

IBA Task Force on Privilege in International Arbitration

Report on Uniform Guidelines on Privilege in International Arbitration

Annex 2 – Legal Advice Privilege

This Report addresses the similarities and primary differences in the rules governing the doctrine of legal advice privilege and related concepts in national laws. The Report also seeks to identify rules of national public order that might impede implementation of uniform guidelines with respect to legal advice privilege in international arbitration (“Guidelines”).

The Report concludes that, while there is a fairly wide array of differences among national laws in protecting legal advice from compelled disclosure—differences that cry out for uniform rules—there appear to be no rules of public order likely to be applicable in international arbitration that would prevent implementation of uniform Guidelines on the topic. We suggest that the Task Force may wish to consider limiting the application of the Guidelines where disclosure or testimony is sought directly from law offices or lawyers, or carving such disclosure out of the Guidelines, so as 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. We believe that other particular features among the laws of privilege in national jurisdictions can be waived by parties to arbitration when adopting the Guidelines or agreeing to arbitration.

Informed by the survey of national laws on privilege, the Report concludes with an outline of certain questions that the Task Force will likely need to resolve in preparing such Guidelines.

Methodology

The Subcommittee undertook a survey of national laws on legal advice privilege and related concepts in a total of 24 jurisdictions from civil and common law countries. The survey was based on publicly available summaries of privilege rules rather than primary sources, including country reports prepared by Task Force members; online summaries, typically published by law firms; and other sources, in particular country reports attached to the Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration published in April 2018. The Subcommittee structured its analysis around the seven key questions discussed below—such as the scope of the documents and information protected by the relevant privilege and the grounds for loss of protection or waiver of the privilege. The Subcommittee’s notes reflecting its analysis are attached as Annex A to this Report. These notes are written in colloquial, not legal, language and are aimed at identifying the “big picture,” without noting all of the nuance and detail in particular national laws that were not pertinent for purposes of this

Report.¹ The notes do not include responses to the seven questions for all jurisdictions, either because our sources did not permit an answer or the relevant rules did not reflect any particularly significant departure from the points found in other jurisdictions.

Key Questions Regarding National Rules on Legal Advice Privilege

As noted, the Subcommittee analyzed the rules of the various jurisdictions across seven key questions. Our conclusions on these questions are below.

1. Scope of protection: what documents or information does the privilege protect?

There appears to be near universal agreement across national jurisdictions that communications between attorneys and clients deserve some protection. The scope of that protection varies to some degree, but the major difference concerns whether the protection extends to such communications in the hands of the client as well as those in the hands of the lawyer. As we will discuss in connection with Question 5 below (on who controls the privilege), we believe this distinction will have limited impact on any Guidelines the Task Force prepares if the Guidelines are conceived of as the product of consent by parties to arbitration. We submit that parties (clients) can always agree that the opposing party's obligation to produce documents will not include communications with its attorneys even if those communications might otherwise be theoretically available in court proceedings in that party's courts. Or parties could agree that they will produce documents that might otherwise be protected in the opposing party's courts. As a result, one question that the Task Force will need to decide is the scope of any protection or privilege, but there is nothing we have found in national law that would prevent the Guidelines from adopting any particular solution (except possibly for production from law offices, as discussed further below).

As has been widely noted,² national rules on legal advice privilege (or something similar) broadly divide into two broad categories: common law and civil law, with substantial variations within each category, particularly in civil law jurisdictions. The ICCA-Queen Mary Report aptly summarizes the key differences as follows:

Broadly, [in common law jurisdictions] documents passing between a client and his lawyer forming part of the chain of information in order to seek and receive advice are protected by advice privilege

“Privilege” is not a concept commonly adopted in civil jurisdictions. Instead the relationship between lawyer and client is

¹ The Subcommittee invites comments from Task Force members more familiar with the national laws in question both on the high level conclusions in this Report as well as the somewhat more detailed analysis in the notes in Annex A.

