

IBA Taskforce on Privilege in International Arbitration

Report on Uniform Guidelines on Privilege in International Arbitration

Annex 3 – Litigation Privilege

LITIGATION PRIVILEGE: INTRODUCTION

Litigation privilege is widely recognised across many jurisdictions but its source, appellation and scope can vary. In essence, litigation privilege and similar concepts consist of the confidentiality protection attached to a document that has been prepared for the purpose of or in anticipation of legal proceedings and a ground upon which a party may justifiably oppose the production of such document.

This section of the report discusses the litigation privilege or similar concepts under the rules of the following jurisdictions: England and Wales, Singapore, the United States, Sweden and India. More specifically, this section seeks to identify common grounds between these rules while understanding the rationale for courts, legislators and regulators to recognise the privileged or confidential nature of documents prepared for the purpose of or in anticipation of legal proceedings. Based on these elements, this section formulates the Taskforce's proposed recommendation for a minimum standard of confidentiality protection, which international arbitral tribunals may apply irrespective of whether the jurisdiction(s) whose privilege rules apply in the case at hand recognise the concept of litigation privilege and whether the relevant document would benefit from such confidentiality protection in a domestic court. When applied by international arbitration tribunals, this minimum standard protection may be referred to as the "Arbitration Privilege".

COMPARATIVE ANALYSIS OF APPROACHES TO LITIGATION PRIVILEGE IN DIFFERENT JURISDICTIONS:

England and Wales:

Under English law, litigation privilege protects communications between the lawyer (acting in a professional capacity) and the client, or between either of them and a third party where the main purpose of the communication is to further litigation or arbitration which is pending, reasonably contemplated or existing.¹

To make a successful claim to litigation privilege, the material in question, whether written or oral, must satisfy the following conditions:

1. It must be a communication between:
 - (a) a lawyer (acting in a professional capacity) and the lawyer's client; or
 - (b) a lawyer (acting in a professional capacity) and a third party; or
 - (c) a client (or probably a litigant in person) and a third party.

In all cases, the lawyer or client/litigant may use an agent, so long as the agent is simply a medium of communication.

Litigation privilege can extend to cover:

- lawyer-to-lawyer communications made on behalf of the same client;
- communications between client or lawyer and the third party made on their respective behalves by agents;
- certain types of confidential documents which, strictly, are not communications but which are created by the lawyer, client or third party and which come into existence to enable

¹ Khodykin, R., Mulcahy, C. and Fletcher, N. [2019]. *A guide to the IBA rules on the taking of evidence in international arbitration*. Oxford, United Kingdom: Oxford University Press.

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legal advice to be sought or given, or information or evidence to be prepared or gathered, in relation to the subject litigation.

2. It must be made for the dominant purpose of litigation.

The concept of “purpose” is broad and can cover various aspects of the litigation process. The “purpose” test is for dominance and not exclusivity. The purpose is to be determined in the light of all the circumstances.² The court will look at the purpose of the document from an objective standpoint. Statements within a document that it was prepared to enable the lawyer to advise on the litigation will not necessarily be determinative of the issue. The court will also look at all relevant evidence including evidence of subjective purpose. The court’s approach to the assessment of evidence in support of a claim for litigation privilege, is to subject the evidence to “anxious scrutiny” in particular because of the difficulties in going behind that evidence.³

The House of Lords in *Waugh v British Railways Board*⁴ unanimously adopted the “dominant purpose” test. The decision established that, even if litigation is reasonably in prospect at the time a document is created, litigation privilege will not be available unless the document was created for the dominant purpose of that litigation. The litigation need not be the sole purpose for which the communication is made, but it is not sufficient to establish that the litigation was one of a number of purposes of equal importance. Where a communication has other uses or purposes, its use in or in connection with the litigation must be the dominant purpose behind its making. What matters may not be the state of mind of the author of the communication but of the party that commissioned or procured.⁵

A further issue is the question of what amounts to “litigation” when considering the dominant purpose test. In *Three Rivers (No 6)*, it was established that one of the criteria for establishing litigation privilege was said to be that the litigation must be “adversarial”, not investigative or inquisitorial. Since the opportunity to clarify at what point an investigation by a regulator becomes “adversarial” was missed in *In re L (A minor) and Property Alliance Group Ltd v Royal Bank of Scotland plc*⁶, the issue of when and where, namely in which forum, the wider concept of litigation privilege may apply remains slightly unclear.

