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Recent Debates in Attorney-Client related Privilege and Confidentiality in Korea and Its Implications to International Arbitration

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This article provides an overview of the state of attorney-client related privilege and confidentiality in Korea. It reviews the statutory framework, and how Korean courts have analyzed the privilege and confidentiality related to attorneys and their clients. It then examines the legislative initiatives Korea is currently debating with regard to adopting a more common law-style attorney-client privilege (ACP). If adopted, the new legislation will mark a significant milestone in providing guidance on how communications between attorney and client will be treated. Its impact in the context of international arbitration practice and law related to Korea is explored.

Key Words : confidentiality, secrecy, attorney-client privilege, legal impediment, legal professional privilege, work product privilege, legal advice privilege, litigation privilege, settlement privilege

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Ⅰ. Introduction

As with many civil law countries, Korea does not specifically have privileges or rights such as attorney-client privilege ("ACP") or work product privilege that are found in many common law jurisdictions. The formal adoption of such privileges has been long debated. Several legislators and the Korean Bar Association, among others, are once again making an active push for its adoption and the chances that it will be realized appear considerable. Most pre-existing research focuses on the issue from a criminal law perspective, and the impact of the current proposals have not been analyzed from an international arbitration viewpoint.

As one of the largest economies in the world. Korea has emerged as a leading hub of international arbitration, particularly in the Asia-Pacific. Heavily reliant upon cross-border trade and investment, Korean parties are among the most active users of international arbitration. A recurrent issue that arises in practice concerns the standards that parties need to follow for document disclosure and the exceptions that apply. When Korean parties are faced with disputes with counterparties from common law jurisdictions, the divergence in perspective creates thorny issues. Tribunals must navigate a fine balance between equality of arms and fairness when they face jurisdictions that hail from different legal traditions. Disputes involving Korean parties, counsel, seats, and governing law add a complex twist that further complicates the situation. The need for greater clarity on the scope of exceptions such as attorney-related privileges and confidentiality continues to arise

This article will provide an overview of the jurisprudence in Korea that applies to the obligations and rights concerning the communications exchanged between attorneys and clients. It will begin with a comparative perspective through a review of common law and civil law jurisdictions. Next, it will provide a review of statutory interpretation, leading court decisions, and scholarly commentary. This will be followed by an examination of the impact of the lack of "common law" type of privileges upon the practice of international arbitration related to Korea. It will then explore the recent legislative efforts being debated. It will conclude with a review of the practical implications of how ACP might affect future arbitration practice.

Ⅱ. A Review of Legal Traditions, Rules and Guidelines

One early view described privilege issues in international arbitration as "the only thing that is clear is that nothing is clear".[1] Another observer categorized it as a "pernicious legal void".[2] The notion that ACP is more expansive in common law countries itself is controversial. According to some observers, the divergences between the common law and civil law traditions are exaggerated and "utterly a myth".[3] Although significant variation exists, this section begins with a broad overview of what are considered common characteristics of the common law and civil law traditions.[4]

1. Common Law Jurisdictions

Countries from common law traditions generally permit some form of ACP.[5] The origins of the privilege can be traced from a litigation system where pre-trial disclosure and document production, particularly of documents from a counterparty is widely recognized.[6] A party is considered to have a right to access information and documents under the possession and control of the opposing side. Disclosure or discovery of information or documents is, however, not unlimited. As an exception, a party can claim as a privilege that it does not have to disclose information and documents that constitute advice obtained from legal counsel. Communications exchanged between an attorney and client are protected as privileged.

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1) Klaus Peter Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion", Arbitration International, Vol. 20, 2006, p. 501 quoting "B.F. Meyer-Hauser, Anwaltsgeheimnis und Schiedsgericht (2004), Schulthess Verlag para 153."

2) Susan D. Franck, "International Arbitration and Attorney-Client Privilege—A Conflict of Laws Approach", Arizona State Law Journal, Vol. 51, 2017, p. 948.

3) Ibrahim Shehata, "Attorney-Client Privilege & International Arbitration", Cardozo Journal of Conflict Resolution, Vol. 20, 2019, p. 374.

4) Other legal traditions such as customary law or Islamic law are beyond the scope of this article.

5) Annabelle Mockesch, Attorney-Client Privilege in International Arbitration, Oxford University Press, 2017, para. 6.40. The term ACP is broadly used. Some jurisdictions call it legal professional privilege or legal impediment, and various permutations exist as discussed below.

6) The privilege extends to the criminal context as well but the focus of this article will be on the impact and implications in civil disputes.

