

IBA Task Force on Privilege in International Arbitration

Report on Uniform Guidelines on Privilege in International Arbitration

Annex 7 – Privilege against Self-incrimination

1. Whether common rules of privilege against self-incrimination apply across jurisdictions?

In a broad sense, the basic principle of the privilege against self-incrimination (“PSI”) or a right to remain silent prevents a criminal defendant from being compelled to testify against himself/herself and allows a witness not to answer a question that will have a tendency to subject him/her to criminal prosecution. This privilege has been widely recognized for its application in criminal proceedings among different jurisdictions around the globe,¹ in international instruments,² and in international criminal law.³ In some jurisdictions, it is one of the most well-known constitutional rights in criminal proceedings, such as the Fifth Amendment of the Constitution of the United States.⁴

However, criminal legal systems of different jurisdictions vary with respect to additional or specific rules or qualifications beyond the basic right to remain silent. For example, many common law jurisdictions request that the accused be timely informed of the right to remain silent, while civil law jurisdictions do not formally endorse this approach (though they may have done so in recent decades, especially in European countries). In civil law jurisdictions, the accused is not generally informed of his right against self-incrimination until he is formally charged. Even among common law jurisdictions, the PSI does not apply in a united manner. Some jurisdictions extend the privilege to corporations as well as to natural persons (such as the UK),⁵ while courts

¹ The PSI has counterparts in the legal systems of at least 108 jurisdictions around the world. See The Law Library of Congress, Global Legal Research Centre, *Miranda Warning Equivalents Abroad*, May 2016.

² Article 14(3)(g) of the International Covenant on Civil and Political Rights (“ICCPR”) provides for the right not to be compelled to testify against oneself. ICCPR was adopted on 19 December 1966 and came into force on 23 March 1976. It has 113 parties, of which 6 has signed but not ratified this instrument, including China, Comoros, Cuba, Nauru, Palau and St. Lucia. Article 7 of EU Directive 2016/343 also obliges EU Member States to ensure the right to remain silent and not to self-incriminate. The PSI, although not explicitly included in Article 6 of the European Convention on Human Rights (“ECHR”), has been recognized as an implied right under Article 6 in various judgments on the fairness of criminal trials, e.g., in the judgements *Funke v. France*, 25 February 1993, Series A no. 256-A; *John Murray v. the United Kingdom*, 8 February 1996, Reports of Judgments and Decisions 1996-I; *Saunders v. the United Kingdom*, 17 December 1996, Reports of Judgments and Decisions 1996-VI.

³ See Article 67(1)(g) of the Rome Statute on the International Criminal Court.

⁴ At least 48 countries have constitutionally codified the right against self-incrimination. Bassiouni, M. Cherif, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, Duke Journal of Comparative & International Law Volume 3, Issue 2, 1993, pp. 235-298.

⁵ See e.g., *New Zealand Apple and Pear Marketing Board v. Master & Sons Ltd.*, [1986] 1 NZLR 191, 196 (stating that “[t]here seems no policy reason why a corporation should not avail itself of the rule” granting right against self-incrimination); *Triplex Safety Glass Co. Ltd. v. Lancegaye Safety Glass Ltd.*, [1939] 2 KB 395, 409 (Ct. App.) (asserting

in others have held that it cannot extend to corporations because the right developed specifically to protect natural persons (such as the United States).⁶

The attitudes among jurisdictions on the availability of the PSI in civil procedures and arbitrations are far from being unanimous, much less any common rule to apply universally. From a comparative law perspective, common law jurisdictions (including the United States and the United Kingdom) tend to allow the application of the PSI to civil proceedings through caselaw or statutory regulations. For example, the practice of the United States courts has established that the Fifth Amendment of the Constitution of the United States providing for the PSI can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.⁷ But on the other hand, civil law countries (including Japan and France⁸) and other countries such as China⁹ tend to only allow the application of the PSI in criminal proceedings. As a matter of fact, the rules in respect of the PSI are underdeveloped in these jurisdictional in a general sense, which seems to be resulted from the fact that document production typically is limited in their legal systems.¹⁰

Despite the above, one may discern some rules or issues as frequently discussed in civil disputes involving assertions of the PSI among common law jurisdictions, though the specific standards and their applications vary. **First**, when a witness refuses to answer an incriminating question, he/she may be required to make explicitly clear that he is claiming the privilege. Mere silence may be insufficient to establish so. **Second**, a blanket assertion of privilege is not sufficient to refuse producing any documents or testimony.¹¹ The PSI applies only where there is a risk of

that court could “see no ground for depriving a juristic person of those safeguards which the law of England accords even the least deserving of natural person”).

