IBA Task Force on Privilege in International Arbitration

Report on Uniform Guidelines on Privilege in International Arbitration

Annex 5 – Settlement Privilege

This Report addresses the similarities and differences in the rules governing the doctrine of settlement privilege (also known as without prejudice privilege) across different legislations and legal systems.

The Report concludes that, as a creature of common law systems, settlement privilege is rarely addressed and not developed in civil law jurisdictions. As such, while its adoption may serve a useful purpose in prompting parties to engage in good-faith settlement negotiations, avoiding protracted and expensive arbitrations, civil law practitioners will have to be proactively educated in this doctrine's contents, requirements, and limitations for it to be successfully embraced by the arbitration community.

Methodology

The Task Force analyzed national laws on settlement in eight jurisdictions from civil and common law countries (England, Wales, Singapore, France, Germany, Switzerland, Italy, and Japan), whose results were then compared and contrasted. The survey was based on publicly available summaries of privilege rules and primary sources, such as bespoke reports prepared by local practitioners and Task Force members.

This Report answers four key questions, attempting to identify the "big picture", without noting all of the nuance and detail in particular national laws that were not pertinent to this Report. The notes do not include responses to all 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 Settlement Privilege

The Subcommittee analyzed the rules of the various jurisdictions across four key questions. Our conclusions are below.

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

No. Settlement privilege is a concept that emanates from English and Welsh law. The 1989 Court of Appeals precedent *Rush & Tompkins v. Greater London Council* is a leading case on the matter. Other common law jurisdictions have adopted the institution *in totum*, most notably Singapore through the *Mariwu* and *Ernest Ferdinand* cases (2006 and 2018, respectively).

Settlement privilege is absent from civil law jurisdictions. The French Civil Code, whilst regulating the formation of contracts, includes since 2016 a vaguely worded confidentiality provision that may be assimilated to settlement privilege, in the sense that it prohibits the use of confidential information garnered through contractual negotiations,

with the consequence of non-compliance being *"those provided by ordinary rules of law"* (Article 1112-2). However, it is unrelated to court proceedings and has not been identified as a settlement privilege by practitioners or case law.

Germany, Switzerland, Italy, and Japan have no specific provisions regarding settlement privilege. German law, however, provides that information exchanged during settlement negotiations, although not privileged and thus eligible for disclosure before the respective court, will have no binding effect on the declaring party, and will serve merely as evidentiary proof.

Nothing prevents parties from entering into confidentiality agreements during settlement negotiations, whose breach would entail liability. However, this is not a default mechanism.

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

Yes. As previously mentioned, common law jurisdictions have given ample treatment to this doctrine. In the following subsections, the main country-specific rules applicable in England and Wales and Singapore will be outlined.

2.1. England & Wales

- Parties may convey, in the context of good faith and genuine settlement negotiations, written or oral information and concessions with the assurance that the counterparty will not be able to disclose and use it against them should the settlement not be reached and the proceedings continued (Rush & Tompkins Ltd v Greater London Council [1989] AC 1280, Cutts v Head [1994] Ch 290).

- A dispute must genuinely exist, but the parties need not be in the midst of litigation. It suffices that during negotiations the parties contemplated, or might reasonably have contemplated, litigation (Framlington v Barnetson [2007] EWCA Civ 502).

- The mere labelling of a document "without prejudice" is not enough: for instance, a letter offering to pay a lower sum than the amount claimed, labelled "without prejudice", was held not to be privileged, as the defendant was asking for a concession rather than giving one (Bradford & Bingley v Rashid [2006] 4 All ER 705). However, a document may still be privileged even without its proper labelling (Unilever Plc v Proctor & Gamble Co [2001] 1 All ER 783, Belt v Basildon & Thurrock NHS Trust [2004] EWHC 783 (QB)). Of course, labelling it appropriately is advisable.

- Within a chain of communications, when the use of "without prejudice" occurs in the first instance but not in the succeeding exchanges, the interaction as a whole will be covered by privilege as long as the messages form part of the same genuine negotiation, as opposed to it becoming an open-ended discussion (Cheddar Valley Engineering Ltd v Chaddlewood Homes [1992] 1 WLR 820).