A key distinguishing factor when compared with the civil law tradition is that in common law jurisdictions the privilege belongs to the client. The client may only assert the privilege, and can waive the privilege. Their counsel do not have the privilege and cannot claim it for themselves, although they can invoke the privilege on behalf of the client. The client, and its legal counsel, cannot be compelled to disclose legal advice that has been provided by the legal counsel.

For common law jurisdictions, ACP usually extends to include in-house counsel and their communications not only with external counsel but also with other employees within their company. Furthermore, ACP is generally viewed as a matter of substantive law in many common law jurisdictions.[7] The scope of the privilege is the same regardless of whether the proceedings are civil, criminal, or administrative.[8] Yet, the scope of the privilege does not coincide with the scope of an attorney's duty of confidentiality and is considered narrower.[9]

At the same time, the scope of ACP varies within common law jurisdictions. ACP can include legal advice privilege, litigation privilege, and joint and common interest privilege. Some places include communications prepared in anticipation of litigation under the concept of work product privilege.[10] U.S. and English law, for instance, diverge on the issue of the definition of who qualifies as a client within a corporation and may benefit from the privilege.[11] In the U.K. the privilege only applies to communications by officials authorized to communicate with the attorneys.

It may be suggested that the wealth of jurisprudence regarding ACP provides greater protections and more predictability for parties from common law countries. This may also be a contributing factor as to why many common law jurisdictions such as London, Singapore, New York, and Hong Kong have become the dominant markets for legal services and also as hubs of international arbitration in recent years.

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7) Shehata, p. 391; Yet, U.S. jurisdictions are not uniform and vary in their characterization of whether it is procedural or substantive. Graham C. Lilly & Molly Bishop Shadel, "When Privilege Fails: Interstate Litigation and the Erosion of Privilege Law", Arkansas. Law Review, Vol. 66, 2013, p. 615–17.

8) Mockesch, para. 6.02.

9) Mockesch, para. 6.02.

10) Baker & McKenzie, Global Attorney-Client Privilege Guide, Retrieved 15 July 2023, https://www.bakermckenzie.com/en/insight/publications/guides/global-attorney-client-privilege-guide ("B&M"), India, p. 15.

11) Mockesch, paras 8.154-8.160.

2. Civil Law Jurisdictions

Civil law countries also have considerable variations but generally approach communications between attorneys and clients from the perspective of the attorney's duty of confidentiality.[12] Since pre-trial discovery and disclosure is limited, and access to the counterparties' documents and communications are in principle not granted, most civil law jurisdictions did not have a need for common law-type ACP to develop. Instead, communications and information from legal counsel have been protected through an attorneys' duty to maintain the secrets of their clients. Civil law jurisdictions also grant attorneys the right to refuse to testify about professional secrets. Similarly, attorneys cannot be compelled to disclose documents related to confidential matters.

Most notably, clients, in turn, typically cannot claim a privilege from disclosure, even if related to communications with legal counsel.[13] This has particularly been the case in the criminal law context or when public authorities such as financial regulators or competition authorities have seized or gained access to documents or information prepared by legal counsel. One leading exception to this situation is France, where clients are able to claim ACP-type privilege.[14]

Furthermore, communications by in-house counsel generally are not protected by ACP-type privilege.[15] They may of course be separately protected based on a contractual duty of secrecy. Communications by outside counsel to in-house counsel, however, would be subject to secrecy protections. Some jurisdictions will differ depending on what type of status the in-house counsel holds.

In Germany, for instance, although unsettled, the prevailing view is that in-house counsel that are *Syndikusanwalt*, who are registered attorneys, would be subject to secrecy obligations.[16] Those in-house counsel who are not admitted to the German bar and those *Syndikusanwalt* who conducted work for a third party and not their employer's corporation would not attract the privilege.[17] In the Netherlands, in-house

12) Generally, for purposes of this article, the terms duty of confidentiality and duty of secrecy are used interchangeably.
13) B&M, p. 23 (Japan), B&M, p. 48 (Taiwan).
14) B&M, p.86 (France).
15) Shehata, p. 392 (Switzerland).
16) Shehata, p. 392. Mockesch, para. 6.08. For a contrary view that German in-house counsel do not have privilege see DLA, p. 83.

counsel admitted to the Dutch Bar or a foreign jurisdictions bar could claim legal professional privilege, but written staff regulations must guarantee a sufficient level of independence.[18] Similarly, in Japan, Taiwan, and Brazil, the privilege or confidentiality obligation would exist if the in-house counsel is a registered attorney or a registered foreign legal consultant.[19]