⁶ *Hale v. Henkel*, 201 U.S. 43, 69,70 (U.S. 1906) (denying corporations the right to the PSI); *Environment Protection Authority v. Caltex Refining Co Pty Ltd.*, [1993] HCA 74 (“[T]he modern and international treatment of the privilege as a human right which protects personal freedom, privacy and human dignity is a less than convincing argument for holding that corporations should enjoy the privilege”). See discussion in Yoshida, D., *The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals*, *Fordham Law Review*, Volume 66, 1997, p. 209.

⁷ *Kastigar v. U.S.*, 406 U.S. 441, 444, 445 (U.S. Cal. 1972); see also *U.S. v. Balsys*, 524 U.S. 666 (U.S.N.Y., 1998) (“The privilege against self-incrimination can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, in which the witness reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding.”). In England, Section 14(1) of the Civil Evidence Act 1968 provides that a person can refuse to answer any question or produce any document, if to do so would “tend to expose” that person to proceedings for a criminal offence or criminal penalty; see also ECHR, *Saunders v. United Kingdom*, no. 19187/91, § 71 (1996); *Ibrahim and Others v. United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 268 (2016).

⁸ Article 116 of French Code of Criminal Procedure requires “[t]he investigating judge [to] inform the [accused] person of his choice to remain silent, to make a statement, or to be interrogated. A record of this information is [then] made in the official record.”

⁹ Article 50 of the Criminal Procedure Law of the People’s Republic of China (amended in 2013) provides that “[n]o person may be forced to prove his own guilt.”

¹⁰ Reto Marghitola, *Chapter 5: Interpretation of the IBA Rules, in Document Production in International Arbitration, International Arbitration Law Library*, Volume 33, Kluwer Law International, 2015, p. 89.

¹¹ *National Life Ins. Co. v. Hartford Acc. and Indem. Co.*, 615 F.2d 595, 599 (C.A.Pa., 1980), fn. 4 (quoting *In re Hoffman Can Corp.*, 373 F.2d 622, 627 (3d Cir. 1967) (“appellants cannot simply refuse to provide all documents; they had to produce those which ‘could not possibly be incriminating no matter how broadly the privilege is construed.’”)); *In re Gorsoan Ltd.*, 435 F.Supp.3d 589, 606 (S.D.N.Y. 2020) (citing *United States v. Clark*, 574 F. Supp. 2d 262, 267

incrimination.¹² Whether there is such a risk does not depend on the witness's assertion, but judge's review. **Third**, the PSI is not absolute and may be abrogated by statute.¹³ **Fourth**, the PSI does not prevent the adjudicator from considering a witness's refusal to answer probative evidence offered against him in assessing the evidence and drawing adverse inferences against the witness as a result.¹⁴

In recent years, the PSI has become one of the frequently used tools by a party to international arbitration (including commercial and investment arbitration) to defend claims involving criminal offences, such as bribe, corruption, fraud and money laundering, and regulatory authorities.¹⁵ That said, the only common view shared by the international arbitration community is that there is no settled or clear rule whether the PSI is an applicable defense in international arbitration.¹⁶ While some arbitral tribunals deem PSI to be a universal right and pardon parties and witnesses for their failure to fulfill requests, other tribunals hold this privilege to be inapplicable.¹⁷

(D. Conn. 2008) (“[A]n individual who wishes to assert his Fifth Amendment right against self-incrimination cannot make a ‘blanket claim of privilege.’”); *Endeavor Energy Res., L.P. v. Gatto & Reitz, LLC*, No. 13-0542, 2017 WL 1190499, at *13 (W.D. Pa. Mar. 31, 2017) (“A proper claim of privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality.”).

