ANNEX
TO THE
DRAFT REPORT FOR PUBLIC DISCUSSION
OF
THE ICCA-QUEEN MARY TASK FORCE
ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION

1 SEPTEMBER 2017
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Memorandum

TO Lisa Bingham

COPY TO Dr Sam Luttrell & Isuru Devendra

FROM Dr Sam Luttrell & Isuru Devendra

DATE 12 May 2016

FILE REF

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Third-Party Funding Attorney-Client Privilege - Australia

1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

In Australia, legal professional privilege protects certain confidential communications between a lawyer and their client from disclosure in court proceedings. Legal professional privilege is governed by common law in all Australian jurisdictions. However, in some jurisdictions, legislation regulates the use of privileged material in national court proceedings.¹ Legal professional privilege belongs to the client, not the lawyer, and as such it is the client who is entitled to waive the privilege.²

Common law privilege

At common law, legal professional privilege protects communications which are written, oral or recorded, but not documents or information given by or contained in a document.² The policy rationale for the privilege is that it facilitates open and honest communications between the lawyer and client, thus benefitting the administration of justice.³ Legal

¹ Evidence Act 1995 (Cth); Evidence Act 1995 (NSW); Evidence Act 2001 (Tas); Evidence Act 2008 (Vic); Evidence Act 2011 (ACT); Evidence (National Uniform Legislation) Act (NT) (together, the Uniform Evidence Acts).
² Commissioner of Australian Federal Police v Propend Finance (1997) 188 CLR 501 at [570].
³ Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49 at 79, 82.
professional privilege may only be overridden or lost by (i) statute or (ii) waiver by the client.\textsuperscript{5}

At common law, legal professional privilege falls within two subcategories (i) advice privilege and (ii) litigation privilege.\textsuperscript{6}

(a) Advice privilege

Advice privilege protects confidential communications between a client, the client’s legal adviser and third parties for the dominant purpose of giving or receiving legal advice.\textsuperscript{7} Advice is reasonably broad in definition and includes "what may prudently and sensibly be done in the relevant legal context".\textsuperscript{8} The advice must be professional advice given by the legal adviser in their professional capacity, and the communications must be for the dominant purpose of obtaining legal advice.\textsuperscript{9} The privilege will not attach to advice that is predominately for a financial, personal, commercial or public relations purpose.\textsuperscript{10}

While third party communications were not originally protected by this privilege, the law has changed in recent years to encompass confidential communications between a legal adviser or client and a third party made for the dominant purpose of the legal adviser providing advice to the client.\textsuperscript{11} The common law therefore offers broader protections with respect of third party communications than the Australian statutory regime, which does not protect third party communications unless the third party is an agent of the client.\textsuperscript{12}

(b) Litigation privilege

Litigation privilege protects confidential communications passing between a client, the client’s legal adviser and third parties if made for the dominant purpose of use in, or in

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{5} Attorney-General (NT) v Kearney (1985) 158 CLR 500 at 532.
\item\textsuperscript{6} These have been mirrored in the Uniform Evidence Acts. See for example, ss 118 and 119 of the Evidence Act 1995 (Cth).
\item\textsuperscript{7} Daniels Corporation International Pty Ltd v Australia and Consumer Commission (2002) 213 CLR 543 at 552.
\item\textsuperscript{8} Balabel v Air India [1988] Ch 317 at 330.
\item\textsuperscript{9} AWB v Cole (No. 5) (2006) 155 FCR 30 at 410.
\item\textsuperscript{10} Three Rivers District Council v Governor and Company of the Bank of England (No 6) [2005] 1 AC 610 at 651; AWB v Cole (No. 5) (2006) 155 FCR 30 at 410.
\item\textsuperscript{11} Commissioner of Taxation of the Commonwealth of Australia v Pratt Holdings Pty Ltd [2005] FCA 1247 at 137–138.
\item\textsuperscript{12} See s 118 of the Evidence Act 1995 (Cth); see also Westpac Banking Corporation v 789Ten Pty Ltd [2005] NSWCA 321 at [29].
\end{enumerate}
\end{footnotesize}
relation to, adversarial proceedings (e.g. national court proceedings or arbitration). For the privilege to arise, the relevant proceedings must be at least "reasonably anticipated" at the time of the relevant communication, which means there is a "real possibility of litigation, as distinct from a mere possibility, but it does not have to be more likely than not".14

Statutory regulation of legal professional privilege

In some Australian jurisdictions, legislation regulates the use of privileged communications in court proceedings. For example, at the federal level, sections 118 and 119 of the Evidence Act 1995 (Cth) protect confidential communications and documents created for the dominant purpose of providing legal advice or use in litigation from being adduced in court proceedings. Under the Uniform Evidence Acts, privilege includes the contents of a confidential document, not just communications.15

Requirements for privilege

The requirements for a communication to attract legal professional privilege are that the communication must: (a) pass between the client and the lawyer (with a lawyer-client relationship); (b) be made for the dominant purpose of enabling the client to obtain legal advice, or for the purpose of existing or anticipated litigation; and (c) be confidential.16

(i) A communication between client and lawyer

A lawyer-client relationship must exist for legal professional privilege to arise. Accordingly, a communication that passes between a lawyer and another person will not necessarily be privileged (i.e. the fact that one person to a communication is a lawyer is not in itself sufficient for the communication to be privileged). The communication must arise in connection with a lawyer acting in their professional capacity.17

Where the lawyer is in-house counsel employed by the 'client', the general principle is that the rules of legal professional privilege apply in the same way as it does for external lawyers. However, a communication from an in-house counsel to their employer (i.e. the client) will not be subject to legal professional privilege if the in-house counsel was not acting with

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15 See for example, *Evidence Act 1995* (Cth) ss 118 and 119.
16 *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.
sufficient independence from their employer. For example, in-house counsel's advice will not be privileged if it is compromised by the personal loyalties, duties and interests of the lawyer (e.g. the lawyer's loyalties to his or her employer). The fact that in-house counsel also performs some non-legal functions in the course of their role, which could affect their independence, does not necessarily mean their communications cannot be privileged.

(ii) Dominant purpose

The "dominant purpose" of a communication is the "ruling, prevailing or most influential purpose" and is to be determined objectively. That is, the intentions of the author or recipient of the communication are not relevant. Essentially, a "but for" test is used to determine the dominant purpose of a communication: would the communication have been made but for the need to obtain legal advice or use in existing or anticipated litigation? If the answer is "no", the dominant purpose requirement will be satisfied, as the communication will have been brought into existence to enable the client to obtain legal advice, or for the purpose of existing or anticipated litigation.

(iii) Confidentiality

For a communication to be subject to legal professional privilege, it must be confidential in the context of the lawyer-client relationship. Generally, confidentiality can be inferred from the circumstances of the communication. For example, a communication between a lawyer and client in public or to a person opposed to the client's interests will likely undermine the confidentiality of the communication.

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its

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18 *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82.
19 *Seven Network Ltd v News Ltd* (2005) 225 ALR 672 at 674.
20 *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 at [10]. The requirement for dominant purpose may be problematic for in-house counsel, whose communications may well have been created for multiple purposes. The test is applied objectively: if objective evidence suggests the document was prepared for non-legal purposes, the document will not attract legal professional privilege: *Sydney Airports Corporation Ltd v Singapore Airlines Ltd & Qantas Airways Ltd* [2005] NSWCA 47.
22 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 73.
23 This is recognised in the definitions of "confidential document" and "confidential communication" used in s 117(1) of the Uniform Evidence Acts.
24 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (1999) 165 ALR 253 at 263.
25 *Gotha City v Sotheby's* [1998] 1 WLR 114.
counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

Under Australian law, legal professional privilege is part of substantive law and is not a rule of evidence or a procedural rule. As a result, legal professional privilege will not protect a lawyer-client communication from disclosure merely because the seat is in Australia (i.e., the rules of legal professional privilege do not arise as part of the lex arbitri).

While legal professional privilege is not a rule of evidence, the rules of evidence regulate (or at least inform) the use of privileged communications in arbitration. For an international arbitration seated in Australia, where the parties to the arbitration agree the applicable procedural rules (such as by accepting the application of the International Bar Association's Rules on the Taking of Evidence in International Arbitration), those rules will often determine or at least guide what use can be made of privileged material.

Where the parties have not agreed the applicable procedural rules, Article 19 of the UNCITRAL Model Law (which has force of law in Australia) allows the tribunal to determine (inter alia) the admissibility of evidence, including privileged material. In practice, tribunals often exercise this power having regard to general principles of fairness between the parties to the arbitration.

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

Waiver of legal professional privilege

As mentioned above, legal professional privilege only applies to communications that are confidential. Generally, if a communication loses its confidentiality, it will no longer be

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27 International Arbitration Act 1974 (Cth) s 16.
protected by legal professional privilege. For example, if a communication is made publicly available, it will lose legal professional privilege.

In addition to a loss of confidentiality, legal professional privilege may be waived, either intentionally or unintentionally. In either case it is the client, as the holder of the privilege, and not the lawyer, who may waive privilege. However, in some circumstances, a lawyer may bind a client to a waiver of privilege committed within the lawyer’s actual or ostensible authority.

At common law, intentional ("express") waiver of legal professional privilege occurs where the client deliberately and intentionally discloses a privileged communication. Under the Uniform Evidence Acts, privilege will be waived where the client has "knowingly and voluntarily" disclosed the privileged communication to a third party on a non-confidential basis. However, privilege will not be waived where the communication is disclosed under compulsion of law.

Unintentional ("implied" or "imputed") waiver of legal professional privilege occurs where the client, as holder of the privilege, acts in a manner that is inconsistent with maintaining the confidentiality of the relevant communication. In assessing whether the privilege holder’s conduct gives rise to such an inconsistency, considerations of fairness may play a role. This is not an overriding principle of fairness, but simply one that may guide whether the privilege holder’s conduct warrants privilege to be waived. Implied or imputed waiver may occur despite the subjective intention of the privilege holder and is to be determined on an objective basis, with party seeking to maintain privilege bearing the onus of establishing that the privilege has not been waived.

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28 Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49.
30 Attorney-General (NT) v Maurice (1986) 161 CLR 475.
31 Goldberg v Ng (1994) 33 NSWLR 639 at 670.
32 Evidence Act 1995 (Cth) s 122.
33 Evidence Act 1995 (Cth) s 122(2).
35 Attorney-General for the Northern Territory v Maurice (1986) 161 CLR 475 at 487.
36 Mann v Carnell (1999) 201 CLR 1 at [29].
37 Mann v Carnell (1999) 201 CLR 1 at [29].
Disclosure to third parties

Disclosure of a privileged communication to a third party may waive privilege, either partially or in full. Australian courts have held that where privileged communications are disclosed to a third party for a limited and specific purpose, privilege may be waived for that limited and specific purpose as against the third party alone. However, in order to constitute a partial (and not a full) waiver of privilege, the privilege holder must retain full control of the disclosed communication. This may, for example, be done through imposing an appropriate confidentiality or non-disclosure regime. Failure to maintain control over the disclosed communication is likely to constitute a full waiver of privilege.

One of the recognised circumstances in which disclosure of a privileged communication to a third party will not waive privilege is where the third party recipient has a common interest with the privilege holder in relation to the subject matter of the privileged communication. An example of this is where a privileged communication is provided by an insured person to their insurer, where both the insured and insurer have a common interest in the subject matter of the communication (e.g. legal advice). Even where a privileged communication is disclosed pursuant to a common interest, the privilege holder must put in place a confidentiality agreement with the recipient that is sufficient to protect the confidentiality and privilege of the disclosed communication. Failure to do so may constitute an implied or imputed waiver of the privilege.

4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please

42 For example, in Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2) [2014] FCA 481, the Federal Court of Australia found that privilege in respect of a confidential report had been waived by a party because it had provided the report to its insurer in circumstances where (i) the report provided to the insurer was the subject of litigation privilege rather than advice privilege; (ii) the disclosure to the insurer was voluntary; (iii) the applicants and the insurer did not have a common interest because at the time the report was provided there was no basis to say that the insurer would cover the claim; (iv) there were no express terms of confidentiality in the insurance agreement; (v) confidentiality of the report could not be implied from the circumstances; (vi) despite the report being marked confidential, it was not obviously sensitive or privileged; (vii) the report's confidentiality was not expressly reserved when it was disclosed to the insurer.
identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

As discussed above, disclosure of a privileged communication to a third party will not necessarily waive privilege. Disclosure to a third party funder is no exception. However, in order to retain privilege over the communication, its disclosure must be made under common interest privilege or in another manner that allows the privilege holder to retain full control of the disclosed communication. This includes implementing a confidentiality regime that sufficiently protects the confidentiality and privilege of the disclosed communication. While there has not been any judicial consideration of the matter in the context of third party funders, common interest privilege is likely to exist between a privilege holder and a third party funder where the funder is funding (or looking to fund) the privilege holder's proceeding and the privileged communication disclosed concerns matters in connection with the proceeding. In these circumstances, it is likely the privilege holder would not waive its privilege in respect of the disclosed communication.

Further, and outside the scope of common interest privilege, privilege in respect of a communication may not be waived where the communication is disclosed to a third party funder under a confidentiality regime that ensures the privilege holder retains full control over the disclosed communication (e.g. limits the number of copies, if any, the third party funder can make, limits the purposes for which the third party funder may use the communication and requires the third party funder to destroy all copies of the communication once the purpose has been satisfied).
CLIFFORD CHANCE

Memorandum

TO: Sarah Breckenridge; Lisa Bingham
FROM: Dr Sam Luttrell & Isuru Devendra

DATE: 1 February 2017
DIRECT DIAL: +61 8 9262 5528

Third-Party Funding Attorney-Client Privilege – Australia (Additional Questions)

1. What law applies to privilege in litigation in your jurisdiction / in arbitration with its seat in your jurisdiction? (You will note that this is a modified version of the first question you answered for us; we thought this may provide slightly more direction. If it does not change your response, please let us know.)

Under Australian law, legal professional privilege is part of substantive law and is not a rule of evidence or a procedural rule. As a result, legal professional privilege will not protect a lawyer-client communication from disclosure merely because litigation is commenced in an Australian court or the seat of arbitration is in Australia (i.e., the rules of legal professional privilege do not arise as part of the lex fori or lex arbitri).

Where there is a foreign element(s) to the document or communication over which privilege is asserted, Australian law is not yet clear as what determines the law which governs the claim to privilege over that document or communication. Commentators have suggested as possible factors: (1) the jurisdiction from which the communication is transmitted; (2) the jurisdiction in which the communication is received; (3) the law in relation to which the legal advice was provided; and (4) and the jurisdiction in which the lawyer that created the communication is admitted.

Further, while legal professional privilege is not a rule of evidence, the rules of evidence regulate (or at least inform) the use of privileged communications in arbitration. For an international arbitration seated in Australia, where the parties to the arbitration agree the applicable procedural rules (such as by accepting the application of the International Bar Association’s Rules on the Taking of Evidence in International Arbitration), those rules will often determine or at least guide what use can be made of privileged material.

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1 Daniels Corporation International Pty Ltd v Australia and Consumer Commission (2002) 213 CLR 543 at 552–553.
Where the parties have not agreed the applicable procedural rules, Article 19 of the UNCITRAL Model Law (which has force of law in Australia) allows the tribunal to determine (inter alia) the admissibility of evidence, including privileged material. In practice, tribunals often exercise this power having regard to general principles of fairness between the parties to the arbitration, including the need to ensure that privilege does not lead to unequal treatment (for example, because one party enjoys the benefit of a privilege that is alien to the other party).

2. Are documents held by the TPF protected i.e. the funder’s own evaluation of the case; separate legal opinions; negotiation of the funding agreement?

Under Australian law, privilege attaches to a confidential communication made with the dominant purpose of obtaining legal advice or to conduct or aid the conduct of litigation. Accordingly, any legal advice obtained by the TPF for its own evaluation of the case and any separate legal opinions obtained by the TPF is likely to be privileged as communications for the dominant purpose of obtaining legal advice. However, this privilege arises out of the relationship between the TPF and its lawyers, with the TPF as the privilege holder. The relationship through which privilege arises is more straightforward where the funder uses external counsel. Where the TPF uses in-house counsel for its assessment, in-house counsel must have been consulted in his or her capacity as a lawyer (e.g. not in a commercial capacity), for privilege to be generated in relation to his or her communication.

It is also arguable that the funder’s conduct in evaluating the case, obtaining separate legal opinions and negotiating the funding agreement may be characterised as being for the dominant purpose of aiding the conduct of existing or anticipated litigation or arbitration. If so, the relevant communications and documents would be privileged, with the party (and not the TPF) as the privilege holder. While the matter has not been directly considered by an Australian court, Australian courts have determined questions as to whether litigation funding agreements are privileged. In Re Global Medical Imaging Management Limited (in liq) [2001] NSWSC 476, Santow J held that a litigation funding agreement was privileged for the purposes of section 119 of the Evidence Act 1995 (NSW) (a statutory provision based largely on the common law of privilege). In that case, Santow J noted that, if the funding agreement was not privileged, it had the potential to reveal the litigant’s likely legal strategy. However, in contrast, in Re Lorie NaJJar and Sons Pty Ltd (in liq) (No 5) [2013] NSWSC 1336, Black J held that a funding agreement was not privileged as it did not reveal any considerations of

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2 International Arbitration Act 1974 (Cth) s 16.
3 Grant v Downs (1976) 135 CLR 674.
4 Waterford v Commonwealth (1987) 163 CLR 54 at 62; Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group plc (No 2) [2013] FCA 1098.
5 Re Global Medical Imaging Management Limited (in liq) [2001] NSWSC 476 at [7].
prospects or strategy in the proceedings. In another case, a similar view was taken by Hodgson JA, with whom Basten JA agreed, in the context of a costs agreement between a client and his lawyers. While these decisions show that Australian law is not settled on the issue, they do suggest that Australian courts are likely to decide that any funding documents which contain, or are likely to contain, details of case prospects or strategy will be privileged. These documents could include the funder's own evaluation of the case, separate legal opinions and records from the negotiation of the funding agreement.

3. **In relation to documents transferred by the lawyer/party to the TPF, does the use of a confidentiality/non-disclosure/common interest agreement work to protect privilege/secrecy in your jurisdiction?**

A privilege holder will waive privilege over a document or communication where he or she acts in a manner that is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Accordingly, it is common practice in third-party funding in Australia for confidentiality and non-disclosure agreements to be entered into between a party (i.e. the privilege holder) and a TPF to protect privileged material transferred by the party to the TPF. Indeed, failure to enter into a confidentiality/non-disclosure agreement could be construed as acting in a manner inconsistent with the maintenance of the confidentiality of the privileged material (with the result that privilege is waived). However, a confidentiality/non-disclosure agreement is not *per se* sufficient to protect privileged material provided by a party to the TPF. Australian courts have considered the privilege holder's control of the privileged material to be fundamental to the maintenance of privilege. Accordingly, in order to best ensure privileged material provided by a party to a TPF is protected, confidentiality and non-disclosure agreements should contain terms which provide the privilege holder with the ability to maintain control over the privileged material so as to prevent further dissemination of the material. An essential component of this is to expressly state the limited purposes for which the privileged material may be used by the TPF.

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6 *CSR Ltd v Eddy* (2008) 70 NSWLR 725.
7 *Mann v Cornell* (1999) 210 CLR 1 at [29].
8 *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2) [2014] FCA 481.
9 *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2) [2014] FCA 481.*
Austria
Dr. Nikolaus Pitkowitz

(Version 17 March 2017)

QUESTIONNAIRE FOR COUNTRY REPORTS

ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration

Q1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer). What law applies to privilege in litigation in your jurisdiction/in arbitration with its seat in your jurisdiction?

While the concept of “privilege” is an integral part of Community law of the European Union, it is not recognized in Austria.\(^1\) However, there is reason to believe, that “privilege” is partly applicable to Austrian Competition Law.\(^2\) Fundamentally, legal profession is deemed to be built on three pillars namely 1) secrecy 2) independence and 3) loyalty to the client. Secrecy as well as loyalty duties persist beyond the proxy relationship for an unlimited time.\(^3\) The relationship between lawyer and client is therefore seen as one of confidence and information held by the lawyer is protected by “professional secrecy”. The concept of “professional secrecy” is laid down explicitly

\(^1\) Hunner, Akzo: Keine wirkliche Erweiterung des Anwaltuprivilegs, ecolex 2007, 871 (871).

\(^2\) Neumayr/Stegbauer, Die Reichweite des Anwaltuprivilegs, OZK 2008, 10 (12).

\(^3\) Mankart, Verschwiegenheit und Doppelvertretung, AnwBl 2014, 161 (161) et seq.
in the Austrian Bar Regulation and is reflected in other laws, such as the Austrian Code of Civil Procedure or the Austrian Code of Criminal Procedure. However, although repeatedly requested by the Austrian Bar Association, “professional secrecy” of lawyers is not granted by the Austrian Federal Constitution.4

2 The concept of “professional secrecy” is twofold. On the one hand, lawyers have a professional duty to keep information pertaining to professional matters confidential.5 On the other hand, lawyers have the right to refer to “professional secrecy” in court proceedings or other proceedings in accordance with the applicable laws6; lawyers may refuse to give testimony with regard to facts the disclosure of which would violate their confidentiality obligation7; likewise, lawyers may refuse to disclose certain documents if the disclosure amounted to a violation of their confidentiality obligation.8

3 The client can release the lawyer from their confidentiality obligation. If the client does not release the lawyer from their confidentiality obligation, the lawyer must refuse testimony/disclosure of documents. If the client releases the lawyer from his/her confidentiality obligation, this does not mean that the lawyer automatically loses his right to refuse testimony/disclosure, since this right has to be exercised in accordance with the Austrian Bar Regulation. Some scholars argue that a lawyer must refuse testimony/disclosure despite being released of his/her confidentiality obligation if it is in the client’s interest (since the lawyer has a better understanding of the client’s interests).9

4 The lawyer’s confidentiality obligation encompasses all matters entrusted to the lawyers and information that they learned in their capacity as lawyers and insofar as non-disclosure is in the client’s interest.10 The lawyer’s confidentiality obligation covers contentious and non-contentious work and applies even if no contractual relationship between the lawyer and the client has been established yet. The confidentiality obligation continues even after the termination of a lawyer-client relationship.11

5 The lawyer’s right to confidentiality may not be circumvented by judicial or other authority measures, in particular by examining the lawyer’s assistants or requesting the disclosure of documents.12 The scope of persons being lawyer’s assistants is un-

4 Cserhölzl/Huber, Anwaltliche Verschwiegenheit und ihre Durchbrechung, insbesondere bei Anwaltsgenossen, AnwBl 2015, 81 et seq.
5 Sec 9 para 2 RAO.
6 Sec 9 para 2 RAO.
7 Sec 321 para 1 no 3 and no 4 ZPO.
8 See 305 no 4 ZPO.
9 Lehner in Engelhart et al. (eds.) RAO Rechtsanwaltsordnung (9th ed. 2015) Section 9 mn 50 seq.; Frauenberger in Fasching/Konecny (ed.) Zivilprozessgesetz § 321 ZPO mn 22.
10 See 9 para 2 RAO.
11 RIS-Justiz RS0072093; RIS-Justiz RS0072359.
12 Sec 9 para 3 RAO.
clear and will certainly include the lawyer’s employees. It probably also includes persons that have access to confidential information on the basis of contractual agreements with the lawyer (such as court appointed experts, hosting providers etc.). There are good arguments that a third party funder could also be regarded as a “lawyer’s assistant” under Sec. 9 para 3 RAO (Austrian Bar Regulation) enabling the third party funder to refer to “professional secrecy”.

However, only the lawyer may claim the benefit of “professional secrecy”. The client, not being a lawyer, cannot claim the benefit of “professional secrecy”. “Professional secrecy” only covers documents in the lawyer’s immediate possession while communication between the client and the lawyer found in the client’s possession is not protected. The client, if being summoned by the court, must testify in his/her capacity as party, but may refuse to give testimony for certain reasons (not, however, due to a risk of monetary disadvantages). In any case, a party cannot be forced to give testimony by subpoena. The party’s refusal to give testimony would be subject to the free assessment of evidence by the court.

Q2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

The parties to arbitration, subject to mandatory provisions, are free to determine the rules of procedure. In practice, the parties often agree on certain standardized rules such as the IBA Rules on Taking of Evidence which contain specific provisions with regard to privilege.

If the parties do not agree on rules of procedure or specific rules on the taking of evidence, Austrian arbitration law applies. Austrian arbitration law does not provide for specific rules on “privilege” or “professional secrecy”. Instead, the arbitral tribunal is authorized to decide upon the admissibility of the taking of evidence, to conduct such taking of evidence and freely evaluate the results of such evidence. That means that the arbitral tribunal will establish rules on the taking of evidence at its own discretion.

