# IBA Taskforce on Privilege in International Arbitration Report on Uniform Guidelines on Privilege in International Arbitration

## Annex 6 – Common Interest Privilege

### 1. INTRODUCTION

1.1 Where it operates, common interest privilege ensures that a person may disclose information to persons with whom it shares a common interest, and do so without waiving privilege over that information.[1]

1.2 In particular, where the communication of privileged information between two persons is concerned with either (i) the subject matter of a common interest or (ii) a litigation related to a common interest, extant at the time of communication, then:

1.2.1 the party sharing the privileged information (the "**disclosing party**") does not lose the right to assert privilege over it (save as against the party with whom it is shared); and

1.2.2 the party with whom the communication is shared (the "**receiving party**") can assert privilege over it – on the same basis as the disclosing party – as against a third party.[2]

1.3 As such, common interest privilege is not a freestanding form of privilege; it is an exception to the general rule that disclosure of a privileged document shall result in the waiver of privilege over that document. In other words, common interest privilege does not constitute a new category of privilege, it is simply a development in case law in certain jurisdictions that enables parties to share material that is already privileged with third parties with whom they have a requisite common interest, and to do so without waiving privilege.

1.4 Unlike with joint interest privilege, the right to waive privilege generally exclusively belongs to the party who originally owned the privilege, and it is not shared by the party to whom the privileged communication has been disclosed.

1.5 The justification for common interest privilege is the same as the justification for privilege more broadly – that is, that it enables "*the free flow of communication to enhance the quality of legal advice.*"[3] In particular, common interest privilege enables the free flow of information in

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1 This is commonly described as common interest privilege acting as a 'shield', and this is the use of common interest privileged which is addressed in this note.
There are also instances in which common interest privilege may act as a 'sword', in order to enable a receiving party to request the production of information from a disclosing party in a dispute, regardless of the fact that, as against third parties, that same information would be privileged from production.

2 *Commercial Union Assurance Co plc v Mander* [1996] 2 Lloyd's Rep 640 at 648..

3 E.g., *LG Elecs. v. Whirlpool Corp.*, No. 08 C 242, 2009 WL 3294800, at *5 (N.D. Ill. Aug. 24, 2009).

situations where persons wish to, for example:

1.5.1 ensure that mutually beneficial advertising is not misleading;[4]

1.5.2 apply for patents,[5]

1.5.3 conduct due diligence,[6]

1.5.4 avoid liability to prevent a lawsuit,[7]

1.5.5 ease interactions between principals / agents;[8] (re)insurers / (re)[9]insureds;[10] creditors / liquidators;[11] and entities within a group of company structure,[12] or

1.5.6 in the context of a litigation, exchange documents between one group of clients and their counsel and another group of clients and their separate counsel.[13]

## 2. QUESTION 1: *DO COMMON RULES OF PRIVILEGE APPLY ACROSS JURISDICTIONS IN THE CATEGORY OF PRIVILEGE CONSIDERED?*

2.1 No. Common interest privilege is not uniformly applied across jurisdictions, and does not even feature in numerous jurisdictions.

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4 E.g., *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389–90 (Fed. Cir. 1996).

5 Michael Pavento, Daniel H. Marti, Tracie Siddiqui & Patrick Eagan, '*Applicability of the Common Interest Doctrine for Preservation of Attorney-Client Privileged Materials Disclosed During Intellectual Property Due Diligence Investigations*', in INTELLECTUAL PROPERTY DESK REFERENCE 353, 353 (2009).

6 E.g., *United States v. BDO Seidelman LLP*, 492 F.3d 806, 815–16 (7th Cir. 2007) ("*Applying the common interest doctrine to the full range of communications otherwise protected by the attorney-client privilege encourages parties with a shared legal interest to seek legal 'assistance in order to meet legal requirements and to plan their conduct'. . . this planning serves the public interest by advancing compliance with the law . . . .*"); *Regents*, 101 F.3d at 1390–91; see also *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn. 1976) ("*Corporations should be encouraged to seek legal advice in planning their affairs to avoid litigation as well as in pursuing it*").

7 Katharine Traylor Schaffzin, '*An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*', 15 B.U. PUB. INT. L.J. 49, 77–78 (2005)., at 62 & n.41.

8 *The World Era (No 2)* [1993] 1 Lloyd's Rep 363.

9 *Svenska Handelsbank v Sun Alliance* [1995] 2 Lloyd's Rep 84.

10 *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027.

11 *Singla v Stockler and another* [2012] EWHC 1176 (Ch).

12 *USP Strategies plc v London General Holdings Ltd* [2004] EWHC 373 (Ch), paragraph 14.