² See, e.g., Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International 127-29, 136-37 (April 2018) (“ICCA-Queen Mary Report”).

seen as one of confidence and information passing between them is protected by a “professional secrecy” doctrine

The secrecy concept, set out in professional rules, statutes, and civil procedure rules or otherwise, means that information relayed between lawyer and client cannot be revealed to the court, authorities or the wider world.³

There is limited variation among common law jurisdictions on the scope of protection. It appears to be widely, but perhaps not universally, accepted that communications in anticipation of retention (that is, before the client has hired the lawyer) are also protected. In one significant point with respect to the scope of protection, common law jurisdictions vary: in England and Wales, and in some U.S. states, the privilege with employees of an entity extends only to employees actually charged with seeking or receiving legal advice from the lawyer (sometimes called the “control group”), while in other jurisdictions the privilege protects communications with any employee or agent of the entity necessary for the purpose of obtaining legal advice.

As noted, the variation as to the scope of the privilege or protection is greater in civil law countries. A key dimension on which protection varies is whether the protection extends only to documents and information in the possession of lawyers or also to documents and information about attorney-client communications in the hands of the clients. Consistent with the notion of professional secrecy, in many civil law jurisdictions (*e.g.*, Austria, Germany, the Netherlands, Portugal, Russia, Spain) the protection only prevents and entitles *lawyers* to refuse to produce documents in their possession regarding their advice to and communications with clients, and to testify about those topics. In others, such as France, Switzerland, Sweden, the United Arab Emirates and Mexico, the protection extends to information in the hands of clients, largely aligning the protections in those jurisdictions with the common law protection of attorney-client communications in the hands of either the client or the lawyer.⁴ Thus, as discussed further in the response to Question 5 below, the Task Force will need to decide the extent to which legal advice privilege or protection extends to documents and information in the hands of both clients and counsel.

One point with respect to the scope of protection that appears to be common among both common and civil law jurisdictions is that the privilege or protection does not extend to certain communications that involve certain criminal or wrongful activity. For example, common law jurisdictions do not provide protection to communications between lawyer and client that are in furtherance of a crime, fraud or sometimes other intentionally wrongful conduct, even if the lawyer is unaware of the client’s purpose. In Germany, the Netherlands and Sweden, professional secrecy does not prevent the seizure of attorney communications if the attorney is an

³ *Id.* at 128-29, 136-37.

⁴ In other jurisdictions, such as Brazil and Turkey, it is unclear whether the protection extends to attorney-client communications in the possession of the client. In Japan, clients cannot refuse to testify about their communications with their lawyers, but they can withhold attorney communications in their possession.

accomplice to a crime or is unlawfully obstructing justice. In China, lawyers are required to disclose any crimes their clients are committing or contemplating that severely impair national or public security.⁵ The Task Force will likely need to decide the scope of any exception for communications involving criminal or other wrongful conduct.

Given the widespread consensus that communications with attorneys to obtain legal advice deserve protection, it should be possible to craft Guidelines for uniform protection applicable in international arbitration. We collect questions on the scope of such protections in the final section of this Report.

2. Scope of protection: does the privilege apply to all lawyers or only some?

Jurisdictions differ widely on the extent to which the protection of the privilege or professional secrecy extends to (1) in-house counsel or (2) foreign lawyers practicing in the jurisdiction. Here, particularly with respect to in-house counsel, the Task Force may face some important and difficult decisions. If in-house counsel are excluded from protection, that will greatly expand the range of information available from parties in countries (including all common law countries) where in-house counsel communications are protected. If in-house counsel are included in the protection, that may raise an issue—possibly only theoretical—in some jurisdictions in which in-house counsel are entitled to decide, independent of the client, whether to disclose otherwise protected documents. In those cases, the client’s agreement to arbitration or to arbitrate under the Guidelines will not necessarily release the in-house counsel from his or her obligation (and right) to keep professional secrecy. Questions with respect to inclusion of foreign lawyers in the protection also arise, but are likely of less significance.

In-house counsel. All common-law jurisdictions surveyed, as well as a number of civil law jurisdictions (*e.g.*, Brazil, Korea, Mexico, Spain and Turkey), include communications with in-house counsel (acting as lawyer rather than client) within the scope of protection of the privilege. In some of these jurisdictions, in-house counsel must be members of the relevant local bar in order to practice as lawyers (and gain the protection of the privilege).