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13 Erläuterung zu § 9 Abs 3 RAO
14 See § 380 para 1 and 3 ZPO.
15 See § 381 ZPO.
16 See § 594 para 1 ZPO.
17 See § 599 para 1 ZPO.
if the parties fail to agree on specific rules. When establishing such rules, the arbitral tribunal will consider factors such as the legal traditions of the parties’ home jurisdiction, fundamental principles of Austrian procedural law, international best practice, the parties’ choice of law, the parties’ choice of institutional rules and the parties’ hypothetical intentions with regard to the taking of evidence.\(^\text{18}\) If a party requests from their opponent to produce documents on the basis of the IBA Rules, the arbitration tribunal will require the party to argue the relevance of the documents and to specify the documents to be disclosed (the arbitration tribunal will not order the production of a category of documents).\(^\text{19}\) Arbitral tribunals seated in Austria must not allow for taking of evidence that violates mandatory provisions pursuant to the Austrian Code of Civil Procedure.\(^\text{20}\) A state court would not grant judicial assistance to an arbitral tribunal if the arbitral tribunal requested measures of taking of evidence that are prohibited under Austrian law.\(^\text{21}\)

9 An Austrian lawyer must comply with professional rules irrespective of his current function.\(^\text{22}\) According to an obiter dictum of the Austrian Attorney Disciplinary Board, Austrian lawyers are bound to the professional rules (including “professional secrecy”) under the Austrian Bar Regulation even if acting outside of Austria.\(^\text{23}\) Therefore, there are good arguments that Austrian lawyers may refer to professional secrecy under Sec 9 para 2 RAO (Austrian Bar Regulation) also in arbitration proceedings.

Q3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

As noted, the client can release the lawyer from his/her confidentiality obligation and thereby waive the privilege of “professional secrecy”. Some scholars argue that a lawyer must refuse testimony/disclosure despite being released of his/her confidentiality obligation if it is in the client’s interest (since the lawyer has a better understanding of the client’s interests).\(^\text{24}\)

\(^{18}\) Cf. Konrad/Petere, Die Anordnung der Urkundenvorlage im internationalen Schiedsverfahren, eclex 2010, 763 (766).
\(^{19}\) Cf. Konrad/Petere, Die Anordnung der Urkundenvorlage im internationalen Schiedsverfahren, eclex 2010, 763 (765).
\(^{20}\) Sec 594 para 1 ZPO.
\(^{21}\) Sec 38 para 2 no 2 JN.
\(^{23}\) OBDK 22.02.2010, 1 BKd 4/09, AnwBl 2010, 8241.
\(^{24}\) Lehner in Engelhart et al. (eds.) RAO Rechtsanwaltsordnung (9th ed. 2015) Section 9 mn 50 seq.; Frauenberger in Fasching/Konevny (ed.) Zivilprozessgesetz § 321 ZPO mn 22.
The client can consent to his lawyer passing on information to a third party and thereby expressly or impliedly release the lawyer from his/her confidentiality obligation. The information in the hands of a third party (as opposed to a lawyer) will not be subject to professional secrecy. Therefore, the third party may be obliged (e.g., by court order), to reveal that information.

Under Austrian civil procedure law, a third party (i.e., a party which is not a part of the proceedings) may be required by the court to disclose a document only, (i) if the third party is subject to a disclosure obligation under Austrian civil law or (ii) if the document is a joint document of the third party and the party requesting the disclosure. Otherwise, the court may not obligate a third party to disclose the document. The mandating legal proclamation ordering a disclosure of documents of a third party is enforceable by means of fines and prison sentences.

Under Austrian civil procedure law, a third party may also be called as a witness. A witness may refuse to give testimony on specific questions for certain reasons, e.g., if answering the question might entail a monetary disadvantage for the witness (a contractual penalty for a breach of a confidentiality obligation is not recognized as such monetary disadvantage) or if the witness, by answering the question, would violate a statutorily recognized confidentiality obligation (e.g., an employee may be considered to be bound by such confidentiality obligation towards his/her employer) or reveal a business secret. It is worth mentioning whether a third party funder (an executive or an employee of the third party funder) could refuse to testify on certain questions referring to a business or trade secret of the client or a third party. The wording of Sec 321 para 1 ZPO encompasses the refusal to give evidence on business secrets ("Geschäftsgeheimnisse"). Furthermore, trade secrets ("Betriebsgeheimnisse") are also subject to the right of refusal due to legal scholars' opinions. Business or trade secrets at third parties' disposal can either refer to party secrets or to those of an uninvolved third party. All such secrets are covered by Sec 321 para 1 Z 5 ZPO. The question therefore is, if a TPF called as a witness has to enter a binding confidentiality agreement with the client in order to invoke the refusal of giving evidence in court. Legal opinions take the view that an obligation of secrecy agreed by contract results in the applicability of the provision Sec 321 para 1 Z 5 ZPO. However, obligations of secrecy deriving from a relationship of trust justify a refusal to give evidence only if a personal connection has been established between the witness (TPF) and the person in need of protection. The situation may be different if the party or the third

25 Sec 308 para 1 ZPO.
26 Sec 308 para 2 ZPO.
27 Kralik, Das Aussageverweigerungsrecht des Zeugen im Zivilprozess (1996) 38seq.
28 Sec 321 para 1 ZPO.
person, whose secret should be protected, expressly releases the witness from their confidentiality duties. Consequently, the witness can no longer refer to the right to refuse to give testimony on specific questions.\(^{31}\)

Q4. **Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration.** Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

13 The client can consent to their lawyer passing information on to a third party and thereby expressly or impliedly release the lawyer from their confidentiality obligation. The benefit of “professional secrecy” is attached to the person of a lawyer, and not to the information provided to the lawyer. Therefore, the benefit of “professional secrecy” cannot continue to attach to the communication if passed on to a third party. Also, the client cannot invoke benefit of “professional secrecy” for information in his hands since it is not a lawyer. A court decision ordering the opponent to disclose a document is not enforceable, but the party’s refusal to disclose a document is subject to the free assessment of evidence by the court. As already pointed out above (see question 3) a third party may be required by court to disclose documents provided that certain conditions are met.\(^{32}\)

Q5. **Are documents held by the TPF protected i.e. the funder’s own evaluation of the case; separate legal opinions; negotiation of the funding?**

14 The information in the hands of any third party (as opposed to a lawyer) will not be subject to “professional secrecy”. Therefore, the third party may be obliged, for example by court order, to reveal that information. In the specific case of Third Party Funding the following has to be outlined. As stated above (see question 1) there is reason to believe that TPF embody “lawyer’s assistants”. Consequently, documents gathered by


\(^{32}\) Sec 308 ZPO.
a funder would underlie “professional secrecy”. However, confidentiality agreements between TPF and their clients commonly include a corresponding clause that enables the funder to disclose and share information as e.g. the evaluation of the case, negotiation of the funding etc. with a third party. This practice would in turn result in a violation of the regulations referring to “professional secrecy”. To the best of our knowledge this apparent legal conflict has not yet been dealt with in jurisdiction.

Q6. **In relation to documents transferred by the lawyer/party to the TPF, does the use of a confidentiality/non-disclosure/common interest agreement work to protect privilege/secrecy in your jurisdiction?**

If third-party funders are not sworn to secrecy by law, it is feasible and advisable to agree on contractual arrangements such as a confidentiality agreement to ensure secrecy of documents transferred by the lawyer. This can rather be seen as a lawyer’s legal obligation. The conclusion of non-disclosure agreements between lawyer/party and the TPF is a commonly known practice in Austria. Therefore, it is important to provide for all contingencies in the terms of the agreement. Contractual components should include a definition of the underlying confidential information, duration and termination of the agreement as well as restrictions and exclusions regarding confidentiality. Furthermore, the return of the provided information, jurisdiction and governing law ought to be regulated.

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34 [Cropleh/Huber, Anwaltliche Verschwiegenheit und ihre Durchbrechung, insbesondere bei Anwaltsgehilfen, AnwBl 192015, 80.](http://www.advofin.at/fileadmin/user_upload/Vorlagen/Vertraulichkeitsuebertragung.pdf)
Date: 12 September 2016

To: ICCA - QMUL Task Force on Third Party Funding in International Arbitration

From: Luiz Aboim – White & Case LLP – London

GUIDELINES ON THIRD PARTY FUNDING: BRAZIL

1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g. the client, the lawyer).

Background

Brazilian law does not provide for the different types of privilege, such as common interest privilege or litigation privilege, which are available in certain common law jurisdictions. A counsel’s communications, documents and premises related to their work are nevertheless protected through a hybrid system combining attorney-client privilege and professional secrecy rules.

Those rules are found in a number of laws and regulations, including the Brazilian Constitution of 1988, the bylaws and the ethics code of the Brazilian Bar Association (BBA Bylaws and BBA Ethics Code), the Brazilian Civil Procedure Code (BCPC), and the Brazilian Criminal Code (BCRC).

Such laws and regulations do not differentiate between different types of counsel, thus privilege and professional secrecy rights can be invoked by private practice lawyers working independently or in law firms, by public attorneys at any level of the Brazilian public administration, and in-house counsel.

The Brazilian Constitution

The Brazilian Constitution is the ultimate source of client-attorney privilege under Brazilian law and provides that the counsel’s communication, documents and premises relating to its legal practice are inviolable. This is the basic privilege principle, which is vested upon counsel, and a corollary of the

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1 The author thanks his colleague Tatiana Ferri, associate at White & Case LLP’s London office, for all the assistance with preparing this memorandum and underlying research.

2 BBA Bylaws, Article 3: "The exercise of advocacy in Brazil and the title of lawyer are limited to those registered with the Brazilian Bar Association (BBA).

Paragraph 1: the attorneys of the General Attorney’s Office (Advocacia-Geral da União), the National Treasury Attorneys’ Office (Procuradoria da Fazenda Nacional), the Federal, State and Municipal Public Attorneys’ Offices and Consultancies, as well attorneys of for their respective indirect administration bodies and foundations, are legal practitioners and therefore are subject to this law, in addition to other specific legal regimes they may be subject to."

3 Brazilian Constitution, Article 133: "The lawyer is indispensable to the administration of justice, and its acts and communications concerning the practice of law are inviolable, in the limits of the legislation."
principle that no one can be forced to inconnitrate himself/herself.\textsuperscript{4} The principles set out in the Brazilian Constitution can be invoked both by counsel and parties, as the case may be.

\textit{The BBA Bylaws and the Brazilian Criminal Code}

The BBA Bylaws when read alongside the BCRC provide counsel and parties with the right to invoke privilege and professional secrecy rights to object to the disclosure of attorney-client communication and other materials.

On the one hand, the BBA Bylaws characterize attorney-client privilege as a counsel’s right, which counsel can invoke if asked (i) to disclose their clients’ information,\textsuperscript{5} or (i) to give evidence in proceedings concerning a matter covered by professional secrecy.\textsuperscript{6} In the latter case, counsel can refuse to testify even if authorized or requested by its client.

On the other hand, the BBA Bylaws provides that legal professional secrecy is a public policy matter, regardless of whether a client specifically requests such secrecy.\textsuperscript{7} As a public policy matter, the confidentiality of attorney-client communication can be invoked by both counsel and the client, as the case may be.

Furthermore, the disclosure of professional secrets is a disciplinary offence if made without a justified reason (\textit{just causa}, as discussed below).\textsuperscript{8} Depending on the negative impact on a client, professional secrecy breach can be punished with disbarment,\textsuperscript{9} or lead to criminal sanctions under the BCRC (including jail time).\textsuperscript{10}

\textsuperscript{4} Nelson Nery Junior and Rosa Maria de Andrade Nery, two leading Brazilian scholars in the field of Civil Procedure Law, explain the inviolability of the attorney-client privilege in Brazil as follows: "The fundamental guarantee of professional’s free practice necessarily results on the protection of data and all communication between the lawyer and his/her client. No one may violate a law firm, even if by judicial order, to seize data, documents and assets that have been entrusted to the attorney by his/her client, for the purpose of proving any crime accusation, inverting the constitutional principle of presumption of innocence (article 5\textsuperscript{o}, LVII, Federal Constitution) and, consequently, reversing the criminal burden of proof of the prosecution and imposing it on the defending party, who has also the right not to inconnitrate himself/herself." NERY JUNIOR, Nelson; ANDRADE NERY, Rosa Maria de. Constituição Federal comentada e legislação constitucional. 4\textsuperscript{th} edition, São Paulo: Revista dos Tribunais, p. 785.

\textsuperscript{5} BBA Bylaws, Article 7: "The following are counsel’s rights:

\[\text{II} – \text{the inviolability of its offices or place of work, as well as its works instruments, of its written, electronic, telephonic or telematics correspondence, provided that these relate to the exercise of its works.}\]

\textsuperscript{6} BBA Bylaws, Article 7: "The following are counsel’s rights:

\[\text{[...]}\]

\[\text{XIX} – \text{refuse to testify as witness in a process in which has acted or may have to act, or about a fact related to an existing or former client, even when authorized or required by the client, where a fact is covered by professional secrecy.}\]

\textsuperscript{7} BBA Ethics Code, Article 36: "Professional secrecy is a public policy matter, regardless of any specific secrecy requested by a client."

\[\text{§ 1\textsuperscript{a}} \text{Communications of any nature between lawyers and clients are deemed confidential.}\]

\textsuperscript{8} BBA Bylaws, Article 34: "It consists a disciplinary offence:

\[\text{[...]}\]

\[\text{VII} – \text{to violate, without good cause, professional secrecy.}\]

\textsuperscript{9} BBA Bylaws, Article 35: "Disciplinary sanctions consist in:

\[\text{I} – \text{warning (censura);}\]

\[\text{II} – \text{suspension;}\]

\[\text{III} – \text{disbarment; and}\]

\[\text{IV} – \text{penalty.}\]

\textsuperscript{10} BCRC, Article 154: "To disclose, without good cause, a secret which such person has knowledge of by virtue of his/her position, occupation or profession, provided such disclosure may cause damage to a third party, Sentence – detention, from 3 months to 1 year, and a fine."
The Brazilian courts have addressed the issue of disclosure of privileged information in several occasions, including from a criminal point of view, and have made clear that information exchanged between counsel and clients is privileged and disclosure is only permitted in very few exceptions.\(^\text{11}\)

The BBA Bylaws provide a privilege exception for client-attorney communications and documents that is not commonly seen in typical civil court proceeding (or arbitration), as it concerns criminal activity by counsel. One such exception is where the lawyer is being investigated for engaging in criminal activity as a co-participant on the same crime carried out by its client.\(^\text{12}\) That said, this exception may become increasingly relevant, for instance, in light of the growing number of cases involving, bribery, corruption and white collar issues in Brazil.

**The Brazilian Civil Procedure Code**

The BCPC contains protections that are wider than such found in the BBA Bylaws and BBA Ethics Code, as it also protects secrecy relating to other professions and an individual’s honor. Although these are not necessarily legal privilege or professional secrecy rules, they may be valuable tools to protect sensitive information from disclosure.

**Limited disclosure rules**

The BCPC adopts a narrow approach to requests for disclosure of documents and information. As in many civil jurisdictions, the parties in principle rely on the evidence in their possession to substantiate their case. A party is not bound by any duty to be candid and produce documents that are unhelpful to its case.

Parties may nevertheless apply for a limited document production before commencing court proceedings or arbitration.\(^\text{13}\) The test a party needs to meet to obtain an order to produce is reasonably strict. The applicant is required to identify the documents in as much detail as possible, explain the facts it intends to prove based on the documents requested, and to explain why it believes the documents requested are in possession of the other party.\(^\text{14}\)

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(The STJ held that if the client is not being investigated for criminal offense in which his or her counsel is a co-author or was otherwise involved, the documents, media and objects in possession of counsel relating to such client are protected by professional secrecy and therefore are privileged.)

\(^{12}\) BBA, Article 7: “The following are counsel’s rights:

[...]

Paragraph 6. If it is identified authorship and materiality evidence of a crime committed by a lawyer, the competent judicial authority may order the breach of the inviolability referred to in item II of this article, in a motivated decision, issuing a specific and detailed warrant for search and seizure, to be executed in the presence of a representative of the Bar Association, being forbidden, in any case, to use documents, media and objects that belong to the lawyer’s clients, as well as other working tools containing client’s information.

Paragraph 7. The exception contained at §6 of this article does not extend to the clients of the investigated lawyer who are being formally investigated as its participants or co-authors for the same offense that gave rise to the breach of the inviolability.”

\(^{13}\) BCPC, Article 396: “The judge may order the party to exhibit a document or object which is in his/her possession.”

\(^{14}\) BCPC, Article 397: “The requested made by the party shall contain:

I – the clear identification, as complete as possible, of the document or thing that is being requested;

II – the purpose of the requested evidence and the identification of the facts which relate to the document or thing.

Memorandum

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In addition, the party on the receiving end of a request to produce documents will have a number of grounds to object production. The main objections parties and counsel may raise are set out below.

Professional secrecy - beyond the legal profession secrecy

The BCPC allows witnesses to refuse to testify on matters protected by professional secrecy including but not limited legal profession secrecy. This includes, for instance, the professional secrecy relating to medical or banking information. This objection can be raised by both counsel and parties on behalf of a witness, or by the witness itself.

Protection of honor and against self-incrimination

The BCPC provides a number of grounds on which a party may object to produce documents requested, not all of which are directly relevant to privilege over communications between clients and counsel, or between counsel. Yet it is useful to be familiar with such grounds where the attorney-client privilege protection is uncertain and an additional lawyer of protection might be required to ensure that documents and information are not disclosed.

The party on the receiving end of a document request may object to and be excused from production if it can establish, for instance, that (i) the document is related to sensitive family issues of such party, (ii) disclosure may violate such party's honor or harm a third party's honor, (iii) disclosure may create a risk of a criminal action against such party, or (iv) if it involves a professional secrecy duty (e.g. medical or other types of professional secrecy).

Documents held by third parties

The BCPC also allows requests to produce against third parties. This can be particularly relevant when the Funder is not a party to the proceedings. A third party, such as a Funder, may resist the disclosure of communications with counsel (or between counsel) on grounds that such communications are subject to legal professional secrecy, or on the same grounds set in the preceding paragraph of this memorandum, relating to the protection of honour or against self-incrimination (although these will likely be less common).

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15 BCPC, Article 388: "The party is not obliged to testify about facts:
II – to which, due to state or profession, it must keep confidential;
16 BCPC, Article 404: "The party and the third party shall be excused from exhibiting the document or the object in court if:
I – it concerns a business related to the family life;
II – its submission may breach a duty of honor;
III – its disclosure results in dishonor to the party or third party, as well as their relatives, by blood or by marriage, up to the third degree; or represent a risk of criminal action;
IV – its exhibition implies the disclosure of facts which due to its condition or professional reasons shall keep secrecy;
V – other serious grounds remain which, according to the judge's prudent will, justify the refusal to exhibit the document or object;
VI – there is any legal provision that justifies the objection to produce.

Sole Paragraph. If the grounds set forth in items I to V concern to only a portion of the content of the document, the party or a third party will exhibit the other portion in a notary for a reprographic copy to be extracted, issued in a detailed report."

17 BCPC, Article 401: "When a document or thing is in a third party's possession, the judge shall summon the third party to submit a response in 15 days."

Memorandum
Negative inferences

The BCPC authorizes the court to draw negative inferences, considering as true the facts alleged by the applicant, if a defendant fails to produce a document and does not raise a timely or legitimate objection to production.¹⁸ The negative inference can be invoked by the party seeking to obtain the document or information that was not produced.

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g. the client, the lawyer).

The Brazilian attorney-client privilege and professional secrecy rules apply generally in arbitration proceedings in the same way they would apply in court proceedings, on the same grounds, and can be invoked by the same parties or counsel as referred to in Question 1 above.¹⁹ The procedural rules concerning evidence production in arbitration are much less clear nevertheless, given the flexibility given to arbitration and its contractual nature.

The Brazilian Arbitration Law (BAL) grants the arbitral tribunal, or the sole arbitrator, broad discretionary powers to order the production of evidence, which may include document production, but does not provide as much detail as does the BCPC.²⁰ Such powers may be limited or expanded by references to institutional rules or by provisions in the agreement, which may include or exclude the BCPC and its provisions on evidence.

In practice, if the contract or the applicable procedural rules are silent on a particular point, arbitration practitioners and arbitrators are likely to apply rules similar to the ones found in the BCPC, as described in our answer to Question 1 (except where excluded by the parties). That said, parties, counsel and arbitrators are increasingly using soft law and guidelines.

Given the absence of guidance in the BAL, it is vital for counsel, especially when advising foreign parties who may not be familiar with Brazilian law, to try agree on the applicable procedural rules as early as possible in arbitration proceedings, so that any unbalance disclosure and privilege rules can be considered by the arbitral tribunal and addressed at an early stage (e.g. in terms of reference or first procedural orders).

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily

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¹⁸ BCPC, Article 400: "When deciding the request, the judge will admit as being true the facts that the party intended to prove through the document or the object if:
I – the requested party does exhibit or provide any declaration within the timeframe established at article 398;
II – the refusal is considered illegitimate."

¹⁹ BBA Ethics Code, Article 38 includes arbitration to the context of the privilege information: "The lawyer is not obliged to testify in judicial, administrative or arbitral proceedings or claims, on the facts which shall keep professional secrecy". In addition, §2 of article 36 of the same code establishes that "[t]he lawyer, when acting as a mediator, conciliator and arbitrator, is subjected to the rules of professional secrecy."

²⁰ BAL, Article 22: "The arbitrator or the arbitral tribunal may take the parties' testimony, hear witnesses and determine the expert examination or other evidence deemed necessary, upon request of the parties or ex-officio."
have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

The attorney-client privilege and professional secrecy obligations under Brazilian law continue after a lawyer resigns from its mandate, but are not without limits. In some narrow circumstances attorney-client privilege can be waived, or deemed waived, making information and documents disclosable. Such exceptions apply equally to court and arbitration proceedings.

Privileged information as evidence; disclosure in negotiations; legal obligation to disclose

Relying on a privileged document as evidence in court or arbitration proceedings is the most common conduct that may give rise to an unintended privilege or secrecy waiver. For instance, when a party asserts to have taken certain actions based on in-house or external counsel’s advice. Where relevant to its decision, a judge may compel the production of such advice, and disregard any privilege attaching to it.

Although less frequent, privilege can also be inadvertently waived if a party has previously communicated the privileged information to the other parties involved. This can be the case, for instance, when a party communicates copies of legal advice received to counter-parties and the Funder. Thus, parties and funders need to ensure the flow of information is carried out with the appropriate safeguards, ideally between counsel and marked as privileged and confidential, to mitigate the risk that privilege is deemed to have been waived.

The BCPC also provides for a more generic obligation to disclose information when required by law, which cannot be objected. This should not displace privilege or professional secrecy obligations except where formal law provides for such exceptions. Some of such exceptions are discussed below.

Counsel involvement in illegal activity

The BBA Bylaws provide that privilege and professional secrecy may be disregarded when counsel, either alone or together with its client, is involved in illegal activities. In this case the relevant

21 BBA Ethics Code, Article 20: “In case of supervening conflicts of interest between the lawyer’s clients, and if such conflicts cannot be harmonized by the lawyer, the latter should opt, with caution and discretion, for one of the mandates, resigning the others but keeping professional secrecy in their respect.”

22 BCPC, Article 399: “The judge will not accept the refusal if:
I – the defendant has the legal obligation to exhibit;
II – the defendant mentioned the document or object, during the claim, with the intention of constituting evidence;
III – the document, by its content, is common to both parties.”

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I – the defendant has the legal obligation to exhibit;
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III – the document, by its content, is common to both parties.”

26 See answer to Question 1 above. BBA, Article 7: “The following are counsel’s rights:
[…]”

Memorandum

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information from counsel and, as the case may be, from clients involved in the wrongdoing may be
ordered to be disclosed, provided that information from clients not related to the matter continue to be
covered by attorney-client privilege.

Lifting privilege on such grounds can work as a sword, giving a party access to its counter-party
otherwise privileged information, in particular in cases involving allegations of bribery, corruption
and other white collar crimes. This rule favours the wider public interest in sanctioning wrongdoing,
but strong evidence is required showing counsel’s involvement in the wrongdoing.

Disputes between counsel and client

The BBA Ethics Code releases counsel from professional secrecy obligations only in exceptional
circumstances, such as when his/her life or honor is threatened. In this case, he or she may disclose
information to avoid such threat, or in self-defence. Therefore, a client may not be able to enforce
professional secrecy where the life or honour of counsel is threatened. Although this situation is
unlikely to materialise in the context of litigation or arbitration, there have been international cases in
the investment arbitration space in which TPF funding was reportedly unduly used and counsel have
been accused of wrongdoing.