3. The litigation must be pending, reasonably contemplated or existing.

Litigation must be a real likelihood rather than a mere possibility,⁷ although not necessarily greater than 50%.⁸ Neither a distinct possibility that sooner or later someone might make a claim, nor a general apprehension of future litigation is enough. In *Westminster International BV and Others v Dornoch Ltd and Others*⁹, the Court of Appeal confirmed that the words “in prospect” in the phrase “litigation reasonably in prospect” could be said to mean “may happen”. It found that the expression “and could well give rise to litigation in the future”, as used by the same judge, was a perfect description of something which would satisfy the test.

If there is no litigation or arbitration in contemplation or existence, the right to assert litigation privilege may not arise. From the moment that litigation is pending, reasonably contemplated or existing, all communications between the client and the client’s solicitor or agent or between one of

² *Grant v Downs* [1976] 135 C.L.R. 674.

³ *Starbev GP Ltd v Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm).

⁴ [1980] A.C. 521.

⁵ *Guinness Peat* [1987] 1 W.L.R. 1027; [1987] 2 All E.R. 716.

⁶ [1997] AC 16.

⁷ *Philip Morris* [2004] EWCA Civ 330.

⁸ Applied by the Court of Appeal in *Westminster International BV v Dornoch* [2009] EWCA Civ 1323.

⁹ [2009] EWCA Civ 1323.

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them and a third party, will be privileged if they came into existence for the dominant purpose of giving receiving advice in relation to privilege, or obtaining evidence or information to be used in or in connection with the litigation concerned.

4. It must be confidential.

The burden of proof to demonstrate that the communication in question is confidential lies with the party claiming privilege.¹⁰ In the case of litigation privilege, the confidential nature of the material may not be obvious, particularly where the communication takes place with a third party such as a potential witness. For example, when a witness discusses evidence with a lawyer, the witness will likely be free to repeat the information to others, and the witness will not be under an obligation of confidence. Therefore, the test looks at whether the information is confidential in the hands of the lawyer.¹¹ It has been proposed,¹² that in this context confidentiality refers to the circumstance of retention rather than creation.¹³ If the confidentiality has never existed, or has been lost for reasons of waiver, the need to consider such matters may not arise.

Whether litigation privilege protects communications or documents exchanged in the context of settlement negotiations:

This issue was addressed in *WH Holding Ltd and another v E20 Stadium LLP*,¹⁴ in which the Court of Appeal ordered disclosure of emails that had passed between the board members and stakeholders for the dominant purpose of discussing a commercial proposal for settlement of an ongoing dispute at a time when litigation was in reasonable prospect. The court said that the emails were not privileged. The Court held that the concept of “conducting litigation” included deciding whether to litigate and whether to settle the dispute giving rise to the litigation. However, there was no authority or justification for extending the scope of litigation privilege to purely commercial internal discussions. Litigation privilege would protect documents in which advice or information obtained for the sole or dominant purpose of deciding whether to litigate or to settle could not be detached, and those which otherwise reveal the nature of the advice or information. However, documents created with the dominant purpose of discussing a commercial settlement fell outside the ambit of litigation privilege.

Singapore:

Legal professional privilege is recognised in Singapore as both a procedural and substantive issue. It has two distinct categories, namely, legal advice privilege and litigation privilege,¹⁵ which only attaches to communications that come into existence for the dominant purpose of being used in aid of pending or contemplated litigation.¹⁶ The two categories are ‘integral parts of a single privilege’. In Singapore, legal professional privilege is a statutory right enacted in sections 128 and 131 of the Evidence Act.¹⁷ The Court of

¹⁰ See *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729; [2008] 2 C.L.C. 258 at [50].