In other civil law jurisdictions (*e.g.*, Austria, France, Sweden, Ukraine, and the UAE), in-house counsel do not gain the protection of privilege or professional secrecy. Finally, in still other civil law jurisdictions, in-house counsel are entitled to privilege or professional secrecy only if they are members of the bar, a status that appears to be uncommon in some jurisdictions (*e.g.*, Japan) and possibly more common in others (*e.g.*, Germany, Netherlands, Portugal, and Switzerland).

⁵ In China, courts can require lawyers to testify or give evidence against their clients, but the Subcommittee understands that in practice it is rare for courts to do so. Also, government bureaus and regulatory authorities in China will not respect a confidentiality obligation claimed by a lawyer in relation to their client, but that fact should not restrict an arbitral tribunal from granting greater protection than might be available in a regulatory proceeding.

The difficulty with respect to including in-house counsel in the scope of protection arises in jurisdictions in which, under national law, in-house counsel has the protection and (as discussed in response to Question 5 below (who controls the privilege)), counsel also have a right to decide whether to disclose protected documents and information notwithstanding client consent to disclose. The Subcommittee identified six jurisdictions potentially in this category, namely the Netherlands, Portugal⁶ and Switzerland (in each of which in-house counsel must be members of the bar to gain the protection, but that status is not universal among in-house counsel) and Korea, Spain and Turkey (in which all in-house counsel have the protection). It is unclear the extent to which this is a real problem or whether in fact consent by the employer to disclosure (through consent to application of the Guidelines or to consent to arbitration) suffices as consent of in-house counsel.

Foreign lawyers practicing in a jurisdiction. There is a similar variety of rules with respect to whether the privilege or professional privilege extends to foreign lawyers practicing in a particular jurisdiction without status as full-fledged lawyers in that jurisdiction. Some common and civil law jurisdictions will offer protection if the foreign lawyer has some special bar status in the jurisdiction (*e.g.*, France, Russia, Ukraine, many U.S. jurisdictions); in others, communications with foreign lawyers are protected if the foreign lawyers have status as lawyers in their home jurisdictions and are providing advice permitted in the jurisdictions where they practice (*e.g.*, England/Wales, Hong Kong, Netherlands, Spain, Switzerland, Turkey). And in some jurisdictions, such as Brazil, Japan, and Sweden, foreign lawyers without local bar membership may not practice and do not gain protection of the privilege, or the situation is unclear (*e.g.*, Austria, Germany). The issue may arise if, for example, a foreign lawyer not fully admitted to practice in Sweden but resident there renders advice to a client that later becomes subject to a document request. Under Swedish law, such advice would not be protected by the privilege. If that advice were rendered in a similar situation in, say, Hong Kong, the advice would be protected by privilege.

The Task Force will likely need to decide whether advice of foreign lawyers practicing without full admission to the bar of the jurisdiction in which they are practicing or in which they rendered the relevant legal advice will be entitled to the protection of the privilege or legal advice protection. If that result differs from the answer in the jurisdiction in which they practice, the Guidelines may conflict with lawyer's rights to professional secrecy as discussed in connection with to Question 5 below (who controls the privilege).

3. Scope of protection: is the identity of the client protected from disclosure?

In some jurisdictions, such as Germany, Sweden, Austria and the Netherlands, counsel are barred from identifying their clients. In others, such as the United States, the identity of the client is usually not privileged unless in particular circumstances the identity of the client will reveal the substance of the legal advice given or requested (*e.g.*, where surrounding circumstances have indicated that some client received or sought particular legal advice but the identity is not known). This protection could have some relevance with respect to the extent to

⁶ In Portugal, there are conflicting decisions on whether the client can release the lawyer from the obligation of professional secrecy.

which a party withholding documents or information will be able to provide information about the documents or information being withheld.