13 The seminal English court decision which held common interest privilege to apply to include co-defendants is *Buttes Gas and Oil Co v Hammer* (No 3) [1981] 1 QB 223. Lord Denning MR described common interest privilege as being "*a privilege in aid of anticipated litigation*". While the House of Lords ([1982] AC 888) reversed the Court of Appeal's decision, it did not affect the issue of common interest privilege and the Court of Appeal's decision continues to be seen as the seminal authority for Commonwealth law countries for this privilege doctrine.

### *(i) Examples of regimes in which common law privilege is found*

2.2 Common interest privilege appears to be confined to common law jurisdictions. Its presence in these jurisdictions appears to be, at least in part, a balance to the broad approach to adversarial document production often featured in those same jurisdictions; in particular, the existence of common law privilege may be seen to counteract the chilling effect that such document production processes could otherwise have on dissemination of information which – as has been discussed above – enables "*the free flow of communication to enhance the quality of legal advice.*"[14]

2.3 In these jurisdictions, common interest privilege ensures that parties other than a client and its attorneys may assert privilege over information. As shall be seen in ***section 2(ii)*** below, in many jurisdictions this might be seen as surprising. However, in common law jurisdictions, this is neither unusual nor novel. In these jurisdictions it is generally the case that, pursuant to litigation privilege (discussed below) – or equivalent doctrines – non-legal actors such as experts may be able to assert privilege in relation to documents prepared for litigation.

#### *a. Selected common law jurisdictions*[15]

2.4 In England and Wales, Singapore and the United States of America, as well as certain other common law jurisdictions, privilege over information may be waived where that information is shared with third parties. However, a transmission of information will not result in such waiver if it attracts common interest privilege.

2.5 Looking at England and Wales specifically, guidance as to the circumstances in which common interest privilege will arise is set out in *Winterthur*, in which it was held that:[16]

> "*where a communication is produced by or at the instance of one party for the purpose of obtaining legal advice or to assist in the conduct of litigation, then a second party that has a common interest in the subject matter of the communication or the litigation can assert a right of privilege over that communication as against a third party. The basis for the right to assert this 'common interest privilege' must be the common interest in the confidentiality of the communication.*"

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14 E.*g., LG Elecs. v. Whirlpool Corp.*, No. 08 C 242, 2009 WL 3294800, at *5 (N.D. Ill. Aug. 24, 2009).

15 See **Annex I** below for details of common interest privilege in Singapore and the USA (at federal level) – further examples of jurisdictions in which common interest privilege operates.

16 *Winterthur Swiss Insurance Company & another v AG (Manchester) Ltd & others* [2006] EWHC 839 (Comm), paragraph 78.

2.6 For common interest privilege to operate then:

2.6.1 the underlying information must attract either legal advice privilege and/or litigation privilege. That is, the relevant information must attract privilege due to its character as either a:[17]

(a) confidential communication made between a client and its legal advisor, or either and a third party, which came into existence for the sole or dominant purpose of conducting adversarial litigation that was extant or reasonably in prospect (*litigation privilege*); or

(b) confidential communication between a client and its legal advisor, which came into existence for the dominant purpose of giving or receiving legal advice (*legal advice privilege*); and

2.6.2 the requisite common interest must exist at the time the information is transmitted to the receiving party (though it is not clear that it necessarily has to have existed at the time when the documents were created). Thereafter, "*once common interest privileged, always common interest privileged*".[18]

2.7 Where common interest privilege applies:[19]

2.7.1 the shared information will retain its original privilege;

2.7.2 both the disclosing party and the receiving party will be capable of exerting that original privilege (via common interest privilege) against third parties; and

2.7.3 it is speculated, but not confirmed, that the right to waive privilege will be held exclusively by the party or parties capable of asserting privilege over the information prior to its common interest communication.[20]

***b. The IPBA Guidelines***

2.8 The Inter-Pacific Bar Association (**"IPBA"**) adopted a set of Guidelines on Privilege and Attorney Secrecy in International Arbitration – the **"IPBA Guidelines"** – by IPBA Council

17 *Winterthur Swiss Insurance Company & another v AG (Manchester) Ltd & others* [2006] EWHC 839 (Comm), paragraph 78.
18 James-Bowen v Commissioner of Police of the Metropolis [2018] UKSC 40.
19 *Winterthur Swiss Insurance Company & another v AG (Manchester) Ltd & others* [2006] EWHC 839 (Comm), paragraph 78.
20 See *Accident Exchange v McLean* [2018] EWHC 23 (Comm); [2018] 4 W.L.R. 26.