On the other end of the spectrum, in France, in house-counsel are not admitted to the bar and not considered attorneys but instead "*juristes d'enterprise*", who are only bound by professional secrecy obligations while external attorneys cannot act as in-house counsel.[20] Similarly, in Switzerland and Sweden, in-house counsel are not members of the bar associations and are not subject to ACP-type protections.[21]

Foreign lawyers practicing within a jurisdiction may also be recognized for privilege-type protections in such places like Germany and Japan.[22] In France, communications between a French attorney and a foreign attorney are privileged regardless of whether it is privileged in the foreign attorney's home jurisdiction.[23]

Unlike common law jurisdictions, civil law countries generally consider the protections associated with attorney communications as a matter of procedural law.[24] Yet, some suggest that even in certain civil law jurisdictions it is considered a substantive matter.[25] The scope of the privilege may vary depending on whether the proceedings are civil, criminal, or administrative.[26]

Yet, as with common law jurisdictions, the scope of the privilege and confidentiality protections are not the same and variations abound. Countries like Germany, for instance, extend the protection to both legal, economic, business, and financial advic

17) Shehata, p. 392.
18) DLA, p. 135. Rotterdam District Court of 28 January 2021, ECLI:NL:RBROT:2021:527.
19) B&M, p. 24 (Japan); DLA, p. 110 (Japan), B&M, p. 49-50 (Taiwan); DLA, p. 21 (Brazil).
20) B&M, p. 86 (France); DLA, p. 75-76 (France); In *Akzo Chemicals Ltd v. European Commission*, Case C-550/07-P (September 14, 2010), the European Court of Justice held that communications between in-house counsel and company employees were not privileged in European competition law cases.
21) Shehata, p. 392.
22) B&M, p. 24; DLA, p. 110 (Japan); Mockesch, para. 6.09 (Germany).
23) B&M, p. 86.
24) Shehata, p. 391 (Germany and Switzerland).
25) Corina Gugler & Karina Goldberg, "Privilege and Document Production in International Arbitration: How Do Arbitrators Deal with Different Legal Systems' Approaches?", Revista Brasilera De Arbitragem, Vol. 14, 2017, p. 63 (Brazil)
26) Mockesch, para. 6.02.

e.[27] This expands the scope of the protection beyond that granted of common law jurisdictions which are limited to legal advice. Whether similar privileges such as work product privilege are included also differ considerably between countries.

It remains a challenge to ascertain how the scope and nature of attorney-related privilege and confidentiality affects international arbitration in civil law jurisdictions in practical terms, particularly given the variation that exists. The results of the efforts to narrow the gap between common law and civil law jurisdictions are explored below.

3. IBA Rules and IPBA Guidelines

To navigate what has been described as the "pernicious legal void" of privilege in international arbitration various leading international professional organizations have attempted to provide more guidance and harmonization.[28] In 2010, the International Bar Association (IBA) first included a provision on legal impediment and privilege when it adopted the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules").[29] The rules are widely adopted in practice. On whether a universal rule should be adopted at the time, two observers stated "it was considered that were was no one answer, for all time, for all purposes, for all regions, for all types of arbitration".[30] Then in 2019, the Inter-Pacific Bar Association issued its Guidelines on Privilege and Attorney Secrecy in International Arbitration ("IPBA Guidelines").

The IBA Rules serve as the benchmark for most tribunals when addressing ACP-related issues. The rules provide broad discretion to the tribunal to determine "legal impediment or privilege" and to determine the under "the legal or ethical rules" applicable.[31] Under Article 9.4, the IBA Rules provide that that tribunals "may take into account" such elements as the following:

> (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of

27) Mockesch, para. 6.21.
28) Franck, p. 948.
29) The rules were subsequently amended in 2020 without any substantive changes to the provisions on legal impediment or privilege.
30) Toby Landau and Romesh Weeramantry, "A Pause for Thought" in van den Berg (ed), ICCA Congress Series No 17, Kluwer Law International, 2013.
31) IBA Rules, Art. 9.2(b).

providing or obtaining legal advice;

(b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;

(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;

(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; and

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

The IPBA Guidelines provide even more specific guidance and more affirmative standards for parties. The Guidelines outline three types of privileges or secrecy protections that should be recognized and should be applicable to both clients and attorneys. The first protection, "Legal Advisor Privilege and Attorney Secrecy Protection", provides that "no person should be bound to disclose information created or communicated...in the course of providing or obtaining Legal Services". (Article 3). This is comparable with Article 9.4(a) of the IBA Rules. Under the definition section, Legal Advisor includes in-house counsel.

