Tribunal upholds applicability of principles of lawyer-client privilege and common interest privilege in ICSID arbitration

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On 4 October 2018, an ICSID Tribunal hearing a dispute under the Chile-Colombia Free Trade Agreement issued a procedural order in which it accepted the applicability of the principles of lawyer-client privilege and common interest privilege in ICSID arbitration proceedings. The decision provides welcome clarification on the potential application of the concept of legal privilege in ICSID disputes. The Tribunal's analysis will give a degree of comfort to both lawyers and clients that in appropriate circumstances privilege might be relied on to prevent the disclosure of documents created for the purposes of seeking or giving legal advice and shared with third parties with a common interest.

The general principles of lawyer-client privilege and common interest privilege

In general terms (as the details of the principles may vary in different jurisdictions), lawyer-client privilege will protect from disclosure to opposing parties confidential communications between a lawyer and their client for the purpose of providing or receiving legal advice. Common interest privilege (which operates as an exception to the general rule that lawyer-client privilege does not apply to communications with, or shared with, third parties i.e. where confidentiality has been lost) allows lawyer-client privilege to be maintained where the third party recipient of the confidential information has a common legal interest in the advice.

While principles of legal privilege are widely accepted and applied in jurisdictions worldwide, ICSID arbitration is a supra-national process with no "seat" (or legal place) of arbitration, meaning that ICSID tribunals are not subject to any national laws that would apply or govern rules of legal privilege. Rather, ICSID tribunals are governed by the ICSID Convention and ICSID Arbitration Rules, neither of which contain any provisions in relation to principles of privilege or, indeed, any mandatory rules of evidence save for the broad discretion afforded to tribunals under Article 43 of the ICSID Convention and Rule 34 of the Arbitration Rules.

Procedural decision in Carlos Rios y Francisco Javier Rios v Chile

In this procedural decision, the Tribunal considered (amongst other things), an assertion by the Claimants that particular emails between legal counsel for companies owned by the Claimants and representatives of bondholders who were not parties to the arbitration should not be produced because they were subject to lawyer-client privilege and common interest privilege.

The Tribunal considered that, while the appropriate first step when considering a claim of privilege is to identify the law applicable to that claim (and in this case the Claimants had not established the existence of the asserted
privilege under Chilean law), the concept of lawyer-client privilege has been "widely accepted in international and comparative law", and has been applied by international tribunals without reference to rules of domestic law. The Tribunal also referred to legal commentators who have argued that well-established privileges can be considered as "general principles of law".

The Tribunal held that, in general terms, lawyer-client privilege protects communications that are (i) confidential; (ii) exchanged between a lawyer and their client; and (iii) for the purpose of giving or receiving legal advice. In relation to common interest privilege, the Tribunal considered that this constitutes a sub-category of lawyer-client privilege, specifically operating as an exception to the general rule that the disclosure of communications covered by lawyer-client privilege to third parties implies a waiver of such privilege as confidentiality is lost. The common interest privilege rule has developed in a number of jurisdictions in order to encourage the free exchange of information between parties in relation to their common legal interests. Again, while this type of privilege varies according to applicable law, the Tribunal found that in general terms it will only arise in the context of communications covered by lawyer-client privilege that have been shared with third parties.

While accepting the application of the concepts of privilege generally, the Tribunal went on to find that on the facts of this case none of the relevant documents were protected by lawyer-client privilege because they were not for the purpose of giving or receiving legal advice. Given that they were not protected by lawyer-client privilege, no common interest privilege would attach either. Further, the Tribunal did not accept that the Claimants had established the existence of a common interest with the third party.

Interaction with the IBA Rules on Evidence

In this case, the Tribunal had already decided in a previous procedural order that the 2010 IBA Rules on the Taking of Evidence in International Arbitration applied to the arbitration pursuant to the agreement of the parties. The IBA Rules specifically refer to the power of a tribunal to exclude from evidence or production any document on the grounds of "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable" (Article 9.2(b)), and in Article 9.3 contain criteria that a tribunal may take into account when considering "issues of legal impediment or privilege ... insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable", including any need to protect the confidentiality of a document "made in connection with and for the purpose of providing or obtaining legal advice". These provisions of the IBA Rules may therefore have laid the ground in this case for the Tribunal to accept the application of principles of legal privilege (the Tribunal having determined that no mandatory rules on privilege applied given the wide procedural discretion conferred by the ICSID Convention and Arbitration Rules as explained above).

Conclusion

The ability of parties to seek and obtain advice from their legal representatives to the fullest extent possible, while having confidence that in doing so those communications will be privileged from disclosure to opposing parties is of critical importance in a fair dispute resolution system. In recognising the potential application of this principle in ICSID arbitration (in particular as the IBA Rules applied), the decision of the Tribunal in Rios v Chile provides some helpful analysis for parties involved in ICSID arbitrations.

The procedural order is also consistent with the previous decision of an ICSID Tribunal in Glamis Gold v United States (a North American Free Trade Agreement (NAFTA) case under the UNCITRAL Rules) in which that Tribunal also recognised the potential applicability of legal privilege in the proceedings before it, and applied a "general consensus" it identified between different US state courts combined with its "knowledge of and appreciation for the differences between court proceedings and international arbitration" "to craft standards" to assist the parties in asserting claims of privilege and their objections to such claims.

In the Rios v Chile case, The Tribunal ultimately found that there was no privilege. This finding in itself underlines that parties to ICSID arbitrations need to consider carefully claims to privilege that they assert, but also be rigorous in testing assertions of privilege by the opposing party.

¹ The Tribunal comprised Prof. Gabrielle Kaufmann-Kohler (President), Oscar M. Garibaldi and Prof.
Brigitte Stern
Case No. ARB/17/16
Glamis Gold, Ltd. v United States of America, Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, 17 November 2005

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