resolution on 13 October 2019. The IPBA has promoted these guidelines on the basis that they "*may be adopted as applicable procedure in international arbitration proceedings by agreement between the parties to the proceedings or alternatively be relied on as guidance by the arbitral tribunal*" in order to "*to provide a common perspective bridging both the civil and common law traditions, in order to provide much needed certainty and predictability*".[21]

2.9 The IPBA Guidelines were formulated on the basis of a 3-step approach:[22]

> "*1. First,* [the IPBA Guidelines] *recognis*[e] *a set of transnational privileges and attorney secrecy guidelines acceptable to both common and civil law jurisdictions arising from legal advisor-client relationships and settlement negotiations.*
>
> *2. Second,* [the IPBA Guidelines] *recognis*[e] *disclosure protected by non-waivable legal impediment or mandatory provision of law.*
>
> *3. Third,* [the IPBA Guidelines] *allo*[w] *a party to avail itself of an equal level of protection that is afforded to another party and otherwise not available to that party.*"

2.10 The result of this approach is a set of guidelines that ***had*** to account for common interest privilege, to ensure that any given party could "*avail itself of an equal level of protection that is afforded to another party and otherwise not available to that party.*"[23]

2.11 The IPBA has suggested that the IPBA Guidelines did, in fact, account for common interest privilege through the two following articles:

> Article 3: "*No Person shall be bound to disclose in an Arbitration any Information created by or communicated between any Persons in the course of obtaining or providing Legal Services.*"
>
> Article 4: "*No Person shall be bound to disclose in an Arbitration any Information created or communicated for the purpose of a Legal Proceeding, whether pending or reasonably in prospect. For the avoidance of doubt, such Information may be created by or communicated as between any of the following: (i) a Party, (ii) a Legal Advisor, and (iii) a third party.*"

2.12 In particular, the IPBA has stated: "*As for common interest privilege, it may be seen as a subset*

[21] As explained by the IPBA here.
[22] As explained by the IPBA here.
[23] As explained by the IPBA here, as step 3.

*of legal professional privilege and is addressed in Articles 3 and 4 of the IPBA Guidelines.*"[24]

***(ii) Jurisdictions in which common law privilege is not found***

2.13 In jurisdictions in which common law privilege is not found, it is frequently the case that privilege exists pursuant to the *obligations* and / or *rights* of the custodians of information. In such jurisdictions, third parties generally cannot assert privilege over information even if it is shared with them (i) by a person who can assert privilege, (ii) confidentially, (iii) pursuant to a common interest.

***a. France***

2.14 In France, for example, communications between an attorney[25] and a client are protected by what in France is known as *le secret professionnel* (professional secrecy). Professional secrecy is both (i) a statutory obligation imposed on attorneys to ensure that they protect their clients (which, if breached, can give rise to a criminal penalties); and (ii) a defence against the seizure and compelled disclosure of attorney-client communications by authorities. Professional secrecy is considered "*general and absolute*" and is strictly enforced.

2.15 Professional secrecy does not accommodate the sharing of information of information with third parties pursuant to a common interest. In fact, an attorney cannot share information covered by professional secrecy with any third party, even with the client's permission. Furthermore, communications between attorneys and non-lawyer third parties are not covered by professional secrecy, even if the latter are providing advice related to a legal matter. As such, French courts have held that privileged information loses its status as privileged if it is part of a communication (i) the addressees of which include a third party, (ii) that is forwarded to a third party, or (iii) that is an email from a client to a third party, in which an attorney is only copied.

2.16 Against this background, there is no such thing as common interest privilege in France.

***b. Switzerland***

2.17 In Switzerland, attorneys must keep all information entrusted to them by a client confidential. Attorneys have contractual obligations of confidentiality towards their clients and any intentional breach of those obligations of professional secrecy would result in criminal

[24] The full text of the IPBA Guidelines may be found here. The Commentary appended to the IPBA Guidelines confirms in relation to Article 2, on page 26 of the pdf.

[25] In this context, 'attorney' denotes a member of a French Bar.

sanctions.

2.18 Additionally, pursuant to Swiss procedural law, parties to litigation have the right to refuse to produce any correspondence covered by attorney-client privilege; this covers correspondence relating to attorneys' typical professional activities (legal advice and legal representation). A client may waive this privilege, and public disclosure of protected information by a client is deemed a waiver.

2.19 Attorney-client communications may be shared among clients who are represented by separate attorneys without waiver of the relevant protections, and the disclosing party in such circumstances will retain its right to invoke privilege. However, there is not the same as common interest privilege – as is clear from the fact that the receiving party cannot assert any privilege information received in this manner. To protect such information from disclosure, parties are generally advised to enter into confidentiality agreements if attorney-client communications are to be shared among them.