¹¹ See *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* [2009] FCAFC 32 (Full court of Australian Federal Court) where the witness was free to discuss evidence with others.

¹² Pattenden, *The Law of Professional Client Confidentiality*, 2nd edn (Oxford: OUP, 2016), para.15.42.

¹³ The Singapore Court of Appeal said in *Skandinaviska Enskilda Banken v Asia Pacific Breweries* [2007] SLR (R) 367 at [44]: “Litigation privilege applies to every communication whether confidential or otherwise so long as it is for the purpose of litigation.”

¹⁴ [2018] EWCA Civ 2652.

¹⁵ *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 (CA).

¹⁶ See *Buttes Gas and Oil Co v Hammer (No 3)* [1981] QB 223 at [243-244].

¹⁷ Cap 97, 1997 Rev Ed.

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Appeal in *Skandinaviska Enskilda Banken AB (Publ) v Asian Pacific Breweries (Singapore) Pte Ltd* stated that sections 128 and 131 only cover an element of litigation privilege.¹⁸ Although litigation privilege exists by virtue of the common law, s 131 of the Evidence Act envisaged the “concept” of litigation privilege¹⁹, and thus there was no inconsistency between the common law and the statutory provisions, with the result that s2(2) of the Evidence Act applied to “confirm the applicability of litigation privilege” at common law.²⁰

Litigation privilege is apt to protect communications between the client (or on his behalf) and a third party (including his lawyer), as well as other materials (documentary or otherwise) that may be generated in preparation for or in connection with litigation. This may include an affidavit that was finalised and intended to be used later at trial, but not yet served or filed.²¹ Thus, litigation privilege can cover communications between a client and a lawyer, but also communications between (1) unrepresented clients and third parties, and (2) a lawyer and third parties, for the dominant purpose of litigation. The seminal case that confirms the existence of litigation privilege and outlines the test for determining when it arises is *Skandinaviska*. In this case, the Court of Appeal adopted the two-stage test in *Waugh v British Railways Board*.²²

Stage 1: Is there a reasonable prospect of litigation when the advice/information is sought?

This is a question of fact. The question is: At the time the client sought legal advice or consulted his lawyer, did he have the prospect of litigation in mind? To determine his state of mind, the circumstances in which legal advice was sought need to be considered. A reasonable prospect does not require that the chances of litigation must be higher than 50 per cent, nor that there must be a virtual certainty of litigation. The party claiming privilege is not required to show that it is more likely than not that adversarial litigation will ensue; on the other hand, it is insufficient to demonstrate that there is a “distinct possibility” that sooner or later someone might make a claim; other is a general apprehension of future litigation.

Stage 2: Is the information/advice obtained for the dominant purpose of litigation?²³

This second requirement relates to the purpose for which legal advice had been sought. If, of course, the sole purpose, on the facts of the case concerned, was for seeking legal advice in anticipation or contemplation of legal proceedings, there would be no problem – and *vice versa*. However, difficulties arise when there is more than one purpose for seeking such legal advice in a given case. In the leading House of Lords decision of *Waugh v British Railways Board*²⁴, the House of Lords held that if the dominant purpose for which legal advice had been sought and obtained was in anticipation or contemplation of litigation, then the advice concerned would be protected by litigation privilege.

A document will only be covered by litigation privilege where these two requirements are cumulatively at the time of the document’s creation.²⁵ Litigation privilege only attaches to communications that are confidential at the time of coming into existence. If the communication subsequently loses the quality of confidentiality, privilege may be lost.

¹⁸ *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 (CA).

¹⁹ *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [27] and [34].

²⁰ See *Skandinaviska* at [67]; Colin Liew, *Legal Professional Privilege* (SAL Academy Publishing 2020) 331.

²¹ *UOB Ltd v Lippo Marina Collection Pte Ltd* [2018].