The Subcommittee believes this issue has little application to claims of privilege in international arbitration, because the client in question will most often be a party to the arbitration and their identity will of course be known. The question is of even less significance if the Guidelines do not apply to outside law firms, who may have multiple clients. The Subcommittee concluded that this issue is unlikely to require separate consideration by the Task Force, particularly if the Guidelines deal only with the substance of the rules that govern legal advice privilege and not with the procedures of how to assert and challenge a claim of protection.

4. Scope of protection: are communications between opposing attorneys protected from disclosure?

In some jurisdictions, including France, the Netherlands, Portugal and Russia (and in rare circumstances, Germany), it appears that communications between opposing attorneys are subject to a separate privilege and protection from disclosure, and counsel cannot disclose them—in some circumstances, even to their client. This is not, strictly speaking, an aspect of legal advice privilege, but rather more akin to a settlement privilege. To the extent, that production from outside law offices is excluded from the Guidelines, this issue will largely, if not entirely, disappear.

5. Control of privilege: who (if anyone) can waive the privilege and decide to produce the documents?

It appears that in all the surveyed jurisdictions, someone has the power to disclose documents that might otherwise be protected by privilege or disclosure. The issue is particularly important for the Guidelines, because to the extent the client can waive the privilege, and the client is a party to the arbitration, the party's agreement to application of the Guidelines, or perhaps its agreement to arbitrate in the first place, can constitute a waiver of any national law protections that are more protective than the provisions of the Guidelines. But to the extent that the lawyer—or a third party—has the power to decide whether to waive otherwise applicable protections, the application of the Guidelines in particular cases may be restricted by national law.

In all common law jurisdictions surveyed, and some civil law jurisdictions—including Germany, Japan, Mexico, Russia, Sweden, and Ukraine—the client has full power to waive the privilege, and release the lawyer from his or her obligations of professional secrecy. But in other civil law jurisdictions—including Austria, Brazil, France, Korea, the Netherlands, Spain, Switzerland, and Turkey—the lawyer either has full power or residual power (after a client waiver) to refuse to disclose some documents or information protected by the relevant legal advice privilege or rule of professional privilege.⁷

⁷ The ICCA-Queen Mary Report made a similar observation, noting as well that in some jurisdictions permission from a regulator or bar association might be necessary to allow a lawyer to reveal information in order, for example, to defend himself or herself. ICCA-

Significantly, however, in no circumstances that the Subcommittee was able to identify does the attorney's power to control the privilege extend to documents in the possession of the client or to testimony by the client or its employees. As a consequence, if the Guidelines applied only to production from the client's files, there would be no conflict with local rules in this respect.⁸ Indeed, it may be that the Guidelines will not apply at all to production from third parties (except by consent of the third party), because such production or testimony will typically involve local courts that will apply their own rules of privilege.

Nonetheless, the question will not entirely disappear, because there may be instances in which a party seeks production from opposing counsel's law offices or even testimony from opposing counsel (or possibly from the opposing party's other lawyers), on the theory that they are agents of the opposing party. (This issue may be seen as an aspect of a broader question that goes beyond privilege: whether an adversary might seek to compel production of documents from an affiliate (parent or subsidiary) of a corporate party on the theory that the party has practical control over the documents.) The Task Force may need to decide the extent to which the Guidelines will apply to such documents or testimony. There are a variety of possible solutions, including barring requests for documents in the hands of outside counsel entirely; carving such requests out of the Guidelines leaving them to the tribunal's discretion or other rules; or permitting counsel to invoke any right they have under their national law to refuse the request. In any case, the issue of the rights of lawyers to refuse disclosure of law office documents or lawyer testimony notwithstanding client consent is a relatively limited one that the Task Force can address in the course of preparing the Guidelines.

6. Waiver/loss of privilege—under what circumstances can the privilege be lost or waived?

The precise circumstances that give rise to a waiver of protection of legal advice privilege vary from jurisdiction to jurisdiction, but there are certain common themes. The Task Force will likely wish to consider how to address each of the possible grounds for waiver discussed below.⁹

Queen Mary Report at 136-37. The issue of regulator or bar association consent is likely to arise rarely in international arbitration, but in any case raises the same issue as in those jurisdictions in which outside counsel have control over some aspect of the relevant protection: the point is that client consent will not suffice.