¹² In terms of “the risk of incrimination”, United States courts find it sufficient that the information would lead to the discovery of incriminating chain of evidence, see *Ohio v. Reiner*, 532 U.S. 17, 19 (U.S. Ohio, 2001), citing *Hoffman v. U. S.*, 341 U.S. 479, 486 (U.S. 1951), while the English courts take the view the risk of exposing the individual to criminal proceedings must be “a real and appreciable risk as distinct from a remote or insubstantial risk”, see *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation*, [1978] 1 All ER 434.

¹³ Case T-112/98 *Mannesmannröhren-Werke v. Commission*, [2004] ECR II-02223, para. 66.

¹⁴ *Beacon Hill Asset Mgmt. LLC v. Asset Alliance Corp.*, 2003 U.S. Dist. LEXIS 5671; see also *John Murray v. the United Kingdom*, 8 February 1996, para. 25, Reports of Judgments and Decisions 1996-I; *Cardno International Pty LTD., Cardno Holdings Pty LTD., and Cardno Limited ACN 108 112 303 v. Carlos Diego Fernando Jacome Merino, Eduardo Jacome Merino, Rafael Alberto Jacome Varela, Galo Enrique Recalde Maldonado, Maria Del Carmen Moreano Barragan, and Patricia Rosero Garces*, ICDR Case No. 01-15-0003-2132, First Partial Arbitration Award, 27 April 2017, para. 220.

¹⁵ Cremades, Bernardo M., and David JA Cairns, *Transnational public policy in international arbitral decision making: the cases of bribery, money laundering and fraud*, Dossier of the ICC Institute of World Business Law: Arbitration-Money Laundering, Corruption and Fraud, ICC Publication, Volume 1, 2003, pp. 65-91, p. 84. (“As bribery, money laundering and fraud involve criminal activities, parties might invoke legal professional privilege or, in some jurisdictions, the privilege against self-incrimination, in rejecting requests from the arbitral tribunal for further information.”); Khvalei, Vladimir, *Standards of Proof for Allegations of Corruption in International Arbitration*, Dossier of the ICC Institute of World Business Law: Addressing Issues of Corruption in Commercial and Investment Arbitration, Volume 13, 2015, p. 63 (“Secondly, such party likewise cannot call on witnesses, because as soon as a witness testifies in international arbitration that he/she paid a bribe, he/she can be immediately charged with a criminal offense. Therefore, witnesses who could give a useful testimony to prove corruption, normally refuses to testify by using various excuses, including the right against self-incrimination.”).

¹⁶ Inan Uluc, *Colliding Worlds of Money and International Arbitration: Unifying the Arbitral Treatment of Money Laundering Around the Risk-Based Approach*, *The American Review of International Arbitration* Volume 31, No. 3, Juris Arbitration Law Library, p. 319 (“It is yet not clear whether the privilege against self-incrimination is an infallible defense in arbitration”), citing Waincymer, Jeffrey, *Procedure and evidence in international arbitration*, *Procedure and Evidence in International Arbitration*, 2012, p. 814.

¹⁷ Inan Uluc, *Colliding Worlds of Money and International Arbitration: Unifying the Arbitral Treatment of Money Laundering Around the Risk-Based Approach*, *The American Review of International Arbitration* Volume 31 No. 3, Juris Arbitration Law Library, p. 319; citing also Greenberg, Simon, and Felix Lautenschlager, *Adverse Inferences in*

It is worth noting that the IPBA Guidelines on Privilege and Attorney Secrecy in International Arbitration (the “**IPBA Guidelines**”) issued by the Inter-Pacific Bar Association (“**IPBA**”) in 2019 considered but did not include the PSI ultimately. To explain this, the IPBA Guidelines referred to the observations that:

*“The self-incrimination privilege is unlikely to be invoked outside the criminal context, unless it is on the basis that testifying in a proceeding could lead to a criminal prosecution elsewhere. This is unlikely to arise in international arbitrations as compulsory testimony is rare.”*¹⁸

In any event, the scope of application of the PSI in evidence taking and document production in international arbitration are limited even if the arbitral tribunals are minded to consider the assertion of the PSI by a party. This may be implied from the various qualifications imposed in the practice of different jurisdictions.

