The Asia-Pacific Arbitration Review

2023

India

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India

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Summary

In summary

The article discusses the concept of legal privilege, specifically in context of in-house legal counsels and the position of law in various jurisdictions including India, the United States and the United Kingdom. The article further evaluates the differences in terms of legal privilege being extended to in-house legal counsels in various jurisdictions and how such differences ought to be navigated in international commercial arbitrations, when parties involved in such arbitrations belong to legal systems with different standards.

Discussion points

- Position taken in India, the United Kingdom and the United States on legal professional privilege
- Position taken in international commercial arbitrations on legal professional privilege
- The status of in-house legal counsel and corresponding issues

Referenced in this article

- UNCITRAL Model Law
- Evidence Act 1872
- Advocates Act 1961
- Bar Council of India Rules
- *Municipal Corporation of Greater Bombay v Vijay Metal Works* (1981) SCC OnLine Bom 55
- *Sunil Kumar v Naresh Chandra Jain* (1985) SCC OnLine All 1118
- *Larsen Tourbo Ltd v Prime Displays* (2002) 5 BomCr 158
- *Shire Dev Inc v Cadila Healthcare Ltd*, Civil Action No. 10-581 (KAJ) (D Del 27 June 2012)
- Arbitration and Conciliation Act 1996

Introduction

With the advent of globalisation in the second half of the twentieth century, international corporations began interacting across national borders and entered into complex commercial transactions. This interaction has continued between the legal regimes governing those corporations and the legal regimes in other nations. Consequently, to avoid

uncertainty, international commercial arbitration has become an attractive alternate dispute resolution mechanism.

This change in the paradigm of international economics resulted in the United Nations General Assembly adopting the UNCITRAL Model Law on International Commercial Arbitration in 1985 (the Model Law). The Model Law plays an important role in providing a legal framework for harmonising and modernising arbitration across jurisdictions.

While legal systems based on the Model Law or emulating the principles therein provide for consistency in international and domestic arbitrations, there is still much uncertainty around the seat of the arbitration, the governing law and the governing rules in relation to nuanced legal principles. One such example is the concept of legal professional privilege.

Legal professional privilege is a fundamental legal right in most jurisdictions or is at least recognised by all 'civilised' legal systems. It provides protection from disclosure of communications between the client and its attorney, lawyer, advocate or solicitor, and is used for the purposes of seeking legal advice, including legal advice and documents received in anticipation of litigation or for use in litigation. Legal professional privilege protects an individual's fundamental right to access justice by encouraging an open, candid and complete discussion between an attorney, lawyer, advocate or solicitor and a client. Most jurisdictions also provide that if such communication is discovered in disputes or by investigating agencies, the same cannot be relied upon in adjudication and a client will be protected from prejudice on this account.

While the principle of legal professional privilege seems to be recognised in most jurisdictions, communications with an in-house legal counsel who does not practise as an attorney, lawyer, advocate or solicitor are protected under the law governing the arbitration and the rules adopted for the purposes of the arbitration.

This issue arises in almost every international commercial arbitration where parties belong to different legal regimes. It is not unusual in such arbitrations to have a common law regime on one side and a civil law regime on the other. This adds to the complexity of the issue as these regimes hold distinct positions on the concept of legal privilege.

Position in India

In India, legal professional privilege is statutorily recognised under section 227 of the Companies Act 2013 and sections 126,[1] 128[2] and 129[3] of the Evidence Act 1872 (the Evidence Act). The Companies Act 2013 prevents a 'legal adviser' from disclosing any privileged communication made to him or her in his or her capacity as an adviser. Similarly, the Evidence Act provides protection from disclosure of communications between a 'barrister, attorney, pleader or vakil' and client made during the employment of such barrister, attorney, pleader or vakil.

The express terms used in section 126 – that the barrister, attorney, pleader or vakil must not state the 'contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment' – extend legal privilege to a document that comes into existence in anticipation of litigation, either for seeking legal advice or for use in the litigation.

The term 'legal professional adviser', as it appears under section 129 of the Evidence Act, has not been defined in the Act itself. Under the Advocates Act 1961 (the Advocates Act), only an 'advocate' is permitted to practise the 'profession of law' in India.[4] An 'advocate' is defined as an advocate enrolled with a bar council.[5]

Under the Bar Council of India Rules (the BCI Rules), when lawyers join a company in full-time employment, they have an obligation under the Rules to surrender their registration as an advocate.[6] This creates an issue in recognising whether legal professional privilege extends to in-house legal counsels in India.

The Supreme Court of India has affirmed that the 'practice of profession of law' includes both litigation and non-litigation matters.[7] However, there have been instances where the view has been taken that in-house counsels cannot claim to be advocates under the Advocates Act. It is pertinent to note that the term 'advocate' is not used in either section 126 or 129 of the Evidence Act. The synonyms used for 'legal professional' point towards a broader interpretation of this position under section 126 and are not restricted to 'advocate' as defined in the Advocates Act.[8] While the Advocates Act does not make a distinction between different types of legal professionals, the intent of the legislature to use an inclusive definition is clear. Further, the phrase used in section 129 is 'legal professional adviser', which already imports a wider interpretation.

Legal privilege is an important protection and an actionable right. Prohibition against disclosure of legally privileged documents has not only been expressly recognised but also enforced by courts in India.[9]

The Bombay High Court in *Municipal Corporation of Greater Bombay v Vijay Metal Works*[10] (the *Vijay Metal* Works case) extended the privileged communication protection under the Evidence Act to 'communications of a salaried employee advising his employer on all legal questions and also other legal matters'. The Court noted, among other things, the trend of corporations appointing lawyers on a full-time basis, and did not find a justification as to why such employees should not be entitled to the same protection as lawyers appearing in court.[11]

The *Vijay Metal* Works case concerned an employee of a government body, and predates the amendment to Rule 49 of the BCI Rules (Rule 49) in 2001. Prior to 2001, Rule 49 contained a specific exception for law officers employed by the government as full-time employees and permitted them to act as advocates. After the amendment, this exception was removed.[12]

In *Sunil Kumar v Naresh Chandra Jain*,[13] the Allahabad High Court opined that the advice of a law officer or a law department is privileged to the extent of section 129 of the Evidence Act and cannot be considered as evidence. Such advice was held to be completely privileged if the person obtaining it does not intend to give it as evidence. The High Court also held that such information could only be ordered to be disclosed if the person receiving it appears as a witness or relies on it in his or her affidavit. However, this decision was also in the context of law officers of a government department and predates the amendment to Rule 49 in 2001.

In *Larsen Tourbo Ltd v Prime Displays*,[14] the Bombay High Court again considered the question of whether privilege is attached to in-house counsel, and whether the*Vijay Metal Works case* was good law. While the Court ultimately left the issue undecided, it opined that to claim legal privilege for advice given by in-house counsel, the advice must be given by a person who is qualified to give legal advice.[15] It was further observed that legal privilege is also attached to documents that came into existence in anticipation of litigation, where the

'dominant purpose' of the document was to seek legal advice or to be used for the purpose of defence or prosecution in legal proceedings.

However, in 2012, in an amicus brief in ***Shire Development LLC v Cadilla Healthcare Ltd and Another***,[16] Justice B N Srikrishna (former judge of the Supreme Court of India) opined that attorney–client privilege would not extend to an in-house counsel under section 129 of the Evidence Act as the term 'legal professional adviser' refers to a person qualified to practise law in India under the Advocates Act.

Applicability of Evidence Act in arbitration proceedings

Section 19 of the Arbitration and Conciliation Act 1996 (the A&C Act) provides that an arbitral tribunal shall not be bound by the Evidence Act.[17] The A&C Act gives the tribunal the discretion to determine the admissibility, relevance, materiality and weight of any evidence. While evidentiary principles may apply, they would have to be read in line with the parties' agreement to be guided by any institutional rules or internationally recognised rules on the taking of evidence in arbitration proceedings.

Therefore, under the provisions of the A&C Act, parties to an arbitration can agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings and in case of failure of agreement, the tribunal may conduct the proceedings in the manner it considers appropriate. Consequently, in the context of international commercial arbitrations seated in India, arbitral tribunals are empowered to consider international rules relating to issues of privilege, which are discussed under 'Position in international commercial arbitrations', below.

Position in the United Kingdom

Under English law, legal professional privilege originates from common law. Communications between clients and their lawyers for the purpose of obtaining legal advice, including advice in connection with existing or contemplated litigation, are considered privileged, and disclosure of such communications is barred.[18] English law recognises two manifestations of legal professional privilege, namely legal advice privilege and litigation privilege.[19]

Legal advice privilege protects communications between the client and the lawyer, where the dominant purpose of the communications was seeking or giving legal advice.[20] Litigation privilege as a separate form of legal professional privilege, distinct from legal advice privilege, protects from disclosure the communications between parties and their lawyers for the purpose of obtaining advice in connection with existing or contemplated litigation, when the following conditions are satisfied: (1) litigation must be in progress or in contemplation; (2) the communications must have been made for the sole or dominant purpose of conducting that litigation; and (3) the litigation must be adversarial, not investigative or inquisitorial.[21]

Position in the United States

Similar to English and Indian law, the law in the United States protects from disclosure documents that are made for the purpose of seeking or obtaining legal advice or assistance.

Legal professional privilege is recognised under the Rule 502 of the US Federal Rules of Evidence.

In ***Colton v United States***, the US Supreme Court recognised the principle of legal privilege and held that any attorney–client communications made for the purpose of securing legal advice cannot be disclosed.[22]

In ***Upjohn Co v United States***,[23] the Supreme Court held that the privilege ensures confidentiality of attorney–client communications, allowing for the client to fully disclose the facts and circumstances of its case and allow the attorneys to provide complete and effective advice. It was further held that it stands to reason that a corporation's employees should enjoy the full benefits of attorney–client privilege in their communications with counsel since any other position would not only make it difficult for lawyers to formulate sound advice when their client is faced with a specific legal problem, but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.

Position in international commercial arbitrations

In comparison to the jurisprudence in India and the United Kingdom, the law on legal professional privilege is most developed in the United States, where the privilege is extended to in-house counsels without exception. In the United Kingdom, legal professional privilege is determined on the basis of the nature of the communication or document sought to be privileged and whether the same falls under legal advice privilege or litigation privilege. In India, the law has now moved closer to the position in the United Kingdom. However, for international commercial arbitrations, especially those governed by the A&C Act, the domestic legislation (ie, the Evidence Act) does not apply and, hence, does not preclude an arbitral tribunal from taking any specific exception to the position under Indian law.

Most of the institutional rules, including the Arbitration Rules of the Singapore International Arbitration Centre 2016 (the SIAC Rules), provide that unless otherwise agreed by the parties, in addition to the other powers specified in the SIAC Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, an arbitral tribunal shall have the power to determine any claim of legal or other privilege.[24]

In light of the above discussion, international best practice or rules for the taking of evidence in international arbitration proceedings become relevant for deciding the claim of legal or other privilege. The most widely used rules in this regard are the International Bar Association's Rules on the Taking of Evidence in International Arbitration 2020 (the IBA Rules).

Article 9.2 of the IBA Rules provides for the following:

> The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons:
>
> (…)
>
> 1.

> legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Article 9.4 below);
>
> (…)
>
> 1. considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling."

Article 9.4 of the IBA Rules states the following:

> In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
>
> 1. any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
> 2. any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;
> 3. the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;
> 4. any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and
> 5. the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

In the absence of any guidance on the applicable privilege rules, international tribunals generally resort to conflict of law rules and apply the 'closest connection' test or the most-favoured nation approach to determine the applicable domestic law for evidentiary privileges.[25] In this regard, article 9.4(c) of the IBA Rules recommends that the arbitral tribunal take into account the expectation of the parties and their advisers at the time the legal privilege is said to have arisen.[26]

The underlying objective of article 9.4(c) of the IBA Rules is to balance the interests of parties from different jurisdictions, and to ensure that the choice of applicable law on legal privilege does not unduly prejudice either party. The choice of the IBA Rules is intended to create uniformity as the parties are from different nationalities. The commentary to article 9 of the IBA Rules provides that, 'Often, these expectations will be formed by the approach to privilege prevailing in the home jurisdiction of such persons.'[27] Accordingly, the law of the jurisdiction in which the information is received or where the counsel is admitted to practise law may be a predictable regime to apply for evidentiary privileges.[28]

It is also important to note that article 9.2(g) of the IBA Rules is a catch-all provision, intended to assure procedural economy, proportionality, fairness and equality in the case. This is relevant in determining the applicable rules of evidentiary privilege as the tribunal must ensure that its choice of applicable law does not unduly prejudice either party. As explained in the commentary to the IBA Rules:

> For example, documents that might be considered to be privileged within one national legal system may not be considered to be privileged within another. If this situation were to create an unfairness, the arbitral tribunal may exclude production of the technically non-privileged documents pursuant to this provision. In general, it is hoped that this provision will help ensure that the arbitral tribunal provides the parties with a fair, as well as an effective and efficient, hearing.[29]

In this regard, the tribunal may take a general approach to document production and decide the applicability of legal privilege accordingly for each document.[30]

In these situations, the status of the in-house legal counsel in his or her domestic jurisdiction and the expectation of the client who has employed him or her become important factors. They help with establishing whether legal professional privilege may be extended to in-house legal counsels. This international approach to legal privilege is recommended to ensure that a party does not unwillingly lose an important right to legal privilege merely because of the laws governing the seat of arbitration (which may be in a neutral jurisdiction). In doing so, the party gets an effective right to defend itself.

By way of illustration, if a corporation registered and operating in the United States employes an in-house legal counsel in India for its local operations in India, any communication with the in-house counsel should be privileged in terms of the IBA Rules as it will be the legitimate expectation of the corporation that all legal communications between a client and its legal counsel (including in-house) would be privileged in terms of the applicable law to corporations in the United States. This privilege would override the actual status of the in-house legal counsel in his or her local jurisdiction when such privilege is tested for the purposes of an international commercial arbitration that prescribes to the IBA Rules.

Conclusion

The status of in-house legal counsels for the purpose of extending legal professional privilege is a relevant consideration for arbitral tribunals in an international commercial arbitration. It requires the arbitral tribunal to adopt international standards and practices, it brings uniformity to legal proceedings and, most importantly, it safeguards the rights of a litigant in terms of communication between an in-house legal counsel who undertakes similar mandates as an external legal professional or lawyer. The issues concerning legal professional privilege for in-house legal counsels are becoming more significant as large multinational corporations rely heavily on in-house counsels for commercial advice that may become the subject matter of litigation and may have to be subjected to local jurisprudence on this issue. Therefore, in international commercial arbitrations, especially where there are differences in legal regimes on recognising legal professional privilege with regard to in-house counsels, progressive rules for taking evidence, such as the IBA Rules, ought to

be resorted to or, in principle, accepted by the arbitral tribunal to conduct the arbitration proceedings. The tribunal should be guided by principles of fairness and equality to decide such issues rather than considering the domestic jurisprudence of the seat of arbitration or the domicile of parties when deciding such issues. This would provide certainty in commercial contracts and would be a relevant factor in choosing international commercial arbitration as the most preferred form of alternate dispute resolution.

Footnotes

[1] *126. Professional communications. — No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment:*

Provided that nothing in this section shall protect from disclosure —

1. *any such communication made in furtherance of any [illegal] purpose,*
2. *any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. It is immaterial whether the attention of such barrister, [pleader], attorney or vakil was or was not directed to such fact by or on behalf of his client. Explanation. — The obligation stated in this section continues after the employment has ceased.*

[2] *128. Privilege not waived by volunteering evidence. — Privilege not waived by volunteering evidence. — If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, [pleader], attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.*

[3] *129. Confidential communications with legal advisers. — Confidential communications with legal advisers. — No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others*.

[4] Sections 29 and 33 of the Advocates Act 1961.

[5] ibid, Section 2(a).

[6] Rule 49, Section VII, Chapter 2, Bar Council of India Rules.

[7] *Bar Council of India v A K Balaji* (2018) 5 SCC 379, paragraph 42.

[8] 'Legal practitioner' means an advocate (or vakil) of any high court, a pleader, mukhtar or revenue agent.

[9] ***Larsen & Toubro Limited v Prime Displays Pvt Ltd***, 2002 SCC Online Bom 267; ***Sunil Kumar v Naresh Chandra Jain***, 1985 SCC OnLine All 1118; ***PUCL v Union of India*** (2004) 9 SCC 580; ***Superintendent Office of Public Prosecutor v Registrar, Tamil Nadu Information Commission***, 2010 (5) CTC 238; ***Supt & Remembrancer of Legal Affairs v Satyen Bhowmick*** (1981) 2 SCC 109; An Attorney, In re (1924) SCC OnLine Bom 3; ***Ganga Ram v Khiala Ram Bansi Lal*** (1968) 4 DLT 676; ***Municipal Corporation of Greater Bombay v Vijay Metal Works*** (1981) SCC OnLine Bom 55.

[10] ***Municipal Corporation of Greater Bombay v Vijay Metal Works*** (1981) SCC OnLine Bom 55, paragraph 4.

[11] ibid.

[12] Justice B N Srikrishna in ***Shire Development LLC v Cadilla Healthcare Ltd and Another***, Civil Action No. 10-581 (KAJ) (D Del 27 June 2012) specifically doubted the legal correctness of the Bombay High Court judgment in the ***Vijay Metal Works*** case.

[13] ***Sunil Kumar v Naresh Chandra Jain*** (1985) SCC OnLine All 1118, paragraph 16.

[14] ***Larsen Tourbo Ltd v Prime Displays*** (2002) 5 BomCr 158.

[15] ibid, paragraph 49.

[16] ***Shire Dev Inc v Cadila Healthcare Ltd***, Civil Action No. 10-581 (KAJ) (D Del 27 June 2012).

[17] 19. Determination of rules of procedure. — (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

1. *Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.*
2. *Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.*
3. *The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence*.

[18] ***The Financial Reporting Council Ltd v Frasers Group PLC*** 2020 EWHC 2607 Ch, paragraphs 26–28; ***Anderson v Bank of British Columbia*** (1876) 2 Ch D 644 at 649; ***Southwark and Vauxhall Water Co v Quick*** (1878) 3 QBD 315 at 320; ***Southwark and Vauxhall Water Co v Quick*** (1878) 3 QBD 315 at 680.

[19] Director, ***Serious Fraud Office v Eurasian Natural Resources Corp Ltd***, (2019) 1 WLR 791, paragraphs 61–66; see also ***Three Rivers District Council and others v The Governor and Company of the Bank of England*** [2004] UK HL 48, at paragraphs 34, 52, 103, 105, 106 and 120.

[20] ***Three Rivers District Council and others v The Governor and Company of the Bank of England*** (Three Rivers 5) [2003] QB 1556 (CA).

[21] ***The Financial Reporting Council Ltd v Frasers Group PLC*** 2020 EWHC 2607 Ch, paragraphs 26–28.

[22] ***Colton v United States***, 306 F.2d 633, 637 (2d Cir 1962); see also ***United States v United Shoe Machinery Corp***, 89 F Supp 357, 360 (D Mass 1950).

[23] ***Upjohn Co v United States***, 449 US 383 (1981).

[24] Rule 27(o) of the Arbitration Rules of the Singapore International Arbitration Centre 2016.

[25] Annabelle Möckesch, Attorney-Client Privilege in International Arbitration (Oxford University Press, 2017), paragraphs 8.110, 8.141, 8.148, 8.202 and 8.203; ***Jürgen Wirtgen and others v Czech Republic*** (PCA Case No. 2014-03) Final Award (11 October 2017); ***BSG Resources Limited v Republic of Guinea*** (ICSID Case No. ARB/14/22) Procedural Order No. 4 (25 November 2015), paragraph 6(c); ***Vito G Gallo v The Government of Canada*** (UNCITRAL) Procedural Order No. 3
(8 April 2009), paragraph 41 ('domestic legal concepts of solicitor-client privilege are recognized and protected by international law'); ***Glamis Gold, Ltd v United States of America*** (UNCITRAL) Decision on Parties' Requests for Production of Documents Withheld on the Grounds of Privilege (17 November 2005), paragraph 20; ***Pope & Talbot Inc v Government of Canada*** (UNCITRAL) Decision by Tribunal (6 September 2000), paragraph 1.9; ***Merrill & Ring Forestry L P v Government of Canada*** (UNCITRAL) Decision of the Tribunal on Production of Documents in Respect of Which Cabinet Privilege Has Been Invoked (3 September 2008), paragraph 15; ***Windstream Energy LLC v Government of Canada*** (UNCITRAL) Procedural Order No. 4
(23 February 2015), paragraph 3.1; see also Berger, Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion, 22 Arb Int'l 501, 503 (2006); T Zuberuhler et al, IBA Rules of Evidence: Commentary on the IBA Rules of Taking of Evidence in International Arbitration, 171-78 (2012).

[26] IBA Rules, article 9.4(c); ***Global Telecom Holdings SAE v Canada***, ICSID Case No. ARB/16/16
(13 December 2018), Procedural Order No. 5, Decision on Outstanding Issues of Legal Privilege.

[27] IBA Rules, Commentary on the revised text of the 2010 IBA Rules on Taking Evidence in International Arbitration, p. 25.

[28] ***Global Telecom Holdings SAE v Canada***, ICSID Case No. ARB/16/16 (13 December 2018), Procedural Order No. 5, Decision on Outstanding Issues of Legal Privilege.

[29] IBA Rules, Commentary on the revised text of the 2010 IBA Rules on Taking Evidence in International Arbitration, p. 26.

[30] ***Philip Morris Asia Ltd v Commonwealth of Australia***, PCA Case No. 2012-12, Procedural Order
No. 12 (14 November 2014), paragraphs 4.6 and 4.8.

IN SUMMARY

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With the advent of globalisation in the second half of the twentieth century, international corporations began interacting across national borders and entered into complex commercial transactions. This interaction has continued between the legal regimes governing those corporations and the legal regimes in other nations. Consequently, to avoid uncertainty, international commercial arbitration has become an attractive alternate dispute resolution mechanism.

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Legal privilege is an important protection and an actionable right. Prohibition against disclosure of legally privileged documents has not only been expressly recognised but also enforced by courts in India.[9]

The Bombay High Court in *Municipal Corporation of Greater Bombay v Vijay Metal Works*[10] (the *Vijay Metal* Works case) extended the privileged communication protection under the Evidence Act to 'communications of a salaried employee advising his employer on all legal questions and also other legal matters'. The Court noted, among other things, the trend of corporations appointing lawyers on a full-time basis, and did not find a justification as to why such employees should not be entitled to the same protection as lawyers appearing in court.[11]

The *Vijay Metal* Works case concerned an employee of a government body, and predates the amendment to Rule 49 of the BCI Rules (Rule 49) in 2001. Prior to 2001, Rule 49 contained a specific exception for law officers employed by the government as full-time employees and permitted them to act as advocates. After the amendment, this exception was removed.[12]

In *Sunil Kumar v Naresh Chandra Jain*,[13] the Allahabad High Court opined that the advice of a law officer or a law department is privileged to the extent of section 129 of the Evidence Act and cannot be considered as evidence. Such advice was held to be completely privileged if the person obtaining it does not intend to give it as evidence. The High Court also held that such information could only be ordered to be disclosed if the person receiving it appears as a witness or relies on it in his or her affidavit. However, this decision was also in the context of law officers of a government department and predates the amendment to Rule 49 in 2001.

In *Larsen Tourbo Ltd v Prime Displays*,[14] the Bombay High Court again considered the question of whether privilege is attached to in-house counsel, and whether the*Vijay Metal Works case* was good law. While the Court ultimately left the issue undecided, it opined that to claim legal privilege for advice given by in-house counsel, the advice must be given by a person who is qualified to give legal advice.[15] It was further observed that legal privilege is also attached to documents that came into existence in anticipation of litigation, where the 'dominant purpose' of the document was to seek legal advice or to be used for the purpose of defence or prosecution in legal proceedings.

However, in 2012, in an amicus brief in *Shire Development LLC v Cadilla Healthcare Ltd and Another*,[16] Justice B N Srikrishna (former judge of the Supreme Court of India) opined that attorney–client privilege would not extend to an in-house counsel under section 129 of the Evidence Act as the term 'legal professional adviser' refers to a person qualified to practise law in India under the Advocates Act.

Applicability Of Evidence Act In Arbitration Proceedings

Section 19 of the Arbitration and Conciliation Act 1996 (the A&C Act) provides that an arbitral tribunal shall not be bound by the Evidence Act.[17] The A&C Act gives the tribunal the discretion to determine the admissibility, relevance, materiality and weight of any evidence. While evidentiary principles may apply, they would have to be read in line with the parties' agreement to be guided by any institutional rules or internationally recognised rules on the taking of evidence in arbitration proceedings.

Therefore, under the provisions of the A&C Act, parties to an arbitration can agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings and in case of failure of agreement, the tribunal may conduct the proceedings in the manner it considers

appropriate. Consequently, in the context of international commercial arbitrations seated in India, arbitral tribunals are empowered to consider international rules relating to issues of privilege, which are discussed under 'Position in international commercial arbitrations', below.

POSITION IN THE UNITED KINGDOM

Under English law, legal professional privilege originates from common law. Communications between clients and their lawyers for the purpose of obtaining legal advice, including advice in connection with existing or contemplated litigation, are considered privileged, and disclosure of such communications is barred.[18] English law recognises two manifestations of legal professional privilege, namely legal advice privilege and litigation privilege.[19]

Legal advice privilege protects communications between the client and the lawyer, where the dominant purpose of the communications was seeking or giving legal advice.[20] Litigation privilege as a separate form of legal professional privilege, distinct from legal advice privilege, protects from disclosure the communications between parties and their lawyers for the purpose of obtaining advice in connection with existing or contemplated litigation, when the following conditions are satisfied: (1) litigation must be in progress or in contemplation; (2) the communications must have been made for the sole or dominant purpose of conducting that litigation; and (3) the litigation must be adversarial, not investigative or inquisitorial.[21]

POSITION IN THE UNITED STATES

Similar to English and Indian law, the law in the United States protects from disclosure documents that are made for the purpose of seeking or obtaining legal advice or assistance. Legal professional privilege is recognised under the Rule 502 of the US Federal Rules of Evidence.

In *Colton v United States*, the US Supreme Court recognised the principle of legal privilege and held that any attorney–client communications made for the purpose of securing legal advice cannot be disclosed.[22]

In *Upjohn Co v United States*,[23] the Supreme Court held that the privilege ensures confidentiality of attorney–client communications, allowing for the client to fully disclose the facts and circumstances of its case and allow the attorneys to provide complete and effective advice. It was further held that it stands to reason that a corporation's employees should enjoy the full benefits of attorney–client privilege in their communications with counsel since any other position would not only make it difficult for lawyers to formulate sound advice when their client is faced with a specific legal problem, but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.

POSITION IN INTERNATIONAL COMMERCIAL ARBITRATIONS

In comparison to the jurisprudence in India and the United Kingdom, the law on legal professional privilege is most developed in the United States, where the privilege is extended to in-house counsels without exception. In the United Kingdom, legal professional privilege is determined on the basis of the nature of the communication or document sought to be privileged and whether the same falls under legal advice privilege or litigation privilege. In India, the law has now moved closer to the position in the United Kingdom. However, for international commercial arbitrations, especially those governed by the A&C Act, the

domestic legislation (ie, the Evidence Act) does not apply and, hence, does not preclude an arbitral tribunal from taking any specific exception to the position under Indian law.

Most of the institutional rules, including the Arbitration Rules of the Singapore International Arbitration Centre 2016 (the SIAC Rules), provide that unless otherwise agreed by the parties, in addition to the other powers specified in the SIAC Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, an arbitral tribunal shall have the power to determine any claim of legal or other privilege.[24]

In light of the above discussion, international best practice or rules for the taking of evidence in international arbitration proceedings become relevant for deciding the claim of legal or other privilege. The most widely used rules in this regard are the International Bar Association's Rules on the Taking of Evidence in International Arbitration 2020 (the IBA Rules).

Article 9.2 of the IBA Rules provides for the following:

> The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons:
>
> (…)
>
> 1. legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Article 9.4 below);
>
> (…)
>
> 1. considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling."

Article 9.4 of the IBA Rules states the following:

> In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
>
> 1. any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
> 2. any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;
> 3. the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;
> 4. any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the

Document, statement, oral communication or advice contained therein, or otherwise; and

5. the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

In the absence of any guidance on the applicable privilege rules, international tribunals generally resort to conflict of law rules and apply the 'closest connection' test or the most-favoured nation approach to determine the applicable domestic law for evidentiary privileges.[25] In this regard, article 9.4(c) of the IBA Rules recommends that the arbitral tribunal take into account the expectation of the parties and their advisers at the time the legal privilege is said to have arisen.[26]

The underlying objective of article 9.4(c) of the IBA Rules is to balance the interests of parties from different jurisdictions, and to ensure that the choice of applicable law on legal privilege does not unduly prejudice either party. The choice of the IBA Rules is intended to create uniformity as the parties are from different nationalities. The commentary to article 9 of the IBA Rules provides that, 'Often, these expectations will be formed by the approach to privilege prevailing in the home jurisdiction of such persons.'[27] Accordingly, the law of the jurisdiction in which the information is received or where the counsel is admitted to practise law may be a predictable regime to apply for evidentiary privileges.[28]