### *c. Sweden*

2.20 The situation appears to be similar in Sweden, where attorneys[26] may not be asked to give testimony about information entrusted to them in their practice, or learnt in connection therewith, pursuant to the Swedish Code of Judicial Procedure (**"CJP"**) (unless there is a statutory basis for it or the party to the benefit of whom the duty of confidentiality applies consents).[27]

2.21 Attorneys in Sweden ***can*** entrust privileged information to: (i) counsel in court proceedings (Sw: *rättegångsombud*), (ii) persons assisting the party in the conduct of the proceedings without having full powers of representation in a specific formal role (Sw: *biträde*), or (iii) defence counsel in criminal proceedings (Sw: *försvarare*), and privilege extends to everything which has been entrusted to that person for the fulfilment of the assignment. However, once again, this is far more limited than common interest privilege, and cannot be said to be equivalent.

2.22 In jurisdictions akin to France, Sweden and Switzerland, the confidential sharing of privileged information by a client or their attorney with a third party will generally not lead to an attorney losing its professional right to assert privilege over that information. However, given that those jurisdictions do not recognize the common interest doctrine, it may lead to a situation in which a receiving party, who is unable to assert privilege due to not being part of the relevant protected

[26] In this context, members of the Swedish bar organisation.
[27] Chapter 36 Section 5 of the CJP.

class, holds the relevant information. Therefore, such transmission of information does render the information vulnerable.[28]

***(iii) Trade secrets***

2.23 Finally, we note that in certain jurisdictions, information may be wholly inaccessible as a result of its nature, for example, where information is a trade secret. For example, in Sweden, pursuant to the CJP, trade secrets are generally exempt from disclosure.[29]

2.24 We understand this to be a slightly different doctrine than privilege, and outside the scope of this paper, but we include this note for the sake of completeness.

2.25 In such jurisdictions, as long as the nature of the exempt information does not change (for example, a trade secret cannot be made public and remain a trade secret[30]), the exempt status of such information will generally not be waived in circumstances where the information is confidentially shared between parties. Given that this is the case, common interest privilege is irrelevant in relation to such information, as there is no waiver of privilege to which an exception can be made.

## 3. QUESTION 2: *DO IDIOSYNCRATIC RULES OF PRIVILEGE APPLY IN SOME JURISDICTIONS IN THE CATEGORY OF PRIVILEGE CONSIDERED?*

3.1 Yes.

3.2 Jurisdictions that feature common interest privilege do not apply the doctrine uniformly. For example:

3.2.1 Jurisdictions differ in their approaches to whether common interest privilege is

[28] It is worth noting that, for the purposes of arbitration, this may not be practically relevant. In particular, so long as a third party holding information is unlikely to be party to any relevant arbitration claim, it may be the case that they will never be in a position wherein they can be practically compelled to disclose information. As such, so long as the party is bound to maintain the confidentiality of the information, whether or not it is able to exert privilege may not be a meaningful consideration, depending upon the laws applicable to the arbitration in question.

[29] Chapter 36 Section 6 of the CJP.

[30] Section 2 of the Trade Secrets Act 2018 provides a comprehensive definition of 'trade secret'. A trade secret refers to information: that concerns the business or operating conditions in a trader's business or a research institution's activities; that, either as a whole or in the specific arrangement of its components, is not generally known or readily available to individuals who normally have access to information of the relevant kind; that the holder has taken reasonable steps to keep secret; and whose divulgation would be likely to cause competitive damages to the holder.

available only in relation to litigation that is live or reasonably foreseeable:

(a) in Australian statute[31] (and in New Jersey, USA[32]), common interest privilege must relate to an actual or anticipated litigation; and

(b) in England and Wales (and in US Federal Law[33]), no such limitation is placed on the doctrine.

3.2.2 Jurisdictions interpret 'common interest' differently (this is a matter that is frequently unsettled even within jurisdictions):

(a) in Australia "*it is not necessary for "common interest" privilege that there be identical interests nor does it require that the interest be held only by those who are parties to the action*";[34] and

(b) in Kansas, USA, "*The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial.*"[35]

3.2.3 Jurisdictions differ as to who can waive common interest privilege:

(a) in Singapore, waiver by a receiving party does not constitute waiver by the other common interest holders;[36] and

(b) in England and Wales,[37] and the USA,[38] the position on waiver remains unclear.[39]

3.2.4 Jurisdictions differ as to the genre of interest that may fall within common interest:

(a) in Arizona, USA, the common interest "*may be either legal, factual, or strategic in character*";[40] and