First, some jurisdictions have established that a privilege may only be invoked by the witness, not counsel.¹⁹ **Second**, as discussed above, the PSI may not apply to corporations, agents of a corporation holding corporate documents, and even corporate documents in a general sense in some jurisdictions.²⁰ **Third**, the PSI may be confined to “*the very act of production-i.e. admitting certain documents exist-that is incriminating*” rather than the contents of the documents produced themselves.²¹ In other words, a witness is unlikely to succeed in refusing production of document, which contains incriminating assertions of facts, but was voluntarily created (i.e. not compelled),²² or which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect, such as pre-existing documents acquired under a warrant or production order.²³

International Arbitral Practice, ICC International Court of Arbitration Bulletin, Volume 22, No. 2, 2011, p. 43. (“Amongst [the reasons why arbitral tribunals were requested to draw adverse inferences] are cases where the party against whom the inference was sought ... called a witness who relied on the privilege against self-incrimination to excuse his failure to answer a question relating to pending criminal investigations (interestingly, according to this arbitral tribunal the privilege against self-incrimination in the circumstances was inapplicable in ICC arbitration) ...”).

¹⁸ Mosk, Richard M., and Tom Ginsburg, *Evidentiary privileges in international arbitration*, International & Comparative Law Quarterly, Volume 50, No.2, 2001, pp. 345-385, p. 383.

¹⁹ *State ex rel. Butterworth on Behalf of Dade Cnty. School Bd. v. Southland Corp.*, 684 F. Supp. 292, 294 (S.D.Fla.,1988).

²⁰ *U.S. v. Darwin Const. Co., Inc.*, 873 F.2d 750, 756 (C.A.4 (Md.),1989).

²¹ *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Opinion of the United States District Court District of New Jersey, 17 July 2020, para. 28; see also *Fisher v. U.S.*, 425 U.S. 391, 410 (U.S.Pa. & Tex.,1976) (“The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced.”); but see *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549, 555 (U.S.Md.,1990) (“[A] person may not claim the Amendment’s protections based upon the incrimination that may result from the contents or nature of the thing demanded.”); see also *National Life Ins. Co. v. Hartford Acc. and Indem. Co.*, 615 F.2d 595, 598 (C.A.Pa., 1980) (“The fifth amendment shields against compelled self-incrimination, not legitimate inquiry, in the truth-seeking process.”).

²² *U.S. v. Hubbell*, 530 U.S. 27, 28 (U.S.Dist.Col.,2000) (“a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not ‘compelled’ within the meaning of the privilege.”)

²³ *Saunders v. the United Kingdom*, 17 December 1996, para. 69, *Reports of Judgments and Decisions* 1996-VI.

Further limitations and conditions of the PSI are discussed in answers to questions 2 and 3 below.

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

Yes. Below are some examples of the special and specific rules in certain jurisdictions.

Under the federal law of United States, as stated above, the PSI protects individuals only. Artificial entities like companies, partnerships and LLPs cannot assert this privilege.²⁴ The exception is a sole proprietorship.²⁵ It follows that the PSI does not apply to corporate documents in a general sense.²⁶ Further, the PSI is deemed waived unless invoked.²⁷

Under English law, the PSI only applies to criminal offences under the law of any part of the UK. That said, where there is a risk of incrimination overseas, the judge may exercise discretion to refuse to order disclosure of the relevant information or to exclude it from evidence. Contrary to the United States, PSI can be entitled by companies under English law. Nevertheless, the question of whether employees or directors of a company are entitled to refuse to provide information, on the grounds that it would incriminate the company, was left open by the House of Lords.²⁸

A remarkable feature of Canadian law on the scope of the PSI is that there is no equivalent to the Fifth Amendment of the Constitution of the United States. A witness may be compelled to give evidence, even if that evidence may incriminate him, but the evidence will not be used to establish his guilt.²⁹

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?

