This would prevent a Party from inadvertently waiving the protection (for instance, by mistakenly including protected Information in the production of evidence). Furthermore, only the Master of the Privilege and Attorney Secrecy[17] can waive the protection.

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[17] In a survey of various jurisdictions, it appears that the predominant position is that the client is the Master who can waive legal professional privilege, e.g. Argentina (with exceptions for the lawyer's self-defence), Brazil, England and Wales, Germany, Japan, Mexico, Nigeria, Switzerland, and the United States: Reinhard and Murphy-Johnson. See Meyer-Hauser and Sieber at 149. Other jurisdictions take a similar position, such as Brunei and Singapore.

Article 9

Illegality and Fraud

The IPBA Guidelines do not afford any protection where the Information was created and/or communicated in furtherance of any illegal or fraudulent purpose.

Illegal or fraudulent behaviour is not to be presumed and has to be properly proven by the party alleging illegal or fraudulent behaviour. The Arbitral Tribunal should carefully form an opinion based on the evidence reasonably available to and provided by the requesting Party whether such behaviour is present.

Article 10

Interpretation

Article 10 provides for the principle of autonomous interpretation. Transnational and international rules shall be interpreted within their own context. Support is drawn from Article 31 of the 1969 Vienna Convention on the Law of Treaties, as well as the rules on interpretation in modern international instruments such as Article 7 of the Convention on the International Sale of Goods and Article 1.6 of the UNIDROIT Principles of International Commercial Contracts, 2016. Autonomous interpretation of the IPBA Guidelines requires an interpretation in good faith in accordance with the ordinary meaning to be given in their context and in the light of their object and purpose, the international character of the IPBA Guidelines and the need to promote uniformity in their application. Questions concerning matters governed by the IPBA Guidelines which are not expressly provided for are to be settled in conformity with the general principles on which they are based or, in the absence of such principles, in conformity with the applicable law.

Regarding the interpretation of the wording of the IPBA Guidelines, it must be borne in mind that, in international contracting and international arbitration, English is a neutral language of convenience. Therefore, interpretations based on domestic meaning or interpretation in any specific jurisdiction should be eschewed.

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