It is also important to note that article 9.2(g) of the IBA Rules is a catch-all provision, intended to assure procedural economy, proportionality, fairness and equality in the case. This is relevant in determining the applicable rules of evidentiary privilege as the tribunal must ensure that its choice of applicable law does not unduly prejudice either party. As explained in the commentary to the IBA Rules:

> For example, documents that might be considered to be privileged within one national legal system may not be considered to be privileged within another. If this situation were to create an unfairness, the arbitral tribunal may exclude production of the technically non-privileged documents pursuant to this provision. In general, it is hoped that this provision will help ensure that the arbitral tribunal provides the parties with a fair, as well as an effective and efficient, hearing.[29]

In this regard, the tribunal may take a general approach to document production and decide the applicability of legal privilege accordingly for each document.[30]

In these situations, the status of the in-house legal counsel in his or her domestic jurisdiction and the expectation of the client who has employed him or her become important factors. They help with establishing whether legal professional privilege may be extended to in-house legal counsels. This international approach to legal privilege is recommended to ensure that a party does not unwillingly lose an important right to legal privilege merely because of the laws governing the seat of arbitration (which may be in a neutral jurisdiction). In doing so, the party gets an effective right to defend itself.

By way of illustration, if a corporation registered and operating in the United States employes an in-house legal counsel in India for its local operations in India, any communication with the in-house counsel should be privileged in terms of the IBA Rules as it will be the legitimate expectation of the corporation that all legal communications between a client

and its legal counsel (including in-house) would be privileged in terms of the applicable law to corporations in the United States. This privilege would override the actual status of the in-house legal counsel in his or her local jurisdiction when such privilege is tested for the purposes of an international commercial arbitration that prescribes to the IBA Rules.

CONCLUSION

The status of in-house legal counsels for the purpose of extending legal professional privilege is a relevant consideration for arbitral tribunals in an international commercial arbitration. It requires the arbitral tribunal to adopt international standards and practices, it brings uniformity to legal proceedings and, most importantly, it safeguards the rights of a litigant in terms of communication between an in-house legal counsel who undertakes similar mandates as an external legal professional or lawyer. The issues concerning legal professional privilege for in-house legal counsels are becoming more significant as large multinational corporations rely heavily on in-house counsels for commercial advice that may become the subject matter of litigation and may have to be subjected to local jurisprudence on this issue. Therefore, in international commercial arbitrations, especially where there are differences in legal regimes on recognising legal professional privilege with regard to in-house counsels, progressive rules for taking evidence, such as the IBA Rules, ought to be resorted to or, in principle, accepted by the arbitral tribunal to conduct the arbitration proceedings. The tribunal should be guided by principles of fairness and equality to decide such issues rather than considering the domestic jurisprudence of the seat of arbitration or the domicile of parties when deciding such issues. This would provide certainty in commercial contracts and would be a relevant factor in choosing international commercial arbitration as the most preferred form of alternate dispute resolution.

Endnotes

1 *126. Professional communications. — No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment:Provided that nothing in this section shall protect from disclosure —*1.*any such communication made in furtherance of any [illegal] purpose,*2.*any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. It is immaterial whether the attention of such barrister, [pleader], attorney or vakil was or was not directed to such fact by or on behalf of his client. Explanation. — The obligation stated in this section continues after the employment has ceased.* ^ Back to section

2 *128. Privilege not waived by volunteering evidence. — Privilege not waived by volunteering evidence. — If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, [pleader], attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.* Back to section

3 *129. Confidential communications with legal advisers. — Confidential communications with legal advisers. — No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others*. Back to section

4 Sections 29 and 33 of the Advocates Act 1961. Back to section

5 ibid, Section 2(a). Back to section

6 Rule 49, Section VII, Chapter 2, Bar Council of India Rules. Back to section

7 ***Bar Council of India v A K Balaji*** (2018) 5 SCC 379, paragraph 42. Back to section

8 'Legal practitioner' means an advocate (or vakil) of any high court, a pleader, mukhtar or revenue agent. Back to section

9 ***Larsen & Toubro Limited v Prime Displays Pvt Ltd***, 2002 SCC Online Bom 267; ***Sunil Kumar v Naresh Chandra Jain***, 1985 SCC OnLine All 1118; ***PUCL v Union of India*** (2004) 9 SCC 580; ***Superintendent Office of Public Prosecutor v Registrar, Tamil Nadu Information Commission***, 2010 (5) CTC 238; ***Supt & Remembrancer of Legal Affairs v Satyen Bhowmick*** (1981) 2 SCC 109; An Attorney, In re (1924) SCC OnLine Bom 3; ***Ganga Ram v Khiala Ram Bansi Lal*** (1968) 4 DLT 676; ***Municipal Corporation of Greater Bombay v Vijay Metal Works*** (1981) SCC OnLine Bom 55. Back to section