It is accepted by some jurisdictions that while there is a strong presumption against interpreting a

²⁴ *Hale v. Henkel*, 201 U.S. 43, 75 (U.S. 1906) (“*The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.*”).

²⁵ *U.S. v. Darwin Const. Co., Inc.*, 873 F.2d 750, 751 (C.A.4 (Md.),1989), fn. 3 (“*In certain limited circumstances, a sole shareholder could have the Fifth Amendment privilege against being personally compelled to produce corporate documents if the very act of production would constitute self-incriminating testimony. In those rare cases, however, the corporation must produce the summoned records through another person.*”).

²⁶ *U.S. v. Darwin Const. Co., Inc.*, 873 F.2d 750, 756 (C.A.4 (Md.),1989) (“*The U.S. Const. amend. V does not apply to a corporation or to a corporation’s papers; agents of a corporation hold corporate documents in a representative rather than a personal capacity. Thus, a custodian’s assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the government.*”).

²⁷ *Rogers v. U.S.*, 340 U.S. 367, 370 (U.S. 1951) (“*If petitioner desires the protection of the privilege against self-incrimination, she is required to claim it. The privilege is deemed waived unless invoked.*”).

²⁸ *Rio Tinto and Kensington International Ltd v Republic of Congo*, [2007] EWCA Civ 1128.

²⁹ Section 13 of the Canadian Charter of Rights and Freedoms provides that “[a] witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.”

statute as taking away the PSI, a statute can still expressly or by necessary implication take away that privilege.³⁰ Several statutory caveats to the PSI of different jurisdictions are set out below for illustration purpose.

In Hong Kong, Sections 179(16) and 184(4) of the Securities and Futures Ordinance explicitly preclude a reliance on the PSI to deny the request for production of records and documents of the non-compliance and misconduct of a corporation. In addition, Hong Kong Court of Final Appeal has ruled that a non-suspect party which was required to provide information and documentation in the course of an investigation conducted under the Prevention of Bribery Ordinance could not invoke the PSI.³¹

Under 18 U.S. Code § 6002, a witness who has been granted immunity and refuses to testify, based on the right not to self-incriminate, may still be forced to testify by the presiding judge, but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.³² Under that statute, if the witness refuses the judge's order, the witness may be held in contempt of court.

In England, by operation of Section 13 of the Fraud Act 2006, the PSI is not available in civil proceedings involving fraud claims, but a statement made under this exception is not admissible against the witness in a prosecution for offences of criminal fraud.³³ Likewise, the PSI does not apply to the claims involving the infringement of intellectual property rights.³⁴

The issue of public order may also arise where the domestic courts are faced with the PSI prescribed under foreign law. In some instances, courts may consider that the policy interests of their own jurisdiction outweigh a foreign party's reliance interests in the secrecy of privileged evidence.³⁵ Insofar as the application of the PSI is concerned, the Supreme Court of the United States once held that the PSI prescribed in its Constitution does not extend to instances in which a defendant fears foreign prosecution.³⁶ Similarly, an English civil court tends not to allow parties refuse to testify on the grounds that they may be exposed to criminal prosecution based in foreign law.³⁷ In light of this, it seems to imply that when strong domestic policy order or regulatory

³⁰ *Chan Sze Ting And Another v. HKSAR*, [1998] 1 HKLRD 45; *Saunders v. the United Kingdom*, 17 December 1996, para. 69, *Reports of Judgments and Decisions* 1996-VI; *Coogan v. News Group Newspapers Ltd & Anor*, [2012] EWCA Civ 48; *O'Halloran and Francis v. the United Kingdom*, [GC], nos. 15809/02 and 25624/02, ECHR 2007-III.

³¹ *A v. The Commissioner of the Independent Commission Against Corruption*, [2012] 15 HKCFAR 362.

³² See 18 U.S. Code § 6002.