⁸ In theory, the Task Force could decide that the protection of legal advice privilege or professional secrecy applies only to documents in the hands of lawyers, but the Subcommittee submits that such a limitation would likely make it not worth the effort to prepare the Guidelines because document production from law offices is at best limited in international arbitration.

⁹ As noted in the response to Question 1 above (pp. 3-4), there is a widespread consensus among jurisdictions that the privilege does not attach in the first place to communications in furtherance of some (or all) criminal or intentionally wrongful activity. Singapore appears to have an expanded form of loss of privilege when the lawyer becomes aware that the client committed a crime or fraud after engagement of the lawyer, but this may

a. *Express waiver*: As noted above in the discussion of Question 5 (who controls the privilege), it appears that all jurisdictions surveyed allow some person—either client or lawyer—to expressly waive privilege protection.¹⁰

b. *Disclosure to third parties*:¹¹ Likewise, it appears to be widely agreed that disclosure by the protected party to third parties can result in loss of protection from production in legal proceedings. But there are several aspects of such waiver that vary among jurisdictions and that the Task Force will likely wish to address:

Limited disclosure: Some jurisdiction, such as Australia, England, Germany, Hong Kong, and India contemplate that a limited disclosure to third parties other than attorney and client for limited use or further disclosure does not destroy the protection applicable to compelled disclosure in court proceedings. In the Netherlands, disclosure in national court proceedings does not result in loss of protection for other purposes. Elsewhere, including in the United States, disclosure to any third person aside from those who share a common legal interest with the client will result in loss of privilege.

Inadvertent disclosure: Many jurisdictions have developed rules that provide that inadvertent disclosure does not give rise to a waiver and the Subcommittee’s survey revealed a range of possible solutions to the issue. In England, such documents can only be used with permission of the court. In the United States, inadvertent disclosure (such as by production in a court proceeding or arbitration) will only result in waiver if the disclosing party failed to take reasonable measures to protect the documents from disclosure. In Brazil and Mexico, whether inadvertent disclosure will result in loss of privilege will be evaluated on a case-by-case basis. In the Netherlands, Portugal and Switzerland, privilege can only be waived explicitly and not inadvertently, but in Switzerland the disclosure can

simply be a specific application of the exception for communications in furtherance of a criminal or fraudulent purpose.

¹⁰ Except for jurisdictions that require regulatory or bar approval before a lawyer may disclose documents subject to professional secrecy. Such a requirement for regulatory approval apparently only applies to documents in the hands of outside counsel and so would not raise an issue if the Guidelines applied only to production of documents or information in the hands of the client.

¹¹ In some jurisdictions in which the protection of professional secrecy extends only to documents in the lawyer’s files—such as Austria and Germany—disclosure to the client loses such protection. Our discussion here of potential provisions on waiver assumes that the Guidelines will apply to documents in the hands of the client (because, as noted above, an application limited to documents in the hands of outside counsel is likely to be so narrow as to make the effort not worth doing).

result in loss of privilege if the receiving party is not bound by an obligation of professional secrecy and discloses the information to others.

Subject matter or collateral waiver. In England, Hong Kong, the United States, and possibly other common law jurisdictions, and also apparently in Germany, a client may not selectively disclose certain communications in a way that might create a misleading picture. Rather, a party may be obligated to disclose all parts of a communication, or all privileged communications, relating to the same issue or subject matter. This doctrine of subject matter waiver may or may not apply to disclosures outside the arbitration or litigation, that is, to extra-judicial disclosures.

c. *Insertion of issue/reliance on advice of counsel:* Several jurisdictions, particularly common law jurisdictions but also Germany, have developed rules that provide that the privilege protecting communications on a particular topic is lost if a client relies on the advice of counsel in its pleadings or testimony (e.g., as a defense to a claim of willful misbehavior), because the opposing party must be provided the full range of advice on the topic in order to test the claim.

d. *Controversies between attorney and client:* Some jurisdictions allow lawyers to disclose privileged communications in a dispute with a client, such as to defend against a charge of wrongful conduct or to collect a fee. In the United States, disclosure to respond to a charge of wrongful conduct must be limited to those necessary to the purpose and generally only to respond to a claim of wrongful conduct made in a legal proceeding (rather than, for example, in a publication). As noted above, some jurisdictions require the lawyer to obtain permission from a regulator or bar association before making such disclosures.