If similar complex events took place in Brazil in the context of TPF arrangements, it is arguable that
counsel to a party or to a Funder might want to be released from privilege or professional secrecy
obligations to defend itself.

4. Please identify the circumstances in which disclosure of an otherwise-protected
communication to a third-party funder will result in loss of the benefit of the privilege or
other rule, in national court proceedings or arbitration. Please identify any
circumstances where the benefit of the privilege or other rule will continue to attach to
the communication, notwithstanding the disclosure. Please make brief reference to case
law, legislation or legal writings relevant to this question, if such exist. Where there is
little or no authority on privilege and how it applies to third party funders, please look
instead at situations analogous to the third party funder relationship e.g. with insurers.

Provided that the information is disclosed by a party to a Funder in a way that attracts privilege, the
circumstances in which privilege might be lost are similar to those set out in our response to Question
3 above. If the Funder is involved in litigation or arbitration proceedings concerning a particular TPF
arrangement, it should avoid referring to the information received from its client and related legal
advice (e.g. when justifying the basis on which it decided to fund a case).

Paragraph 6. If it is identified authorship and materiality evidence of a crime committed by a lawyer, the competent
judicial authority may order the breach of the inviolability referred to in Item II of this article, in a motivated decision,
issuing a specific and detailed warrant for search and seizure, to be executed in the presence of a representative of the
Bar Association, being forbidden, in any case, to use documents, media and objects that belong to the lawyer’s clients,
as well as other working tools containing client’s information.

Paragraph 7. The exception contained at §6 of this article does not extend to the clients of the investigated lawyer who
are being formally investigated as its participants or co-authors for the same offense that gave rise to the breach of the
inviolability.”

27 BBA Ethics Code, Article 37: “Privilege shall cede in face of exceptional circumstances that constitute good cause, as
in cases of serious threat to the right to life and to the honour or that involves self-defence.”

The BBA internal courts have also decided on this regards in a few occasions, see Proc. E-2.846/03 - unanimous
decision dated 16/10/03, Rel* Dr ROSELI PRINCIPE THOMÉ – Rev. Dr. CARLOS AURELIO MOTA DE SOUZA –
Presidente Dr. ROBISON BARONI. http://www2.oabsp.org.br/asp/tribunal_etica/pcp_ementasano.asp?ano=2003
(last checked on 12 August 2016).

28 See, Chevron v. Donziger, United States District Court, Case 11 - Civ 0691 (LAK), March 4, 2014
Where information provided to a Funder is not covered by attorney-client privilege or legal profession secrecy, it may still be covered by other rules on professional secrecy, in particular banking secrecy (sigilo bancário), depending on the legal status of the Funder. Where Funders are constituted as financial institutions, they may benefit from professional secrecy rules applicable to financial institutions. In Brazil, Funders exercise an activity that broadly falls on the definition of financial institution, but such assessment needs a case by case analysis depending on the legal structure chosen by the Funder. For instance, some Funders are just managers of investment funds, only the latter being regulated by the financial authorities.

Despite this potentially favourable interpretation, the Brazilian courts have not yet addressed the specific issue of whether a Funder attracts any kind of professional secrecy rules to the documents it receives from clients.

Therefore, the most conservative approach is to assume that documents and information communicated to Funders are not necessarily automatically covered by any sort of legal privilege or professional secrecy rules, and ensure that the communication of documents and information be carried out in a way that attracts some protection.

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20 Law (Lei Complementar) 105/2001, Article 1: “Financial institutions shall keep secrecy with regard to its passive and active credit operations and services:
Paragraph 1: For the purpose of this law, financial institutions are: [...] IV – credit, funding and investment institutions;”

30 Naturally, a family office that provides a one-off funding to a relate or unrelated company may not be considered to be a financial institution for the purposes of Brazilian regulations, but banks that have a TPF portfolio may be subject to banking secrecy rules.

Memorandum
QUESTIONNAIRE FOR COUNTRY REPORTS

ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration

China

1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

For the purposes of this report, references to China (or "PRC") do not include Hong Kong. Hong Kong has its own distinct legal framework based on the English common law system, in which legal privilege is constitutionally recognized and guaranteed.

No Privilege in China

"Privilege" in the common law sense is not recognised under Chinese law.

Part of the explanation for this is that the Chinese legal system is more akin to that of continental Europe than to a common law system. Specifically, there is no general regime for discovery/compulsory document disclosure in Chinese civil litigation.

Public authorities in the PRC (such as the police, prosecutors and regulatory authorities) have wide powers to seize documents and problems can certainly arise when they seek to seize what under common law rules would be considered to be privileged documents. There is no constitutional or statutory recognition of a right to receive confidential legal advice, and in practice the authorities (including the courts in civil proceedings) may well demand production of documents which in other jurisdictions would be protected from disclosure on grounds of privilege.

In particular, the legal duty of confidentiality owed by lawyers to their clients under Article 38 of the PRC Lawyers’ Law and Article 8 of the Code of Practice for Lawyers (which are guidelines for the professional conduct of lawyers in the PRC produced by the PRC National Bar Association):

- does not appear to help if documents are sought directly from the client rather than from the lawyer; and
- may be overridden in the context of investigations.

The confidentiality rule is further qualified to the extent that it will not apply to communications which are aimed at or involve criminal acts causing harm to State security, public security or the safety of the person or property of others. Criteria such as these tend to be interpreted widely in the PRC if the State so requires.

Article 46 of the PRC Criminal Procedure Law ("CRPL") allows defence lawyers to keep

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1 Law of the People’s Republic of China on Lawyers (中华人民共和国律师法), Order of the President [2012] No. 64.
2 Code of Practice for Lawyers (律师执业行为规范), Lv Fa Tong [2011] No.35.
3 Criminal Procedure Law (中华人民共和国刑事诉讼法), Order of the President of the People’s Republic of China [2012] No. 55.
confidential the information learnt in relation to their clients during the course of providing legal services. There is no similar provision in the PRC Civil Procedure Law ("CPL"). However, defence lawyers are required to inform the judicial authorities if they become aware that the client or other persons are preparing to implement, or are implementing, criminal activities causing harm to State security, public security or the personal safety of others. Furthermore, this right of confidentiality does not apply to instances where the prosecution is seeking disclosure of attorney-client communications held by the client.

In addition to the above confidentiality afforded to the attorney-client relationship, Article 188 of the CRPL also provides that the spouse, parents and children of an accused cannot be compelled by the court in a criminal case to appear in court to give oral testimony. This means that information held by certain persons connected with the accused by kinship will effectively be covered by a special right of confidentiality.

Confidentiality of State and trade secrets

While China does not have a body of law relating to privilege, it is worth noting that it does have a regime safeguarding trade and State secrets, particularly as severe criminal penalties can arise if a party is found to be illegally obtaining or possessing, transmitting or reproducing State secrets in contravention of the State Secrets Law, or disclosing or using trade secrets obtained by theft, inducement and coercion. Penalties range from heavy fines to prison terms and even the death penalty for serious cases involving State secrets endangering national security.

In the context of litigation proceedings, Article 68 of the CPL provides that evidence involving State secrets, trade secrets or private matters of individuals shall be kept confidential and if such evidence must be presented in court, it may not be presented in any public court hearing. Article 48 of the "Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings" also states that evidence involving State secrets, trade secrets, private matters of individuals or any other evidence that needs to be kept secret shall not be the subject of cross-examination in a public court hearing.

Similarly, Article 134 of the CPL provides that civil cases shall be tried in public except for cases involving State secrets or private matters of individuals, or cases for which the law provides differently.

Article 183 of the CRPL provides that criminal cases at first instance shall be tried in public, except for cases involving State secrets or personal privacy, and that cases involving trade secrets may not be tried in public if the party concerned so requests.

Thus, Chinese laws protect trade and State secrets from dissemination to the public, but despite these provisions, confidentiality in respect of documents does not apply between the parties to the litigation or arbitration. It is therefore not possible to prevent full discovery of a document containing trade secrets to the opposing party where such document is required to be used as evidence. The law is silent on whether disclosure of confidential documents that belong to one party can be limited to certain groups of people in the organization of the opposing party.

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist

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4 Civil Procedure Law (中华人民共和国民事诉讼法), Order of the President of the People’s Republic of China No. 69.
7 Several Provisions of the Supreme People’s Court on Evidence in Civil Proceedings (最高人民法院关于民事诉讼证据的若干规定), Fa Shi [2001] No. 33.

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disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

As mentioned above, there is no privilege or special rights of confidentiality in respect of communications between the lawyer and the client (or between lawyers) save for the limited rights mentioned in question 1.

In arbitration proceedings there is no general right to obtain documents that are in the possession of the opposing party.

If the arbitration involves State secrets, Article 40 of the Arbitration Law provides that it may not be heard in public. However, this does not prevent discovery of a document containing State secrets to the opposing party where such document is required to be used as evidence.

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

As privilege does not exist in China, the concern in other jurisdictions that privilege may be lost in respect of documents that are disclosed in national court proceedings or arbitration does not arise.

4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

As privilege does not exist in China, the concern in other jurisdictions that privilege may be lost in respect of documents that are disclosed by a party to its funder does not arise.
England & Wales – Ania Farren, BLP

1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

Under English law, a party or its counsel may rely on legal professional privilege in order to avoid producing evidence to a third party or the court. In the case of litigation, it allows the respective litigant to withhold inspection of the privileged document in question, although the document must be included in the disclosure list.

Legal professional privilege is a substantive common law right that has two sub-heads, “legal advice privilege” and “litigation privilege”. These will be described in more detail below.

Definition of a legal professional

The heading includes all members of the legal profession - solicitors, barristers, in-house lawyers and foreign lawyers. It also includes legal executives and licensed conveyancers if they are employed by a licensed body to advise on the English law. Section 190 Legal Services Act 2007 adds that communications and documents provided by an authorised person in relation to certain work streams (e.g. conveyancing, probate, conduct of litigation services) are privileged from disclosure. Such a person would be one who is authorised by an approved regulator to carry out a relevant activity.

Paralegals and trainees will be covered so long as they are properly supervised by a qualified solicitor, in which case their work will be viewed as the work of the legal department. Whether privilege applies to communications with lawyers who are without a practising certificate is unclear as there is a lack of authority. For in-house lawyers, it depends on the context of their work. Business administration or general administration will not be privileged, whereas work relating to their legal function will be privileged. The question to be considered is “whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law”.

With regards to other professions, the Supreme Court has refused to extend the scope of legal advice privilege, although Lord Neuberger did make obiter comments that this restriction could be illogical in the modern world. As an example, the ICAEW, the English professional body of accountants has renewed its complaints in a paper to the UK Competition and Markets Authority (CMA) in February 2016, arguing a distortion of the market where accountants cannot claim privilege.

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1 Three Rivers District Council and others v Governor and Company of the Bank of England (No 4) [2004] UKHL 48, Lord Scott at 38.
2 R (Prudential PLC and another) v Special Commissioner of Income Tax and another [2013] UKSC 1.
3 At 48.
Privilege belongs to the client

The Court of Appeal has confirmed that legal professional privilege belongs to the client, and that the client’s lawyer is bound by it. Unless the client waives privilege, a lawyer cannot disclose privileged information without their client’s consent.

Legal Advice Privilege

Legal advice privilege applies to:

- confidential communications;

- made/passing between a client and his/her professional legal adviser;

- which have come into existence for the purpose of giving or receiving legal advice, whether in the context of legal proceedings or a non-contentious matter.

The communication in question needs to be confidential. If a document is disclosed to a limited number of parties on express terms that it must remain confidential and is not to be available outside of those parties, privilege will probably not be lost.

If a lawyer prepares documents in the course of giving legal advice to a client, they will be covered by privilege. The papers do not actually need to be communicated to the client. Documents passing from the client to the lawyer need to be communicated.

The Court of Appeal in the leading case of Three Rivers (No 5) adopted a very narrow definition of who the client is, holding that the clients in this case were not the bank itself, but an internal department of the bank. Therefore, where the client is a corporate entity not all documents produced by employees and sent to the lawyers will be privileged, rather those coming from a small group within the organisation such as the board of directors or an expressly identified group of individuals.

Litigation Privilege

Litigation privilege applies where the material in question is:

- confidential;

- a communication between either the lawyer (acting in a professional capacity) or the client and a third party, or a document created by or on behalf of the client or his lawyer; and

- made for the dominant purpose of litigation. Litigation must be actual, pending or reasonably contemplated or existing.

Thus, the communication can be between (i) a lawyer and the client; (ii) a lawyer and a third party; or (iii) the client and a third party.

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6 See The "Good Luck", [1992] 2 Lloyd’s Rep. 540, "...internal documents or parts of documents of the client or indeed the lawyer reproducing or otherwise revealing those communications are also covered by the same privilege, whatever the purpose or motive (short of fraud) for which the document comes into existence".
The key issue is that the communication needs to have been made for the dominant purpose of litigation which is pending, reasonably contemplated or existing. There must also be a real likelihood of litigation, although the chance of it happening need not be greater than 50%.\(^7\) The Court of Appeal subsequently relaxed this threshold to litigation "may happen", supporting Cooke J’s expression at first instance that it "could well give rise to litigation in the future" as being sufficient to satisfy the test.\(^8\)

In his commentary, Colin Passmore opines that "the modern importance of litigation privilege is that, in contrast with advice privilege, it enables a client (or his non-legal representatives) or his lawyer to communicate in protected circumstances with third parties, so long as they do so in relation to and for the dominant purpose of contentious proceedings."\(^9\) The wider scope of litigation privilege could allow communications to and from the funder to be protected (to be discussed further below).

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

For arbitral proceedings seated in England and Wales, the 1996 English Arbitration Act applies. Section 34 on procedural and evidential matters provides, in pertinent part,

"(1) it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

(2) Procedural and evidential matters include –

... (d) whether any and if so which documents or class of documents should be disclosed between and produced by the parties and at what stage;

... (f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;"

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

Privilege may be waived where:

- the document is disclosed in court proceedings;

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\(^7\) USA v Philip Morris Inc and British American Tobacco (Investments) Ltd [2004] EWCA Civ 350, Brooke LJ at 68.

\(^8\) Westminster International BV and Others v Dornoch Limited and Others [2009] EWCA Civ 1323.

• the confidentiality of the document is otherwise lost;

• there is an express or implied waiver, which must be by or on authority of the privilege holder.

• fraud exception: rather than privilege being lost, documents will not attract legal professional privilege at all if they were created for the purpose of furthering a criminal or fraudulent plan, but would otherwise meet the criteria of privilege.\textsuperscript{10}

Where privileged documents are disclosed to a limited number of third parties for a limited purpose pursuant to express terms that privilege is not waived, this usually prevents a wider waiver or loss of privilege.\textsuperscript{11}

Both litigation and legal advice privilege stipulate that the documents must be kept confidential; waiver of privilege tends to occur as a result of the communication in question losing its confidentiality. The confidentiality can therefore be protected if the documents are provided on the express terms that they are to remain confidential, and the receiving party undertakes to ensure that this happens.\textsuperscript{12}

By determining and restricting how the third party may use such information, one waives privilege to that party, but retains it for enforcement against the rest of the world. In the context of third-party funders, this should be the approach taken to ensure the retention of legal advice and/or litigation privilege over the relevant documents. To try and retain the most protection, one should avoid disclosure until confidentiality and common interest agreements have been signed.

4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a \textbf{third-party funder} will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

See answer to question 3 above, for how privilege may be lost, as a result of the disclosure of an otherwise-protected communication to a third party funder.

Privilege is probably retained where disclosure is made to the funder on the express terms that the privileged document is to remain confidential.

Privilege is also retained where it can be shown that there is a “common interest” in the subject matter of the relevant communication or the proceedings that the document relates to, (known as “common interest privilege”). Where privileged documents are disclosed to a third party who has such a common interest, the document remains privileged.

\textsuperscript{10} Kuwait Airways Corporation v Iraqi Airways Company [2005] EWCA Civ 286


\textsuperscript{12} Alrashid M., Wessel J. and Laird J., p. 107.
There are yet to be any cases specifically discussing this type of privilege in relation to third party funders so there is a degree of uncertainty, but it has been applied in a range of contexts, including in relation to insurers.

The Winterthur case found that an insurer held a common interest in the policy holder's litigation. Mr Justice Aikens explained that:

“where a communication is produced by or at the instance of one party for the purpose of obtaining legal advice or to assist in the conduct of litigation, then a second party that has a common interest in the subject matter of the communication or the litigation can assert a right of privilege over that communication as against a third party. The basis for the right to assert this "common interest privilege" must be the common interest in the confidentiality of the communication”\(^\text{13}\).

Commentators have opined that the third-party funder would share this common interest in the confidentiality of the communication “as it has the common interest of pursuing litigation or arbitration in much the same way an insurer does”.\(^\text{14}\)

\(^\text{13}\) Winterthur Swiss Insurance Company & Anor v AG (Manchester) Ltd & Ors [2006] EWHC 839 at 78.

ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration

QUESTIONNAIRE FOR COUNTRY REPORTS

Response for FRANCE
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1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

Professional secrecy prohibits a French attorney from communicating information or documents obtained in the course of representing a client to any third party.

This obligation is a non-waivable public policy rule that is a general rule, absolute, and unlimited in time: even the client cannot authorize their own counsel to release confidential information. However, the client may lawfully disclose to any third party information or document it obtained from its counsel.

The obligation is sanctioned both by criminal law (art. 226-13 Criminal Code) and by Bar ethical rules and disciplinary sanctions.

The obligation of professional attorney secrecy in litigation appears in Article 66.5 of Law 71-1130 (March 28, 2011), which provides:

In all matters, whether in advisory work or litigation, the legal opinions addressed by an attorney to his client or intended for the benefit of his client, the communications exchanged between a attorney and his client, between the attorney and his colleagues with the exception of those marked "official", meeting notes and more generally all the documents in the matter are protected by professional secrecy.

Pursuant to this rule, documents protected by professional secrecy may not serve as evidence in a civil proceeding.

In application of this law, the French National Bar attorney rules ("Règlement Intérieur National" or "RIN") confirm at article 2.2 that professional secrecy covers the following:
• meeting notes and generally all the elements of attorney’s files, including all information provided to attorneys in the exercise of their profession
• client names and attorney calendars
• payment of legal fees and the management of attorney’s client escrow account, and
• information required by statutory auditors.

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g., professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

For arbitral proceedings seated in France, the French rules of ethics apply to attorneys registered with a French bar and to European attorneys exercising before a French jurisdiction.

French legal ethics rules, including rules prohibiting disclosure of information covered by professional secrecy, will also apply to attorneys registered with the French bar in any arbitration, including outside France.

Foreign counsel will not be bound by French ethical rules if s/he is not a member of a French bar, but are typically subject to the ethical rules of their Bar of origin (See, eg., CCBE Code of Conduct for European Lawyers) (a lawyer engaged in cross-border practice is “bound to observe the rules of the Bar or Law Society to which he belongs”).

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

An attorney may not communicate information covered by the professional secrecy of his client, even with the consent – or at the request - of the client; the secrecy obligation is absolute and non-waivable.

Privilege may only be waived by the client, who is the beneficiary of the professional secrecy obligation (See, Civ. 1ère, April 30 2009, n°08-13.596) (waiver by client of professional secrecy when client gave copy of letter from attorney to his father). The communication directly by the client of information covered by professional secrecy to a third party is a waiver of any professional secrecy protection.

The client would accordingly be advised to require an express contractual confidentiality undertaking with the third party funder to cover such information which will serve to protect confidentiality.
In insurance matters the courts have some limited discretion to ensure that there has been no fraud by the insured party, and can prevent an insured from asserting confidentiality to avoid fraud. In particular, the judge must determine whether the invocation of secrecy by an insured is intended to protect a "legitimate interest" of the insured. If the insured invokes confidentiality protections in order to avoid scrutiny of the insured's own fraud or breach of the insurance policy, the judge can allow the insurer to submit information to the court that would otherwise have been covered by professional secrecy (See, 2e Civ., June 2, 2005, no 04-13.509).

4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

See 3 above for how privilege may be lost as a result of the disclosure of information covered by professional secrecy to a third party funder, and how a contractual confidentiality agreement can protect such communications despite the waiver by the client of the professional secrecy that would previously have been attached to such information.

There are no decided cases on this point in the context of third party funders.

In insurance litigation, civil liability insurance policies in France typically include an express clause that allows the insurer to manage the litigation for and on behalf of the insured party ("clause de direction du process"). Such clause serves to appoint the insurer as agent of the insured, and the insurer can then exchange with the insured's counsel about the matter without violating the mandatory professional secrecy rules. The insurer typically makes all strategic decisions with the litigation counsel they have selected, and pays for all fees and costs, in the defense of the insured's interests.

The objective of enabling the insurer to intervene and manage the insured's litigation is to guarantee that the insured is properly defended, since the insurance company will ultimately be responsible for any liability assessed against the insured. Indeed, the French insurance Code requires the insurer waives any defenses it may later be able to assert at the time it takes over management of the insured's litigation, subject to any express reservations (art. L 113-17 Code des Assurances). The parties can accordingly determine whether the interests of the insured and the insurer are perfectly aligned.

Whether by analogy this would allow communication of protected information to the third party funder without waiver of professional secrecy has not been decided by any court, but would appear doubtful. The third party funding contract is not an insurance contract, which is a very specific type of contract governed by the Insurance Code, and so analogies will be difficult to draw.
ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration

Country Report for Germany – Part B

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I. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

Disclosure obligations in German civil court proceedings:

First of all, it should be mentioned that, with few exceptions, German law on civil procedure does not require a party to disclose or permit the inspection of documents upon request of the opposing party. One of these exceptions is sec. 142 of the German Code of Civil Procedure (Zivilprozessordnung, “ZPO”). Sec. 142 para. 1 sent. 1 ZPO stipulates that “[t]he court may direct one of the parties or a third party to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference.”

However, the court, in exercising its discretion whether or not to direct a party to produce documents, must keep in mind that the general rule under German law is that the claimant must prove every element of its case, including liability, cause and quantum. Certainly, depending on the type of case and the defenses raised, the burden of proof may shift from claimant to respondent. But this does not change the rule that a party is generally not required to hand over to the opposing party the means to win the case. Rather, a party which does not bear the burden of proof is generally not required to disclose documents and records. Likewise, German

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1 With respect to third-party funding, it is common that German funders request that the claims to be funded are assigned to them by the funded party as collateral without disclosing the assignment (stille Sicherungssektion). Even in cases of such assignments, German law does not require disclosure of the funder in national court
substantive law only contains few provisions which require a party to disclose or allow the inspection of documents.\textsuperscript{2}

This is important to note because it illustrates that the German doctrine of legal privilege was not developed as a result of obligations to disclose internal documents in civil court proceedings.

**Legal privilege under German law:**

From the perspective of German law, legal privilege (Anwaltsprivileg) is used as a generic term comprising several legal concepts which are, among others, aimed at protecting communications between attorneys and clients from disclosure to courts, public prosecutors, government authorities, administrative bodies, opposing parties and/or third persons. These concepts, which are contained in several statutes and usually apply not only to the attorney, but also to the attorney's assistants and employees, may differ as regards their objectives, content and scope.

In general, legal privilege at least comprises the following concepts and provisions:

- **Protection of professional secrecy:** Sec. 203 para. 1 no. 3 of the German Criminal Code (Strafgesetzbuch, "StGB") stipulates that "[w]hoever unlawfully discloses a secret of another, (...) which was confided to or otherwise made known to him in his capacity as an attorney (...) shall be liable to imprisonment not exceeding one year or a fine." This means that attorneys generally may resist disclosure of information they acquired in their professional capacity simply because they run the danger of being punished if they disclose such information. The provision is regarded as stipulating both a duty and a right to maintain confidentiality. Corresponding duties to maintain confidentiality are governed in sec. 43a para. 2 of the Federal Lawyers' Act (Bundesrechtsanwaltsordnung, BRAO) and in sec. 2 of the Rules of Professional Practice (Berufsordnung der Rechtsanwälte, BORA). The duty to maintain confidentiality is unlimited in time,\textsuperscript{3} but does not comprise evident, publicly known facts and insignificant information.\textsuperscript{4}

- **Rights to refuse testimony, both in criminal court proceedings (sec. 53 para. 1 no. 3 of the German Code of Criminal Procedure (Strafprozessordnung, "StPO")) and in civil court proceedings (sec. 383 para. 1 no. 6 ZPO).**

(\textit{cont'd from previous page})
• The right to resist a court directive for the production of documents (sec. 142 para. 2 ZPO), which is derived from the right to refuse testimony in civil court proceedings.
• The protection of correspondence which may not be confiscated (sec. 97 StPO).
• The prohibition of interception and of recording of certain communications (sec. 100c para. 6 StPO).
• The prohibition of investigation measures directed at attorneys if the attorney has the right to refuse testimony (sec. 160a StPO).
• The inadmissibility of evidence which has been obtained in an illicit manner.