³³ Section 13 of the Fraud Act 2006 provides that PSI does not apply in proceedings relating to the recovery of property. The word "property" is broadly defined as meaning "*money or other property whether real or personal (including things in action and other intangible property)*".

³⁴ Section 72 of the Senior Courts Act 1981.

³⁵ Mosk, Richard M., and Tom Ginsburg, *Evidentiary privileges in international arbitration*, *International & Comparative Law Quarterly*, Volume 50, No.2, 2001, pp. 345-385, p. 382.

³⁶ *U.S. v. Balsys*, 524 U.S. 666, 668 (U.S.N.Y.,1998).

³⁷ Civil Evidence Act [1968], Section 14(1).

interests are at stake, the domestic courts are not likely to allow foreign PSI to impede its own fact-finding process.

There are no international instruments expressly against the PSI based on international public policy or public order. However, international law practice may likely accept a narrower protection against self-incrimination due to public policy or public order concerns. For example, in *Mannesmannröhren-Werke v. Commission*, the European Court of Justice held that as opposed to the broad protection offered under Article 6 of the ECHR and in the context of EC competition law investigations, the PSI cannot extend to investigation against a person who is requested to provide information and pre-existing documents, where such information and documents may be used to establish anticompetitive conduct against him.³⁸

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?

As one can see, there has been an increasing number of international arbitration cases where the tribunals are seized of issues of criminal offences and regulatory authorities. Nevertheless, based on our research of the laws and practice of various jurisdictions and international tribunals, we find it practically difficult to formulate uniform rules of the PSI in the context of international arbitration. There are several considerations and concerns.

At the outset, it remains controversial whether the application of the PSI in relation to civil and arbitration proceedings is appropriate. In this respect, Sir Sedley J critically noted that the rule's "real mischief... is the suppression of crucial evidence". He asked how "an exclusionary rule designed to promote justice by preventing the use of torture or pressure to extract confessions [has] become transmuted into a personal right which is able to defeat the ends of justice?"³⁹

A pertinent question follows that to what extent the application of the PSI is appropriate in international arbitration. This requires careful consideration having regard to the degree of protection of the PSI varying significantly among the jurisdictions. As discussed, on the one hand, this privilege barely exists in certain civil law jurisdictions. On the other hand, in the jurisdictions where the privilege is developed, it remains one of the most complex guarantees in the fundamental rights.⁴⁰ The issue is further complicated by the fact that the exceptions to the PSI have been evolving in a piecemeal fashion. For example, a number of carve-outs to this privilege under English law remain largely unrelated and the exceptions continue to grow in number.⁴¹

In light of this, it is practically difficult to establish a uniform pattern of rules that may be acceptable to, and be clear, with certainty, to be followed by, parties from various legal

³⁸ Case T-112/98 *Mannesmannröhren-Werke v. Commission* [2001] ECR II-02223, paras. 65 and 67.

³⁹ *JSC BTA Bank v. Ablyazov & Ors*, [2009] EWCA Civ 1125.

⁴⁰ TRECHSEL, Stefan. *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 341.

⁴¹ Geoff Steward, Emma Jacob, *Privilege against self-incrimination: 'an archaic and unjustifiable survival from the past'?*, *The In-House Lawyer*, May 2012, accessed on 14 July 2023, < <https://www.inhouselawyer.co.uk/legal-briefing/privilege-against-self-incrimination-an-archaic-and-unjustifiable-survival-from-the-past/>>.

backgrounds.

Next, the function of the privileges set out in Article 9.2(b) of the current version of the IBA Rules (“**2020 IBA Rules**”) is to exclude from the arbitral record, or deny a request for the production of, any evidence in an international arbitration. In practice, the privileges are more frequently raised and discussed in the exercise of document production.