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31 Section 122(5)(c) of the Evidence Act (Cth).
32 *O'Boyle*, 218 N.J. at 190.
33 See *Schwimmer*, 892 F.3d at 244.
34 *Fair Work Ombudsman v Quest South Perth Pty Ltd* [2012] FCA 608 at [36] per McKerracher J.
35 *United States Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192-JWL-DJW, 2006 WL 3715927, at *1 (D. Kan. Dec. 12, 2006).
36 *Motorola Solutions Credit Co LLC v Kemal Uzan* [2015] 5 SLR 752.
37 See ~~Charles Hollander KC, *'Documentary Evidence'*, (Sweet & Maxwell, 14th ed), Chapter 19: Privilege Deriving from Joint and Common Interests, paragraph 19-10, referencing Sir Andrew Smith in~~ *Accident Exchange v McLean* [2018] EWHC 23 (Comm); [2018] 4 W.L.R. 26..
38 See, e.g., *Great Am. Surplus Lines Ins. Co. v. Ace Oil Co.*, 120 F.R.D. 533, 536-38 (E.D. Cal. 1988), and *United States. Gonzalez*, 699 F.3d 974 (9th Cir. 2012).
39 *United States Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192-JWL-DJW, 2006 WL 3715927, at *1 (D. Kan. Dec. 12, 2006).
40 *Fields*, 206 Ariz. at 142, 75 P.3d at 1100 (internal quotation marks omitted) (quoting Restatement § 76).

(b) in Kansas, USA, "*The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial.*"[41]

3.3 Furthermore, the relevance of the doctrine, and therefore the likelihood that it evolves, varies between jurisdictions. Notably, in England and Wales, there is an ongoing question as to whether common interest privilege has been effectively rendered redundant by the doctrine of limited waiver or sometimes selective waiver.[42] On the other hand, in the USA, common interest privilege remains a doctrine of great importance.

3.4 As a whole, however, the principle is understood in a relatively uniform manner.

## 4. QUESTION 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?*

4.1 As noted above, common interest privilege is not a freestanding form of privilege, it is an exception to waiver of pre-existing privilege. As such, any public order considerations which impact the founding privilege are also of relevance to common interest privilege.

4.2 In particular, whether such founding privilege can be waived, and in what circumstances, affects the need for, and application of, common interest privilege.

4.3 For example, if information is of such importance on public order grounds that privilege cannot be waived over it, then common interest privilege cannot be of relevance, as without the ability to waive privilege in relation to that information, there can be no common interest-based exception to waiver.

## 5. QUESTION 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?*

### *(iv) Conclusion*

5.1 As mentioned above, there are many jurisdictions in which common interest privilege does not

[41] *United States Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192-JWL-DJW, 2006 WL 3715927, at *1 (D. Kan. Dec. 12, 2006).

[42] Property Alliance Group Limited v The Royal Bank of Scotland PLC [2015] EWHC 1557 (Ch)..

feature. Furthermore, even in the jurisdictions in which it does feature, its application is not uniform. Defining rules for common interest privilege in international arbitration that would meet users' expectations across jurisdictions may therefore prove difficult. The interplay between any rules applicable in international arbitration and local regulations applying to attorneys would also likely raise complex issues.

5.2 That being said, generally speaking it would be desirable to make sure that there is some kind of level playing field in relation to "*common interest privilege*" situations in international arbitration. Otherwise, parties represented by counsel from different jurisdictions may, in the same arbitration, not be afforded equal protection in relation to their disclosures of privileged information to third parties on the basis of common interest. This would be inconsistent with the fundamental importance of equality of arms in international arbitration. It would therefore be desirable to enable all parties to benefit from a protection equivalent to common interest privilege.[43] This could occur in different ways – for example, by employing a system:

5.2.1 wherein documents benefit from privilege for the purpose of the arbitration, or related arbitrations, as a result of their nature (similar to the IPBA Guidelines) **[broader]**; or

5.2.2 whereby privilege in relation to privileged documents will not be deemed to be waived for the purpose of the arbitration, or related arbitrations, in circumstances where they are shared with third parties with a common interest **[narrower]**.

5.3 The second, narrower solution, appears to be more realistic.

5.4 This ***conclusion*** arises from the following matters of theory and practice.

***(v) Theoretical points***

5.5 Common interest privilege:

5.5.1 does not feature in numerous jurisdictions, and

5.5.2 in the jurisdictions in which it does feature, it operates on a relatively uniform basis.

5.6 As a matter of theory, common interest privilege:

5.6.1 furthers the public interest, as it decreases the transaction costs for parties attempting to engage in mutually beneficial activities; and

[43] That is, the aspects of common interest privilege that act as a shield and not a sword.

5.6.2 cannot increase the class of privileged documents (as it is simply an exception to waiver), meaning that its imposition is unlikely to make it harder for litigants to access relevant evidence.