In general, it is the lawyer who may claim the benefit of the above-mentioned concepts of legal privilege (but it is the client who can release the lawyer of his duty to maintain confidentiality).

Finally, it should be noted that most of the above-mentioned aspects of the German legal privilege doctrine do not apply to in-house counsel (Syndikusrechtsanwälte). The rationale to broadly exclude in-house counsel from the doctrine of legal privilege is to ensure effective criminal prosecution.\(^5\) Hence, in-house counsel may refuse testimony in civil court proceedings,\(^6\) but generally are required to testify in criminal court proceedings.

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

The German arbitration law does not contain specific rules on the taking of evidence. Sec. 1042 para. 4 ZPO, a provision which is loosely based on the UNCITRAL Model Law on International Commercial Arbitration, merely states that “[a]bsent an agreement by the parties, (...) the procedural rules shall be determined by the arbitral tribunal at its sole discretion. The arbitral tribunal is authorized to decide on the admissibility of the taking of evidence, to so take evidence, and to assess the results at its sole discretion.”

This means that, absent an agreement by the parties, the arbitral tribunal has wide discretion in determining if and to what extent parties may request opposing parties to produce documents and, likewise, to what extent disclosure may be resisted. As mentioned, the German (arbitration) law does not contain any specific rules in this regard.

In practice, arbitral tribunals often seek guidance by the IBA Rules on the Taking of Evidence in International Arbitration, sometimes even in purely domestic arbitration proceedings seated in

\(^{5}\) BT-Drs. (Bundestagsdrucksache) 18/5201, 40.

\(^{6}\) Offermann-Burokart, Das Gesetz zur Neuordnung des Rechts der Syndikusanwälte, NJW 2016, 113, 118.
Germany. In general, the disclosure obligations under the IBA Rules go much further than those of German law on the taking of evidence,\(^7\) with few possibilities to resist disclosure (see Artt. 9.2 and 9.3 of the IBA Rules).

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

The client may expressly or impliedly release the attorney from his/her duty to maintain confidentiality. An example of implied consent is if the client instructs the attorney to take care of the correspondence with an insurer or a funder. The client, the so-called “master of the secret” (Herr des Geheimnisses),\(^8\) may limit the circle of persons to whom the attorney is allowed to release information. For example, the client may release the lawyer of his duty to maintain confidentiality viv-à-viv a funding company without running the risk of (accidentally) waiving counsel’s duty to maintain confidentiality towards others.

In general, the release may also be revoked by the client.\(^9\) If the attorney is released of his/her duty to maintain confidentiality, he/she is generally obliged to testify in criminal court proceedings (sec. 53 para. 2 StPO) and in civil court proceedings (sec. 385 para. 2 ZPO).

Other than that, legal privilege may be limited or cancelled by other provisions. For example, there are several provisions obliging an attorney to report certain facts to the authorities in order to prevent serious criminal offenses\(^10\) or to detect and prosecute money laundering.\(^11\)

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\(^7\) See question 1.
\(^8\) Kleine-Cosack, BRAO, 7th edition 2015, sec. 43a para. 40.
\(^10\) Sec. 138 StGB.
\(^11\) Sec. 2 para. 1 no. 7, sec. 11 para. 4 in connection with para. 1 sent. 1 of the German Money Laundering Act (Geldwäschergegesetz, GwG).
4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third-party funders, please look instead at situations analogous to the third-party funder relationship (e.g., with insurers).

As stated under question 3, the client may release the lawyer of his duty to maintain confidentiality vis-à-vis a funder. This does not endanger counsel’s duty to maintain confidentiality towards others.

However, it is advisable that disclosure of privileged information to a funder is made on confidential terms.

It may be argued that information shared directly between the funded party and the funder (without involving a lawyer) is not protected by legal privilege under German law. Hence, with respect to preserving legal privilege, it is advisable that any communication between the funded party and the funder runs via counsel.
QUESTIONNAIRE FOR COUNTRY REPORTS

ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration

Hong Kong

1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g., professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

Legal privilege is a constitutionally recognised and guaranteed right in Hong Kong. Generally speaking, legal privilege covers any confidential communications between:

(i) a lawyer and his/her client where the dominant purpose of the communications is the seeking or giving of legal advice ("legal advice privilege"); or

(ii) a lawyer and his/her client, or a lawyer/client and a third party (such as a witness of fact, an expert witness or a consultant) where the dominant purpose is advising on or obtaining evidence in relation to actual or contemplated litigation ("litigation privilege").

Legal professional privilege belongs to the client and his successor in title unless it is properly waived by them. The lawyer is not entitled to waive the privilege unless he or she has express authority to do so.

Legal advice privilege

Legal advice privilege applies to communications between a client and its legal adviser acting in his professional capacity for the purpose of giving or receiving legal advice, whether or not litigation is in contemplation, and provided these communications are confidential. The privilege does not apply to communications between a third party and the client.

Communications that do not contain legal advice may also attract privilege if they are part of a "continuum of communications" between the client and legal adviser, aimed at keeping both informed so that advice may be sought and given as required. Moreover, legal advice is not confined to telling the client about the law; it could include advice as to "what should prudently and sensibly be done in the relevant legal context".

It should be noted that the Hong Kong Court of Appeal in Citic Pacific Ltd v Secretary for Justice [2015] 4 HKLRD 20, CA rejected the narrow approach taken by the English Court of Appeal in Three Rivers District Council (No 5) [2003] QB 1556 as to the definition of "client" for the purposes of legal advice privilege.¹

¹ In Three Rivers District Council v Governor and Co of the Bank of England (No 5) [2003] QB 1556, the English Court of Appeal found that the Bank of England had established a three-person team, the BIU, to deal with inquiries and to seek and receive the Bank's solicitors' advice in relation to the Bingham Inquiry into the Bank's conduct in its capacity as regulator of a bank called BCCI. The Court held that only the three individuals in the BIU, and no other employees of the Bank of England, were the "client" for the purposes of legal advice privilege. Accordingly, only communications between the members of the BIU and the Bank's solicitors were protected by the privilege. This decision significantly narrowed...
Instead, the Hong Kong Court of Appeal held that the appropriate test for whether internal communications within a corporation were covered by legal advice privilege depended on whether such documents were created for the "dominant purpose" of obtaining legal advice. The Hong Kong Court viewed the test as an effective means of screening out unmeritorious claims for legal advice privilege.

Litigation privilege

The scope of litigation privilege is broader than that of legal advice privilege. It includes not just lawyer-client communications, but also communications with third parties (such as factual witnesses, expert witnesses and external consultants), provided that the dominant purpose of the communications relate to actual litigation or to cases where there is a real likelihood of litigation occurring. In this context, "litigation" includes not only court proceedings, but also any other adversarial proceedings such as arbitration, specialist tribunal and/or disciplinary actions. However, it does not generally include matters of an investigative or inquisitorial nature. This means that communications in relation to such investigations are generally only subject to legal privilege if they are covered by legal advice privilege.

Apart from legal advice privilege and litigation privilege as described above, there are a number of other types of "privilege" that are available under Hong Kong law.

Common interest privilege

Common interest privilege applies to communications between parties in relation to a legal issue, or actual or contemplated litigation, where those parties share a common interest/position in the issue/litigation. In order for the privilege to apply, the purpose of the communication must be for the parties to inform each other of the facts, or the issues, or advice received in respect of a legal issue, or to obtain or share legal advice in respect of contemplated or pending litigation. The effect of the privilege is the same as that of legal privilege in that the documents covered by the privilege are exempt from inspection in civil and criminal litigation.

Examples of where parties may share a common interest are relationships between co-defendants, insured and insurer and a company and its shareholders.

Without prejudice privilege

The "without prejudice" rule covers communications between parties in a dispute that are genuinely aimed at reaching a settlement. Such communications are not admissible as evidence in any legal proceedings (save for those to determine whether a settlement has in fact been reached or what the terms of any settlement reached may be). However, unlike legal professional privilege, without prejudice privilege does not override any legally enforceable court orders, search warrants or regulatory notices requiring the production of documents. To ensure protection, parties should label written communications "without prejudice". In respect of conversations, it is important to communicate unequivocally to the other party that they are taking place on a without prejudice basis. Failure to take this step, however, does not mean that the protection will cease to exist. The test is one of substance rather than form.

Public interest privilege

Public interest privilege allows a party to withhold from production confidential government documents/communications which, if made available to a third party or the public, would be injurious to the public interest. For a document/communication to be covered by this privilege, it needs to be shown that the adverse impact of its release on government functions/the public is greater than the public interest in documents being made available for use in legal proceedings.

Privilege against incrimination of self or spouse

A party may resist giving discovery of documents in civil proceedings where such discovery of documents

the definition of "client", which had previously been understood to include any employees of a client entity.
might incriminate and/or expose him or his spouse to proceedings for a penalty under the laws of Hong Kong. The privilege extends to companies that are parties to an action, but does not extend to the directors and officers of those companies. The privilege does not apply where the risk is limited to being exposed to penal proceedings abroad or where the discovery of documents will or may expose the disclosing party to penalties or criminal proceedings relating to infringement of intellectual property rights.

Hong Kong law applicable to communications with foreign lawyers

According to Hong Kong conflict of laws rules, privilege is considered to be a procedural issue, which is determined by the law of the forum. Consequently, in court proceedings, Hong Kong law on privilege determines whether documents are privileged regardless of where they were generated or where they are situated in the world. This means that documents will be considered to be privileged if they meet any of the requirements set out above. Generally, communications with a foreign lawyer will attract privilege in the same way as communications with a Hong Kong qualified lawyer. More particularly, according to Hong Kong privilege rules, documents prepared by foreign lawyers based in Hong Kong advising on foreign law are covered by legal privilege, regardless of whether they would also be covered by privilege under the relevant foreign law.

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

S.47(3) of the Hong Kong Arbitration Ordinance (Cap. 609) provides that an arbitral tribunal is not bound by the rules of evidence and may receive any evidence that it considers relevant to the arbitral proceedings. This is, however, subject to s. 56(9), which specifically provides that a party may resist production of documents or evidence that it would not be required to produce in civil proceedings before a court.

International arbitral tribunals seated in Hong Kong will therefore recognize the parties' rights to rely upon legal privilege or equivalent rights to withhold evidence in arbitral proceedings, although it may be necessary to first conduct a conflict of laws analysis to determine which applicable law governs the existence and scope of the legal privilege or right.

Where the IBA Rules on the Taking of Evidence in International Arbitration (which deal with procedural matters relating to evidence, including the production of documents, in much greater detail than any of the main institutional rules) apply, these expressly state that an arbitral tribunal may, at the request of a party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection where there is a legal impediment or privilege under the legal or ethical rules determined by the arbitral tribunal to be applicable.

Even where the IBA Rules do not expressly apply, tribunals may be guided by its provisions.

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

Legal privilege does not apply (or, if it did apply, it is lost) where the communications in question are not or are no longer confidential in nature. Confidentiality may be lost where the document is made available to a third party unless it is made available to a limited number of individuals in strict confidence and based on the understanding that privilege is not being waived (known as the “six best friends” rule).
Further, legal privilege can be waived by a client, implicitly or expressily, if the privileged information is deployed in court proceedings (for example, by being referred to in witness statements, expert reports or pleadings). Whether such a waiver has occurred will depend upon the nature in which the information is referred to. While a pure reference to the existence of the privileged document may not constitute a waiver, a reference to and reliance upon the content of the document is more likely to result in a loss of privilege. Where privilege is waived in relation to parts of a document, or in relation to one document amongst a number of documents relating to the same issue, this may result in the waiver of privilege in relation to the whole document and/or other related (privileged) documents as a result of what is known as "collateral waiver".

In addition, there is no legal privilege where communications involving a lawyer are undertaken for the purposes of furthering fraudulent or illegal acts (eg where a lawyer advises on how one can structure transactions in such a way as to perpetuate a scam).

Partial waiver

The concept of partial waiver of legal privilege is recognised in Hong Kong. This means that privilege may not be lost completely if a party chooses to disclose a privileged document to a third party such as a regulatory authority, provided that it is made clear that any waiver of privilege is limited to the purposes of the investigation alone. Thus, legally privileged documents provided to a regulator for the purposes of an investigation may continue to be protected from disclosure to other third parties where the purpose is outside the scope of the regulatory investigation (eg for use in civil or criminal proceedings).

4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

Third party funding is currently prohibited in Hong Kong, due to the common law rules on champerty and maintenance, which remain both torts and crimes under Hong Kong law. There are certain, limited, exceptions: (a) cases involving third parties with a legitimate interest in the outcome of the litigation; (b) where "access to justice considerations" apply; or (c) a miscellaneous category including insolvency litigation (eg in the sale and assignment by a liquidator or trustee in bankruptcy of an action commenced in the bankruptcy to a purchaser for value or a litigation funder).

There is little case law in relation to issues surrounding the involvement of third party funders in litigation or arbitration cases, much less the issue of whether privilege would be lost in respect of documents disclosed to third party funders.

Unless the funder is considered to be a client of the funded party's legal representatives, it is unlikely that communications between counsel, the funder and the funded party will be covered by legal advice privilege, although it is likely that such communications would be covered by litigation privilege. The extent to which common interest privilege could apply is not clear.

It is also possible that any communications between the funded party and counsel that are protected by legal professional privilege may lose such protection if later forwarded to the funder, as this may be seen as an implied waiver of privilege.

The Hong Kong Law Reform Commission is currently consulting on whether to allow third party funding for
arbitrations seated in Hong Kong. Draft legislation is expected to be introduced to Hong Kong’s Legislative Council in autumn 2016.

[Note to editors: We have conducted searches for potentially analogous cases but there were none that were helpful.]
ICCA-Queen Mary Taskforce on Third Party Funding in International Arbitration Attorney-Client Privilege Subcommittee - Questions for National Reports

1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer)

Advocate-client privilege may be relied upon to resist disclosure of confidential communications exchanged between the advocate and client. This privilege has been accorded protection under the Indian Evidence Act, 1872 ("the Evidence Act").

Only private and confidential communications between the client and the advocate is covered. Further, the privilege applies only to communications exchanged during the course of, or for the purpose of the employment/engagement as advocate.

The Evidence Act confers the privilege to various types/categories of legal professionals such as "barrister, pleaders, attorneys and vakils", all of which categories have been consolidated by the Advocates Act, 1961 ("the Advocates Act") within the term "advocate". The protection is also extended to interpreters, clerks and servants of the advocate. The Advocates Act prohibits in-house lawyers from practising as advocates during the course of their employment, and therefore in-house counsel would appear to fall outside the purview of this privilege. However, there is a Bombay High Court decision, the only Indian Court decision squarely on this point, which suggests that in-house counsel would be provided with the same protection as advocates.

This privilege belongs to the client and the advocate shall not be permitted make any such disclosures unless the privilege is waived by the client, expressly under Section 126 of the Evidence Act, or impliedly in the circumstances mentioned in Section 128.

The Bar Council of India Rules

These Rules are framed under the Advocates Act and the spirit of the advocate-client privilege as incorporated in the Evidence Act is reiterated in these Rules. The relevant rule mandates that an advocate shall not, directly or indirectly, commit a breach of the obligations imposed by Section 126 of the Evidence Act.

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule.

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1 Sections 126-129 of the Indian Evidence Act.
2 Section 127 of the Indian Evidence Act.
3 See: Satish Kumar Sharma v Bar Council of Himachal Pradesh (2001) 2 SCC 365 (Division Bench, Supreme Court of India); Opinion given by Justice BN Srikrishna, former Judge of the Supreme Court of India in Shire Development LLC v Cadilla Healthcare Ltd, US District Court of Delaware (Civil Action No.1 0-581 (KAI)) and the ensuing order of the Court (19 October 2012).
4 Municipal Corporation of Greater Bombay v Vijay Metal Works AIR 1982 Bom 6 (Single Judge, Bombay High Court).
5 In a scenario where the client examines the advocate as to the privileged communication.
6 Rule 16 of Part VI, Chapter II, Section II.
case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

The Arbitration and Conciliation Act, 1996 ("the Arbitration Act") applies to all arbitrations seated in India. The relevant provisions that deal with the rules of procedure and evidence are contained in Section 19, which reads as follows:

"(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).
(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.
(3) Falling 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.
(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevancy, materiality and weight of any evidence."

Whilst the Evidence Act and the technical rules of evidence codified therein do not apply to arbitrations in the strict sense, arbitral tribunals are expected to follow the well-established principles of the law of evidence and also the basic tenets of natural justice.

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

Listed below is a non-exhaustive list of circumstances resulting in the loss of the benefit of the advocate-client privilege:
- Communications made in furtherance of any illegal purpose.
- Communications made in furtherance of any fact observed by the advocate showing that any crime or fraud has been committed since the commencement of his engagement.
- Express waiver of the privilege by the client.
- Implied waiver by the client, where a client offers himself as a witness he may be compelled to disclose any such communications which may appear to the court necessary in order to explain any evidence he has given in the witness box.
- Where a party to a suit (client) gives evidence at his own instance and when the advocate is called as a witness and the client questions him on a confidential/privileged matters.
- Where confidentiality of the document is lost. Transfer of privileged documents to a third party would be considered to be a waiver of privilege, because the confidentiality of documents, which is necessary for the privilege to operate, would be lost upon such transfer.

Legal professional privilege in India is limited only to communications passing between client and advocate. Therefore, it would be advisable to allow disclosure of confidential documents to a third party by explicitly stating that the documents being provided are subject to privilege, and also entering into a confidentiality agreement with the third party.

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7 See: Section 1 of the Indian Evidence Act; and Section 19(1) of the Arbitration and Conciliation Act.
8 Proviso 1 to Section 126 of the Indian Evidence Act.
9 Proviso 2 to Section 126 of the Indian Evidence Act.
10 Section 129 of the Indian Evidence Act.
11 Section 128 of the Indian Evidence Act.
12 In order to obtain the privilege, the communication must have been made confidentially in the context of a client-advocate relationship and with a view to obtain legal advice.
4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

For how privilege would be lost, kindly see the response to question 3 above.

It might be possible for the privilege to continue to attach to disclosed communications where the disclosure is made only after securing a non-disclosure/confidentiality agreement which clearly enumerates the conditions subject to which the disclosure is made (including the fact that the documents provided are subject to privilege). However, given that third party funding is very rare in India, there is no case law, legislation nor any legal writings on how privilege would apply in a third party funding scenario.
<ABA SIL/ICCA-Queen Mary Task Force Joint Project> Part B

Japan – Aoi Inoue, Anderson Mori & Tomotsune

QUESTIONNAIRE FOR COUNTRY REPORTS

ICCA·Queen Mary Task Force on Third Party Funding in International Arbitration

1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

It is considered that the concept of legal privilege does not exist in Japan (please see JASRAC v. Japan, Tokyo High Ct., Sept. 12, 2013). There has not been any case law that has recognized the categorical concept of “attorney-client privilege” in straightforward way. However, the Code of Civil Procedure of Japan (Act No. 109 of 1996, the “CCP”) provides the following rights of refusal to disclose communications between the lawyer and the client.

(i) The right to refuse to testify as a witness (Article 197, paragraph 1, item 2 of the CCP)

The CCP provides that the current and former lawyers of a client may refuse to testify as witnesses in a civil court when questioned about their knowledge of facts obtained during the course of their professional duties, as long as such facts are still considered confidential. This is set out in Article 197, paragraph 1, item 2 of the CCP: “Cases where ... attorney at law (including a registered foreign lawyer), patent attorney, defense counsel, notary ... or a person who was any of these professionals is examined with regard to any fact which they have learnt in the course of their duties and which should be kept secret”. The lawyer may claim the benefit of this right. Please note that it is not clear from the language of the provision whether the lawyer’s advice to the client falls within the scope of this provision.
(ii) The right to refuse to produce documents (Article 220, item 4-c of the CCP)

Lawyers have a duty of confidentiality in relation to clients' confidential documents. The CCP provides that the holder of such documents may refuse to produce them to a civil court, provided that the duty of confidentiality has not been exempted or waived. Article 220, item 4-c of the CCP stipulates that "A document stating the fact prescribed in Article 197, paragraph 1, item 2 or the matter prescribed in Article 197, paragraph 1, item 3, neither or which are released from the duty of secrecy" shall be exempted from the obligation to produce documents. It is considered that not only the lawyer (as a holder of the document) but also the holder of the documents (e.g., the client) may claim the benefit of the right to refuse to produce documents based on this provision.

Again, please note that it is not clear from the language of the provision whether documents containing the lawyer's advice to the client fall within the scope of this provision.

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

In Japan, the Arbitration Act of Japan (Act No. 138 of 2003, "Arbitration Act") is silent on the existence and treatment of issues of privilege or other protections (e.g. professional secret) a client or its counsel may rely on in order to resist disclosure in arbitral proceedings. The same is true of the Commercial Rules of the Japan Commercial Arbitration Association.

However, where the arbitral proceedings give rise to such issue, arbitral tribunals will usually recognize the parties' rights to rely on evidentiary privileges in line with the general practice of international arbitral proceedings. For instance, Article 9.2 of IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules of Evidence") provides that "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 for any of the following reasons ... (b) legal impediment or
privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.” The IBA Rules of Evidence are widely acknowledged by Japanese practitioners of international arbitration.

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

(i) National court proceedings

(i) The right to refuse to testify as a witness (Article 197, paragraph 1, item 2 of the CCP)

As explained in question 1, a lawyer may claim the benefit of the right to refuse to testify as a witness in a civil court only "with regard to any fact which they have learnt in the course of their duties and which should be kept secret." The Supreme Court of Japan ruled that it is reasonable to construe that "facts which should remain confidential" as set forth in Article 197, paragraph 1, item 2 of the CCP refer to facts which are not known to the public and the concealment of which is not only beneficial, from a subjective perspective, to clients who have retained the lawyers, but also worthy of protection from an objective perspective. *The Daiichi Mutual Fire and Marine Insurance Company v. The Gibraltar Life Insurance Co., Ltd.*, 58 Minshu 2393 (Sup. Ct., Nov. 26, 2004). Generally, if the facts were known to public or the client agreed to make such fact known to public, the benefit of the right to refuse to testify as a witness in a civil court will be lost.

Therefore, if the relevant facts that would ordinarily have been protected from disclosure were disclosed to a third party, the benefit of the right to refuse to testify as a witness in a civil court may be lost, depending on circumstances.

(ii) The right to refuse to produce documents (Article 220, item 4 of the CCP)

Article 220, item 4 of the CCP stipulates that "A document stating the fact prescribed in Article 197, paragraph 1, item 2 or the matter prescribed in Article 197, paragraph 1,
item 3, neither or which are released from the duty of secrecy” shall be exempted from the obligation to produce documents. Generally, if the document is known to public or the client agrees to make such document known to public, the benefit of the right to refuse to produce such document in a civil court will be lost.

Therefore, as with the case of the above (i), if the document stating the facts that would ordinarily have been protected from disclosure were disclosed to a third party, the benefit of the right to produce such document in a civil court may be lost, depending on circumstances.

(2) Arbitration

As explained in the response to question 2, in Japan, the Arbitration Act is silent regarding the existence and treatment of issues of privilege or other rules that a party or the counsel may rely on in order to resist disclosure in arbitral proceedings. However, if the arbitral proceedings give rise to such issue, arbitral tribunals will usually recognize the parties’ rights to rely on evidentiary privileges in line with the general practice of international arbitral proceedings. For instance, Article 9.3 of the IBA Rules of Evidence provides that “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: ... (d) 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”. Generally, if the relevant communications were disclosed to a third party, arbitral tribunals may conclude that the legal privilege has been lost because of waiver of privilege.
Please note that (i) TPF is not common in Japan yet and (ii) there is almost no legal writing regarding how this form of arbitration funding is to be dealt with under Japanese law. In addition, to my knowledge, in Japan, there is no case law or in legal writing on how to ensure that the privilege on information shared with the third party funder is preserved. Therefore, the answers below are based on my views and not on statutes, case law or legal writing.

(1) National court proceedings

Generally speaking, the disclosure of communication protected in accordance with Article 197, paragraph 1, item 2 of the CCP to a third-party funder may result in loss of the right to refuse to testify as a witness in a civil court, depending on circumstances. Likewise, it is considered that the disclosure of documents protected in accordance with Article 220, item 4 c of the CCP to a third-party funder may result in loss of the right to refuse to produce such document in a civil court, depending on circumstances. On the other hand, where disclosure is made to the third party funder on the express term that the facts or document are to remain confidential, this may reduce the risk of losing the benefit of the right of refusal.

(2) Arbitration

As explained in the response to question 2, in Japan, the Arbitration Act is silent regarding the existence and treatment of issues of privilege or other rules that a party or its counsel may rely on in order to resist disclosure in arbitral proceedings. However, if the arbitral proceedings give rise to such issue, arbitral tribunals will usually recognize parties’ rights to rely on evidentiary privileges in line with the general practice of international arbitral proceedings.