However, as discussed above, the situations in the context of international arbitration, where the application of the PSI arises in denying production of documents, are rather limited. *First*, the application of the PSI in civil and arbitration proceedings, as opposed to criminal proceedings, has only found support in the practice of some common law jurisdictions and ECHR. *Second*, it remains inconsistent among the jurisdictions whether corporations and corporate documents can fall under the protection of the PSI. *Third*, even in the jurisdictions where the application of the PSI is possible, the PSI is hardly applicable beyond the very act refusing to admit the existence or not of the document requested.⁴²

Further, it bears emphasis that the PSI is considered a fundamental constitutional right in certain jurisdictions. It follows that an arbitral tribunal that ignores or fails to apply the local rules of the PSI may run the risk of jeopardizing enforceability of award if a domestic court determines that local public policy requires the application of privilege law in relation to the PSI.⁴³ This would further increase the difficulty in formulating uniform rules.

Despite the above-mentioned observations, there might be of interest to formulate soft guidelines for an arbitral tribunal to consider when seized of a PSI claim, in which circumstances the following may be proposed.

First, as discussed above, the PSI is the result of a balance of interests and, thus, must be assessed in light of the respective procedural and factual framework.⁴⁴ Since the investigative power of an international arbitral tribunal is not comparable to a national police power, whether tribunal should easily allow an assertion of the PSI in rejecting the taking of evidence may be determined on a case-by-case basis. In this respect, a balance of interests test may be adopted.⁴⁵ In practice,

⁴² However, this limitation itself is not beyond controversy. In *Fraport v. Philippines*, the arbitrators were faced with a legal advice provided to the claimant, of which the subject is a serious criminal offence. The legal advice was obtained by the respondent State indirectly and not through document production. In considering the admissibility and weight of this legal advice, the dissenting arbitrator opined that “*the double violations of professional secret and the privilege against self-incrimination is problematic*”, see *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, 19 July 2007, Dissenting Opinion of Mr. Bernardo M. Cremades, para. 23.

⁴³ Mosk, Richard M., and Tom Ginsburg, *Evidentiary privileges in international arbitration*, International & Comparative Law Quarterly, Volume 50, No.2, 2001, pp. 345-385, p. 383.

⁴⁴ *Jérôme Valcke v. Fédération Internationale de Football Association (FIFA)*, CAS 2017/A/5003, Arbitral Award, 27 July 2018, para. 264. We find the reasoning of the tribunal in and for this sport arbitration may also be adopted in other types of international arbitration.

⁴⁵ Also in *Jérôme Valcke v. FIFA*, the tribunal held that “*in the context of sport, the privilege against self-incrimination may not be easily invoked in a disciplinary proceeding. The question is whether the balancing of the interests involved tips in favour of the privilege against self-incrimination if a parallel criminal proceeding is pending or anticipated.*” *Jérôme Valcke v. Fédération Internationale de Football Association (FIFA)*, CAS 2017/A/5003, Arbitral Award, 27 July

such balancing depends on the individual circumstances. The arbitral tribunal may be encouraged to consider the weight of the public interest in the investigation, and the availability of the protective measures on the subsequent use of the requested document or evidence, for example, whether the document requested will be used beyond the purpose of the particular arbitration case and be compulsorily disclosed to the national authorities for regulatory or criminal investigations.⁴⁶

Second, the PSI only arises from serious criminal allegations. Given this, where a party invokes the PSI in rejecting requests from the arbitral tribunal for further information, the tribunal must determine whether to draw any adverse inference against such party in light of all the circumstances of the case,⁴⁷ and with care.⁴⁸

2018, para. 266.

⁴⁶ See, as reference, *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Opinion of the United States District Court District of New Jersey, 17 July 2020, para. 32; *Brannigan and Others v. The Right Honourable Sir Ronald Keith Davison (New Zealand)*, [1996] UKPC 35

⁴⁷ *John Murray v. the United Kingdom*, 8 February 1996, para. 158, *Reports of Judgments and Decisions* 1996-I.

⁴⁸ Cremades, Bernardo M., and David JA Cairns, *Transnational public policy in international arbitral decision making: the cases of bribery, money laundering and fraud*, Dossier of the ICC Institute of World Business Law: Arbitration-Money Laundering, Corruption and Fraud, ICC Publication, Volume 1, 2003, pp. 65-91, p. 84.