- Purely commercial discussions regarding settlement will not be privileged (WH Holdings Ltd v. E20 Stadium LLP [2018] EWCA Civ 2652). However, other precedents state that as long as negotiations were genuinely aimed at settlement, the nature of the proposals discussed in the documents is irrelevant, thereby extending the privilege to certain commercial matters as well as legal exchanges (Sportradar AG v Football Dataco Ltd/Betgenius, [2022] CAT).

- The formula "without prejudice save as to costs" may also be used. It allows the court to analyze the settlement agreement once it has delivered the judgement, when awarding costs. Its practical use is that English courts operate on a 'loser pays' principle, and an apparently negative position may be seen on a more positive light once the full facts of the settlement are considered, thus impacting the cost allocation. Only in this scenario will courts be able to take into account the settlement agreement (Vestergaard v Bestnet [2014] EWHC 4047 (Ch)).

- However, this rule is not absolute, and as such, certain exceptions may apply:

    - Should the existence or terms of a settlement agreement be disputed, the parties may resort to negotiations in order to interpret it and shed light on each other's actions (Oceanbulk Shipping & Trading SA v TMT Asia Limited and 3 others [2010] UKSC 44).

    - Without prejudice communications may also be used as evidence by a party defending itself against allegations of fraud, misrepresentation or undue influence (Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd [2021] EWCA Civ 551).

    - The privilege may also be disregarded by courts when the exclusion of evidence would result in a cloak for perjury, blackmail or other unambiguous impropriety (Unilever Plc v Proctor & Gamble, Halfords Media (UK) Limited v Ponomarjovs (October 2015 – Chancery)).

    - When one party settles a dispute with another party and then turns to a third party to recover all or a portion of the payment, the latter may argue that the terms were unreasonably burdensome. In that scenario, the agreement may be presented under the interpretation that the party trying to recover its costs waived its entitlement to claim privilege. This is commonly known as the *Muller exception* (Muller v Linsley & Mortimer [1996] PNLR 74).

    - Finally, evidence of the negotiations may also be admissible in order to explain the delay in the proceedings or an apparent consent to the counterparty (Unilever plc v The Proctor & Gamble Co [2000] 1 WLR 2436).

- The privilege is joint, meaning that it can also be waived, but it must be done by both parties. It may be done inadvertently.

2.2. Singapore

- The Singapore Court of Appeals through different rulings has confirmed that Singaporean law adopted the English law position regarding settlement privilege.
- In *Mariwu v Dextra Asia* (2006) it was determined that Section 23 of the Evidence Act (as it then was) is *"a statutory enactment of the common law principle relating to the admissibility of 'without prejudice' communications based on the policy of encouraging settlements"*, thus endorsing the application of the without prejudice rule in *Rush & Tompkins*. This was held on the basis that Section 23 of the Evidence Act, which encourages the amicable settlement of disputes, is identical to the common law.
- In *Ernest Ferdinand* (2018), the Court of Appeals confirmed the trend by stating that without prejudice privilege exists in respect of communications between parties where the communications arise in the course of genuine negotiations to settle a dispute; and where the communications involve an admission against the maker's interest. This rule protects the party invoking the privilege against allegations of adverse inferences. In addition, the without-prejudice rule also recognizes any implied agreements which may arise out of the consequences of a party making an offer or agreeing to negotiate under without-prejudice situations.
- Thus, for all intents and purposes, the Singaporean position is identical to England and Wales.

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?

The research conducted did not produce any result indicating the existence of rules of public order relating to settlement privilege. The possibility of waiving settlement privilege, even inadvertently, also suggests the inexistence of public order rules.

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?

Although settlement privilege is an important institution, which may positively impact international arbitration, the introduction of uniform rules appears to be difficult due to the inexistence of settlement privilege in civil law jurisdictions.

Alternatively, the Subcommittee could think about having a set of uniform rules for common law jurisdictions and different uniform rules for civil law jurisdictions (i.e., having a set of rules on privilege explaining how it works in the common law and civil law systems), so that arbitration users and arbitrators are aware of the differences and can rely on those rules depending on whether the arbitration is related to one system or the other. However, this will not resolve the problem they may face if the arbitration relates to common law and civil law jurisdictions, unless there is a general privilege rule applicable to all types of privileges providing for a solution (e.g., Article 25 of ICDR International Arbitration Rules sets forth that when the parties, their counsel, or their

documents would be subject under applicable law to different rules, the arbitrator should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection).