International Arbitration Insights Series (2022) Part IV: Discovery & Privilege

Privilege questions in international arbitration

The position of in-house counsel & waiver of privilege by substance disclosure

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What is so special about international arbitration for privilege questions?

1. If we assume, as we must, that the outcome of an international arbitration is a function of the information, including the documentation, that is put before the arbitrators, then clearly the question of when and how privilege will apply to some of that information, is relevant to such an outcome.

2. Today, I will discuss two specific aspects of this 'privilege question', namely:

   a. what is the position of in-house counsel to the creation and maintenance of privilege, and

   b. when using privileged documents, when can that privilege be lost because of 'Substance Disclosure'.

3. Although the term 'privilege' is often used in discussion about international dispute resolution, it is a complex and often poorly understood concept. In order to best deal with these two aspects, it is important to give the discussion a little context about privilege.

4. In general terms, what we know as privilege emerged from the adversarial common law system, and is rooted in the assumptions of that system. Those assumptions, however, are not universal, and so nor is the concept of privilege.

5. The term 'privilege' covers a range of different concepts, each with its own criteria. In general terms the word 'privilege' is used in relation to legal privilege – a right that protects

from disclosure, confidential communications involving the request for and receipt of legal advice or representation. However, the term can extend to:

a. statutory privilege (given in the context of tax investigations etc),

b. 'common interest' privilege arising between allied parties in litigation,

c. journalistic privilege;

d. confessional privilege;

e. self-incrimination privilege,

f. 'public interest' privilege – usually applying to government secrets;

g. 'without prejudice' or settlement privilege; and

h. 'marital' privilege – extended to communications between a married couple.

6. In the common law system, most of these have crystalised as separate concepts by reference to statutes. Each has its own set of criteria: rules, conditions, effects, and implications.

7. In some common law countries, even legal privilege describes a range of quite distinct concepts. In Australia, common law legal privilege has been recognised as a fundamental, substantive human right. However, it has been augmented by various statutes, including by the creation of 'client legal privilege' in the *Evidence Acts*, which includes 'legal advice privilege' and 'litigation privilege'. Each of these is so similar as to virtually identical, but for some details.

8. In practice, however, they operate at different times and in different contexts, and those nuanced differences can be very important. For example: common law privilege applies outside the context of legal proceedings (such as in a police investigation) or at least legal proceedings that involve the application of rules of evidence (such as hearings before certain tribunals).

9. Even considered within the context of countries following the common law system, the identity, criteria, and implications of legal privilege are unlikely to be the same. The concept and operation of legal privilege is quite different between the UK, Australia, Singapore, Canada, and the United States, for example.

10. More importantly, international arbitration, as the name suggests, involves arbitration of disputes between nationals of different countries. Often, by arbitrators with 'third'

nationalities. The legal systems of many countries, such as China, the Emirates, Egypt, and EU members, do not include the concept of legal privilege *per se*.

11. In some, such as in France, a form of privilege arises as an emanation of the lawyers' duty of confidentiality. In others, statutory provisions provide a form of privilege. Some simply have no such thing. In many countries, including common law countries that recognise what might traditionally be thought of as legal privilege, the right of privilege can be reduced or removed by statute – often in cases involving the preservation of life, sometimes in cases involving national security.

12. Accordingly, in the international context, what one may understand as legal privilege is a 'slippery' & amorphous concept. It must be carefully considered on a case-by-case basis.

Why is this of particular importance for International Arbitration?

13. The differences in the way the privilege concept is recognised from place to place, will mean that the concept may apply differently for the purposes of an international arbitration than is ordinarily assumed for a domestic dispute. The reach of privilege may be greater, may be lesser, and will almost certainly be subject of requirements that might be unfamiliar.

14. Whether rules of privilege apply, and what rules apply, may depend upon the law of the contract, the law of the arbitration, the law of the seat, and the location of different parts of the hearing.

15. The nature and extent of the privilege concept may be significantly affected by the legal tradition, background, and experience of the particular arbitrator. It might also vary depending upon the place where the information is stored, the place that the privilege is asserted, or the place in which the claim for privilege is challenged.

16. Privilege, as a concept, may be more or less important to the arbitration of different disputes. It might strongly influence the way that a party wants to press its case, or to conduct its arbitration. In the alternative, another party might not care.

17. Because the question of privilege usually arises in the context of a dispute, but the entitlement for a claim of privilege might arise much earlier in the transaction, the possibility that a party may want to claim privilege with respect to certain kinds of confidential

communication is something that parties and their legal advisors should consider at a very early stage of a project or a transaction.

18. Which brings us to the role of in-house counsel. One of the challenges for in-house counsel is management of confidential information, particularly with respect to privilege claims. That challenge can be great for in-house counsel operating in a jurisdiction where the full implications of the privilege concept do not exist.

