IBA Task Force on Privilege in International Arbitration

Report on Uniform Guidelines on Privilege in International Arbitration

Annex 4 – Public Interest Immunity

1. Whether common rules of privilege apply across jurisdictions in the category of privilege considered?

1.1. Almost always exists in some form across jurisdictions, and has also been recognized in some international arbitration cases[1].

1.2. Mostly enacted in legislation/ statute – potentially because Governments consider it a crucial protection. However, the privilege can exist either as a general principle of law or be embodied in legislation[2]. In some jurisdictions, certain of these protections may be classified as legal impediments rather than privileges[3].

1.3. Roman Mikhailovich Khodykin, Carol Mulcahy and Nicholas Fletcher provide some examples of public interest privilege:

> "*In Nigeria, Section 243 of the Evidence Act 2011 provides that: 'A Minister, or in respect of matters to which the executive authority of a State extends, the Governor or any person nominated by him, may in any proceedings object to the production or request the exclusion of oral evidence, when, after consideration, he is satisfied that the production of such document or the giving of such oral evidence is against public interest'. 'Cabinet privilege' exists under Section 38 of the Canada Evidence Act 1985. According to this provision, the production of documents prepared for or used by Ministers of the Crown in executive policy-making deliberations is to be refused. In England 'public interest immunity' has replaced 'Crown Privilege' and is similar in scope to that found in the Nigerian provision mentioned above. Halsbury's Laws describe it thus: 'It is a general rule of law founded on public policy and recognised by Parliament that any documentary evidence may be withheld or an answer to any question may be refused on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest. The rule is a rule of substantive law and may be described as a principle of constitutional law; it is not a mere matter of practice or procedure'. A similar type of privilege known as*

[1] Pope & Talbot Inc v. Canada; Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania.

[2] Roman Mikhailovich Khodykin, Carol Mulcahy, Nicholas Fletcher, '12. Commentary on the IBA Rules on Evidence, Article 9 [Admissibility and Assessment of Evidence]', in: Roman Mikhailovich Khodykin, Carol Mulcahy, Nicholas Fletcher (eds), *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, Oxford: Oxford University Press, 2019, p. 434.

[3] *Ibidem,* p. 435.

'executive privilege' exists in the United States. This allows the President and other state officials to withhold certain communications within the executive department from the courts and from Congress. In addition, some US states courts recognize a privilege protecting the deliberative process of government"[4].

1.4. One question is who can assert this privilege?

- In some jurisdictions, it is only the head of the relevant Government department that can assert the privilege.
- In other jurisdictions, it can be the Government official himself/herself who can assert this privilege.

1.5. Another question is who determines whether the privilege can be asserted?[5]

- In some jurisdictions, it is the court that assesses the information/ document before determining whether the privilege can be asserted;
- in other jurisdictions, the Government official himself/ herself cannot be compelled to disclose communications;
- in some situations, it is only the head of the Government department that can waive any such privilege.

1.6. What sort of categories of public interest are covered?[6]

- Affairs of the State; cabinet confidences
- Communications made in official confidence
- National security; military defense of the country[7]
- Grounds of political or institutional sensitivity (anything classified "Secret")[8]
- Police matters, eg protection of threatened individuals

2. Whether idiosyncratic rules of privilege apply in some jurisdictions in the category of privilege considered?

2.1. The analysis presented in the Country Reports indicates a prevailing tendency among States to regard public interest information as confidential and inviolable.

[4] See Roman Mikhailovich Khodykin, Carol Mulcahy, Nicholas Fletcher, '12. Commentary on the IBA Rules on Evidence, Article 9 [Admissibility and Assessment of Evidence]', in: Roman Mikhailovich Khodykin, Carol Mulcahy, Nicholas Fletcher (eds), *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, Oxford: Oxford University Press, 2019, pp. 433-434.

[5] See Biwater Gauff LTD. v. United Republic of Tanzania, Procedural Order n°2, 2006, p.8.

[6] See Biwater Gauff LTD. v. United Republic of Tanzania, Procedural Order n°2, 2006, p.9.

[7] See Klaus Peter Berger, 'Chapter 13: Evidentiary Privileges', in: Franco Ferrari and Friedrich Jakob Rosenfeld (eds), *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues*, Alphen aan den Rijn: Kluwer Law International, 2022, p.309.

[8] SeePope and Talbot, Inc. v. Goverment of Canada, 06 September 2000, §1.4, p.2.