10 ***Municipal Corporation of Greater Bombay v Vijay Metal Works*** (1981) SCC OnLine Bom 55, paragraph 4. Back to section

11 ibid. Back to section

12 Justice B N Srikrishna in***Shire Development LLC v Cadilla Healthcare Ltd and Another***, Civil Action No. 10-581 (KAJ) (D Del 27 June 2012) specifically doubted the legal correctness of the Bombay High Court judgment in the ***Vijay Metal Works*** case. Back to section

13 ***Sunil Kumar v Naresh Chandra Jain*** (1985) SCC OnLine All 1118, paragraph 16. Back to section

14 *Larsen Tourbo Ltd v Prime Displays* (2002) 5 BomCr 158. Back to section

15 ibid, paragraph 49. Back to section

16 *Shire Dev Inc v Cadila Healthcare Ltd*, Civil Action No. 10-581 (KAJ) (D Del 27 June 2012). Back to section

17 19. Determination of rules of procedure. — (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).1.*Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.*2.*Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.*3.*The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence*. Back to section

18 *The Financial Reporting Council Ltd v Frasers Group PLC* 2020 EWHC 2607 Ch, paragraphs 26–28; *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 at 649; *Southwark and Vauxhall Water Co v Quick* (1878) 3 QBD 315 at 320; *Southwark and Vauxhall Water Co v Quick* (1878) 3 QBD 315 at 680. Back to section

19 Director,*Serious Fraud Office v Eurasian Natural Resources Corp Ltd*, (2019) 1 WLR 791, paragraphs 61–66; see also *Three Rivers District Council and others v The Governor and Company of the Bank of England* [2004] UK HL 48, at paragraphs 34, 52, 103, 105, 106 and 120. Back to section

20 *Three Rivers District Council and others v The Governor and Company of the Bank of England* (Three Rivers 5) [2003] QB 1556 (CA). Back to section

21 *The Financial Reporting Council Ltd v Frasers Group PLC* 2020 EWHC 2607 Ch, paragraphs 26–28. Back to section

22 *Colton v United States*, 306 F.2d 633, 637 (2d Cir 1962); see also *United States v United Shoe Machinery Corp*, 89 F Supp 357, 360 (D Mass 1950). Back to section

23 *Upjohn Co v United States*, 449 US 383 (1981). Back to section

24 Rule 27(o) of the Arbitration Rules of the Singapore International Arbitration Centre 2016. Back to section

25 Annabelle Möckesch, Attorney-Client Privilege in International Arbitration (Oxford University Press, 2017), paragraphs 8.110, 8.141, 8.148, 8.202 and 8.203;***Jürgen Wirtgen and others v Czech Republic*** (PCA Case No. 2014-03) Final Award (11 October 2017); ***BSG Resources Limited v Republic of Guinea*** (ICSID Case No. ARB/14/22) Procedural Order No. 4 (25 November 2015), paragraph 6(c); ***Vito G Gallo v The Government of Canada*** (UNCITRAL) Procedural Order No. 3
(8 April 2009), paragraph 41 ('domestic legal concepts of solicitor-client privilege are recognized and protected by international law'); ***Glamis Gold, Ltd v United States of America*** (UNCITRAL) Decision on Parties' Requests for Production of Documents Withheld on the Grounds of Privilege (17 November 2005), paragraph 20; ***Pope & Talbot Inc v Government of Canada*** (UNCITRAL) Decision by Tribunal (6 September 2000), paragraph 1.9; ***Merrill & Ring Forestry L P v Government of Canada*** (UNCITRAL) Decision of the Tribunal on Production of Documents in Respect of Which Cabinet Privilege Has Been Invoked (3 September 2008), paragraph 15; ***Windstream Energy LLC v Government of Canada*** (UNCITRAL) Procedural Order No. 4
(23 February 2015), paragraph 3.1; see also Berger, Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion, 22 Arb Int'l 501, 503 (2006); T Zuberuhler et al, IBA Rules of Evidence: Commentary on the IBA Rules of Taking of Evidence in International Arbitration, 171-78 (2012). ^ Back to section

26 IBA Rules, article 9.4(c);***Global Telecom Holdings SAE v Canada***, ICSID Case No. ARB/16/16
(13 December 2018), Procedural Order No. 5, Decision on Outstanding Issues of Legal Privilege. ^ Back to section

27 IBA Rules, Commentary on the revised text of the 2010 IBA Rules on Taking Evidence in International Arbitration, p. 25. ^ Back to section

28 ***Global Telecom Holdings SAE v Canada***, ICSID Case No. ARB/16/16 (13 December 2018), Procedural Order No. 5, Decision on Outstanding Issues of Legal Privilege. ^ Back to section

29 IBA Rules, Commentary on the revised text of the 2010 IBA Rules on Taking Evidence in International Arbitration, p. 26. ^ Back to section

30 ***Philip Morris Asia Ltd v Commonwealth of Australia***, PCA Case No. 2012-12, Procedural Order
No. 12 (14 November 2014), paragraphs 4.6 and 4.8. ^ Back to section

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