The Model

19. The potential variability of the privilege concept does not assist its analysis. For the purposes of this discussion, we should adopt a simple model, namely:

> '**legal professional privilege'**: applies to enable a party to resist disclosure of a confidential communication between a lawyer and a client, where such a communication was made for the dominant purpose of giving or receiving legal advice or representation, or for use in anticipated or current litigation.

20. And for present purposes, 'litigation' includes arbitration.

In-House Counsel – what is a 'lawyer'

21. The model set out above reflects a 'traditional', but now quaintly old fashioned view of who or what is a 'lawyer' and who is a 'client'. In the 21st century, the majority of lawyers do not fit within the traditional private practice model. In-house lawyers, employed by a party, proliferate, and fill a very wide range or roles in organisations, and practice in a very wide range of styles.

22. In some instances, the in-house lawyers are employed in a legal department that operates in the same way as a private practice firm. In others, in-house lawyers are found in different places, with different roles, and operating in different ways in an organisation. Some are relatively 'independent' and are employed as 'lawyers'. Others are part of various levels of management or administration, not obviously practising law at all.

23. Some have been admitted as practising lawyers in a particular jurisdiction, others have academic qualifications but are not licensed to practice as lawyers. Some are qualified in one jurisdiction, but operate in another under some form of licence or restriction. There is no 'one size-fits-all' way of classifying in-house lawyers.

24. Because of the dazzling range of possibilities for both the role of in-house counsel and for the concept of privilege, there is, likewise, no one answer to how privilege concepts apply to them. Accordingly, it becomes necessary to start with the model.

25. For in-house lawyers, the challenges to the application of privilege, according to the model, most often involve the questions:

- whether the in-house lawyer is a 'lawyer' for the purpose of the model? And allied to this
- what is the 'purpose' of the communication.

26. In most jurisdictions, the question: "who is the lawyer in the in-house" context involves close regard to the status and role of the in-house lawyer in the overall organisation. Again, authorities in different countries provide no universal answer. In most places, this question involves consideration of:

a) What is the role / status of the in-house lawyer within the organisation?
This consideration goes to the question: to what extent is the lawyer's role in the communication involve the performance of an independent function of legal advisor (or conversely, to what extent is the 'lawyer' merely acting as an employee, governed by the whim or the will of the employer or manager.
Challenges to privilege on this point can involve a very close, and invasive, inquiry into the activities, authority, independence, and so on of the particular lawyer involved, and that person's interrelationship with management.
In general terms, a greater rather than lesser degree of 'independence' in the proffering of legal advice to the employer (as client) is required to satisfy the requirement of the communication being with a 'lawyer'. In most cases, there has to be the <u>real</u> capacity for the lawyer to give advice that the employer does not want to hear.

b) Even here, there are matters of fact and degree. In some places, the in-house lawyer being admitted to practice law in a particular jurisdiction can be very important. Not so much in others.

c) And in most places, there is a difference between communications made in the context of getting / receiving legal advice and communications made in the furtherance of anticipated or existing litigation.

27. Where parties are going into projects or transactions involving activities or entities in other jurisdictions, prudence suggests that some consideration of the application and implication of privilege be expressly considered – either with the client getting advice from its lawyers, or from the issue being considered by in-house counsel. Sometimes, this might call for general advice especially oriented to a particular jurisdiction.

28. Remembering that privilege usually attaches to communications – not limited to paper documents, it is useful to have regard to the ways that communications take place, and where and how records of those communications are kept. All of these matters are important.

Dominant Purpose of the Communication

29. Which brings us to the dominant purpose of the communication. The purpose requirement for privilege has changed over the years, and may be quite differently viewed in different jurisdictions. In the English common law system, the requirement was originally a 'sole purpose' test.

30. However, the volume and complexity of modern commerce and the multitude of ways that documentation can be created, led to the criteria being modified to the 'dominant purpose' test. That is: to carry privilege, the communication must be made for the 'dominant purpose' of either getting or receiving legal advice etc.

31. Even with the relaxation of the purpose criteria, the identification of privilege remains a complex, and nuanced, process, particularly for in-house counsel. For example, there may be an accident on site, with one party's crane colliding with another party's machinery. The inhouse counsel might commission and investigation or report.

32. What is the purpose of the report? Is it privileged? The inquiry and report may have several purposes: it might be

    a. for use in litigation that the lawyer thinks is likely;

    b. to enable management to understand what caused the incident;

    c. to enable management to deal with any industry regulatory authority;

    d. for operational reasons, so the organisation can implement measures to ensure the accident doesn't happen again.

33. Each of these is a purpose, but not all of them will fit the criteria for a privilege claim. Most probably a) and possibly c) will satisfy a privilege requirement. But b) and d) may not.

34. And then, which of the 4 possible purposes is dominant? And how do you determine dominance. There is no single formula. In the case on which this scenario was modelled, the report commissioned by the in-house lawyer was found not to satisfy the dominant purpose 'test'.[1] But there is nothing special about that case, the same outcome could be found in any number of common law jurisdictions.