As explained in the response to question 3, generally, if the relevant communications were disclosed to a third party, arbitral tribunals may conclude that legal privilege has been lost because of waiver of privilege. On the other hand, where disclosure is made to the third party funder on the express term that the facts or document are to remain confidential, this may reduce the risk of losing the benefit of legal privilege.
QUESTIONNAIRE FOR COUNTRY REPORTS

ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration

THE NETHERLANDS

Prof. Dr. Marielle Koppenol-Laforse and Mr. Thomas Stouten

1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

On the basis of Article 165 (2) of the Dutch Code on Civil Procedure ("DCCP") and Article 843a DCCP, a person, that by virtue of his office or profession is held to observe secrecy, may invoke privilege. Lawyers, doctors and civil-law notaries are considered persons that fall under this provision, but unlicensed in-house counsel, accountants, tax-advisors and mediators, for example, are not. Only the lawyer, and not the client, can decide whether to invoke or to waive privilege.

With regard to communication between a lawyer and his client, except for documents that are clearly the object of, or have contributed to the commission of a criminal offence, all such communication is protected by privilege.

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

Although, the Dutch Arbitration Act does not explicitly provide for privilege with regard to disclosure of documents or acting as a witness in arbitral proceedings, it is accepted that such privilege also exists in those proceedings.

With regard to request for disclosure of documents, the parliamentary papers to the Dutch Arbitration Act provide that privilege is a ground for refusal such disclosure. Also, in Dutch legal

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1 The authors are Dutch lawyers with the law firm of Houwthoff Buruma. Marielle Koppenol-Laforse is also a professor of International Commercial Contract Law at Leiden University.
2 Ava Borasco, 'Privilege and International Implications against the Backdrop of the Panama Papers', ABA's Business Law Today, July 2016, p. 4.
literature, it is argued that a lawyer can invoke privilege when called as a witness in an arbitration. Article 1041a DCCP provides that if a witness does not voluntarily appear or, having appeared, refuses to make a statement, the arbitral tribunal may allow the party requesting that the witness be heard, within a time set by the arbitral tribunal, to apply to the provisional relief judge of the district court with the request that an examining judge be appointed before whom the examination of the witness will take place. If a lawyer refuses to make a statement in an arbitration and is called before a judge, that lawyer can invoke the privilege of Article 165 (2) DCCP. Consequently, it is believed that the privilege can also be invoked during the arbitration.7

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

Privilege can only be waived explicitly and not inadvertently. In this respect, the Dutch Supreme Court has held that correspondence with a lawyer can only be seized with the lawyer’s explicit prior permission.8 A lawyer may still invoke privilege when he or his client disclosed privileged communications to a third party out of court.9 As mentioned under 1, only the lawyer can waive privilege and not the client.

4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

Privilege is not related to the nature of certain communication but it relates to all communication a lawyer received or sent in his or her capacity as a lawyer.10 Disclosure of privileged communication in national court proceedings or arbitration does not result in loss of the benefit of the privilege if the privilege was not waived explicitly by the lawyer.

5. Are documents held by the third party funder protected i.e. the funder’s own evaluation of the case; separate legal opinions; negotiation of the funding agreement?

Although there is no case law available that provides that third party funders may not invoke the privilege as mentioned in the articles stated above under questions 1 and 2, we consider it unlikely that third party funders are covered by these articles, because we would not consider the profession of third party funder comparable to that of doctor, lawyer or civil-law notary in this respect.

With regard to communication between a lawyer and his client, except for documents that are clearly the object of, or have contributed to the commission of a criminal offence, all such

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7 Meijer, T&C Burgerlijke Rechtsvordering, art. 1041a RV, Comment e.
10 Dutch Supreme Court 27 April 2012, NJ 2012/408.
communication is protected by privilege. Consequently, it is advisable for a lawyer to address his client in his communication to the third party funder as well, in order to be able argue that this communication is privileged. In addition, if the third party funder has its own lawyer, and that lawyer evaluated the case, provided the legal opinion and assisted with the negotiation of the funding agreement, that lawyer can invoke privilege in order to protect these documents.

6. In relation to documents transferred by the lawyer/party to the third party funder, does the use of a confidentiality/non-disclosure/common interest agreement work to protect privilege/secrecy in your jurisdiction?

Documents that are part of the communication between the lawyer and its client (i.e. the party) are protected by legal privilege. If the third party funder is copied in such communication it can profit from that privilege too. A confidentiality agreement does not add to legal privilege. The third party funder, the client and the lawyer can also enter into a confidentiality agreement to ensure that the third party funder treats the documents it receives in a confidential manner.\textsuperscript{12}


ICCA/Queen Mary Questions for National Reports

1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

A – In the Portuguese jurisdiction, all communication between the client and his or her attorney is covered by “professional secrecy” and, therefore, the attorney is bound to keep such communication confidential. This duty covers not only information but also documents, materials, assets, and the like, that the client owns and may have handed over to the attorney to keep under a fiduciary legal relationship.

Indeed, according to Art. 92(1) of the Code of Ethics of the Portuguese Bar Association, applicable to all attorneys licensed to practice in Portugal, the attorney is bound to keep confidential every factual circumstance of which he or she may have become aware during the performance of his/her mandate, in particular:

a) any fact related to a professional matter of which he/she may have become aware through disclosure made by the client or that was disclosed by instructions of the client;

b) facts of which he/she may have become aware through the exercise of any office in the Bar Association;

c) facts related to professional matters that may have been disclosed by a colleague with whom he/she is associated or to whom he/she renders professional services;

d) facts that may have been disclosed by a “co-petitioner”, “co-defendant” or “co-interested party” or by their attorneys;

e) facts of which the counter-party to his/her client may have disclosed during the negotiations of a settlement, whether this settlement has been concluded or not.

However, this duty of confidentiality is not absolute: whenever necessary to defend the interests and honour of the client or of the attorney him/herself, the attorney is entitled to seek permission from the competent Regional Council of the Portuguese Bar Association to disclose facts covered by the duty of confidentiality (Art. 92(4) of the “Code of Ethics”).

This request may be filed by whomever is entitled to seek disclosure of the factual circumstances covered by secrecy—usually, the disputant parties (either claimant/petitioner or respondent/defendant), but also the public prosecutor (in criminal proceedings), and the court on its own motion.

Most times, it is the attorney him/herself who is interested in lifting this confidentiality and, therefore, he/she must seek leave to disclose. In this respect, the typical situation happens when the attorney has been called as a witness in a case and he/she wishes to deliver testimony on factual circumstances of which he/she has become aware during the performance of the mandate.

The counter-party may also be interested in having the confidentiality duty lifted, and the public prosecutor or the court judge may also seek this permission. Lastly, a former client of an attorney may also be interested in doing so, when the attorney in question is not willing to cooperate in delivering his/her testimony in a pending case. In all these cases, the interested party may seek permission from the Regional Council of the Bar Association. However, even if the Regional Council authorises the disclosure, the attorney may refuse to disclose any fact
covered by confidentiality, at his/her own discretion and subject to no penalty whatsoever (Art. 92(6) of the “Code of Ethics”). This consideration has led the jurisdictional body of the Portuguese Bar Association to decide, in a few cases, that the “attorney is the only person entitled to seek permission to disclose facts covered by professional secrecy” (for instance, the Opinion rendered by the Lisbon District Council No. 18/2014 of 13 August 2014, accessible at http://oadb.datajuris.pt, last accessed on 23 April 2016). Unquestionably, this is the practical result of the applicable statute but its wording seems to allow that the application may be filled by whomever is interested in having the confidentiality cloak lifted. In any event, any testimony delivered in breach of the duty of confidentiality is inadmissible as evidence (Art. 92(5) of the “Code of Ethics”).

The duty of professional secrecy applicable to the attorney-client relationship is the subject matter of numerous decisions, both from the Portuguese superior courts and from the Portuguese Bar Association jurisdictional bodies. All these decisions recognise that confidentiality is of paramount importance to the legal system and, particularly, to the attorney-client relationship. It is covered by such an intense power that the courts have considered it to be a matter of “public policy, protecting a general and social interest” that only in very special conditions may be set aside (see, for instance, the decision of the Lisbon Court of Appeal of 19 April 2012 available at www.dgsi.pt, last accessed on 23 April 2016). This is the reason why the attorney is not allowed to disclose of his/her own free will and, except under extremely exceptional circumstances, must also seek permission from the client before disclosing any factual circumstance covered by the confidentiality duty.

In short, the attorney enjoys full discretionary power not to disclose facts covered by professional secrecy. Further, the attorney may not disclose confidential information without first seeking approval from the local Bar and from the client. This means that an attorney will only be allowed to disclose confidential information if he or she is granted leave (both from client and the Portuguese Bar) and if he or she is willing to do so.

This privilege is not extended to the party itself, who will always be bound to testify or produce documents if ordered to do so by a court judge.

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

A – The above stated applies to arbitral proceedings with the exception of the reference to a court order. Arbitral tribunals do not enjoy the “ius imperii” powers of the state court judges. Whenever needed, an arbitral tribunal may seek the cooperation of the state court judge to collect evidence, such as witness statements and or depositions, including to collect a statement / testimony from a recalcitrant witness. An attorney may obviously fall in that category but, as said, may always invoke the professional secrecy to avoid testifying.

From the practical viewpoint, there is no difference between “court procedures” and “arbitral proceedings”.

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that
would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

A – As a matter of principle, due to the public nature of the proceedings brought before the state courts—and especially, due to the public nature of the hearings—all materials, documents, information, statements and the like, once admitted as evidence (which means that the above stated rules must be complied with), fall under the public domain.

Conversely, as a matter of principle, everything occurring in arbitration proceedings is considered confidential, unless the parties agree to disclose. Every aspect related to an arbitration proceeding is considered to be subject to a confidentiality duty, the breach of which constitutes a criminal offence, punishable with imprisonment (Art. 195 of the Portuguese Penal Code), and provides the grounds for indemnity according to the general principles of law.

Accordingly, information contained in a judicial proceeding loses its privileged nature, whereas in arbitration proceedings it must be kept confidential.

This does not mean that a party to an arbitration proceeding is not allowed to convey its own information, data and related materials to a third party for specific purposes, such as the assessment of possible funding. However, the duty of confidentiality covers information regarding the counter-party of which the “disclosing” party became aware only through the proceedings. That is, a third party may not have access to confidential information that reached the arbitration proceedings through the counter-party.

On the other hand, there is a major difference between arbitration and judicial proceedings concerning confidential information conveyed to an attorney and to a third party (who is not an attorney). As said, an attorney may always refuse to waive the privilege even if ordered to do so by a court decision (or a tribunal order). Conversely, information conveyed to a third party, who is not the attorney, is not covered by privilege and, therefore, the duties of confidentiality — even if deriving from applicable non-disclosure agreements and legal provisions such as Art. 195 of the Portuguese Penal Code — must give way to a court order (but not of an order of an arbitral tribunal). In any event, when ordering privileged information to be disclosed to a third (non-attorney) party, the court must strike a careful balance between the interests related to the judicial procedure (among other criteria, the indispensability of the measure to the “search for material truth”) and the duties of confidentiality binding that third party.

4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

A – The above stated applies to third party funders. A third party funder is not considered covered by privilege and, therefore, it may well have to disclose confidential information of which it became aware due to its involvement in the case if ordered to do so by a court
decision (but not by a decision of an arbitral tribunal). The common law doctrine of "common interest" does not apply in Portugal. Although the particular situation of the third party funders has not yet reached the courts, similar situations, such as the case of professional secrecy applicable to the banking industry, are often decided by the Superior Courts (Court of Appeal and Supreme Court of Justice) and the privilege is frequently lifted according to the above stated standards (see, as an example, decision of the Lisbon Court of Appeal of 27 March 2007, accessible at www.dgsi.pt, last accessed 24 April 2016).
Russia – Ilya Nikiforov, Egorov Puginsky Afanasiev and Partners

1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

In sum, advocate’s secret protects an advocate and its dossiers from disclosure/production. However, information, documents and other matter are admissible evidence as if they can be legitimately sourced elsewhere - even if it constitutes an advocate work product, or, by the same token, originates from advocates' dossiers or is found in advocate-client communications. To this extent captions and endorsements such as “Confidential and Privileged”, “Advocate's Secret”, “Attorney-Client Work Product” create a (rebuttable) presumption that the document is not eligible for production/disclosure.

Under Russian law, an advocate (or its client) may rely on legal professional privilege in order to avoid producing evidence to a third party or the court. In the case of litigation, it allows the respective litigant to refuse production of the privileged document in question, or strike the privileged matter/information/document/record off evidence.

Legal professional privilege is called, “advocate’s secret” (advocatskaya tayna – адвокатская тайна). It relates to all professional services whether the communication have been made for the dominant purpose of litigation or not.

The advocate’s secret is framed in Russian legal system as immunity of the advocate and its personnel from being forced to disclose matters relating to legal assistance and a duty of the advocate to keep those matters confidential and not to disclose those matters without client’s consent.

Definition of an advocate. This profession includes members of the bar, and registered foreign lawyers. In-house lawyers are not included. Notaries (who are also legal professionals) are subject to a different regime of notary secrets (notarialnaya tayna – нотариальная тайна).

Para-legal and trainees, and other staff of law offices is covered in professional secrecy regime. Law offices for this purpose means an eligible professional corporation/structure advocates can exercise advocates' activity only through Advocates' cabinet, Advocates' bureau, Advocates' collegiums or a legal advice office.

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1 Federal Law On Advocacy and Advocate Activity No 63-FZ
3 Ibid
They shall be properly supervised by a qualified advocate.

Whether privilege applies to communications with lawyers, who are not members of the Bar is unclear as there is a lack of authority, but circumstantial evidence suggests that it does not.

Privilege belongs to the client.

The duty to maintain secret is upon legal professional the client’s advocate is bound by it. Unless the client waives privilege, an advocate and/or his associates cannot disclose privileged information without their client’s consent and, respectively, officers of the court and law enforcement agents, let alone other private parties and their lawyers cannot force the disclosure of that matter by the advocate.

Advocate’s secret privilege applies to communications, items, information and documents; which have come into existence in connection of giving or receiving legal advice, whether in the context of legal proceedings or a non-contentious matter. It also applies to attorney-to-attorney correspondence.

There is no express provision that communication in question needs to be confidential. Furthermore, there is no requirement in the law that advocate’s secret only applies to the matter made/passing between a client and his/her advocate. So, if a document is disclosed to a limited number of parties on express terms that it must remain confidential and is not to be available outside of those parties, privilege will probably not be lost.

If a lawyer prepares documents in the course of giving legal advice to a client, they will be covered by advocate’s secret. The subject matter does not actually need to be communicated to the client.

Litigation Privilege is not discerned from advocate’s secret generally. General rules apply. Matters pertaining to advocate’s secrets were addressed by the Constitutional court on a number of occasions (although exclusively in the context of criminal proceedings). Most recently the decision of 6 June 2016 № 1232-O. Other rulings of the RF Constitutional court pertinent to the matter are 16 July 2009 № 970-O; 23 September 2010. № 1147-O; 29 May 2007 r. № 516-Ox 17 June 2008 r. № 451-O; 6 July 2000 r. № 128-O; 6 March 2008 r. № 428-O; 6 July 2000 r. № 128-O; 6 March 2003 № 108-O; decision of 25 October 2001 r. № 14-П; determination 6 July 2000 r. № 128-O.

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

For arbitral proceedings seated in Russia – both domestic and international, - the 2016 Law on Arbitrage (Arbitration proceedings) in Russian Federation applies.5

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Section 5 on procedural and evidential matters (conduct of arbitration) provides, in pertinent part,

"Article 19. Defining the Rules for Arbitrage Procedure

1. Provided that the provisions of this Federal Law are observed, the parties may at their own discretion to agree on the arbitrage procedure.

2. In the absence of the agreement provided for by Part 1 of this article, an arbitration tribunal may with the observance of the provisions of this Federal Law to effect arbitrage in such a way as it deems proper, in particular in respect of determining the admissibility, relevance and significance of any proof.

Article 21. Confidentiality of Arbitrage

1. If the parties have not agreed otherwise or if not otherwise provided for by federal law, arbitrage shall be confidential and a case shall be heard in closed session.

2. Arbitrators and employees of a permanent arbitration institution are not entitled to divulge the data that have become known to them in the course of arbitrate without the parties' approbation.

3. An arbitrator is not subject to an interrogation as a witness in respect of the data that have become known thereto in the course of arbitrage."

This language is refined in the Law on International Commercial Arbitration:\n
Article 19. The Determination of the Rules of Procedure

1. Given observance of the provisions of this Law, the parties shall be free to agree on the procedure of arbitration proceedings to be adopted by the arbitration tribunal.

2. In the absence of such an agreement, the arbitration tribunal may, with account of the provisions of this Law, carry out arbitration proceedings as it sees appropriate. The powers the arbitration tribunal is vested with shall include those to define the permissibility, relevance, importance and significance of any evidence."

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

Documents, information and other matter produced as evidence/pleadings in court remain part of court files. These may be opened/accessible to a third party and, thus, secrecy is lost. To preserve privileged information/documents/matter the court proceedings/dockets may be sealed by order of a judge in charge of the matter. This modality is typical where docket contains classified matters/commercial secrets. Hearings may be conducted after closed doors. A court

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order is required to open case file to third parties (including use in other litigation). So, this does not give an absolute immunity, but increases chances to prevail of protection from disclosure.

Arbitration is different. Confidentiality of arbitration proceedings is a default rule (Art. 21 of the Law on Arbitrage (Arbitration Proceedings) in Russian Federation) Arbitrators and arbitral institutions/their staff are immune from giving evidence in proceedings they administer (confidentiality of arbitration operates on the same conceptual basis as advocate’s secret – as a professional immunity from disclosure). Therefore, materials introduced in arbitration remain secure (unless the parties have agreed otherwise).

In either case advocate and its dossiers remain immune/privileged in a sense that they are not subject to production/disclosure by advocate notwithstanding the fact they were introduced in litigation/arbitration and because part of the case record. In the context of third-party funders, this should be the approach taken to ensure that custody of legal advice and/or litigation privilege over the relevant documents is with an advocate.

To try and retain the most protection, one should avoid disclosure until confidentiality agreement have been signed and see that privileged matter/information/documents/records is returned (and copies destroyed) by a third party, such as litigation funder, upon completion of its exercise/review. Alternatively, documents shall be transferred and kept in custody/dossier of an advocate of a third party (e.g. litigation funder).

Privilege may be waived where:

- the document is disclosed in court proceedings;
- the confidentiality of the document is otherwise lost;
- there is an express or implied waiver, which must be by or on authority of the privilege holder.
- abuse of privilege exception: documents will not attract legal professional privilege at all if they were created for the purpose of furthering a criminal or fraudulent plan, or otherwise the privilege of advocate’s secret is abused, used in deviation of its genuine purpose, even where otherwise the criteria of privilege would be met.7

Advocate’s secret is a privilege vested with an advocate, information and documents that are legitimately sources elsewhere are not privileged, no matter the fact the same matter is privileged as part of advocate’s dossier.

4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

See answer to question 3 above, for how privilege may be lost, as a result of the disclosure of an otherwise-protected communication to a third party (such as funder).

7 *RF Constitutional Court decision of 6 June 2016 № 1232-O*
Privilege is also retained where information and documents are in custody of third party’s advocate rather than third party itself.

Advocate’s secret is essentially an immunity of advocate’s files and docket (as explained above). Disclosure of an otherwise-protected communication, information and documents to a third party (e.g. insurers, funder) will not, as such, result in loss of the benefit of the Advocate’s secrecy, in national court proceedings or arbitration – the Advocate and its docket remains immune. But - to the extent these materials remain in possession/control of the third party - they are not prone to disclosure/document production court order addressed to such third party. However, if privileged matter returns to advocate’s possession or destroyed, no copies remaining with a third party, the matter remains immune in the hands of Advocate. Endorsement of such communications as a “commercial secret” will add an extra layer of protection from a private request for disclosure addressed to a third party, but may be over hidden by the court order if addressed to a third party.
ICCA-OM TPF Task Force

A. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

Introduction

As an important preliminary point, all matters of legal professional privilege (that is, both legal advice privilege and litigation privilege), if brought in national court proceedings before the Singapore courts, are governed principally by the Evidence Act, followed by the common law authorities. In the Singapore legal system, statutes are higher up in the hierarchy of sources of law as compared to any case authorities. In addition, while case authorities are often needed to interpret broadly worded statutes, foreign case authorities cannot be relied upon unless they are consistent with the Evidence Act (see section 2(2) of the statute).

In civil cases, privilege is often claimed during the pre-trial process of discovery, though the court has the power under section 164(2) of the Evidence Act to at any time inspect documents which are subject to claims of privilege. Privilege should not be conflated with a lawyer’s general duty of confidentiality.\(^1\) To further disambiguate, the term “privilege” is used for the purposes of this report to the exclusion of other traditional types of privilege that clients might have (such as the privilege against self-incrimination, marital privilege, common interest privilege, and without prejudice communications).

Lawyer’s obligation not to disclose

Under section 128(1) of the Evidence Act, a lawyer cannot disclose “any communication made to him in the course and for the purpose of his employment ... 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.” Explanation 1 to the provision states that obligations in section 128 continue “after the employment has ceased”. Section 128(3) then states that it is “immaterial whether the attention of such advocate or solicitor was or was not directed to such fact by or on behalf of his client.”\(^2\)

In other words, section 128 obligates a lawyer\(^3\) not to disclose any privileged communications made to him by the client in the course of his employment, and this is the first aspect of legal advice privilege caught by the Evidence Act. The jurisprudence has since made the following clarifications with respect to the precise scope of section 128:

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\(^1\) See rule 24 of the Legal Profession (Professional Conduct) Rules.

\(^2\) However, Jeffrey Pinsker argues that section 128 only applies to communications actually received by the lawyer.

\(^3\) Section 129 of the Evidence Act obligates the lawyer to supervise his staff and supervise as well to ensure the said communications remain privileged.
(1) Although the word “confidential” does not appear in section 128, legal advice privilege necessarily concerns the protection of confidential communications.\textsuperscript{4}

(2) Section 128 only applies to communications and not mere facts observed by the lawyer.\textsuperscript{5}

(3) Section 128 is not confined to legal advice but includes communications in a broader legal context.\textsuperscript{6}

(4) Section 128 can apply to communications which include factual information from another source.\textsuperscript{7}

(5) Section 128 does not apply to documents that pre-existed the commencement of the lawyer-client relationship,\textsuperscript{8} but may apply to documents from third parties where these have been collected by a lawyer for the purpose of advising his client.\textsuperscript{9}

(6) The privilege does not arise only when the retainer commences, but when it commences depends on the point in which the lawyer was first consulted in his professional capacity.\textsuperscript{10}

(7) Litigation need not be contemplated at the time of the communication.\textsuperscript{11}

(8) The client may include a person or committee of persons within a corporation authorised to communicate with its lawyers.\textsuperscript{12}

(9) Although section 128 does not literally extend legal advice privilege to third party communications, a communication obtained by the client through a third party can be privileged if it was for the dominant purpose of legal advice.\textsuperscript{13}

**Client’s right not to disclose**

Under section 131(1) of the Evidence Act, a client shall not 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.” This forms the second aspect of legal advice privilege caught by the Evidence Act, in that pursuant to this provision the client is not required, and cannot be compelled, to disclose protected communications between his legal adviser and him.

Section 131(1) has also been interpreted to reflect the doctrine of litigation privilege. This privilege protects information provided by a third party to the lawyer or client predominantly for the purpose of pending litigation. However, the effect of illegality on the claim of such a privilege as well as the circumstances in which the claim may be waived or lost remain unclear.\textsuperscript{14}

**Extension of obligation to other types of lawyers**

\textsuperscript{4} Skandinaviska v Asia Pacific Breweries (2007).

\textsuperscript{5} Chua Su Yin & Co v Ng Sun Yee (1991).

\textsuperscript{6} Skandinaviska v Asia Pacific Breweries (2007).

\textsuperscript{7} Skandinaviska v Asia Pacific Breweries (2007).

\textsuperscript{8} Yentours v Mountain (1991).

\textsuperscript{9} Lyell v Kennedy (1884).

\textsuperscript{10} Munister v Priest (1930).

\textsuperscript{11} Greenough v Gaskell (1833).


\textsuperscript{13} Skandinaviska v Asia Pacific Breweries (2007).

Under s 128A(1) of the Evidence Act (which was only recently introduced via a legislative amendment in 2012), section 128 applies equally to “legal counsel in an entity” (such as in-house counsel and lawyers working for the government), except that the protection only extends to legal advice.