²² [1980] AC 521 (UKHL).

²³ *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 (CA) at [52]; *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007].

²⁴ [1980] AC 521, [1979] 2 All ER 1169 (HL).

²⁵ *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [45]; Bankim Thanki, *The Law of Privilege* (3rd Edn) (Oxford University Press: 2018) at [3.50].

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Where lawyers are acting as co-counsel jointly representing one or more clients, their communications would be protected by legal advice privilege and/or litigation privilege, subject to the same rules as set out above. Beyond that, there are no rules that protect communications between lawyers. Neither legal advice privilege or litigation privilege protects communications between lawyers, merely on the basis that they are attorneys. As a matter of professional courtesy, however, lawyers will often keep materials realised in confidence where so requested by his/her counterpart.

While litigation privilege can apply to communications between a litigant (or his lawyer) and a third party, a third party is generally anyone who is neither the client nor the lawyer, i.e., a stranger to the client-lawyer relationship, such as an expert witness. Nevertheless, even in such situations, the privilege still would not apply to communications by a lawyer with opposing counsel.

The United States:

In the United States, the work product doctrine originated at common law and was articulated by the US Supreme Court in the seminal case *Hickman v Taylor*.²⁶ The work product doctrine exempts from discovery documents and other information prepared in anticipation of litigation or for trial. The doctrine is now codified for the federal courts in Rule 26(b)(3) of the Federal Rules of Civil Procedure. It has been substantially codified by Federal Rule of Civil Procedure 26(b)(3). The work product doctrine protects only litigation-related materials and affords only a qualified protection. It protects documents and tangible things, as well as “intangible work product”, but it does not protect the underlying facts that are held in the work product. Instead, the doctrine shields the interpretation of those facts. To invoke work product protection, a document must be prepared in response to a threat of impending litigation. Courts determine if the anticipated litigation has the requisite level of imminence by conducting a case-by-case analysis. A general fear of litigation in the future will not meet the anticipation requirement.²⁷ There must be some specific suspicion that litigation is probable.²⁸

There are two types of work product:

(a) “Ordinary” work product

In practice, ordinary work product is defined in the negative. It is all material prepared in anticipation of litigation or for trial that is not opinion work product. It should reveal a legal theory or opinion provided by an attorney using his or her legal knowledge. If a layperson could have generated the same work product under the circumstances, the work product will qualify as fact work product. Ordinary work product includes witness statements, factual eyewitness information, investigative reports, photographs, diagrams, sketches and memoranda of recordings prepared in anticipation of litigation.

(b) “Opinion” work product

Opinion work product is defined as material prepared by an attorney which captures “mental impressions, conclusions, opinions, or legal theories of an attorney”.²⁹ Although pure legal theories are not protected, the attorney’s interpretation of these theories and the application of the facts to the theories is protected.³⁰ As well as protecting the attorney’s mental impressions, the opinion work product doctrine also protects the mental processes of persons assisting in trial preparation such as

²⁶ 329 US 495, 508–12 [1947].

²⁷ See *In re Gabapentin Patent Litigation*, 214 FRD 178, 183 (DNJ 2003) (“In general, though, a party must show more than a “remote prospect”, an “inchoate possibility”, or a “likely chance of litigation”).

²⁸ See *In re Doe*, 662 F.2d 1073, 1076 n. 2 (4th Cir. 1981).

²⁹ Fed. R. Civ. P. 26(b)(3).

³⁰ See *In re Vitamins Antitrust Litig.*, 211 FRD 1, 4 (D.D.C. 2002).