2.2. Most States categorize similar types of documents and information as subject to public interest immunity. These include government documents, government possessions, public authority information and information related to the public interest in general.

2.3. However, the treatment of confidentiality rules regarding each document varies among States and is subject to the discretion of each jurisdiction. Tribunals generally evaluate claims of public interest immunity on a case-by-case basis, taking into account the relevant governing laws, the significance of the information and the competing social interests involved.

2.4. In conclusion, each State establishes its own interpretation and application of public interest immunity. There are idiosyncratic approaches regarding the types of documents and information that are eligible for public interest immunity, as well as the entities authorized to assert this privilege.

3. Whether rules of public order (or international public order, as the case may be) apply in some jurisdictions in relation to the category or privilege considered?

3.1. In this context, it is very relevant. As noted above, understandably, this appears to be a matter of importance to Governments.

3.2. Public interest and public policy are directly related, and in order to safeguard sensitive information, States employ the mechanism of public interest immunity privileges. Therefore, the privileges of public interest immunity are established by the State as a consequence of public policy.

3.3. However, it should be noted that public interest immunity is a matter of specific internal public policy rather than a general principle of law, as there is no international public policy regulating this topic. The authority to establish public interest immunity lies within the jurisdiction of each individual state and is constrained by the boundaries of their own legal systems[9].

3.4. Certain privilege rules in relation to public interest, national security, etc., may fall under article 9(2)(b) of the IBA Rules, which provides practical guidance for tribunals to rule on privilege issues. The benefit of the referred article is that "*while avoiding expression of a fixed rule that might trespass on mandatory provisions of applicable law (and thereby create more problems than would be solved), the rules provide a decision-making framework that provides assistance to the tribunal as it navigates its way through these complex issues*"[10]. Article 9(2)(b) of the IBA Rules tends "*to suggest that the laws of the home jurisdictions of the parties*

[9] Michael Reisman; James Richar Crawford, 'Chapter 12: Procedure and Proof: Developing the Case', in W Michael Reisman, James Richard Crawford , et al. (eds), *Foreign Investment Disputes: Cases, Materials and Commentary*, 2nd edition, Alphen aan den Rijn: Kluwer Law International, 2014, p. 1123.

[10] Roman Mikhailovich Khodykin, Carol Mulcahy, Nicholas Fletcher, '12. Commentary on the IBA Rules on Evidence, Article 9 [Admissibility and Assessment of Evidence]', in: Roman Mikhailovich Khodykin, Carol Mulcahy, Nicholas Fletcher (eds), *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, Oxford: Oxford University Press, 2019, p. 431.

are the appropriate ones to take into account on issues of privilege", even though "*considerations expressed in Article 9.3 allow the tribunal take into account factors relevant to the broader conduct of the arbitration*"[11].

4. In light of the above, whether uniform rules of privilege would be desirable in relation to the category considered, and what form these rules of privilege could take?

4.1. Yes, relevant points noted above.

4.2. Given the significance of national security and sensitivity of Governments, query if the rules of privilege should simply follow the applicable law of the relevant Government to which the document/ information belongs.

4.3. There is pattern of what type of information is considered to benefit from public interest immunity, however the specifics of public interest immunity vary from State to State and the person who is analyzing each information must look at the specific state law that governs such information.

4.4. Tribunals tend to respect claims of public interest immunity although there have been exceptions. For instance, in the case Biwater Gauff v. Tanzania, the ICSID tribunal declined to recognize the government of Tanzania's assertion of public interest immunity, stating that the concept of public interest immunity is "*not a general principle of law*"[12].

4.5. In the case of Merrill Ring Forestry v. Canada[13], the court emphasized the need for a "*balancing test*" to be conducted. This test involves weighing the potential harm that would arise from the release of the documents against the public interest in ensuring a fair administration of justice. Several factors were considered by the court in this analysis. Firstly, the nature of the documents was taken into account, including whether they contained information regarding actual discussions or deliberations within the Cabinet, or if they were documents brought to the attention of the Cabinet, potentially even prepared by private entities. Secondly, the court considered the importance of these documents in enabling the investor to adequately prepare their memorials and present their case. Lastly, the issue of confidentiality was also taken into consideration[14].

4.6. In any case, it is important to notice that "*privilege is derived from the laws and regulations under which such institutions operate and which also include the right to maintain a certain*

[11] Roman Mikhailovich Khodykin, Carol Mulcahy, Nicholas Fletcher, '12. Commentary on the IBA Rules on Evidence, Article 9 [Admissibility and Assessment of Evidence]', in: Roman Mikhailovich Khodykin, Carol Mulcahy, Nicholas Fletcher (eds), *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, Oxford: Oxford University Press, 2019, p. 432.