5.7 To this end, its inclusion in the international arbitration process is likely to be a net positive at a societal level.

***(vi) Practical points***

5.8 The recognition of common interest privilege in any guidelines would be unlikely to lead to privilege being exerted over documents that parties would expect to see disclosed.

5.9 In particular, common interest privilege may be claimed by: (i) disclosing parties and (ii) receiving parties.

5.10 In jurisdictions in which common interest privilege is not found, disclosing parties would likely be able to exert privilege in similar cases. For example, if a client confidentially disclosed a matter of common interest to a third party in jurisdictions such as France, Switzerland or Sweden, this would be unlikely to prevent their attorneys from asserting legal privilege pursuant to their professional obligations and rights.

5.11 Furthermore, in such jurisdictions, (ii) receiving parties would likely not be relevant persons in disclosure processes. Notably, in many civil legal systems, parties to a dispute disclose only documents and evidence on which they rely to establish their case. As such, whilst parties would not necessary expect that disclosed documents were privileged in the hands of third parties, they would likely not expect that such documents would form part of contentious proceedings. As such, extending common interest privilege to cover such documents would not be inconsistent with the expectations of parties from such jurisdictions.

## 6. ANNEX I – INITIAL EXAMPLES OF PRIVILEGE

| Country | Is common interest privilege applicable? |
|---|---|
| **Examples of jurisdictions in which common law privilege is found**[44] | |
| **England and Wales** | **Can confidentially sharing privileged information with a third party result in that information losing its privileged status?**<br><br>Yes, sharing documents can lead them to lose their status as privileged documents.<br><br>For example, a party may be deemed to have waived privilege in relation to documents that would otherwise benefit from litigation privilege or legal advice privilege in circumstances where the client shared those documents with a third party.<br><br>**Is there a defence on the basis of common interest?**<br><br>Yes.<br><br>"[W]*here a communication is produced by or at the instance of one party for the purpose of obtaining legal advice or to assist in the conduct of litigation, then a second party that has a common interest in the subject matter of the communication or the litigation can assert a right of* |

[44] See also, for example: **Ghana**, Evidence Act 1975 (NRCD 323), section 100; and **Australia**, wherein the common interest doctrine is recognized both at common law and under section 122(5) of the Evidence Act (Cth).

| | |
|---|---|
| | *privilege over that communication as against a third party. The basis for the right to assert this 'common interest privilege' must be the common interest in the confidentiality of the communication.*"[45]<br><br>Where common interest privilege applies:[46] (1) the shared information will retain its original privilege; (2) both the disclosing party and the receiving party will be capable of exerting that original privilege (via common interest privilege) against third parties; and (3) the right to waive privilege will likely be held exclusively by the party in whose hands privilege first arose in relation to the information.[47] |
| **Singapore** | **Can confidentially sharing privileged information with a third party result in that information losing its privileged status?**<br><br>Yes, sharing documents can lead them to lose their status as privileged documents.<br><br>For example, a party may be deemed to have waived privilege in relation to documents that would otherwise benefit from litigation privilege or legal advice privilege in circumstances where the client shared those documents with a third party.<br><br>**Is there a defence on the basis of common interest?**<br><br>Yes.<br><br>The High Court of Singapore has articulated the common interest doctrine in the case of *United Overseas Bank*, stating:[48]<br>"*Traditionally, common interest privilege has two aspects* […]<br>*First, it can be used to enable party B to shield behind the privilege of party A and prevent party C from obtaining or using documents from B which were disclosed pursuant to the common interest between A and B in the subject matter of the communications* […]<br>*Second, it can also be used to enable A to obtain from B documents which B can withhold on the ground of privilege against the rest of the world, on the basis that it is inconsistent with their common interest for B to claim privilege against A in relation to these* |

45 *Winterthur Swiss Insurance Company & another v AG (Manchester) Ltd & others* [2006] EWHC 839 (Comm), paragraph 78.
46 *Winterthur Swiss Insurance Company & another v AG (Manchester) Ltd & others* [2006] EWHC 839 (Comm), paragraph 78.
47 *Accident Exchange v McLean* [2018] EWHC 23 (Comm); [2018] 4 W.L.R. 26..
48 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd and others* [2018] 4 SLR 391, at paragraphs 114 and 115.