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paralegals, investigators, consultants, or law office personnel.³¹ The most common instances of opinion work product include memoranda which contain analyses of law or fact, evaluations of trial strategy, perceived strengths and weaknesses in a case, intended lines of proof, cross-examination plans, and the inferences drawn by the lawyer.³² The compilation, ordering or indexing of facts may also be regarded as opinion work product.³³

The doctrine only protects documents that are prepared for the purposes of litigation from discovery. Materials are prepared in anticipation of litigation if they would not have been prepared but for the prospect of that litigation. Work product prepared in the ordinary course of business, or pursuant to public requirements unrelated to litigation, are not protected.³⁴ Most courts have decided that documents prepared “because of” litigation will be protected.³⁵ However, other courts require that in order to acquire work product protection, preparation for litigation must be the dominant motivating factor underlying the creation of the document.³⁶

Work product doctrine does not entirely protect such work product from discovery. A court can compel disclosure of ordinary work product if the party requesting it shows substantial need and undue hardship.³⁷ The party seeking production must demonstrate why the desired materials are relevant, and that prejudice will result from the non-disclosure of those materials. Courts have developed a range of factors in establishing need and hardship, including the significance of the materials to the preparation of the case, the difficulty and cost in obtaining substantial equivalents to the desired materials, the uses to which the desired materials will be put, and the extent to which the asserted need has been substantiated. Undue hardship is most commonly proven when materials are unavailable elsewhere. This standard is rarely met and involves situations such as witness unavailability, where the only alternative source of information is the opposing party’s work product. The bar for discovery of opinion testimony is higher still, requiring an “extraordinary showing of necessity.”³⁸ Opinion work product is given a heightened level of protection, and even absolute protection by courts in some jurisdictions.³⁹ The US Supreme Court stopped short of ruling that opinion work product is always protected.

The common interest rule also applies to the work-product doctrine. Materials exchanged between, or jointly produced by, parties with a common legal interest in the same anticipated litigation are protected under the work-product doctrine.

Sweden:

Swedish legal privilege consists of two separate privileges: a broad privilege which applies to lawyers who are members of the Swedish Bar Association (commonly referred to as “advocates”), and a more limited privilege that applies to all trial representatives irrespective of whether they are advocates, lawyers or lack formal legal education. There are minimal requirements as regards who may represent a party in litigation in Swedish courts and representatives do not have to be legally trained. It is not essential to be a lawyer to

³¹ See *Virginia Elec. & Power Co. v Sun Shipbuilding & Dry Dock Co.*, 68 FRD 397, 402 (E.D. Va. 1975); Fed. R. Civ. P. 26(b)(3) advisory committee note.

³² See *Upjohn*, 449 US at 399–402.

³³ See *Sporck v Peil*, 759 F.2d 312, 315–17 (3d Cir. 1985) (selection process can create opinion work product even though the documents themselves do not qualify for work product protection).

³⁴ See Fed. R. Civ. P. 26(b)(3) advisory committee note.

³⁵ See *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)*, 357 F. 3D 900, 907 (9th Cir. 2004).

³⁶ See eg, *V. S. v Davis*, 636 F. 2d/028, 1040 (5th Cir. 1981).

³⁷ Fed. R. Civ. P. 26(b)(3).

³⁸ *Upjohn*, 449 US at 399–402.

³⁹ See eg, *Sporck*, 759 F.2d at 316 (opinion work product accorded ‘almost absolute protection’); *In re Int’l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir. 1982) (same); *Garcia v City of El Centro*, 214 FRD 587, 591 (S.D. Cal. 2003) (‘Opinion work product, containing an attorney’s mental impressions or legal strategies, enjoys nearly absolute immunity and can be discovered only in very rare circumstances’).

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represent someone in court and a party may represent himself without counsel, although this is uncommon. A person who lacks formal legal education may assist someone in a judicial matter as “lay legal representative” if the court considers him/her sufficiently competent and fluent in Swedish and he/she is resident within the EU.

The Swedish Arbitration Act sets forth no privileges for arbitrations seated in Sweden but as arbitrators have no compulsory powers under Swedish law to enforce an order to produce documents, a party seeking an enforceable order must apply to a court. In that context the privileges set forth by the Code of Judicial Procedure (the “CJP”) will apply. It is unclear whether litigation privilege covers third-party communications or applies to adjudicative proceedings that are not conducted in a regular court. It is reasonable that litigation privilege should apply when arbitration proceedings are adversarial and adjudicative.⁴⁰

The CJP states that in order for litigation privilege to apply, the legal representative must have been formally appointed to represent a client in court proceedings; the communication in question must have been confidentially entrusted to the representative or be information ‘in the performance of his assignment’ and must have been made to facilitate the legal representation in the litigation; and the client must not have consented to disclosure of the communication.⁴¹ The scope of privilege will be decided by the court on an ad hoc basis by making an overall assessment of the facts taking into consideration for instance: the power of attorney which may be provided in writing or orally before the court; the filing of a statement of claim or other application; a pre-trial settlement; and the nature of the legal matter. Correspondence and administrative matters relating to the matter which is being litigated may be included in the scope of the privilege.

India:

In India, the modern law on legal professional privilege has developed in two strands: litigation privilege and the more general, legal advice privilege. Sections 126 to 129 of the Indian Evidence Act deal with the privilege that is attached to professional communications between the legal adviser and the client, which covers litigation privilege. Section 126 has been enacted for the protection of the client and not of the lawyer. It is founded on the impossibility of conducting legal business without professional assistance and on the necessity, of securing full and unreserved intercourse between the two, in order to render that assistance effectual.⁴²

Litigation privilege attaches to confidential communications between client and lawyer if the dominant purpose of that communication concerns advice or evidence in respect of litigation that exists or is contemplated, or is reasonably in prospect between:

- a lawyer and a client;
- a lawyer and an agent; or
- a lawyer and a third party for the sole or dominant purpose for litigation whether for:
 - seeking or giving advice in relation to it;
 - for obtaining evidence to be used in it; or
 - for obtaining information leading to obtaining such evidence.

⁴⁰ Shaughnessy 2001.

⁴¹ CJP, chapter 36, section 5, para 3.

⁴² Rantanlal Ranchhoddas, Dhirajlal Keshavlal Thakore and Khan, A. (2017). *Ratanlal & Dhirajlal: Law of Evidence, Updated 23rd Edition*. Part III: Production and Effect of Evidence.

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Litigation privilege covers documents created in respect of the seeking or giving of legal advice for the purposes of actual or contemplated legal proceedings. This includes any documents that are brought into existence for the purpose of preparing for actual or contemplated legal proceedings. It is the basis for claiming privilege for correspondence with witnesses of fact or experts and proofs, reports or documents generated by them. Litigation privilege is not confined to documents providing legal advice and includes, for example, papers passing between lawyers and potential witnesses. It covers communications between a lawyer or a lawyer's client and a third party as well as any document brought into existence for the primary purpose of being used in litigation.⁴³

The test for whether a document is covered by the litigation privilege involves three conditions, all of which must be satisfied for the privilege to arise:

1. litigation must be in progress or in contemplation;
2. the communications must have been made for the sole or dominant purpose of conducting that litigation; and
3. the litigation must be adversarial, not investigative or inquisitorial.

Litigation privilege would apply to subsequent litigation that commences while the earlier litigation is pending. Otherwise, the application of privilege would depend upon the facts of the matter and the court's discretion.

LITIGATION PRIVILEGE: THE RATIONALE

It is apparent across all the jurisdictions discussed above, that in order to have a due process, a litigant or prospective litigant should be able to prepare properly for the proceedings by having third party communications in the confidence that others thereafter will not be entitled to examine and perhaps profit from them. Lord Rodger of Earlsferry in *Three Rivers (No.6)* observed the continuing impact of the adversarial nature of litigation as a justification for the privilege when he stated: "Litigation privilege...is based on the idea that legal proceedings take the form of a contest...In such a system each party should be free to prepare his case as fully as possible without premature disclosure or interference from the opposing party."⁴⁴ Since the law requires "the freest possible communication"⁴⁵ between client and lawyer concerning the client's litigation, an essential element of that freedom is the ability of either of them to communicate confidentially and without inhibition with a third party who might be able to assist the client's case, without being obliged to disclose the result of their communications to the other side.