[12] Biwater Gauff LTD. v. United Republic of Tanzania Procedural Order No. 2, 2006. p. 8

[13] Merrill & Ring Forestry L.P. v. the Government of Canada, 2008

[14] Eugenie Caroit, Paloma Garcia Guerra, 'Privilege in international arbitration: what are the trends?', in João Bosco Lee and Flavia Mange (eds), Revista Brasileira de Arbitragem, Alphen aan den Rijn: Kluwer Law International, 2020, Volume XVII Issue 66, pp. 67 – 90.

*degree of secrecy for internal communications. These laws are not automatically applicable in international arbitration**. An arbitral tribunal needs to weigh such laws against other substantive and procedural obligations incumbent on the tribunal in each individual case**. These other obligations may be rooted in the procedural rules governing the arbitration, the substantive law governing the contract, the overall purpose of the arbitration and the tribunal's fundamental duty to treat the parties with equality and fairness"*[15].

Analysis of the Country based Report – Public interest privileges		
Country	**What is considered public interest?**	**How it is related to privilege?**
Sweden	Government documents Government possessions Public authority information Information related to the public interest in general	"Not all documents are subject to disclosure. There are several exceptions to the rules on production of documents. The exclusions include legal privilege, trade secrets and personal notes. A party may only request the disclosure of private documents, i.e. documents not in the possession of public authorities that fall under the principle of public access to information"[16]. "For some public authorities there is legislation under which information created and obtained for a legal dispute of the authority or a company owned by the Government, or a municipality may be held confidential under certain conditions (Chapter 19, Section 9 of the Public Access to Information and Secrecy Act, the "PAISA")"[17]. "Confidentiality also applies for information provided to the Chancellor of Justice (Sw: Justitieombudsman) for the purpose of a legal dispute if it can be assumed that the Government's position as a party in the dispute is prejudiced by a disclosure (Chapter 42, Section 2, second paragraph of the PAISA). These rules exempt documents from the public authorities' constitutional duty to disclose information to the public. However, it does not prevent a court from ordering the production of a public document containing such confidential information, if it can be assumed to be relevant as evidence (Chapter 38, Section 8 of the CJP)"[18].

[15] Klaus Peter Berger, 'Chapter 13: Evidentiary Privileges', in: Franco Ferrari and Friedrich Jakob Rosenfeld (eds), *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues*, Alphen aan den Rijn: Kluwer Law International, 2022.
[16] Country Report for Sweden, p. 3
[17] Country Report for Sweden, p. 5
[18] Country Report for Sweden, p. 5

		"The confidentiality according to Chapter 19 Section 9 of the PAISA applies to public authorities representing the public as part in the dispute or another public authority, representing the former authority"[19].
Singapore	Government documents Government possessions Public authority information Information related to the public interest in general	"Proper to apply a "balancing approach" to resolve the issue of whether legal privilege should give way to other countervailing public policy considerations. Factors to be considered for penumbra (non-core) elements: • Privilege may be lost even if person claiming it had not acted dishonestly; • Degree of culpability is an important factor; • Court must evaluate claim against public policy considerations; • Claim is stronger if information is covered by both litigation and legal advice privilege; • Claim is stronger if conduct of claimant is itself an issue in the proceedings rather than being a separate and distinct factor; and • Party seeking to lift privilege must adduce "at least some prima facie evidence" that the privileged communications were made as part of an ongoing fraud. • The balancing test is part of the process of defining what is fraud under s 128(2) of the Evidence Act, and thus it does not mean that legal advice privilege can be waived as long as there is competing public interest of sufficient weight (at [66]). • "Language may be inherently flexible, but there is a limit to how much any particular word can be stretched beyond its natural meaning to take on meanings which it cannot reasonably encompass. For example, I cannot see how an argument for privilege to be lifted in order to facilitate national security aims can possibly be construed as falling within the ambit of the fraud exception"[20]. "Official communications under s 126 Evidence Act:

[19] Country Report for Sweden, p. 9
[20] Country Report Singapore, pp. 6-7

		i. No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure. ii. No person who is a member, an officer or an employee of, or who is seconded to, any organisation specified in the Schedule to the Official Secrets Act (Cap. 213) shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure"[21]. "Tentat Singapore v Multiple Granite [2009] i. Not limited to the specific circumstances expressly stated in statute. ii. Privilege militates against public interest in the availability of all relevant evidence for the purpose of adjudication. Hence, a party wishing to maintain his privilege must act in a manner consistent with, and which preserves, his right"[22].
England and Wales	Government documents Government possessions Public authority information Information related to the public interest in general	"Once privilege has been established, an absolute right to withhold the document in question arises. Therefore the court will not be called upon to exercise any discretion, whether on the grounds of public policy or otherwise"[23]. "Public interest immunity Under CPR 31.19 a party is entitled to "withhold disclosure of a document on the ground that disclosure would damage the public interest…" The aim is to prevent disclosure of material which would harm the nation or the administration of justice. A without notice application is required to rely on this immunity"[24].
United States	Government documents Government possessions	"Evidence of compromise offers or acceptances, and any form of communications in the context of settlement negotiations, are not admissible in evidence,

[21] Country Report Singapore, p. 11
[22] Country Report Singapore, p. 18
[23] Country Report England and Wales, p. 3
[24] Country Report England and Wales, p. 7

	Public authority information Information related to the public interest in general	on behalf of any party, to prove or disprove the validity or amount of a claim or to impeach by a prior inconsistent statement. Fed. R. Evid. 408(a). Such offers or communications are only protected if made after a dispute has arisen, however. Although an actual litigation does not need to exist, there must exist a difference of opinion between the parties that the negotiations are attempting to resolve. See Alpex Computer Corp. v. Nintendo Co., 770 F. Supp. 161, 164 (S.D.N.Y. 1991). There are two exceptions to this exclusionary rule: (i) The negotiations or offers of compromise are (a) related to a claim in a criminal case and (b) between a party and a public office that is exercising its regulatory, investigative, or enforcement authority. Fed. R. Evid. 408(a)(2)"[25]. "The state secrets privilege is a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be harmful to national security and was first recognized in United States v. Reynolds, 354 U.S. 1 (1953). The privilege can be claimed only by the government, and specifically must be claimed by the head of the department with control over the matter in question after personal consideration by that officer. See Zuckerbraun v. General Dynamics, 935 F.2d 544, 546 (2d. Cir. 1991). For example, the Secretary of the Navy herself must claim the state secrets privilege for a case involving secret naval communications or documents, as was the case in Zuckerbraun. See id. The privilege may be asserted even when the government is not a party to the case. See id. A court before which the state secrets privilege is invoked must evaluate the validity of the claim without disclosing the information claimed under the privilege. See id. In evaluating the validity of the privilege claim, a court must grant "utmost deference" to the executive's assessment of the impact that disclosure would have on national security. See id.

[25] Country Report United States, pp. 15-16

		If a court finds that that the state secrets privilege applies, it must exclude the secret communication or document from evidence. This may result in dismissal if the remaining evidence is insufficient to maintain the case. See Halkin v. Helms, 690 F.2d 977, 998-99 (D.C. Cir. 1982)"[26]. "Revealing or using confidential client information may result in professional sanction. Depending on the severity of the breach of confidentiality, sanctions may range from formal reprimand, to suspension, and ultimately to disbarment. Typically, formal reprimands are given for disclosures of confidential information that do not seriously prejudice the client. For example, an Indiana divorce attorney was reprimanded for discussing his former client's divorce and financial situation with a friend on the police force, after the attorney learned his former client was arrested for murdering her former husband. See In re Rhame, 416 N.E.2d 823 (Ind. 1981). Serious sanctions such as suspension or disbarment are typically reserved for intentional disclosures or uses of confidential information that prejudice the client and benefit the attorney. For instance, in Stark County Bar Association v. Osborne, 1 Ohio St. 3d (1982), an attorney was suspended for using confidential information, including about a client's poor health, to enter into business deals that were particularly advantageous for the lawyer and detrimental to his client"[27].
Brazil	Government documents Government possessions Public Authority information Information related to the Public Interest in general	"Regarding State Secrets, Article 5, XXXIII of the Brazilian Constitution provides that all persons have the right to receive, from the public agencies, information of private interest to such persons, or of collective or general interest, which shall be provided within the period established by law, subject to liability, except for the information whose secrecy is essential to the security of society and of the State"[28].

[26] Country Report United States, pp. 16-17.
[27] Country Report United States, p. 18.
[28] Country Report Brazil, p. 7.