| | |
|---|---|
| | *documents* […]<br>*In any case, for either aspect of common interest privilege to apply, some similar interest should be at stake*".<br><br>Where common interest privilege applies, the mere disclosure of documents from a disclosing party to a receiving party with a common interest does not waive privilege as against third parties.<br><br>The Singapore High Court has also made clear that any waiver by a receiving party does not constitute waiver by the other common interest holders, including the disclosing party, unless the common interest holder in question participated in that waiver in a relevant manner.[49] In particular, waiver by a receiving party in the common interest group does not constitute waiver by the other common interest holders because "*it would be unfair to allow waiver by one recipient in a common interest group to constitute waiver by the other innocent common interest holders who had not participated in any way in the waiver*".[50] |
| **United States** | **Can confidentially sharing privileged information with a third party result in that information losing its privileged status?**<br><br>Yes, sharing documents can lead them to lose their status as privileged documents.<br><br>For example, a party may be deemed to have waived privilege in relation to documents that would otherwise benefit from litigation privilege or legal advice privilege in circumstances where the client shared those documents with a third party.<br><br>**Is there a defence on the basis of common interest?**<br><br>Yes.<br><br>Common interest privilege is the major exception to the waiver of privilege that might otherwise result from third-party disclosures.<br>- Common interest privilege operates as an extension of attorney-client privilege, and protects communications between parties in furtherance of a joint effort or strategy.[51]<br>- Although protected communications must generally be made to advance a legal purpose, at a federal level, and in many states, the common |

49 *Motorola Solutions Credit Co LLC v Kemal Uzan* [2015] 5 SLR 752.
50 *Motorola Solutions Credit Co LLC v Kemal Uzan* [2015] 5 SLR 752 at 754.
51 See *United States v. Krug*, 868 F.3d 82, 86 (2nd Cir. 2017).

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| | interest rule applies even if there is no active litigation.[52] It is sufficient for the parties to have a common interest in a legal matter, even if no litigation materializes.[53]<br>- Although this expands the number of parties with whom information can be shared without waiving attorney-client privilege, the communications between parties must still advance a common purpose.[54] The common interest rule is not a blanket extension of privilege to all communications between parties with a joint defence or common interest.<br>- The protection provided by the common interest rule may be waived voluntarily. Courts are divided on which parties can voluntarily waive common interest privilege. Some courts hold that an individual party can waive privilege for communications it produces or creates.[55] Other courts hold that, irrespective of which party produced that communication, waiver for any communication protected by the common interest privilege requires consent of all parties.[56]<br>- Subsequent litigation between the parties in common interest also waives common interest privilege with respect to information that is at issue in the new litigation.[57] Waiver only extends to information actually shared between the parties.[58] |
| **Examples of jurisdictions in which common law privilege is not found** | |
| **Jurisdictions where privilege results from the *obligations* of information holders[59]** | |
| **France** | **Can confidentially sharing privileged information with a third party result in that information losing its privileged status?**<br><br>Yes, confidentially sharing privileged documents can lead them to lose their status as privileged documents. |

52 See *Schwimmer*, 892 F.3d at 244.
53 See *Schwimmer*, 892 F.3d at 244.
54 See *United States v. Krug*, 868 F.3d 82, 86 (2nd Cir. 2017).
55 See, e.g., *Great Am. Surplus Lines Ins. Co. v. Ace Oil Co.*, 120 F.R.D. 533, 536-38 (E.D. Cal. 1988).
56 See, e.g., *United States. Gonzalez*, 699 F.3d 974 (9th Cir. 2012).
57 See *Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc.*, 213 B.R. 433, 439 (Bankr. S.D.N.Y. 1997).
58 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. g (2000).
59 See also, **Brazil**, where professional secrecy is an obligation incumbent on the attorney (pursuant to Article 26 of the Bar Association Code), and the attorney has the duty of keeping confidential all facts learned during the exercise of the legal profession. Thus, if the attorney shares the privileged communication with a third client, it will happen in breach of his or her duty. On the other hand, if the client authorises the disclosure, it will be deemed to have waived confidentiality (although the attorney may still not make such disclosure); **Qatar**, pursuant to (i) Law No. 23 of 2006, Articles 51, 56 and 57, (ii) Law No. 7 of 2005 (as amended by Law No. 2 of 2009) and its regulations including QFCA Rules (2018). Paragraph 8, Part 6 [Legal Services Code] of the QFCA Rules, and (iii) Article 233 of Law No. 13 of 1990 (known as the Civil and Commercial Procedure Code); and the **UAE (onshore)**, pursuant to: e.g. Federal Law No. 23 of 1991, Regulation of the Legal Profession, Art. 42 and Draft Conduct Charter, Art. 12(b).