Aikens J. clearly outlined the fundamental rationale for protecting communications covered by litigation privilege in *Winterthur Insurance Company v AG (Manchester) Limited (in liquidation)* when he stated that it "rests, in modern terms, on the principles of access to justice, the proper administration of justice, a fair trial and equality of arms."⁴⁶ It can therefore be understood that the purpose of litigation privilege entails four key principles: access to justice; the proper administration of justice; a fair trial; and equality of arms. These principles are examined more closely below.

Firstly, litigation privilege furthers access to justice as it encourages parties to gather evidence and explore potential legal recourses and remedies without adversarial interference and fear of premature disclosure. It

⁴³ Greenwald, D.M., Russenberger, M. and International Bar Association (2012). *Privilege and confidentiality: an International Handbook*. Part 1: Legal Privilege in India.

⁴⁴ *Three Rivers District Council and Others v Governor and Company of the Bank of England (No.6)* [2004] UKHL 48; [2005] 1 A.C. 610 at [52].

⁴⁵ Cotton L.J. in *Southwark and Vauxhall Water Co v Quick* [1878] 3 Q.B.D. 315 at [322].

⁴⁶ [2006] EWHC 839 (Comm) at [68].

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protects a party from disclosing certain communications that the adversary may be able to use to shape their case as to defeat the ends of justice.⁴⁷

Secondly, litigation privilege aids the administration of justice in that it encourages a client "...to make a clean breast of it" to his lawyer with a view to the prosecution of his claim or the substantiation of his defence to a claim brought against him.⁴⁸ It accomplishes this by ensuring that only relevant, necessary and reliable evidence is placed before the tribunal.

Thirdly, litigation privilege facilitates a fair trial because it ensures a litigant or prospective litigant is able to prepare their contending positions and seek evidence without being obliged to disclose the result of their searches to their opponent.⁴⁹ In this way, it secures full and unreserved communications between a client and their lawyer, or either of them with a third party such as an expert or witness and in doing so facilitates an efficient and due process.

Fourthly, litigation privilege promotes equality of arms by creating a "zone of privacy" in which lawyers can work on their case without fear of unnecessary intrusion by their adversaries who might then gain a strategic advantage.⁵⁰ Indeed, any such intrusion or the lack of protection stemming from litigation privilege may create an imbalance between the parties.

MINIMUM STANDARD RECOMMENDATION:

The principles of access to justice, the proper administration of justice, fair trial and equality of arms are of considerable importance in international arbitration. Therefore, the rationale for granting confidentiality protection to communications prepared for the purpose of or in anticipation of legal proceedings does apply to international arbitration. It follows that the possibility for arbitral tribunals to apply a minimum standard protection to communications traditionally deemed as covered by the litigation privilege (or similar concepts) would be a positive development for arbitration users and their counsel, particularly in terms of certainty. It may be appropriate to call this minimum standard protection the "Arbitration Privilege" as the protection will cover litigation privilege specifically within the international arbitration context.

For the Arbitration Privilege to apply, the material in question would have to:

- Be a communication between the counsel (acting in a professional capacity) and the client, or between them and a third party (or be a document created by or on behalf of the client or the client's lawyer).
- Be made for the dominant purpose of an arbitration.
- Relate to arbitration that is either pending (commenced) or reasonably contemplated.
- Be confidential.

The right to claim Arbitration Privilege would be subject to the exceptions of waiver, crime or fraud and necessity.

⁴⁷ Bray, *The Principles and Practice of Discovery* [1885] at [406–07].

⁴⁸ *Anderson v Bank of British (Columbia)* [1876] 2 CH D 644 at [649-650].

⁴⁹ *Lee v. South West Thames Health Authority* [1985] 1 WLR 845 at [850].

⁵⁰ 2023 Bloomberg Industry Group, *Work Product Doctrine in State Court*, p.1.