Inference from refusal to waive privilege: Finally, common law jurisdictions have developed a rule that a court may not draw any adverse inference from a party's refusal to waive privilege. The Task Force may wish to consider whether the Guidelines should contain such a provision.

7. Does public policy bar or require disclosure in the context of civil proceedings (that is, regardless of client consent)?

The Subcommittee identified no issues of public policy that would prevent the development or issuance of Guidelines with respect to legal advice privilege. In two specific areas, there might be public policies that require or prevent disclosures that the Task Force may wish to consider in developing Guidelines.

First, the rights of attorneys in certain civil law jurisdictions to withhold law-office documents or testimony on grounds of professional secrecy even when the clients have consented to such disclosure discussed above may raise questions of public policy. As noted above and below, the Task Force may wish to consider whether to limit the application of the Guidelines to ensure that attorneys are not called upon to breach those national rules when they might apply.

Second, some jurisdictions, such as Austria, China, and the Netherlands, allow for attorney-client communications to be seized by regulators or the government because of

overriding public considerations such as national security or in the case of serious crimes. These provisions are unlikely to play a role in international commercial arbitration, although they may in investor-state arbitration. The issue may arise in two forms: (1) where the state requests production of such documents in the arbitration or (2) where the state seeks to use such documents that were seized through other procedures. With respect to requests for production of privileged documents in the arbitration, we believe these public policy concerns would not likely affect the scope of document production in an arbitration taking place outside of the state in question, since by agreeing to arbitration states generally agree to be treated like private parties and surrender their sovereign power of compulsion with respect to document production. On the issue of use of privileged documents obtained through other means, there may be a range of solutions, but the Task Force may wish to consider carving out of the Guidelines the question of whether to allow the use of such documents, as a question that is likely to be highly fact sensitive.

Questions that the Task Force Will Likely Need To Resolve in Developing Uniform Guidelines on Legal Advice Privilege

Informed by the foregoing survey of commonalities and differences among national courts with respect to protection of legal advice from compelled disclosure, the Subcommittee offers the following suggestions as to questions that the Task Force may wish to resolve in preparing uniform Guidelines for use in international arbitration:

Applicability of Guidelines

- 1) Will the Guidelines apply only where the parties have agreed to their application or will the tribunal have discretion to apply them regardless of party agreement?

[*Comment:* Client consent enables a departure from national rules of privilege or secrecy in many jurisdictions, so it may be that client consent will need to be an essential feature of the Guidelines. On the other hand, it may be possible to sustain the position that consent to international arbitration by itself constitutes client consent sufficient to allow for implementation of the Guidelines, insofar as the Guidelines will constitute a distillation of an international consensus of procedural rules applicable in arbitration.]

- 2) Will the Guidelines apply to production of documents and testimony from non-parties to the arbitration at all or only when the non-parties consent to their application?

[*Comment:* If the Guidelines apply only to production from parties, that will largely, but not entirely, address the issue of whether a lawyer has the right to refuse to consent to production of documents from its own files even if the client has consented. An adversary might still seek documents or testimony from counsel on the theory that the lawyers are agents of the client, which is an aspect of question 3 below.]

Scope of protection

- 3) *Client vs. Lawyer Possession.* Does the privilege protect documents and information (i.e., testimony) reflecting attorney-client communications undertaken for the purpose of seeking legal advice in possession of clients or only in the possession of lawyers?

[*Comment:* If the Task Force adopts the narrowest form of protection extending only to documents in the hands of lawyers, the Guidelines might not be worth pursuing, because disclosure in international arbitration will rarely reach into the files of lawyers, so the Guidelines would be of limited application.

