
Legal Professional Privilege In Arbitration: Momentum From The European Court Of Justice

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International arbitration proceedings often bring together parties and counsel from different jurisdictions, each with differing expectations and approaches to core procedural issues. One issue that illustrates the tension between different jurisdictions and different legal traditions particularly well is that of legal professional privilege. While common law systems generally afford stronger protections of legal privilege, the concept is limited to non-existent in civil law countries.

The issue once again garnered significant attention earlier this year, when the IBA Arbitration Committee's Task Force on Privilege in International Arbitration issued its report highlighting the complexities and challenges faced by arbitral tribunals in dealing with issues of privilege. Among its conclusions, the task force found that developing uniform guidelines on "legal advice privilege"—i.e., confidential communications between a client and their legal advisor for the purpose of seeking, obtaining or providing legal advice—is both possible and desirable. But to date, no such uniform guidelines or rules exist. While there are attempts at creating uniform procedural frameworks that recognise the protection of legal advice privilege, such as the ELI/UNIDROIT Model European Rules of Civil Procedure 2021 (the "**ELI/UNIDROIT** Rules") discussed below, they do not yet establish a common definition of what legal advice privilege entails.

As discussions about legal professional privilege and the need for uniform guidelines continue to evolve within the arbitration community, recent developments in European Union law have added a new dimension to the debate. In particular, two landmark rulings by the European Court of Justice (the "**ECJ**"), have introduced new momentum towards harmonizing the divergent approaches to privilege. These rulings, which expand the scope of legal professional privilege under the Charter of Fundamental Rights of the European Union (the "**Charter**"), may shape parties' expectations throughout EU jurisdictions and may thereby assimilate diverging approaches in civil and common law jurisdictions. That in turn will have a significant impact on any effort to compile uniform guidelines or rules on legal privilege.

I. HOW DOES THE ISSUE OF LEGAL PROFESSIONAL PRIVILEGE ARISE IN ARBITRATION?

Arbitral tribunals have wide discretion in choosing the applicable procedural rules (see, for example, Art. 25(1) of the ICC Rules, which allow the tribunal to establish the facts of the case by "*all*

appropriate means").

Absent an express choice by the parties, this wide discretion also applies to the rules governing legal professional privilege. The tribunal can choose from a variety of options: It can apply the law of the seat of the arbitration or the law governing the substance of the dispute. It can also apply to both parties the “most protective privilege” rules that would be available to any party under national law. Another predominant approach is the “connecting factor” test, which seeks to determine what jurisdiction the privileged situation or document has the closest connection to.

The approach that perhaps mirrors parties’ expectations most accurately is to apply the law of the jurisdiction in which the lawyer involved in the communications is qualified to practice. Gary Born, for example, suggests that this is generally the better choice-of-law solution from the perspective of predictability and conforming to the parties’ expectations (Born, *International Commercial Arbitration*, 3rd ed., §16.02 [E][8][e]). This is because the justification for legal privilege is rooted in the national laws of the jurisdiction where the lawyer is barred. A one-size-fits-all analysis “ignore[s] the legal basis and justifications for privilege” (Born, §16.02 [E][8][f]).

However, while this approach is the logical starting point of the analysis, a significant “side effect” of this method is a potential unlevel playing field between parties. Communication between one party and its lawyer from one jurisdiction might be considered privileged, while the same type of communication of the other party, with a lawyer from another jurisdiction, might not be privileged and subject to disclosure.

In this context, understanding the systemic distinctions between common and civil law approaches to privilege is key. The distinct features of these different approaches to privilege are deeply embedded in the relevant procedural laws of common and civil law jurisdictions:

Common law jurisdictions typically afford strong protection to legal privilege. Here, civil proceedings usually entail extensive document production, and in consequence, such jurisdictions have developed an intricate system of protections against overreach in production. Therefore, in common law jurisdictions, legal privilege rules commonly function as a shield against the other litigant. English law, for example, recognizes two types of legal professional privileges: “legal advice privilege” (which protects communications between lawyer and client that were made to obtain legal advice) and “litigation privilege” (which covers communications related to pending or commenced litigation between lawyer, client and third parties).

The typical civil law regime, on the other hand, has very limited disclosure procedures in litigation and, consequently, has never had the need to develop an extensive concept of legal professional privilege. Rather, most civil law jurisdictions have established a (weaker) functional equivalent in the form of professional secrecy rules. These rules serve an entirely different function compared to privilege rules in common law jurisdictions: They were never intended to protect against document production requests by the other side because document production procedures typically do not play a prominent role in civil law jurisdictions. Rather, the functionally similar secrecy rules have been developed to protect individuals against overreach of the state, i.e., government authorities. Under German law, for example, attorney-client communication itself is not privileged. Nevertheless,

lawyers have the right and obligation to not disclose certain confidential information under their ethical and professional rules. However, only documents and information in the hands of the lawyer fall under the secrecy obligation. Any communication held by the client is not subject to professional secrecy rules.