35. Technology has made the dominant purpose test even more complicated, and more difficult to either analyse or to predict. The data rich activities of Building Information Modelling (**BIM**), the use of data bases and meta data, and transactions documented by Blockchain or other similar cryptographic technologies make the identification of even a discrete number of competing 'purposes' for communications very difficult to identify, much less to manage.

36. In disputes in which the maintenance of 'privilege' is important, in-house counsel face an array of evolving challenges in protecting and advancing their firm's interests. However, the point to remember is that these are challenges, they are not necessarily barriers, and can be managed with care. Obviously, however, the first step lies in being aware of the issue at the beginning.

[1] *Singapore Airlines v Sydney Airports Corporation* [2004] NSWSC 380 (7 May 2004).

Waiver of Privilege – Substance Disclosure

37. Apart from the challenges relating to recognising, establishing, and claiming privilege to communications that relate to an international arbitration, the next greatest challenge for inhouse counsel lies with substance disclosure.

38. Having a claim for privilege over a communication requires that it remain 'confidential'. This can be difficult when the information in that communication is being used in the context of an evolving project or in a dispute.

39. Not every part of a particular communication will necessarily be secret at all times. If proceedings are commenced, the fact of the dispute, the parties to it, and the subject matter of the dispute will be in the public domain. As time, and the dispute, goes on, bits and pieces of once confidential information and some confidential facts will inevitably make their way into the public domain. Sometimes, management may want to reduce 'brand-damage' by issuing a press release or making an announcement to a market.

40. Where those matters that are made public are also set out in confidential communications, there is the danger that privilege is lost because the communication is no longer confidential. Where the 'substance' of the confidential communication is revealed, this is 'substance disclosure' and privilege is lost.

41. The concept is a complex and nuanced one. A confidential advice may contain only material that is in the public domain, but the way the material is put together may be of significance, and so be said to retain privilege. On the other hand, if enough of another communication is leaked out, privilege may be lost.

42. This question of partial disclosure of a communication can be problematic. At common law, where parts of a confidential communication lose privilege but the rest of it retains privilege, the privilege has been found to extend to the public part, so the whole of the document retains privilege. On the other hand, privilege provided by some statutes operate the other way: namely, where part of a communication loses privilege so that it can only be understood by reference to the still-confidential part, the whole of the communication loses privilege.

43. 'Substance disclosure' arises where the substance of the confidential communication is revealed, privilege is lost. If a party reveals the essence of the communication, the rule will apply. If a party reveals so much of the essence of the communication that it would

be unfair or misleading to have that information but not the confidential part, the rule will also apply.

44. ‘Substance disclosure’ is a significant challenge for in-house counsel. What amounts to substance disclosure is a matter of fact and degree, by reference to the nature and content of the particular communication, and the nature and content of its non-confidential use.

45. Substance disclosure is a particular problem in the context of press-releases, or when senior management are being criticised either in the press or at shareholder meetings, when they feel almost compelled to say that they were acting on advice. It can also arise in the context of pleadings – claims, defences, or replies – where the party wants to justify a particular action by referring to advice.

46. That being said, the issue involves more than simply referring to advice. What is required is revealing the substance of the advice. For example, the party may say that it took advice, and it acted. A press announcement to this effect does not reveal what that advice was. The advice might have been to the opposite effect of what was done. That kind of statement in most cases would not involve a substance disclosure of a confidential advice.

47. However, the same press announcement, saying, to the effect: ‘we received advice and acted accordingly’ would very likely be held to have lost privilege because of substance disclosure. The fact that the advice was followed by the action reveals the substance of the advice.

48. Similarly, where a party is accused of recklessness and it says that: it was not reckless because it acted on advice, that would be substance disclosure as well.

49. Substance disclosure can be difficult to manage, because it is a nuanced exercise in which one word out of place may make the difference. Sometimes there is no harm done by disclosing. That is a different issue. The important thing is disclosing where you want to or have to, not disclosing by accident.

50. For in-house counsel, controlling confidentiality can be difficult – particularly where there are multiple purposes for a communication, and not everyone using the communication will know or care about the privilege aspect. And once privilege is lost, it is lost forever.

51. As was the case with recognising and managing privilege claims, substance disclosure is a challenge, but not a barrier. It can be managed with care, and by taking steps to know what it is, and to monitor and manage the use of ‘confidential’ documents.

52. Again, the difficulties will not only emerge after a dispute has matured and an arbitration has begun. Like the privilege question, no strategy for dealing with substance disclosure can beat thinking about the issue at the beginning of the transaction or at the outset of the project: identifying what information is confidential, what confidential information is likely to be created, where it will be kept, and how it might be used.

53. To be ready for these issues, is to be forearmed. And as always, it does not hurt to take independent legal advice at the various stages to help in making these decisions.

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