Privilege being balanced against the rights of an accused person

Though the common law world has developed a variety of positions on this, it is still unclear in Singapore if an accused person is entitled to rely on a privileged communication between another person and his lawyer for the purpose of establishing his defence or exonerating himself.

Section 2(1) of the Evidence Act makes it clear that the Evidence Act only applies to judicial proceedings, so by default all of what has been said above do not apply to any sort of arbitral proceedings. Even if the arbitration is seated in Singapore, the law concerning disclosure would depend on the rules governing the arbitration, which would be based on what the parties had agreed to. If the parties had not agreed to anything specifically in relation to evidence, there is perhaps greater room to argue that the IBA Rules should apply as a code of internationally accepted principles. In any case, the main considerations are what parties had agreed to and whether any rule of evidence would unduly impede the efficient but fair disposal of the dispute, though in practice it appears that most times the parties would defer the matter to the tribunal.

Privilege can be waived. First, section 128(1) of the Evidence Act refers to the possibility of the client expressly consenting to the lawyer disclosing the privileged communications. However, there is no fixed form in which the waiver must assume (such as whether it is in writing). What is required is that for the waiver to be effective, it must be consistent with the facts. Secondly, as seen above in section 131(1) of the Evidence Act, a client may implicitly waive his privilege if he voluntarily gives evidence as a witness. But by virtue of section 130 of the Evidence Act, privilege is not waived just because a client gives evidence. The sort of waiver that is contemplated is where his answer to a question contains privileged information. Thirdly, privilege is considered waived if a client sues his own lawyer; whatever that might be

16 Yeo Ah Tee v Lee Chuan Meow (1962).
relevant in shedding light on the suit is no longer protected. Finally, if privilege is relinquished (accidentally or otherwise) during the discovery process, the holder of the privilege must offer good reasons why the communication(s) in question should nonetheless not be presented at trial. The holder can also seek an injunction to prevent misuse of information.

Privilege can also be forfeited or inapplicable to begin with. Under section 128(2) of the Evidence Act, any communication “made in furtherance of any illegal purpose” or “any fact observed by any advocate or solicitor in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment” is not protected by privilege. This means that a client’s confession is privileged. However, “illegal” includes iniquitous conduct and “fraud” covers both civil and criminal fraud. The following factors are considered: the level of dishonesty, the degree of culpability, the public interest, whether the communication was protected by both legal advice and litigation privilege, and the level of evidence demonstrating the improper conduct.

The preceding paragraphs describe the position in national court proceedings. For arbitral proceedings, please see the answer to question B above.

D. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

Because the Evidence Act was written 134 years ago and has not undergone any meaningful change, it is unsurprising that it is silent on the scenario where there is a third-party funder involved, and there are thus far also no known cases that have discussed this relatively new development. The closest analogy one can draw is in the context of litigation privilege, since that potentially protects communications between third parties and the lawyers. In principle, however, the concept is at odds with (legal professional) privilege in the traditional sense, which is about the relationship between the lawyer and the client; on the one hand, while privilege has a near-sacrosanct status in (at least) the common law world because of the assumption of the fundamental importance of maximum freedom of communication between lawyer and client, on the other hand an overly broad conception of privilege is against the public’s interest to have as much information as possible in legal proceedings.

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17 Paragon Finance v Freshfields (1999)
18 See Order 24 rule 19 of the Rules of Court.
19 HT SRL v Wee Shio Woon (2016).
20 Illustration (a) to section 128 states: “A, a client, says to B, a solicitor: “I have committed forgery and I wish you to defend me”. As the defence of a man known to be guilty is not a criminal purpose this communication is protected from disclosure.”
21 Gelattissimo Ventures (S) Pte Ltd v Singapore Flyer Pte Ltd (2010).
22 Gelattissimo Ventures (S) Pte Ltd v Singapore Flyer Pte Ltd (2010).
23 Gelattissimo Ventures (S) Pte Ltd v Singapore Flyer Pte Ltd (2010).
The preceding paragraph describes the position in national court proceedings. For arbitral proceedings, please see the answer to question B above.
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15 August 2016

ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration

Country Report for South Korea – Part B

Robert W Wachter1 and Jennifer Eun-Kyung Yoo2

1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

1. Although Korean law does not formulate the attorney-client privilege in the same manner as common law jurisdictions, attorneys and former attorneys bear a general confidentiality obligation that precludes them from disclosing any confidential information they acquire in the course of performing their professional duties as counsel (Article 26 of the Attorney-at-Law Act). In principle, attorneys are required to protect the confidential information of their clients as well as prospective clients. The law does not distinguish between external and in-house counsel, meaning that the same confidentiality protection applies to communications between in-house counsel serving in a company and the employees of the same company, if the communication was obtained by the in-house counsel in the course of performing professional duties as an attorney.

2. The Criminal Code expressly provides for punishment of attorneys, former attorneys and their assistants who intentionally disclose confidential information their obtained in the course of performing their professional duties (Article 317 of the Criminal Code).

3. In civil and criminal proceedings, if a lawyer is subjected to examination as a witness, the lawyer may refuse to testify about confidential information obtained in the course of providing legal services to a client or prospective client (Article 315 (1)(1) of the Civil Procedure Act, Article 149 of the Criminal Procedure Act). Unlike the attorney-client privilege in common law jurisdictions, this protection does not belong to the client. Rather, it is the attorney who may invoke the legal protection to avoid having to disclose confidential information as a witness in a criminal or civil case, in order for the attorney to faithfully comply with the statutory professional obligations.

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4. The same rules regarding an attorney's testimony as a witness also apply with respect to production of documents to civil court (Article 344 (1)(3)(e) of the Civil Procedure Act), and search and seizure of documents or materials in a criminal investigation or litigation (Article 112 of the Criminal Procedure Act).

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secrets) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

5. There are no rules that specifically govern the issue of attorney-client privilege in arbitral proceedings where the seat of arbitration is Korea. The Korean Arbitration Act provides that the parties are free to agree on the arbitral procedure, provided that their agreement does not contravene the mandatory provisions of the Act (Article 20 (1) of the Arbitration Act). Absent such an agreement, the arbitral tribunal may, subject to the provisions of the Act, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal shall include the power to determine the admissibility, relevance, materiality and weight of any evidence (Article 20 (2) of the Arbitration Act).

6. Accordingly, in the (unlikely) circumstance that the parties have specifically agreed on the applicability of attorney-client privilege or any other similar rule, the arbitral tribunal will respect the parties' intentions. Otherwise, the matter will be subject to the arbitral tribunal's discretion. If a Korean legal practitioner is appointed as an arbitrator, he/she is likely to refer to the rules governing civil proceedings codified in the Civil Procedure Act.

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

7. The confidentiality obligation under the Attorney-at-Law Act does not apply if the disclosure is expressly required by law (Article 26 of the Attorney-at-Law Act).

8. In civil procedure, the attorney's right to refuse to testify or produce documents does not apply when their obligation to maintain confidentiality has been waived (Article 315 (2), Article 344 (1)(3)(e) of the Civil Procedure Act). For example, if the client calls the attorney as witness to testify about an issue that would otherwise be subject to the confidentiality obligation, the client would be deemed to have waived the confidentiality protection that would otherwise apply.
9. In criminal procedure, Korean law recognizes two exceptions to the confidentiality obligation: (i) when the client has consented to the disclosure of confidential information, and (ii) when important public interest is at stake (Article 112, Article 149 of the Criminal Procedure Act). Although there is yet no clear guideline on the scope of important public interest, most Korean legal scholars agree that this term would include where there is need to stop a continuing or imminent crime which could cause serious personal injury or death. Although there are different views, on the whole, scholars seem reluctant to extend the scope of important public interest to completed crimes or crimes involving property damage.

4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with Insurers.

10. Third-party funding is still unfamiliar and untested in Korea, so there are no particular rules governing this issue. Contingency fees are permitted in Korea, and contingency fee arrangements are common. There is still uncertainty whether third-party funding would be permitted in Korean court litigation, particularly whether a third-party funding arrangement might violate the Attorney-at-Law Act, which provides that “no fees and other profits earned through services that may be provided only by attorneys-at-law shall be shared with any person who is not an attorney-at-law” (Article 34 (5) of the Attorney-at-Law Act). A Korean district court decision has held that an agreement that violates Article 34 (5) shall be deemed null and void (Chuncheon District Court decision Case No. 2006Gahap319 dated 22 June 2007).

11. There has been little discussion or commentary regarding how third-party funding arrangements would affect the confidentiality obligation. Yet, it should be noted that the wording of the Civil Procedure Act on the right to refuse to produce documents is broad (Article 344 (1)(3)(e) of the Civil Procedure Act), and applies to any person holding the relevant document, even if the holder is a third party. Therefore, if third party funding or a similar relationship were introduced into Korean law, and the third party is requested to produce documents which could be considered confidential information between a lawyer and a client, the third party would have the right to refuse document production.

12. In contrast, the right to refuse to testify as witness in civil proceedings applies only to attorneys (Article 315 of the Civil Procedure Act). The same rule applies to criminal procedures: that is, only the attorney can rely on the right to refuse witness testimony and to refuse search and seizure of documents or other materials (Article 112, 149 of the Criminal Procedure Act).
1. Spain provides a strong protection against disclosure of communications under the principle of professional secret. The strength of the protection is evidenced in two visible ways: first, its protections are included and developed across the hierarchy of Spanish norms (Constitution, law, regulation and ethical rules); second, the law provides strict sanctions for violation of the privilege, including not only fines against or disbarment of the infringing lawyer, but also incarceration of up to four years.

The essence of Spanish professional secret protection is contained in Art. 542.3 of the Organic Law on Judicial Power (LO 6/1985 of July) and in Art. 32 of the General Statute of the Spanish Legal Profession (RD 658/2001) which imposes on attorneys the obligation to hold in confidence all facts and information which they know by reason of their professional conduct and precludes an attorney from being obligated to testify with respect to the same.

The broad scope of the protection is exemplified by Art. 5 of the Ethical Code of the Spanish Legal Profession (27 September 2002), providing in pertinent part that the duty and right of professional secret covers confidences and proposals of the client, of the other party, of other attorneys and all facts and documents received or reviewed by reason of the attorney’s professional conduct.

Professional secret is so firmly implanted in the Spanish legal order that there is little recent jurisprudence in the issue. In one recent case, in which a high-visibility investigative judge was sanctioned for wiretapping conversations between incarcerated criminal suspects and their lawyers (Supreme Court, Criminal Division, 79/2012 of 9 February), the Supreme Court referred to professional secret as both a right of the attorney to not reveal information of any sort that was provided by the client or obtained in the exercise of the right of defense and a right of the accused that this lawyer not reveal such information to third parties, even under duress.

Professional secret can thus be claimed both by the lawyer and the client.

2. Given the breadth of the definition/description of professional secret in Spanish law as summarized in (1) above, its protections must be considered applicable in arbitral proceedings seated in Spain.

3. Spanish professional secret protections can be lost (or overridden) in various circumstances. These include: situations involving advice and assistance in matters of money laundering; situations in which the client and others protected by the concept (e.g., opposing counsel) all expressly authorize disclosure; and “states of necessity” in which (typically after consultation with the relevant bar association) the non-disclosure could give rise to a greater prejudice than would the disclosure (e.g., situations involving the imminent commission of a crime).
In principle, the disclosure to a third party of a communication that would ordinarily have been protected by professional secret would be considered to waive the protections.

4. We are not aware of existing legislation, precedents or legal writings addressing the circumstances in which disclosure of otherwise-protected communications to a third-party funder will result in the loss of the benefit of the protection. Nor are we aware that the question has been addressed by law or precedent or by legal authors in the possibly analogous area of relationships with insurers.

That said, our view is that where the object of the insurance is precisely the provision of legal assistance to the assured, then the assured must be considered the one and only client, and thus absent the assured’s consent (contained perhaps in the policy), disclosure cannot be made to the insurer.

But where the situation involves the total or partial subrogation of the insurer in the position of the assured (e.g., by making payment of a claim), in our view both assured and insurer should be considered as clients. In this case, the protections would apply, permitting disclosure to the insurer and not treating such disclosure as waiver.
Answers Questionnaire ICCA–Queen Mary Task Force on Third Party Funding in International Arbitration

1. When documents and/or information are shared with a Swedish advocate it is safe from having to be disclosed. Advocates, and their employees, cannot be obliged to testify regarding information obtained in the line of the advocate's business.\(^1\)

A party cannot be obliged to produce documents including information shared with its advocate.\(^2\)

2. Please see the answer provided to question 1. In arbitrations a party or a witness may not testify under oath and the arbitral tribunal does not have jurisdiction to order a party to the proceedings to produce any documents. The arbitral tribunal may however seek guidance with these issues at the relevant district court.\(^3\) The district court is to apply the same rules as in court proceedings. Hence, the applicable rules regarding privilege is the same as in a litigation.

3. There is only one exception to the rule that a Swedish advocate cannot be obliged to testify regarding information obtained in the line of the advocate's business. The exception concerns information of certain more serious crimes unless the advocate is defending the suspected individual in the criminal proceedings.\(^4\)

4. There is no authority on privilege and how it applies to third party funders in Swedish law. The disclosure of an otherwise protected communication to a third party funder will result in loss of the benefit of the privilege.

The relevant rules that may be applicable as to the perseverance of the privilege concern trade secrets. If the information disclosed to the third party funder include trade secrets, the court or arbitral tribunal will balance the evidentiary value and the interest of keeping the information secret against each other and decide on whether the information should be disclosed.

The assessment made in this regard is the same no matter if the information is to be disclosed in a witness statement\(^5\) or as part of document production\(^6\).

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\(^1\) Chapter 36, Section 5, the Swedish Code on Judicial Procedure ("the Code").

\(^2\) Chapter 38, Section 2, the Code.

\(^3\) Section 26, the Swedish Arbitration Act.

\(^4\) Chapter 36, Section 5, the Code.

\(^5\) Chapter 36, Section 6, the Code.

\(^6\) Chapter 38, Section 2, the Code.
ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration

Country Reports: Switzerland

Kirstin Dodge, Simon Vorburger and Sabine Neuhaus

January 4, 2017

I. Question I

Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

1 The Swiss approach to disclosure in national court proceedings\(^1\) is entirely different than US-style discovery. The fundamental principle in Switzerland is that each party has to bring its case based on the evidence that is in its possession or available to it outside of court proceedings and may not rely on the other party's help to compile evidence to support its claims or defenses.\(^2\)

2 Nonetheless, Swiss law provides for limited grounds on which a party may request that another party be required to produce information or documents. These grounds are either based on
   i) contractual rights (for example, the right of a principal in a mandate relationship to request certain documents or information);

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1 This paper focuses on civil court proceedings and arbitrations, as this project is concerned with third-party funding of civil proceedings. The situation in Switzerland with respect to attorney secrecy in the regulatory compliance context (e.g. with respect to disclosures to financial oversight agencies or prosecutors of the results of internal investigations) is more complicated and potentially less protective.

ii) rights in substantive law (for instance, intellectual property laws providing for rights of licensors to royalty reporting information from licensees or data protection laws providing for rights to request information on whether the controller of a data file processes data concerning the requesting person); and

iii) limited procedural rights (for instance, the right under certain limited circumstances to request documents or information to produce evidence for a clearly defined allegation of fact).³

If a party has such a right and requests that a document be produced, such request is made to the court (not directly to the other party) and must clearly identify the respective document or group of documents. If documents or oral testimony are properly requested, the court will still weigh the respective interests of the parties in deciding whether evidence must be produced.⁴ A party is considered to have a strong interest, for example, in protecting internal communications or analyses conducted within a business.⁵ Since all elements of such requests must be substantiated and proven, they are — generally — combined with an action for payment or damages. For the same reasons, an isolated action demanding the production of documents or information is typically cumbersome and thus rarely brought. US-style document production requests (e.g. for "any and all documents regarding" a topic) are considered to be fishing expeditions and are not granted by Swiss courts.⁶

Because of this very limited access to document production as well as the broad scope of Swiss attorney secrecy (see below, paras. 5-11), parties and counsel do not regard document production in Swiss court proceedings as posing any threat to attorney secrecy. It is essentially unheard of that a party to a civil proceeding would be ordered to disclose communications between the party and its attorney.

The concept of attorney-client privilege or work product doctrine in Switzerland differs from the stand-alone concept as it is known in many common law countries. The privilege applicable to correspondence between an attorney and client as well as documents containing legal research and opinions and related facts, notes of discussions, strategy papers or drafts of contracts, are encompassed within and protected by "attorney secrecy" obligations.⁷ Attorney secrecy applies to documents within an attorney's files as well as any such documents which have been released to and kept by the client.⁸ Attorney secrecy binds and in principle belongs to the attorney⁹ although a client can release an attorney from his secrecy obligation and request that the attorney disclose protected information.¹⁰ Moreover, such release may be done selectively¹¹

³ See, e.g., Article 158 of the Swiss Civil Procedure Code.
⁴ Schmid, Basler Kommentar ZPO, 2nd edn. 2013, article 160 n 25.
⁵ Schmid, Basler Kommentar ZPO, 2nd edn. 2013, article 160 n 25.
⁶ See, e.g., Decision of the Swiss Federal Supreme Court 8C_199/2010 of March 23, 2011, cons. 5.3.
⁷ Schmid, Basler Kommentar ZPO, 2nd edn. 2013, article 160 n 16.
⁸ Merghithe, Document Production in International Arbitration, 2015, p. 83.
⁹ Schüller, Schweizerisches Anwaltsrecht, Grundlagen und Kernbereich, n 497.
as there is no concept of an "all-or-nothing" disclosure or waiver of attorney secrecy in Switzerland. Additional details regarding attorney secrecy are discussed below.

Correspondence and files of in-house counsel are not covered by attorney secrecy in Switzerland as in-house counsel are not bound by the norms relevant for attorneys in private practice. However, for the reasons stated above, this correspondence is generally not, as a practical matter, subject to involuntary disclosure in civil court proceedings.

Generally, attorney secrecy has the function of protecting the special trust relationship between attorney and client. It is established and safeguarded by federal laws governing the client-attorney (contractual) relationship, attorney ethics, criminal law and civil and criminal procedure.

The contractual relationship between the client and the lawyer is governed by the Swiss Code of Obligations and imposes certain duties upon the lawyer. Among these obligations are the diligent and faithful performance of the mandate entrusted to him, which also includes the obligation to treat the client's matter as confidential.

Moreover, the Swiss Federal Act of June 23, 2000 Concerning the Freedom of Movement of Attorneys (the Federal Attorney Act, FAA) is applicable to all Swiss attorneys. The FAA imposes an obligation on attorneys to keep as a professional secret any information obtained through their clients in their function as attorneys as well as any other observations made in connection with or even after the respective mandate. This obligation is of unlimited duration and applies towards everyone. A waiver of attorney secrecy by the client allows, but does not oblige, the attorney to share entrusted information. In addition, attorneys are under an obligation to ensure that attorney secrecy is safeguarded by persons who assist them in their work. An attorney disclosing information without authorization exposes himself to disciplinary sanctions.

In addition to the provision on attorney secrecy in the FAA, Article 321 of the Swiss Criminal Code, upon complaint, sanctions the disclosure of confidential information obtained by attorneys in their professional capacity who are subject to a duty of confidentiality with imprisonment of up to three years or a monetary penalty.


See also, Marghitola, Document Production in International Arbitration, 2015, p. 57.


See, Article 308 Swiss Code of Obligations.


Article 13 para. 1 sentence 1 Swiss Federal Attorney Act.

Article 13 para. 1 sentence 2 Swiss Federal Attorney Act.

Article 13 para. 2 Swiss Federal Attorney Act.

The relevant authority of the cantonal bar to which the respective attorney is admitted has jurisdiction to take disciplinary action against the attorney.
The Swiss Civil Procedure Code also protects the absolute nature of attorney secrecy. Generally, parties to state court proceedings and third parties are under a statutory obligation to participate in the taking of evidence if so ordered by the court (although, as already discussed above, the circumstances under which a court will order such participation are limited). If a person is ordered to participate and refuses without justification, the Swiss Criminal Code foresees penalties for the defaulting party. But neither a party to a civil proceeding nor an attorney who is a third party to the proceeding can be ordered to produce documents or provide testimony covered by attorney secrecy. Similarly, if an attorney himself is a party to the proceeding, he may refuse to cooperate in the taking of evidence if disclosure of a secret would constitute an offence under Article 321 of the Swiss Criminal Code. Even if a client waives attorney secrecy, the attorney may nevertheless refuse to participate. In case of such justified non-participation in evidence taking, the court is prohibited from drawing any inferences from the non-participation with respect to the fact to be proven.

II. Question II

Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

Swiss law concerning International arbitrations is set out in the Swiss Federal Act on Private International Law (the PILA). The PILA is very concise and liberal, addressing only indispensable aspects of a lex arbitri. Consistent with the principle of party autonomy, there are no mandatory procedural rules governing arbitrations seated in Switzerland other than the right to fundamental due process: the arbitral tribunal shall treat the parties equally and respect their right to be heard in an adversary procedure. Otherwise, the conduct of arbitral proceedings is determined by way of direct agreement between the parties or by reference to

\[\text{21} \quad \text{Neter | Zindel, Kommentar zum Anwaltsgesetz, Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (Anwaltsgesetz, BGFA), 2nd edn. 2011, article 13 n 90.}
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\[\text{22} \quad \text{Article 160 para. 1 of the Swiss Civil Procedure Code.}
\]

\[\text{23} \quad \text{Article 292 of the Swiss Criminal Code.}
\]

\[\text{24} \quad \text{Article 160 para. 1.b of the Swiss Civil Procedure Code; see, for a discussion of rights to refuse participation in the taking of evidence, Hasenböhler, Das Beweisrecht der ZPO, Allgemeine Bestimmungen, Mitwirkungspflichten und Verweigerungsrechte, Band I, 2016, n 4.145 et seq.}
\]

\[\text{25} \quad \text{Articles 163 para. 1.b and 166 para. 1.b of the Swiss Civil Procedure Code.}
\]

\[\text{26} \quad \text{Articles 163 para. 1.b and 166 para. 1.b of the Swiss Civil Procedure Code.}
\]

\[\text{27} \quad \text{Article 162 of the Swiss Civil Procedure Code; see also, Hasenböhler, Das Beweisrecht der ZPO, Allgemeine Bestimmungen, Mitwirkungspflichten und Verweigerungsrechte, Band I, 2016, n 4.196.}
\]

\[\text{28} \quad \text{Chapter 12 (Articles 176-194) of the Swiss Federal Act on Private International Law.}
\]

\[\text{29} \quad \text{Hochstrasser | Fuch, Basler Kommentar IPRG, 3, Aufl. 2013, Introduction to Chapter 12, n 190.}
\]

\[\text{30} \quad \text{Article 182 para. 3 Swiss Federal Act on Private International Law.}
\]
arbitration rules. Absent party agreement, it is for the tribunal to determine the procedure to the extent necessary.\textsuperscript{31}

13 In line with this liberal approach, the provision on the taking of evidence in the PILA states only that the tribunal itself shall take the evidence, and that the assistance of the court at the seat of arbitration may be requested by the arbitral tribunal or a party (with the consent of the arbitral tribunal) where such assistance is needed.\textsuperscript{32} There is no provision in the PILA dealing with evidentiary privileges and there is no uniform practice of arbitral tribunals seated in Switzerland in handling evidentiary privileges and document production.\textsuperscript{33}

14 If parties and/or counsel from jurisdictions with different concepts of attorney secrecy or attorney-client privilege are involved in the same proceedings, counsel will usually argue that the tribunal should apply the "most favored nation rule" and thus apply the law of the party which grants the most extensive protection to privileged information. In addition, if requested to produce documents which are protected by Swiss attorney secrecy, Swiss counsel may argue that their secrecy obligations pursuant to the FAA and potential sanctions under the Swiss Criminal Code require that they be exempted from such disclosure. Indeed, it has been suggested that foreign counsel participating in an arbitration in Switzerland might also be subject to criminal liability under the Swiss Criminal Code for disclosing materials subject to attorney secrecy protections.\textsuperscript{34}

15 The arbitral tribunal will typically weigh the interests that are involved, respect the parties' legitimate expectations and respect equality of arms when deciding whether or not to compel a party to disclose attorney-client communications or other materials covered by attorney secrecy or privilege.\textsuperscript{35}

III. Question III

Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

\textsuperscript{31} Article 162 paras. 1 and 2 Swiss Federal Act on Private International Law.
\textsuperscript{32} Article 184 Swiss Federal Act on Private International Law.
\textsuperscript{33} Meyer-Hauser, Anwaltsgeheimnis und Schiedsgericht, 2004, n 181.
\textsuperscript{34} Oberholzer, Basler Kommentar Strafgesetzbuch II, 3\textsuperscript{rd} edn. 2013, art. 321 n 6; Frischknecht | Schmidt, Privilege and Confidentiality In Third Party Funder Due Diligence: The Positions in the United States and Switzerland and the Resulting Expectations Gap in International Arbitration, in: (2011) 8 Transnational Dispute Management, Issue 4, p. 1 et seqq., p. 19.
16 In Switzerland, there is no doctrine of waiver of attorney secrecy. Even voluntary disclosure of a document covered by attorney secrecy to a third party does not lead to an abrogation or forfeiture of secrecy as to other documents or information. A client may directly disclose secret information to a third party or authorize its attorney to do so but such authorization can be revoked at any time.