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Exception (1): Crime or Fraud

- In *Gelatissimo Ventures (S) Pte Ltd v Singapore Flyer Pte Ltd*⁵¹, the High Court held that the crime/fraud exception under the Evidence Act applied to both legal advice privilege and litigation privilege.⁵² Arbitration privilege will not protect communications made in furtherance of any illegal purpose,⁵³ or prevent from disclosure any fact observed by legal counsel which shows that a crime or fraud has been committed.⁵⁴ If there has been crime or fraud or it is clear that inspection of a privileged document was given by mistake, the party who saw it may be enjoined for making use of the knowledge gained from that document.
- In proving that communications were made for an illegal purpose, the proponent is generally required to rely on extraneous evidence and will not be allowed to inspect the privileged documents or communications for the purpose of finding in them additional proof of the illegal purpose. The extraneous evidence must be capable of establishing to a degree of cogency the existence of an illegal purpose and a bald assertion of an illegal purpose is seldom sufficient to prove its existence.⁵⁵
- It was affirmed in *PP v Soh Chee Wen* that if there is sufficient reason to think that the witness's testimony is tainted by misconduct or abuse of process, such as witness tampering or witness coaching, then the litigation privilege in the communications pursuant to which such misconduct was carried out would also fall away.⁵⁶

Exception (2): Necessity

In *PP v Soh Chee Wen*, the accused was allowed to argue that privileged evidence was necessary to be relied on. The test was whether his competing interest outweighed the Prosecution's interest in withholding the communications.

Exception (3): Waiver

(i) Express waiver:

- This involves a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it was open to that party to claim or raise. It could not meaningfully be said that a party had voluntarily elected not to claim a right or raise an objection if he is unaware that it is open to him to make the claim or raise the objection.⁵⁷

(ii) Implied waiver:

- A waiver is not to be easily implied. In a situation where the privileged document was disclosed to, presented to, or shared with another, what mattered was the context and purpose for which this was done – the question was whether a shield of confidentiality could reasonably be expected to exist following the sharing of the heretofore privileged document.⁵⁸ In the context of a multi-party litigation, selective disclosure of a document to some but not all of the parties does not necessarily constitute waiver of Arbitration Privilege as against all the parties.

⁵¹ [2010] 1 SLR 833, [2009] SGHC 235.

⁵² Cap 97, 1997 Rev Eds 128(2).

⁵³ Evidence Acts 128A(2)(a); Singapore Parliamentary Debates, 14 February 2012, Volume 88, p 1128.

⁵⁴ Evidence Acts 128A(2)(a); Singapore Parliamentary Debates, 14 February 2012, Volume 88, p 1128.

⁵⁵ See *Knaresborough Banking Co v Lorrimer* (1897) 41 SJ 734.

⁵⁶ [2020] SGHC 186.

⁵⁷ See *Rahimah bte Mohd Salim v PP* [2016] 5 SLR 1259.

⁵⁸ See *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 291 at [114].

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Annex 3 – Litigation Privilege

- It entails an examination of all the circumstances of the case, including:
 1. what has been disclosed;
 2. the circumstances under which the disclosure took place;
 3. whether it may be said that the party had “relied” or “deployed” the advice to his case; and
 4. whether it can be said that there is a risk that an incomplete and misleading impression had been given.

This is a fact-sensitive exercise of judgment. The inquiry is objective and not subjective.

(iii) Waiver through disclosure:

- Arbitration privilege can be waived if it is disclosed to an adversary directly or if the disclosure enables an adversary to gain access to the information. If a document covered by Arbitration Privilege is inadvertently disclosed during a document production, for example, the protection may be waived unless the holder of the Arbitration Privilege took reasonable steps to prevent disclosure, and the holder promptly took reasonable steps to remedy the error.

There is currently a lack of clear guidance on what applicable principle in relation to litigation privilege to use in the international arbitration community. The most straightforward solution to this issue would be to have a minimum standard protection such as the one described above. The IBA Task Force on Privilege believes that Arbitration Privilege is desirable and enforceable as its adoption will offer some level of uniformity and certainty to this important area of arbitral practice.