In sum, legal systems with extensive document production tend to have stronger privilege protections, whereas systems with limited document production generally afford less protection.

II. LEGAL PROFESSIONAL PRIVILEGE UNDER EUROPEAN LAW

The concept of legal professional privilege has long enjoyed protection under European law. Specifically, Art. 7 of the Charter guarantees the “right to respect for [...] private and family life, home and communications” and therefore also protects communication between lawyer and client.

Both the European Court (the “EC”) and the ECJ have issued several opinions dealing with attorney-client privilege. In its 1982 landmark decision *AM&S*, the ECJ developed the fundamental scope of legal professional privilege and held that attorney-client communication is protected to the extent that the correspondence (i) takes place for the purpose and in the interest of the client's rights of defence, and (ii) originates from independent lawyers not bound to the client by a service contract (ECJ decision of 18 May 1982, C-155/79).

The scope of legal privilege was solidified by two further decisions. In *Hilti*, the EC ruled that legal privilege also applies to internal records of a company that reflect legal advice received from an external lawyer as long as the records are merely summarising that legal advice (EC decision of 4 April 1990, T-30/89). In *Akzo*, the ECJ clarified its stance on legal privilege and held that correspondence with an in-house lawyer is not protected under EU law (ECJ decision of 14 September 2010, C-550/07 P).

A. Orde van Vlaamse Balies and Others (C-694/20)

Building on this foundational understanding, the ECJ's Grand Chamber decision in *Orde van Vlaamse Balies and Others* of 8 December 2022 further examined the scope of legal professional privilege under Art. 7 of the Charter and expanded its application.

In the underlying proceedings, two Belgian attorney organizations and other plaintiffs brought an action before the Belgian Constitutional Court to strike down provisions of Flemish legislation on administrative cooperation in the field of taxation. The Flemish decree transposed an EU Directive which provides that all intermediaries involved in cross-border tax planning are required to report relevant practices to the competent tax authorities. That obligation also concerns so-called “lawyer-intermediaries.” However, Member States may grant intermediaries a waiver from such obligation where it would breach legal professional privilege protected under their national laws. In such circumstances, lawyer-intermediaries are required to notify any other intermediary of their respective reporting obligations vis-à-vis the competent authorities. The Flemish law provided for just that and imposed a notification obligation on lawyer-intermediaries towards other intermediaries.

In its request for a preliminary ruling, the Belgian Constitutional Court asked the ECJ to clarify

whether the requirement to report under the Directive infringes the right to respect for private life as guaranteed by Art. 7 of the Charter.

In its decision, the ECJ observed that Art. 7 of the Charter protects all correspondence between individuals but affords strengthened protection to exchanges between lawyers and clients. Going far beyond its holding in *AM&S*, the Court found that “Art. 7 of the Charter does not only protect communications related to the activity of legal defence, but rather protects any legal advice.”

The ECJ noted that, other than in exceptional situations, individuals who consult a lawyer can reasonably expect that their communication is private and confidential and that their lawyer will not disclose to anyone, without their consent, that they are consulting them. In fact, anyone must be able to consult a lawyer without any constraints. The Court found justification for this specific protection of legal professional privilege in lawyers’ fundamental role in a democratic society, which is that of defending litigants.

The Court held that the obligation of a lawyer to notify other intermediaries where they are exempt from a reporting obligation due to legal professional privilege constitutes an interference with the right to respect for communications between lawyers and their clients under Art. 7 of the Charter and determined that this interference was not justified to achieve the objective of the Directive. Therefore, the Court concluded that the obligation to notify under the Directive is invalid.

B. Ordre des Avocats du Barreau de Luxembourg (C-432/23)

In its subsequent ruling in *Ordre des Avocats du Barreau de Luxembourg* of 26 September 2024, the ECJ reaffirmed its commitment to safeguarding legal professional privilege, clarifying that this protection extends to all forms of legal advice and applies universally across all areas of law.

The case arose when the Luxembourg tax authority requested a local law firm to provide all available information and documents related to services rendered to a Spanish company in connection with a corporate transaction. This request was prompted by a request from the Spanish tax authorities, which had been made in accordance with Council Directive 2011/16/EU on administrative cooperation in taxation. The Luxembourg law firm refused to comply, noting that the information sought by the authority was covered by legal professional privilege under Art. 7 of the Charter. In response, the tax authority issued an injunction requiring disclosure and later imposed a fine for non-compliance. The law firm challenged the decision in front of the Luxembourg courts, and the Administrative Court of Luxembourg eventually referred the case to the ECJ. In its request for a preliminary ruling, the Administrative Court of Luxembourg asked the ECJ to clarify, *inter alia*, whether a lawyer’s legal advice on company law falls within the scope of the heightened protection of communication between lawyers and their clients granted by Art. 7 of the Charter.