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| | A brief explanation of the relevant upstream privilege[60]<br>Any communication between an attorney (member of a French Bar) and a client is protected by what in France is known as *le secret professionnel* (professional secrecy). This protection is considered "*general and absolute*" and is strictly enforced.<br>- Professional secrecy is a statutory obligation imposed on an attorney to protect the client, which can give rise to a criminal penalty in the case of breach. It is also a protection against authorities' seizure and compelled disclosure of attorney-client communications.<br>- The protection applies to advice and any communication between attorney and client, and to any information that the attorney has obtained, from whatever source, in the course of his or her professional work for the client.<br>- The protection is not focused on 'kinds of documents', but rather applies to all communications of any sort and any information that the attorney maintains that was obtained in the context of their professional relationship with the client.<br>- Professional secrecy also applies to any communications between or among attorneys, even an adversary, unless it is clear that such a communication is specifically designated as "official" and is permitted to be shared with others.<br>- Professional secrecy applies to attorneys, even if the information can be obtained from a non-privileged source, in the sense that an attorney cannot disclose to any third party any information he or she has obtained in the course of a professional relationship. By contrast, a client cannot resist disclosure of publicly available information on the ground that it was shared with, or obtained from, an attorney.<br>- An attorney cannot share information covered by professional secrecy with any third party, even with the client's permission. Communications between attorneys and non-lawyer third parties are not covered by professional secrecy, even if the latter are providing advice related to a legal matter.<br>- No disclosure by an attorney – whether inadvertent or intentional – will terminate the protection afforded by professional secrecy.<br>- French courts hold that privileged information loses its status as privileged if it is part of a communication (i) the subjects of which include a third party, (ii) that is forwarded to a third party, or (iii) that is an email from a client to a third party, in which an attorney is only copied.<br><br>**Is there a defence to the loss of such privilege as a result of sharing on the basis of common interest?**<br><br>No.<br><br>The closest equivalent under French law is that attorneys working together in a joint defence or for clients with a common interest will be |

[60] The bases for these rules are found in the various Bars in France (which have clearly expressed rules of professional conduct (*déontologie*), and provide mechanisms for their enforcement); national bar groups; and to some degree in the European Convention on Human Rights. Legislation recognises the legal force of these rules (article 66-5 of Law No. 71-1130 dated 31 December 1971).

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| | subject to professional secrecy. However, this is not common interest privilege, it is simply an overlapping of the attorneys' professional secrecy obligations. This is far more limited than common interest privilege. |
| **Jurisdictions where privilege results from the *rights* of information holders** | |
| **Sweden** | **Can confidentially sharing privileged information with a third party result in that information losing its privileged status?**<br><br>Yes, confidentially sharing privileged documents can lead them to lose their status as privileged documents.<br><br><u>A brief explanation of the relevant upstream privilege</u><br>a) In Sweden, an attorney may not be asked to give testimony about information entrusted in the practice or learnt in connection therewith unless there is a statutory basis for it or the party to the benefit of whom the duty of confidentiality applies (i.e. the client) consents.[61]<br>b) Furthermore, an attorney, and the person to the benefit of whom the duty of confidentiality applies, cannot be ordered to produce a document which can be assumed to contain information about which the attorney cannot be asked to give testimony.[62]<br>c) Where an attorney gives an assignment to a (i) counsel in court proceedings (Sw: *rättegångsombud*), (ii) someone assisting the party in the conduct of the proceedings without having full powers of representation in a specific formal role (Sw: *biträde*), or (iii) defence counsel in criminal proceedings (Sw: *försvarare*), privilege extends to everything which has been entrusted to that person for the fulfilment of the assignment.<br><br>**Is there a defence to the loss of such privilege as a result of sharing on the basis of common interest?**<br><br>No.<br><br>For example, where an attorney shares a document with a person which is neither (i) a trade secret, nor (ii) shared for, and in fact used for, an assignment in relation to proceedings, that document will not be privileged in the hands of the receiving party. |
| **Other – trade secrets and equivalents** | |
| **Sweden** | **Can confidentially sharing relevant documents with a third party result in those documents becoming vulnerable to disclosure orders?** |

61 Chapter 36 Section 5 of the CJP.
62 Chapter 38, Section 2 of the CJP.

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| | No, for example, confidentially sharing a trade secret would not lead it to lose its status as a piece of information exempt from disclosure, as long as that sharing does not change the nature of the information such that it is no longer a trade secret.<br><br>A brief explanation of the relevant upstream privilege<br>a) A party is generally not obliged to disclose documents containing trade secrets. Only under exceptional circumstances is it considered proportional to disclose such documents.[63]<br>b) If documents qualify as personal/memory notes they are privileged, unless the court finds exceptional reasons for their production.[64]<br><br>**Is there a defence on the basis of common interest?**<br><br>No.<br><br>There is no role for a common interest defence in this context. The relevant information is exempt from disclosure in and of itself, due to its nature. |

63 Chapter 36 Section 6 of the CJP.
64 Chapter 38 Section 2 of the CJP.