On the other hand, as noted above, the Task Force may wish to consider whether to limit the application of any Guidelines adopted so that they do not apply at all, or apply differently, to production of documents from a law firm or testimony from a lawyer in general or in jurisdictions where the lawyer enjoys a right under national law to refuse to testify and that right is not waivable by the client.]

- 4) *Communications in Anticipation of Retention.* Does the privilege protect communications between a prospective client and a lawyer made in an anticipation of retaining the lawyer but before the engagement of the lawyer or when an engagement does not result from those communications?
- 5) *Crime/Fraud Exception.* To what extent does the protection extend to communications for the purpose of criminal or other wrongful (*e.g.*, fraudulent) conduct? If it does not, does the lawyer need to join in that purpose and become an accomplice in the conduct or does the exception extend to such communications even when the lawyer did not know of the client's criminal or otherwise wrongful conduct?
- 6) *Entities as Clients.* Where the client is an entity (*e.g.*, a corporation), does the privilege extend to communications with any employee or agent of the entity for the purpose of providing legal advice to the entity or only to some, such as the control group?
- 7) *In-House Counsel.* Does the protection extend to communications with lawyers who act as in-house counsel?

[*Comment:* If the protection of the privilege does not extend to communications with in-house counsel, the Guidelines would conflict with the law in common law and some civil law systems where such communications are protected as well as those civil law systems that extend protection if in-house counsel are members of the Bar. But if the protection does extend to communications with in-house counsel, the Guidelines, even if adopted with client consent, may conflict with the right of counsel in some jurisdictions to decide whether to disclose otherwise protected documents and information. It is unclear the extent to which this latter issue actually arises or whether in fact the employer client's consent is sufficient to release the in-house lawyer from his or her obligation (and right) to secrecy. If the issue is a real one, one possible solution would be to extend the privilege to in-house counsel, but to allow in-house counsel to withhold documents otherwise subject to production under the Guidelines in those jurisdictions in which counsel has the right to withhold documents notwithstanding client consent to disclose them.]

- 8) *Foreign Lawyers.* Does the protection extend to communications with lawyers who do not have full status as lawyers in the jurisdiction where they practice and the advice was rendered?

[*Comment:* This question may be largely subsumed by the decision on whether the Guidelines apply to production from outside law offices or testimony from outside lawyers at all. If production or testimony from foreign outside lawyers is subject to the Guidelines, the Guidelines may conflict with local rules providing counsel the right to control the privilege or professional secrecy. Even if the Guidelines do not apply to production from outside counsel, this question may still need to be addressed insofar as advice from counsel not admitted in the jurisdiction in which they practice may appear in the files of the client.]

Waiver of protection

- 9) *Express waiver.* Who can waive the privilege and in what form?
- 10) *Limited Disclosure.* What disclosures will result in loss of privilege? In particular, can privilege survive a disclosure to a third party for a limited use or limited further dissemination?
- 11) *Inadvertent Disclosure.* Under what circumstances, if any, will an accidental or inadvertent disclosure result in loss of privilege?
- 12) *Subject Matter or Collateral Waiver.* Under what circumstances, if any, will disclosure of some privileged communications, or some portions of a privileged communications, on a particular subject matter or issue require the disclosure of other privileged communications, or portions of the communication, on the same subject or issue?
- 13) *Advice of Counsel/Insertion of Issue:* Under what circumstances, if any, will legal advice privilege be lost where the client relies on the advice in its pleadings in the arbitration?
- 14) *Controversies Between Attorney and Client:* To what extent may a lawyer disclose otherwise privileged communications in a dispute with the client, such as to defend himself or herself against charges of misconduct or to collect a bill?
- 15) *Inference from Refusal To Waive:* To what extent may a tribunal draw adverse inferences from a party's refusal to waive privilege and allow for production of otherwise privileged documents or testimony?

Use of Privileged Documents

16) *Use of Privileged Documents Obtained Elsewhere*: To what extent, if at all, may a party use documents of another person that are subject to protection under the Guidelines but that were obtained by that party outside of the arbitration?

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