In its decision, the ECJ reiterated the significance of the specific protection afforded to lawyers’ professional secrecy and answered the preliminary question in the affirmative, holding that ***legal advice provided by a lawyer, regardless of the area of law, is subject to the protection of Art. 7 of the Charter.***

Consequently, the ECJ determined that the injunction issued by the Luxembourg tax authority, which

required the law firm to disclose all documentation and information related to the lawyer-client relationship, violated the right to privacy in communications between a lawyer and their client as guaranteed by Art. 7 of the Charter.

At the same time, the court also clarified that the rights under Art. 7 of the Charter are not absolute. Under Art. 52 of the Charter, the rights and freedoms recognised by the Charter may be restricted, provided that the limitations are established by law and respect the core essence of the rights. Any limitations must be in line with the principle of proportionality and must therefore be necessary and genuinely serve the objectives of general interest recognized by the European Union. Ultimately, however, the ECJ held that an injunction such as the one at issue violated the core of the right to confidentiality of communications between lawyers and their clients, and therefore constituted an interference which cannot be justified.

III. PRACTICAL IMPLICATIONS OF THE EUROPEAN COURT DECISIONS FOR LEGAL PRIVILEGE ISSUES IN INTERNATIONAL ARBITRATIONS

Discussions of privilege issues within the arbitration community rarely refer to EU law and EU jurisprudence on legal privilege and seem to overlook their potential significance. The reason for this approach by the arbitration community may be that the Charter and the ECJ precedents directly apply only to EU institutions and to Member States where national laws fall within the scope of European Union law (Art. 51(1) of the Charter).

However, while not directly applicable to international arbitration proceedings, EU jurisprudence can influence these proceedings in two key ways:

First, EU case law will shape and influence the expectations of parties regarding the treatment of legal privilege throughout the European Union (which includes both civil and common law jurisdictions but largely consists of civil law countries). Both ECJ decisions mentioned above have been widely publicized and discussed, and the expansion of the concept of legal privilege under EU law is a highly relevant topic. Consequently, EU parties are likely to be familiar with the extended scope of legal privilege under EU law, which could shape and expand their expectations about the types of communication that should be privileged more generally. This is particularly relevant in the arbitration context, since tribunals often consider parties' expectations when determining the rules governing privilege.

In European civil law countries, this could result in a trend towards a broader understanding of privilege, aligning more closely with the common law perspective. Over time, the influence of EU law could lead to expanded privilege protections under civil law, fostering greater legal convergence and consistency across jurisdictions and, in particular, vis-à-vis common law rules.

Second, EU jurisprudence will also likely shape efforts to create uniform guidelines regarding legal privilege. Any institution currently considering such guidelines is likely to look to EU law when preparing its draft.

As an example, the 2021 ELI/UNIDROIT Rules attempted to create uniform procedural rules, including with respect to legal privilege. This collaborative project by the European Law Institute

(ELI) and the International Institute for the Unification of Private Law (UNIDROIT) aimed to develop “detailed rules, considering existing legal instruments at [the] EU level, European legal traditions, and current legal developments in Europe, in order to produce a framework of reference and source of inspiration for a broad range of actors, notably legislators and policymakers.” (ELI/UNIDROIT Rules, Foreword, at p. v.) Notably, the ELI/UNIDROIT Rules reflect a broader trend towards expanding document production, even in legal systems where this was traditionally not the case. While the ELI/UNIDROIT Rules were driven by civil law principles, they contain provisions for “access to evidence orders” allowing a party to file an application and request the production of certain evidence from the other party (ELI/UNIDROIT Rules, Rules 100 et seq.). Commentary to these rules notes that they “are intended to set out European best practice” and that they aim to ensure access to evidence “in a manner that is very different from US-style discovery.” (ELI/UNIDROIT Rules, Rule 100, Comments, at para. 1.) Still, because the ELI/UNIDROIT Rules contain some form of document production, they also provide for legal privilege protection: Rule 91(2)(c) provides that “[e]vidence may not be elicited in violation of: ... (c) legal professional privilege”

As explained above, where document production broadens, privilege protections expand and become more intricate over time. Therefore, in such contexts, the ECJ decisions on legal privilege will likely influence the evolution of privilege rules significantly.

These effects may grow even stronger as EU courts continue to broaden the scope of legal privilege under EU law. In this context, the law firm Jones Day filed an application with the European Court of Human Rights (the “**ECHR**”) concerning the seizure of documents and electronic data that is currently pending. The ECHR will need to determine whether the seizure of documents was in line with the European Convention on Human Rights and, in particular, its Art. 8, which guarantees the “right to respect for his private and family life, his home and his correspondence” and is the corresponding right to Art. 7 of the Charter.

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