17 The non-waivability of attorney secrecy must also be deemed to apply to arbitrations seated in Switzerland, at least as to Swiss parties and counsel. To hold otherwise would subject Swiss parties and counsel to sanctions (waiver of attorney secrecy and forced disclosure) which are fundamentally inconsistent with their expectations at the time of the sharing of the information with the attorney and/or at the time that such information is selectively disclosed. Application of a doctrine of all-or-nothing waiver would also require Swiss counsel to violate attorney secrecy obligations imposed by Swiss law.

IV. Question IV

*Please identify the circumstances in which disclosure of an otherwise protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with Insurers.*

18 Third party funding of state court litigation is becoming more common in Switzerland. There is no Swiss legislation concerning third party funders but such funding has been held to be legal by the Swiss Federal Supreme Court (Switzerland’s highest court). The Supreme Court has also held that concerns regarding attorney secrecy do not justify prohibition of third party funding agreements because a client may authorize his attorney to share information with a funder that is protected by attorney secrecy.

19 In Swiss state court litigation, there is essentially no conceivable situation in which a party could properly request that the other party disclose whether it is funded by a third party, because the right to file a request to obtain information is legally restricted to very limited cases, most importantly to the ones where a party has a contractual or substantive right to information

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35 See with respect to Insurers and third party funders: Decision of the Swiss Federal Supreme Court (BGE) BGE 131 I 223, cons. 4.5.6.; Fellmann, Anwaltsrecht, 2010, note 607.

37 Decision of the Swiss Federal Supreme Court (BGE) BGE 131 I 223, cons. 4.5.6.


40 Decision of the Swiss Federal Supreme Court (BGE) BGE 131 I 223 as well as Decision of the Swiss Federal Supreme Court No. 2C_814/2014 of January 22, 2016.

41 Decision of the Swiss Federal Supreme Court (BGE) BGE 131 I 223, cons. 4.5.6.
(supra, paras. 1-2). However, if a party seeks to obtain or is receiving state-financed legal aid (unentgeltliche Rechtspflege), such party has a duty to disclose to the court any third party funding arrangement which could make the party ineligible to receive legal aid.42

Third party funders are not bound by attorney secrecy provisions in the FAA.43 However, because there is no doctrine of waiver and because attorney secrecy is not lost when information is disclosed to a third party (supra, para. 16), sharing information with a third party funder does not raise any concerns regarding loss of attorney secrecy from a Swiss law perspective. The Swiss Federal Supreme Court has affirmed this with respect to sharing information with liability insurers.44

A third party funder could be ordered to participate in state court proceedings (either by giving testimony or producing documents) based on the respective provisions of the Swiss Code of Civil Procedure (supra, para. 11). It has been suggested that documents entrusted to a third party funder are not subject to the same protection as they would have if in the possession of an attorney.45 However, a third party has a right to refuse to participate in the taking of evidence if (i) the third party is the confidant of other legally protected secrets and (ii) shows credibly that the interest in keeping the secret outweighs the interest in establishing the truth.46 Swiss legal doctrine affirms that secrets protected by civil law such as the fiduciary duty of an agent under a mandate agreement may fall under this exception.47 By analogy, a third party funder could resist an order to participate in the taking of evidence based on the party's interest in keeping secret the information shared with the funder. It should be noted, however, that the interest in keeping information secret is usually not established unless there has been an effort to obtain a waiver of secrecy.48

In addition, if a third party funder were ordered to provide documents, the court may take the necessary measures to safeguard business secrets that might be found within the documents such as redaction of parts of the document.49

For the reasons set out above, information covered by attorney secrecy should not be ordered to be disclosed or produced in arbitrations in Switzerland even if it is disclosed to a third party funder. However, as arbitral tribunals have considerable discretion with respect to the conduct of the proceedings and as document production in arbitrations sometimes proceeds in

42 Bühlcr, Berner Kommentar ZPO, Band I: Art. 1-149 ZPO, 2012, Vorbem. art. 117-223 n 63; Schumacher, Prozessfinanzierung. Erfolgshonorierter Fremdfinanzierung von Zivilverfahren, Diss. Zürich 2016, n 86 and 110 (with reference to a Decision of the Zurich High Court, LA110040 of April 8, 2014, cons. 8:3; “obligation of plaintiff and attorney, respectively, to immediately inform the court of third party funding”); Rüegg, Basler Kommentar ZPO, 2nd edn. 2013, article 117 n 17.
43 Nater | Zindel, Kommentar zum Anwaltsgesetz, Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (Anwaltsgesetz, BGFA), 2nd edn. 2011, article 13 n 26 a contrario.
44 Decision of the Swiss Federal Supreme Court (BGE) BGE 131 I 223, cons. 4.5.6.
46 Article 166 para. 2 Swiss Civil Procedure Code.
47 Schmid, Basler Kommentar ZPO, 2nd edn. 2013, art. 166 n 18 with reference to art. 153 n 8d.
48 Schmid, Basler Kommentar ZPO, 2nd edn. 2013, art. 166 n 8e.
49 Article 166 Swiss Civil Procedure Code.
unexpected ways, some precautions should be taken when disclosing information to a third party funder. Indeed, for both civil court cases and arbitrations, it is prudent to advise a client of potential risks associated with sharing information covered by attorney secrecy with a third party funder and to obtain written authorization from the client prior to making such disclosures. It is also advisable to conclude a non-disclosure agreement with the third party funder.  

ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration
Country Report for Turkey

Utku Coşar

Questions for National Reports

1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

Under Turkish civil procedure, in principle, the parties are not obliged to submit information or documents regarding the subject matter of the case to the opposing parties or to the court. However, according to Code of Civil Procedure (CCP) article 219, they are required to submit all documents in possession if that party or the other party to the case relies on such documents as evidence.1 Similarly, in commercial disputes the court, on its own or upon a request by one of the parties, may request from the parties to submit their commercial books (CCP article 222/1). In cases where the documents relied on are in the possession of third parties, the party relying on such documents may request the submission of such from the court. If the court decides that the requested documents are necessary for resolving the case, it may order the third party to submit them (CCP article 221).2

The notion of privilege is not specifically and separately regulated in Turkish Law. However, Turkish Law provides rights to particular persons to refrain from doing certain things, or to prevent certain investigatory or judicial rights. These rights constitute the privilege enjoyed by such persons in investigations or proceedings, and confer on them the possibility of avoiding participation in the collection of case materials without any adverse implications being drawn.

Specifically, in the Turkish legal system, privilege is available by legislation to persons of a certain status, such as persons of certain professions3 or persons who have a certain kinship to the persons involved in the proceedings (CCP articles 248-250).4 In other words, privilege is

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1 Please also see Answer to the Question 3 below.
2 On the other hand, article 221/3 of the CCP provides that those persons who are entitled to refuse to testify are also permitted not to submit the requested documents. For the persons who are entitled to refuse to testify, please see infra n4. Moreover, according to article 221/3 of the CCP, the provisions applicable to witnesses shall also be applied to the persons who are obliged to submit documents or who have to testify on such.
3 Those who obtain secret information in relation to a person in the course of their public service or profession may refrain from testifying. Besides attorneys, notaries (Public Notary Code, article 54), health-sector workers such as doctors and nurses (Patient Rights Regulation, article 21, 23), and financial consultants (Code on Accountants, Accountant Financial Consultants and Sworn Financial Consultants, article 43) also have a right to refrain from testifying in relation to information they possess regarding the persons they serve (article 46 of the Criminal Procedure Code).
4 According to article 248 of the CCP, the following persons may refrain from testifying: i) the fiancé of one of the parties; ii) the spouse of one of the parties, even if the marriage was ended; iii) the persons or their spouses who have kinship to one of the parties; iv) persons who have connection with one of the parties through adoption; v) blood relatives or persons with an affinity relationship by marriage, even if the marriage
not assigned to certain relationships but to the persons with the required status. Such persons automatically enjoy privilege by virtue of the legislation. For example, being a lawyer is sufficient to enjoy the privileges available to attorneys.

In order to fulfill their duties and protect the rights and interests of their clients, lawyers enjoy various privileges. One of them is the duty of confidentiality provided in Article 36 of the Turkish Attorneyship Law (TAL).

According to Article 36 of TAL:

“Attorneys are prohibited from disclosing information that has been entrusted to them or that they come upon in the course of performing their duties both as an attorney and as members of the Union of Bar Associations of Turkey and various bodies of bar associations.

Attorneys’ testification on matters mentioned in the first paragraph is contingent upon their having received the client’s consent. However, even with this condition satisfied, the attorney may refrain from testification. Exercising the right to refrain will not entail legal and criminal responsibility.”

According to this, without the consent of their clients, lawyers cannot testify regarding the information they received during the course of their attorneyship duties. Moreover, even if clients give consent to the production, lawyers are still entitled to refuse to testify on the information they come upon in the course of performing their duties. Besides the TAL, article 249 of the CCP and article 46 of the Criminal Procedure Code also entitle attorneys to refrain from testifying.5

An attorney’s duty of confidentiality is based on the trust relationship between the client and the attorney.6 The Turkish Court of Appeals also confirmed that article 36 of the TAL is provided to ensure that the client should be able to trust his/her lawyer and be certain that his/her secrets shall be kept confidential since the foundation of the contractual relationship between lawyer and client is based on the principles of trust and loyalty.7

establishing the relationship is ended, including third degree; vi) foster parents, their children and the children who are taken into protection.

CCP article 249 provides that persons who have had their testimony applied for regarding information that should be kept confidential according to the law may refrain from testifying. On the other hand, it is also provided that without prejudice to article 36 of the Attorneyship Law, those persons cannot refrain from testifying if the owner of the information gives his/her consent.

Moreover, article 250 of the CCP provides that a person may also refrain from testifying in the following situations due to the danger of an interest violation: i) if the testimony of the witness would directly cause harm to himself/herself or to the persons listed in article 248; ii) if the testimony of the witness would injure the reputation or would cause criminal investigation or prosecution against himself/herself or to the persons listed in article 248; iii) if the testimony of the witness would reveal secrets regarding his/her occupation.

For example, CCP article 249 provides that, without prejudice to article 36 of the TAL, the persons who may refrain from testifying on the information which should be kept confidential according to the law cannot refrain from testifying if the owner of the information gives his/her consent (thus making the lawyer’s privilege provided in TAL article 36, an exception to the persons who cannot refrain from testifying even if the owner of the information gives his/her consent).

The duty of confidentiality not only grants the lawyer the right to refrain from testifying, but it also grants them the right to keep the documents and files confidential. Accordingly, documents created or obtained by lawyers in the performance of their duties are protected by privilege. This privilege ensures that lawyers do not have to disclose documents that are in their possession and that they can protect such documents from interference by others.

With respect to the protection of documents, lawyers enjoy two significant privileges under the Turkish Criminal Procedure Law (CPL): (a) letters and documents between suspects or accused and their attorneys cannot be confiscated; (b) attorneys cannot be subject to body searches or to searches of their offices or dwellings.

As stated above, privilege is only available to persons of a certain status under the Turkish civil procedure. In other words, privilege is not assigned to certain relationships but to the persons with the required status. In parallel with this, privilege does not apply to attorney-client relationships, but to the attorney himself. As a consequence, the assertion of legal privilege based on the attorney-client relationship is only provided to the lawyer and not the client. Therefore, it can only be asserted by the lawyer.

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

Arbitrations seated in Turkey are either subject to Section 11 of the Code of Civil Procedure (CCP) (applicable to domestic arbitration) or to the International Arbitration Law (IAL) (applicable to arbitrations that are seated in Turkey and containing a foreign element). Both Section 11 of the CCP and the IAL are silent on privilege issues between the attorney and the client.

According to both of these laws, the parties may agree on the procedural rules applicable to the arbitration without prejudice to the mandatory rules. In the absence of such, the arbitral tribunal shall conduct the arbitration in accordance with Section 11 of the CCP (for domestic arbitration) and the IAL (for international arbitration) (CCP art. 424; IAL art. 8/A).

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8 According to article 221/3 of the CCP, those persons who are entitled to refuse to testify are also permitted not to submit the requested documents. According to this provision, the provisions applicable to witnesses shall also be applied to the persons who are obliged to submit documents or who have to testify on such (CCP 221/3).

9 According to Article 154 of the CPL, the correspondence between the suspect or the accused and their lawyers cannot be subject to scrutiny. Moreover, according to Article 126 of the CPL, the letters and documents between the suspect or the accused and their lawyers which are within the possession of the lawyers cannot be confiscated.

10 Article 130 of the CPL also provides that the offices of lawyers may only be searched with a court decision and only in relation to the incident that is addressed in such decision under the supervision of the Public Prosecutor with the presence of the president of the bar association or a lawyer representing him/her. Article 130 of the CPL continues to state in respect of the items to be seized that if the lawyer whose office is searched or the president of the bar association or the lawyer representing him/her objects to the seizure stating that those are related to the professional relationship between the lawyer and the client, then those items shall be put in a separate envelope or a package and sealed by the present individuals. The decisions on the seizure of such items are given within twenty-four hours by a judge or a court depending on the stage of the criminal proceedings. If it is decided that the seized items are in fact in relation to the professional relationship between the lawyer and the client, the items are immediately returned to the lawyer and the records of the seizure are disposed of.
Since the parties have the freedom to determine the procedural rules applicable to the arbitration, they may agree on the procedure to be followed (directly or by reference to arbitration rules) in the taking of evidence, including whether there will be a document production procedure and the implementation of such.

Although there is no established consensus under Turkish Law nor any established case law on the law applicable to privilege claims in arbitration, in cases where each party to the arbitration requests the production of the communications between attorney and client, and if an inequality occurs to the application of different laws (such as the law applicable to the privilege claim of one of the parties provides a wider scope of privilege to that party than the opposite), there is discussion that the law which provides the wider scope of privilege to the communication should be applied.\footnote{Cemile Demir Gökayyla, Milletlerarası Tahkimde Belge İbrazi (Document Production in International Arbitration), Vodat Kitapçılık, 2014, pp. 148-150, 154, 165. See pp. 144 \textit{et seq} for the discussion of other approaches.}

As stated above, both CCP (domestic Arbitration Section) and the IAL are silent on the privilege issues between the attorney and the client. Nevertheless, in both domestic and international arbitrations, if the arbitral tribunal seeks the assistance of the Turkish courts for the collection of evidence (article 432 of the CCP and article 12/B of the IAL), the privilege rules explained in Question 1 above continue to apply.

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

As explained under question 1 above, lawyers may testify and produce otherwise privileged documents if their clients give their consent (TAL, article 36/2).\footnote{On the other hand, lawyers may choose to refrain from testifying even if the client consents.} In such case it is considered that the right of asserting privilege over the confidential information is waived.

According to legal writings, if a person (who has the right to refuse to testify) decides to give a testimony, he/she is obliged to reveal everything he/she knows.\footnote{\textquoteleft\textquoteleft The right to refuse to testify may be exercised for all of the events and the facts that are subject to dispute. It may not be exercised in such a way where certain parts of the other obligations arising from testifying are performed and certain parts are not. In other words, since the right to refuse to testify cannot be exercised by dividing it, it does not give the right to the witness to answer the questions he/she chooses and make statements regarding the issues he/she chooses. This is because the right cannot be used partially; the witness may either exercise the right to refuse to testify and does not make a statement or if he/she does not exercise such right and make a statement, he/she is obliged to reveal everything he/she knows.	extquoteright\textquoteright (Mesut Ertanhan, Witness and Testifying under Civil Procedure Law, "Modeni Yargılama Hukukunda Tanık ve Tanıklık", 2005, Şekilin, Ankara, 2005, p. 126).} Therefore, the privilege over communication between the client and the attorney (which would otherwise be protected from disclosure) is considered lost in case the lawyer testifies with the consent of the client.

In relation to the disclosure to a third party of a communication that would ordinarily have been protected from disclosure based on attorney-client privilege, as explained under question

\textit{\textsuperscript{11}} Cemile Demir Gökayyla, Milletlerarası Tahkimde Belge İbrazi (Document Production in International Arbitration), Vodat Kitapçılık, 2014, pp. 148-150, 154, 165. See pp. 144 \textit{et seq} for the discussion of other approaches.

\textit{\textsuperscript{12}} On the other hand, lawyers may choose to refrain from testifying even if the client consents.

\textit{\textsuperscript{13}} \textquoteleft\textquoteleft\textquoteleft The right to refuse to testify may be exercised for all of the events and the facts that are subject to dispute. It may not be exercised in such a way where certain parts of the other obligations arising from testifying are performed and certain parts are not. In other words, since the right to refuse to testify cannot be exercised by dividing it, it does not give the right to the witness to answer the questions he/she chooses and make statements regarding the issues he/she chooses. This is because the right cannot be used partially; the witness may either exercise the right to refuse to testify and does not make a statement or if he/she does not exercise such right and make a statement, he/she is obliged to reveal everything he/she knows." (Mesut Ertanhan, Witness and Testifying under Civil Procedure Law, "Modeni Yargılama Hukukunda Tanık ve Tanıklık", 2005, Şekilin, Ankara, 2005, p. 126).
1 above, lawyers have the duty of confidentiality, and the assertion of legal privilege based on the attorney-client relationship is only provided to the lawyer and not the client.

In situations in which the communication of the attorney and client is disclosed to third parties, the disclosed third party (who is not entitled to refrain from testifying) is not entitled to refrain from submitting the requested documents. This is because, as stated in Question 1 above, in the Turkish legal system, the right to assert privilege is only available to persons of a certain status, such as persons of certain professions or persons who have a certain kinship to the persons involved in the proceedings (CCP articles 248-250).\(^\text{14}\)

Therefore, if such third party is ordered to submit the said attorney-client correspondence to the court,\(^\text{15}\) and if such third party does not fall within the scope of the provisions of the CCP stated above (articles 248, 249 and 250 of the CCP)\(^\text{16}\), it would be under the obligation to submit the requested correspondence.

4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

Turkish Law does not provide any specific regulations regarding how privilege applies to third-party funders.

As explained in question 3 above, in case the otherwise-protected communication is disclosed to a third party, such third party (who does not fall within the scope of articles 248, 249 and 250 of the CCP) is not entitled to get the benefit of this privilege and cannot refrain from disclosing or submitting the requested documents if ordered by the court under article 221/1 of the CCP.

\(^{14}\) See supra n3 and n4.

\(^{15}\) Under the IAL and the CCP, the arbitration agreement is not binding on the non-signatories, and therefore the arbitral tribunals do not have jurisdiction over the third parties to produce documents. However, according to article 432 of the CCP and article 12/B of the IAL, the tribunal may request the assistance of the courts for the collection of evidence.

\(^{16}\) See supra n3 and n4
ICCA-QMUL TPF TASKFORCE
INTERNAL WORKING DRAFT SEPTEMBER 2017: PLEASE DO NOT CITE

QUESTIONNAIRE FOR COUNTRY REPORTS

ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration

1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

*Communications between the lawyer and the client are protected by advocate secrecy. According to part 1 of article 22 of the Law of Ukraine “On The Bar and Advocates’ Practice” (hereinafter – the Advocate Law), an advocate secret is any information which became known to an advocate, assistant advocate, intern advocate or an employee of an advocate in relation to a client or issues on which a client (or a person with whom an advocate refused to conclude an agreement on legal assistance on grounds foreseen by the Law) approached an advocate, the content of advice, consultations, clarifications of an advocate, documents compiled by him, information on electronic carriers, other documents and information received by the advocate during the conduct of advocate’s practice.*

*The advocate is under an obligation to maintain advocate secrecy. This obligation extends to an assistant advocate, intern advocate, employee of an advocate or a person who has lost the right to conduct advocate’s practice. An advocate or an advocate bureau has to ensure conditions under which unauthorized persons cannot obtain access to secret information and such information cannot be disclosed.*

*The benefit of advocate secrecy may be claimed by the client or the advocate. It should be noted that the benefit may be claimed by an advocate qualified in Ukraine and conducting his or her activity under the Law “On The Bar and Advocates’ Practice” or a foreign advocate registered with the Qualification and Disciplinary Committee of the Bar. It cannot be claimed by other legal professionals representing a party in court who are not members of the Bar, or by persons qualified as an advocate but not acting in that capacity.*

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

*In relation to advocates qualified in Ukraine under the Advocate Law or foreign advocates registered with the Qualification and Disciplinary Committee of the Bar, the same provisions on advocate secrecy apply as in relation to national court proceedings (please see above).*

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible
effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

The Advocate Law provides for two instances where the benefit of privilege (secrecy) may be lost. According to part 2 of article 22 of the Advocate Law, information or documents may lose the status of an advocate secret pursuant to a written application from a client. In addition, pursuant to part 4 of that article, if a client makes a claim against an advocate in connection with the advocate’s activity, such an advocate is absolved of his obligations of maintaining advocate secrecy insofar as necessary for the defence of his rights and interests.

The effects of disclosure to a third party of information subject to advocate secrecy depend on the circumstances of the disclosure. Unless there is written agreement of the client to lift the status of advocate secrecy as provided by article 22 of the Law, such information will not be regarded as admissible evidence in court proceedings despite having been disclosed to a third party.

Ukrainian law is rather express in requiring written consent of the client for information normally subject to advocate secrecy to be admissible in court proceedings. For instance, article 23 of the Advocate Law provides that an advocate (or other persons to whom advocate secrecy applies) cannot be required to disclose information subject to secrecy and cannot be questioned as witnesses on such information, except for cases where the person that confided in them has absolved them from the obligation to keep the information secret in the manner foreseen by the Advocate Law.

Similarly, the Criminal Procedural Code provides that an advocate cannot be questioned as a witness as to information subject to advocate secrecy, and can be absolved from the obligation to keep such information secret by the person who has confided in them in writing and to the extent determined by such a person (article 65).

Currently, based on public sources we are not aware of any instances where the benefit of secrecy was lost by implication or as a result of disclosure to a third party.

4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

As mentioned above, communication between a client and an attorney will cease to be subject to advocate secrecy upon a written application from the client. We are not aware of any instances where disclosure to a third party such as a funder or an insurer resulted in loss of privilege.
5. What law applies to privilege in litigation in your jurisdiction / in arbitration with its seat in your jurisdiction? (You will note that this is a modified version of the first question you answered for us; we thought this may provide slightly more direction. If it does not change your response, please let us know.)

The issue of legal privilege (advocate secrecy) in Ukraine is regulated by the Law of Ukraine "On The Bar and Advocates' Practice".

6. Are documents held by the TPF protected i.e. the funder’s own evaluation of the case; separate legal opinions; negotiation of the funding agreement?

As mentioned above, information subject to advocate secrecy may only constitute admissible evidence in court if the client has consented to its disclosure. To our knowledge, the fact of disclosure to the TPF does not of itself waive this protection. Therefore, documents held by the TPF are also protected as long as they are subject to advocate secrecy.

7. In relation to documents transferred by the lawyer/party to the TPF, does the use of a confidentiality/non-disclosure/common interest agreement work to protect privilege/secrecy in your jurisdiction?

A confidentiality/non-disclosure agreement may impose obligations on the parties to that agreement not to disclose information to third parties. However, it does not protect privilege/secrecy in court proceedings, since a court may take a decision on the disclosure of such documents and their use as evidence.
ICCA/QM Third-Party Funding Task Force Attorney-Client Privilege Sub-Committee
Questions

1. Please describe, with brief reference to case law, legislation or legal writings, the
privileges or other rules (e.g. professional secret) on which a party or its counsel may
rely in order to resist disclosure in national court proceedings of communications
between the lawyer and the client (or between lawyers) that would otherwise have to
be disclosed. In each case, please identify who may claim the benefit of the privilege
or other rule (e.g., the client, the lawyer).

Disclosure is generally quite rare in national court litigation in the UAE, mainly
because there is no general duty or mechanism for disclosure of documents in place.
Only a few provisions in separate laws permit disclosure in specific circumstances.¹
To the extent that disclosure may be permissible, the UAE Federal Law No 23 of
1991 regarding the Regulation of the Legal Profession (the Legal Profession Law)
prohibits the disclosure by an attorney of information which he/she may have
obtained by reason of his/her profession. Specifically, Article 41 of the Legal
Profession Law provides that an attorney cannot give evidence in relation to any
matter which he becomes aware of “in the course of practicing his profession without
the consent of the person who has supplied the relevant information unless the client
intends to commit a crime”. In addition, Article 42 proscribes revealing confidential
information by an attorney unless its disclosure can prevent a crime.

As this prohibition is provided for by law, it is arguable that the benefit of the
privilege can be claimed by the attorney, the client or any interested party.

Although there is no law or set of rules on the treatment of privileged documents in
the DIFC, the Rules of the DIFC Courts provide that the Court may exclude
privileged documents from a document production order.² In view of the common
law background of DIFC law, it is expected that the DIFC Courts will rely or
otherwise be inspired by English law concepts of privilege. The ADGM Court allows
a party to withhold the disclosure of privileged documents.³

¹ Article 18 of Federal Law of Evidence No 10 of 1992 (the Law of Evidence) allows national courts to order
disclosure in domestic litigation, upon application of either party, in three cases: (i) if the law permits the
introduction of the requested document; (ii) if the requested document is common to the parties; or (iii) if
the requested document is relied upon by the requesting party’s counterparty at any stage during the
litigation. In the context of UAE-seated arbitrations, Article 209(2)(b) of the Federal Civil Procedure Code
No 11 of 1992 (CPC) enables national courts to order the disclosure of documents held by third parties,
on upon an application of a party to the arbitration, when such documents are considered necessary for
rendering the award.

² Rules of the DIFC Courts 2014, Rule 28.28(2).

³ ADGM Court Procedure Rules 2016, Rule 90.2-90.4.
2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

There are no specific rules that govern disclosure of attorney client communications in the course of UAE-seated arbitrations. Hence, tribunals seated in the UAE are expected to follow international guidelines on the taking of evidence in this regard. The *IBA Rules on the Taking of Evidence in International Arbitration* prescribe that the arbitral tribunal shall treat the opposing parties with equality and fairness in the taking of evidence and production of documents. Accordingly, arbitral tribunals typically apply the most-protective privilege rule; i.e. the tribunal imposes the most stringent privilege requirements on counsel for all parties to the arbitration. Therefore, resisting disclosure would be on the grounds provided for in the regime designated by the arbitral tribunal.

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

The obligation to refrain from disclosing attorney-client communications in the Legal Profession Law is placed on the attorney. While an attorney who breaches this duty may be subject to disciplinary action, it is unclear whether the benefit of the privilege is lost in those circumstances under UAE law. Absent a separate non-disclosure agreement, it is arguable that the third party who receives such information is not under an obligation to preserve its confidentiality.

The ADGM Court Procedure Rules provide wider protection to privileged documents. Rule 90.4 provides that a privileged document which is inadvertently disclosed to the opposing party cannot be used by the latter party without the Court’s permission. It can be inferred from this Rule that an intentional disclosure of a privileged document results in loss of the benefit of the privilege. Similarly, disclosing an otherwise privileged document in DIFC Court litigation is likely to result in loss of the privilege.

4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where

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4 *IBA Rules on the Taking of Evidence in International Arbitration* (2010), Article 9(2)(g).
there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

Aside from the DIFC and the ADGM, the concept of privilege is generally not recognised under UAE law beyond protecting the confidentiality of attorney-client communications. As a third party funder is neither deemed a client nor a lawyer under UAE law, disclosure of privileged documents to a third party funder in national court proceedings increases the chances of loss of any alleged privilege of the document in question.

UAE law is silent on the disclosure of information to third party funders in UAE-seated arbitrations. Accordingly, tribunals have the discretion to decide on whether such disclosure jeopardises the benefit of the privilege in accordance with applicable standards in international arbitration.

5. What law applies to privilege in litigation in your jurisdiction / in arbitration with its seat in your jurisdiction?

As explained under Question 1, given that disclosure is more of an exception rather than the norm, there is no formal framework that provides for the concept of privilege in the UAE beyond the protection of attorney-client communications.\(^5\)

In the DIFC and the ADGM, the Courts are expected to apply, respectively, DIFC law and English law concepts of privilege as part of the body of law applicable in those financial free zones.

6. Are documents held by the TPF protected i.e. the funder’s own evaluation of the case; separate legal opinions; negotiation of the funding agreement?

Documents in the possession of the TPF may enjoy a considerable degree of protection not by virtue of any concept of privilege, but owing to the TPF’s status as a ‘third party’ to the litigation or arbitration. However, in circumstances where a party to a UAE-seated arbitration is successful in obtaining an order from the curial court for disclosure of such documents, the TPF may be required to provide them.\(^6\) Further, the power of national courts to order disclosure in the course of litigation pursuant to Article 18 of the Law of Evidence is limited to the ‘litigating parties’. It is unlikely that a UAE court would treat a TPF as a party to a court litigation unless there were grounds for joinder of the TPF.

In exceptional circumstances, the DIFC and ADGM Courts may issue orders against third parties to produce documents if (i) disclosure of the requested documents will likely support the applicant’s case, or adversely affect the case of one of the other

\(^5\) Legal Profession Law, Articles 41-42.

\(^6\) The power to order disclosure of documents held by third parties in UAE-seated arbitrations is reserved to the national courts. Tribunals do not possess the same power. See CPC, Article 209(2)(b).
parties to the proceedings; and (ii) disclosure is necessary for the fair disposition of
the claim (and also for saving costs under the Rules of the DIFC Courts).
Except for privileged documents, other documents held by the TPF could possibly be subject to a
document production order if the court is satisfied that there are sufficient grounds for
doing so.

7. In relation to documents transferred by the lawyer/party to the TPF, does the use of a
confidentiality/non-disclosure/common interest agreement work to protect
privilege/secrecy in your jurisdiction?

These agreements may be effective in protecting the secrecy of documents as between
the contracting parties. It is unclear, however, that an agreement of that sort would be
a valid defence for a party thereto against a court order for disclosure of documents
covered by those agreements.

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To: Nikolaus Pilkowitz  
Innhwa Kwon  
GRAF & PITKOWITZ

Re: ABA SIL / ICCA-Queen Mary Task Force Joint Project

QUESTIONNAIRE FOR COUNTRY REPORTS
ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration

CALIFORNIA

1. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in national court proceedings of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

A party or its counsel may rely on the attorney-client privilege, the work product doctrine, or the ethical duty of confidentiality to resist disclosure in national courts proceedings of communications between the attorney and the client. While the attorney-client privilege and the work product doctrine apply "in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client," the ethical duty of confidentiality prevents an attorney from revealing her/his client's confidential information "even when not confronted with such compulsion."

Attorney-Client Privilege.

A party may invoke the "attorney-client privilege" to resist disclosure of "confidential communications" between the party and its attorney. The privilege attaches to communications made in confidence by the client where legal advice of any kind is sought from a professional legal advisor in her/his capacity as such. For the privilege to apply, the

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1 See California Rules of Civil Procedure ("CRPC") 3-100, cmt. 2 ("The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy.").

2 Id. at cmt. 3.

3 The attorney-client privilege is set out in Sections 950 through 962 of the California Evidence Code.

4 Cal. Evid. Code § 954. The party may also use the attorney-client privilege "to prevent another from disclosing" the confidential communication. Id.

communication must be made for the purpose of giving or receiving legal advice. The privilege applies to corporations as well as to individuals, and to in-house counsel and outside counsel. The client is the holder of the attorney-client privilege. The public policy behind the attorney-client privilege is to promote full and open discussion between clients and their attorneys.

Only "confidential communication[s]" are protected by the attorney-client privilege. A "confidential communication" is "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

The test in California as to whether a communication is "confidential" for purposes of the attorney-client privilege is not content-based; rather, it depends on whether the communication arises in the course of representation in which the client has sought legal advice. As such, the privilege does not attach when the attorney is engaged in non-legal work such as rendering business or technical advice. In cases where the attorney has mixed business and legal responsibilities, California courts look at what the dominant purpose of the client's retention of the attorney was.

Unlike under federal law, the attorney-client privilege is a legislative creation in California. The significance of this is that the courts of California have no power to expand on stated exceptions to the attorney-client privilege or to recognize implied exceptions to it. Therefore, the law regarding the applicability of the attorney-client privilege in California is stable.

Work Product Doctrine.

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9 See Mitchell v. Superior Court, 37 Cal. 3d 591, 599-600 (1984) ("[T]he fundamental purpose behind the [attorney-client] privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. In other words, the public policy fostered by the privilege seeks to ensure the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.").
11 Id.; see Costco Wholesale Corp. v. Superior Court, 47 Cal. 4th 725, 732 (2009) (holding that a communication from counsel to his client is covered in its entirety by the attorney-client privilege, regardless of whether the communication contains factual or legal information).
13 See, e.g., Costco Wholesale, 47 Cal. 4th at 735.
15 Id. (citing Wells Fargo Bank v. Superior Court, 22 Cal. 4th. 201, 206 (2000).
A party or its attorney may rely on the "work product doctrine" to resist disclosure of "[a]ny writing that reflect an attorney's impressions, conclusions, opinions, or legal research or theories."\textsuperscript{16} California's work product doctrine is more expansive than the work product doctrine under federal law in that it applies to any document prepared by an attorney in connection with her or his work as an attorney, regardless of whether litigation was contemplated,\textsuperscript{17} whereas the federal work product doctrine only covers materials "prepared in anticipation of litigation or for trial."\textsuperscript{18} Moreover, California's work product doctrine provides absolute protection to qualifying documents, whereas under the federal work product doctrine, work product materials may be discoverable in federal courts upon a showing of substantial need where the party seeking discovery cannot obtain equivalent materials without undue hardship.\textsuperscript{19} Since the work product doctrine was created to protect attorneys and their interests, it is the attorney who is the holder of the protection under the doctrine under both federal and California law.\textsuperscript{20}

Duty of Confidentiality.

Finally, an attorney may assert the duty of confidentiality to her/his client as a standalone reason for resisting disclosure of communications between the attorney and the client.\textsuperscript{21} An attorney's obligation to maintain client confidences is governed by section 6068 of the California Business and Professions Code, which states that "[t]he duty of an attorney...[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."\textsuperscript{22} Although there is no precise definition of what constitutes a client's "confidence," ethics committee opinions by the California State Bar Association (which are non-binding, but provide useful guidance) have noted that attorney's ethical duty of confidentiality is broader than the attorney-client privilege and extends to cover all of the information gained within the scope of the professional relationship that the client has requested be kept secret, or the disclosure of which would likely be harmful or embarrassing to the client.\textsuperscript{23}

2. Please describe, with brief reference to case law, legislation or legal writings, the privileges or other rules (e.g. professional secret) on which a party or its counsel may rely in order to resist disclosure in arbitral proceedings (with their seat in your jurisdiction) of communications between the lawyer and the client (or between lawyers) that would otherwise have to be disclosed. In each case, please identify who may claim the benefit of the privilege or other rule (e.g., the client, the lawyer).

Broadly speaking, the same attorney-client privilege, work product privilege, and ethical standards of confidentiality described above would apply in an international arbitration seated in California. In practice, it is likely that a California-qualified attorney representing a client in a California-seated international arbitration would be able to resist disclosure by relying on California attorney-client and work product privileges. Most institutional arbitration

\textsuperscript{17} Ruman v. Bottomley, 143 Cal. App. 3d. 810, 815 (1983).
\textsuperscript{19} Id.
\textsuperscript{21} See California Rules of Professional Conduct (CRPC) 3-100(A).
\textsuperscript{22} Cal. Bus. & Prof. Code § 6068(e)(1).
rules are silent on the issue, and rules such as the IBA Rules on the Taking of Evidence in International Arbitration (2010)\textsuperscript{24} give wide discretion to the arbitral tribunal.

While there is no explicit statutory language stating that the attorney-client privilege and the work product doctrine apply to arbitrations in California, the California Evidence Code contains language implying that they do. Section 915(a) of the Code, which explicitly prohibits the disclosure of privilege information when an adversary challenges a claim of attorney-client privilege or the work product doctrine, states that a "presiding officer" cannot require disclosure of such privileged information. By contrast, Section 915(b) provides a procedure by which a "judge" can conduct an "in camera review" of documents claimed to be privileged under the work product doctrine.\textsuperscript{26} This distinction in the authority referred to in two consecutive parts of the same Section of the California Evidence Code has been viewed by some commentators as a reflection of the California Legislature's intent that the attorney-client privilege and the work product doctrine apply to arbitrations, but that the procedure of in camera review does not.\textsuperscript{28}

Similarly, although we were unable to identify any California case law explicitly confirming the application of the attorney-client privilege and work product doctrine to California-seated international arbitrations, a 1985 decision by the California Supreme Court strongly implies their application. In Moore v. Concliffe, the Court confirmed that the litigation privilege (which protects attorneys and parties in a lawsuit from defamation claims arising from statements made in the course of the suit) applies to arbitrations in California.\textsuperscript{27} In finding the privilege to apply in arbitrations, the Court reasoned that an arbitration proceeding "is designed to serve a function analogous to—and typically to eliminate the need to resort to—the court system."\textsuperscript{28} This rationale could logically extend to the application of other privileges in California-seated arbitrations.

3. Please describe the circumstances in which the benefit of the privilege or other rule may be lost in national court proceedings or arbitration. In particular, please describe the possible effect of disclosure to a third party of a communication that would ordinarily have been protected from disclosure to a court or arbitral tribunal by reason of the privileges or similar rules described in questions 1 and 2.

Under both U.S. federal law and California law, the benefit of the attorney-client privilege may be lost in court proceedings or in arbitration if the confidential communication is voluntarily disclosed to an unrelated third party.\textsuperscript{29} This is articulated in Section 952 of the California Evidence Code, which generally states that "confidential communications," i.e. communications protected by the attorney-client privilege, do not include those that the client knows are received by a third party, unless the third party (i) is present to further the client's interests, or (ii) is necessary to transmit the information or accomplish the purpose for which the lawyer is consulted.\textsuperscript{30} Confidential information may be disclosed to the third party, for example, if the third party is present during the communication or if the lawyer or client later discloses privileged information to a third party. The client's authorization regarding

\textsuperscript{24} See, e.g., Rule 9(2)(b).
\textsuperscript{25} Cal. Evid. Code § 915(b).
\textsuperscript{26} See, e.g., Freeman Freeman & Smiley, An Arbitrator's Powers Are Limited (June, 2006).
\textsuperscript{27} 7 Cal 4th 638 (1985).
\textsuperscript{28} Id. at 644 (citing Blanton v. Womancare, Inc., 38 Cal. 3d 396, 402 at *5 (1985)).
\textsuperscript{29} See Hernandez v. Tanninen, 804 F.3d 1095, 1100 (9th Cir. 2010).
disclosure to the third party does not prevent the loss of the attorney-client privilege, even though the client is holder of the privilege.

Work product protection may also be waived by disclosure to a third party by the attorney, or by the attorney's consent to disclosure to a third party. California courts are more lenient regarding waiver of work product privilege through disclosure to third parties than federal courts—the privilege is waived only if the information is disclosed to a third party who has "no interest" in maintaining the confidentiality of the information.\(^{31}\) The rationale offered by California courts is that disclosure to such a third party would be "wholly inconsistent with the purpose of the [work product] privilege," which is to safeguard the attorney's work product and trial preparation.\(^{32}\) California courts have also recognized that the work product privilege protects information against opposing parties, and not "against all others outside a particular confidential relationship, in order to encourage effective trial preparation."\(^{33}\) Overall, the work product privilege is less likely to be waived through disclosure to third parties than the attorney-client privilege.

4. Please identify the circumstances in which disclosure of an otherwise-protected communication to a third-party funder will result in loss of the benefit of the privilege or other rule, in national court proceedings or arbitration. Please identify any circumstances where the benefit of the privilege or other rule will continue to attach to the communication, notwithstanding the disclosure. Please make brief reference to case law, legislation or legal writings relevant to this question, if such exist. Where there is little or no authority on privilege and how it applies to third party funders, please look instead at situations analogous to the third party funder relationship e.g. with insurers.

The attorney-client privilege or the work product doctrine may continue to attach to communications between the attorney and the client, despite voluntary disclosure to a third party, if the "common interest doctrine" is found to apply. In order for this doctrine to apply, it must first be established that the exchanged communication or document was otherwise protected from disclosure under the attorney-client privilege or the work product doctrine.\(^{34}\) In addition, parties must have had in common an interest in "securing legal advice related to the same matter,"\(^{35}\) the parties who shared the protected communication or document must

\(^{31}\) See Contra Laguna Beach County Water Dist. v. Superior Court, 124 Cal. App. 4th 1453, 1459 (2004) (holding that "disclosure operates as a waiver only when otherwise protected information is divulged to a third party who has no interest in maintaining the confidentiality...of a significant part of the work product."); BP Alaska Exploration, Inc. v. Superior Court, 199 Cal. App. 3d 1240, 1251 (1988); see also Lohman v. Superior Court, 81 Cal. App. 3d 90, 101 (finding that work product protection is waived through the attorney's acts). There is no statutory provision governing waiver of work product protection.


\(^{33}\) BP Alaska, 199 Cal. App. 3d. at 1256.

\(^{34}\) See Oxy Resources Calif. LLC v. Superior Court (Capline Natural Gas LP), 115 Cal. App. 4th 874, 889, 890 (Cal. Ct. App. 2004) ("[A] party seeking to invoke the [common interest] doctrine must first establish that the communicated information would otherwise be protected from disclosure by a claim of privilege. For example, the content of the communications may comprise information shared in confidence by a client with his or her attorney, a legal opinion formed and advice given by the lawyer in the course of the attorney-client relationship, or a writing reflecting an attorney's impressions, conclusions, or theories.") (citing Cal. Evid. Code § 952; Code Civ. Proc., § 2018, subd. (c)).

\(^{35}\) Id. at 891 (quoting First Pacific Networks, Inc. v. Atlantic Mut. Ins. Co., 163 F.R.D. (N.D.Cal.1995)).
have had a "reasonable expectation" that it would be kept confidential; and sharing of the communication or document must have been "reasonably necessary" to advance the purpose for which the lawyer was consulted.

It is not necessary that the parties have a common interest on every single matter in the litigation or transaction—in fact, they may have adversarial interests on some issues and common ones on others. For example, in Oxy Resources California LLC v. Superior Court, the court, despite noting that the interests of two parties involved in a complex transaction were "adversarial, common, and at times, a blend of the two," held that the communications between the two parties could satisfy the requirements of the common interest doctrine. The relevant inquiry was not whether the parties had all interests in common between them, but whether "the withheld communications were on matters of common interest." The court used in camera review of the documents to determine whether the withheld communication involved matters of common interest.

Whether parties had a "reasonable expectation" that the communication or document would be kept confidential is a fact-specific inquiry. It may be shown, for instance, by the fact that the party disclosing the communication or document took steps to ensure that the information would remain confidential, such as instructing third parties to keep the information confidential. Even communications with a large group may be protected by the common interest doctrine if the attorney has taken adequate steps.

A review has found no case law discussing whether the sharing of privileged communication with a third party funder who is financing/investing in all or part of a party's claim or defense is considered "reasonably necessary" for advancing that party's interest. General examples of third parties on whom the common interest doctrine extends include "attorneys, [...] family members, business associates, or agents of the party or his attorneys on matters of joint

36 Id. at 891 ("[t] is essential that participants in an exchange have a reasonable expectation that information disclosed will remain confidential.").

37 See Cal. Evid. Code § 954 ("A disclosure in confidence of a communication that is protected by a privilege provided by Section 964 (lawyer-client privilege)...when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer...was consulted, is not a waiver of the privilege."); see also McKesson HBOC, Inc. v. Superior Court, 115 Cal. App. 4th 1229, 1237 (2004) (stating that Evidence Codes sections 912 and 952 together "permit sharing of privileged information when it furthers the attorney-client relationship; not simply when two or more parties might have an overlapping interest.").

39 115 Cal. App. 4th 874 (2004). In this case, Oxy Resources and another company called EOG entered into a complex transaction in which they agreed to exchange interests in oil and gas producing properties. The agreement included property subject to a preferential purchase right held by the third party, Calpine. Before finalizing their agreement, Oxy and Alpine executed a Joint Defense Agreement, anticipating that third parties (e.g., Calpine) might assert claims against which Oxy and EOG would have a common interest in defending. Calpine did sue Oxy and EOG, on the basis that it was denied right of first refusal.

39 Id. at 899 (noting that the trial court relied on general statements that all the withheld communications were on matters of common interest and were reasonably necessary to accomplish the purpose for which the lawyers were consulted).

40 Id. at 895 ("An in camera review of the documents would permit the court to determine whether the disclosures were reasonably necessary to accomplish the lawyer's role in the consultation.").

41 See Seahaus La Jolla Owners Ass'n v. Superior Court, 224 Cal. App. 4th 754, 774 (2014) (holding that communications by counsel to members of homeowner's association were protected by common interest).

42 Id.
concern." \(^{43}\) However, "involvement of an unnecessary third person in attorney-client communications destroys confidentiality." \(^{44}\) Again, whether the involvement of a third party was necessary or unnecessary is a fact-specific inquiry.

For example, in *Insurance Co. of North America v. Superior Court*, the California Court of Appeals held that the presence of two so-called "outsiders" in a meeting between a party ("the party") which was a wholly-owned subsidiary of a larger corporation ("the parent company") and it's counsel did not destroy privilege. \(^{45}\) Of the two outsiders, the first was the vice president of the parent company, attending in his capacity as legal officer of the parent company, and the second was the president of a different wholly-owned subsidiary of the parent company, attending in his capacity as a member of a committee created by the parent company to supervise certain policies of its operating subsidiaries. \(^{46}\) The relevant inquiry was whether the presence of these two individuals in the meeting between the party and its counsel was reasonably necessary "to accomplish the purpose for which counsel had been consulted." \(^{47}\)

In finding that it was, the Court took into account the individuals' job titles, job duties, and the likely impact of their advice on the party. \(^{48}\) With respect to the first individual, the Court noted that as "a staff officer of a higher headquarters whose advice is persuasive but not compulsory on a lower-echelon operating entity," he was present in the meeting in the capacity of legal consultant and adviser to the party. \(^{49}\) With respect to the second individual, the Court found that he was present in the meeting as a temporary employee and consultant present to advise the party whether it should modify its reserve policies by reason of counsel's representation. \(^{50}\) Based on this analysis, the Court concluded that the presence of the two individuals was reasonably necessary for advancing the party's interest, and that it did not waive the privilege. \(^{51}\) In the second part of the opinion, the Court went on to articulate a general rule that "an officer or employee of a holding or affiliated company can receive legal advice from counsel employed by a wholly owned subsidiary or affiliate without destroying the communication." \(^{52}\)

By contrast, the presence of a court bailiff in a consultation during which a criminal defendant makes a statement to his attorney has been held to be unnecessary, thereby destroying privilege. \(^{53}\)

It may also be relevant to note that unlike federal courts which recognize a "common interest privilege" that extends the attorney-client privilege to disclosures made in the presence of

\(^{43}\) *Oxy Resources*, at 890.

\(^{44}\) *Id.*

\(^{45}\) 108 Cal. App. 3d. 758 (1980).

\(^{46}\) *Id.* at 762.

\(^{47}\) *Id.*

\(^{48}\) *Id.* at 762-765.

\(^{49}\) *Id.* at 764.

\(^{50}\) *Id.* at 764-765.

\(^{51}\) *Id.* at 765.

\(^{52}\) *Id.* at 771.

\(^{53}\) *People v. Castiel*, 153 Cal. App. 2d 663, 669 (1957); *see also D.L. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 735 (1964) (stating that "when the client communicates with his attorney in the presence of other persons who have no interest in the matter...he is held to have waived the privilege.").
two or more clients who share a common interest in a legal matter, California courts have not created a distinct privilege. Instead, California has developed the common interest doctrine as an exception to the general rule that a privilege is waived upon voluntary disclosure to a third party. The practical consequence of this distinction is that California courts may compel production of documents asserted to be protected solely by the "common interest privilege." Therefore, parties should ensure that a privilege log does not identify documents as protected only by the "common interest privilege" but specifically cites the applicable underlying attorney-client privilege or work product doctrine.

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54 This is because in California, unlike under federal law, privileges are creatures of statute. Courts in California have no power to create new privileges, and the California Evidence Code does not include a joint defense privilege for separately represented parties. To provide some protection, California courts have recognized that they can shelter shared communications under California Evidence Code section 912 which states that a disclosure does not waive privilege if such disclosure is (a) confidential and (b) reasonably necessary for the accomplishment of the purpose for which a lawyer was consulted.

55 Oxy Resources, at 890 (stating that the common interest doctrine is a "non-waiver doctrine," analyzed under standard waiver principles applicable to attorney-client privilege and work product protection); see also Meza v. H. Muehstein & Co., 176 Cal. App. 4th 909, 973 (Cal. Ct. App. 2009) (stating that California recognizes the "common interest doctrine").