The second protection, "Legal Proceedings Privilege and Attorney Secrecy Protection", states that no person shall be required to disclose "any Information created or communicated for the purpose of a Legal Proceeding, whether pending or reasonably in prospect". (Article 4). The scope of Legal Proceeding includes any type of "legal, civil, administrative, regulatory, or criminal proceeding, investigation, or inquiry, including litigation, mediation, adjudication, and arbitration". (Definitions). This is comparable to the "work product privilege" in many common-law jurisdictions and is an addition that it not specifically included in the IBA Rules.

The third privilege or secrecy protection defined as "Settlement Privilege and Attorney Secrecy Protection" involves "any Information created and communicated in the course of negotiations for the purpose of arriving at a settlement of any dispute or differences".(Article 5). This is comparable with Article 9.4(b) of the IBA Rules.[32] The

exceptions to the protection are where there is a dispute on whether a settlement has been concluded; or where all parties to the actual or intended settlement consented to the disclosure.

The IPBA Guidelines also protect from disclosure information that is protected due to a non-waivable legal impediment or mandatory provision of law (Article 6). Any party seeking to rely on such protection should notify the other party and tribunal promptly.[33] (Article 7.2). Under Article 7.3, a tribunal may exclude a disclosure that a party makes despite its right to withhold when done due to belated notification or inconsistent conduct by the other party.[34]

The IPBA Guidelines specify that parties, legal advisors, or any third party involved in arbitration can be the holders of privilege. The term "legal advisor" applies to lawyers in various capacities, such as private practitioners, public officers, trainees, and their assistants. In-house counsel also fall under this category, independent of whether they are or have been admitted to the bar, as long as their position within an organization identifies them as legal counsel. Third parties involved in arbitration may include experts, litigation service providers, and third-party funders.

4. Applicable Law

The applicable law to apply to issues of privilege and attorney secrecy remains a thorny issue. A dominant position has yet to emerge. Viewing privilege as a procedural matter, some observers suggest the law of the lex arbitri should be considered as an initial matter but ultimately the same level should apply to both parties for fairness purposes.[35] If viewed as a substantive law issue, the governing law of the contract might be considered. Others suggest the law that is most closely connected with a communication should apply and that this should be the location of the client combined with the most protective rules.[36] Some believe the place of enforcement should be considered, while others advocate a transnational standard

32) The IBA Rules also call this the "without prejudice" privilege. Art. 9.4(b).
33) IPBA Guidelines, Commentary, p. 28 ("as soon as it has reasonable grounds to believe that it will rely on the protection").
34) IPBA Guidelines, Commentary, p. 29.
35) Sungwoo Lim, International Arbitration, Bakyoungsa, 2016, pp. 228-229.
36) Mockesch, para. 6.02.

should apply.[37] While a transnational standard would be ideal, and would provide consistency and predictability, as the background to the IBA Rules provides, this remains an elusive challenge.

In the end, the only common theme that tends to emerge is that, out of a consideration of procedural fairness, most tribunals will seek to apply the same standards to both parties to maintain equality of arms. Yet, even this practice may still have unfairness issues because the parties have different expectations and various other considerations arise as noted below.

Ⅲ. Attorney-related Confidentiality Obligations and Rights in Korea

1. Statutory Law, Rules and Regulations

In Korea, the statutory framework provides a range of statutes concerned with attorney confidentiality. Several key statutes focus on the obligations of attorneys related to the secrecy of advice given to clients. First, although framed in the criminal law context, the Constitution provides under Article 12.4 that "Any person who is arrested or detained shall have the right to prompt assistance of counsel."[38] As explained later, this right to counsel includes the right of a person to seek advice from counsel. Such advice would need to be subject to some degree of secrecy for it to be effective.

Next, the Attorney-at-Law Act provides under Article 26 that an attorney or former attorney shall not "divulge any confidential matter that he or she has learned in the course of performing his or her duties".[39] An exception exists for where disclosure is required by law. Notably, the obligation only applies to the attorney and no mention is made of whether the client can be compelled to disclose communications shared with their attorney. A similar secrecy requirement also exists under Article 23 of the

37) Shehata, p. 390.
38) Constitution of the Republic of Korea ("Constitution"), Constitution No. 10, 29 October 1987.
39) Attorney-at Law Act, Act No. 17828, 5 January 2021.

Korean Bar Association's Code of Ethics for attorneys.[40] For foreign legal consultants working in Korea, the Foreign Legal Consultant Act provides a similar duty of secrecy under Article 30.[41]

Based on the Attorney-at-Law Act, the Seoul Bar Association and others bar associations require attorneys to technically receive their permission when they work in-house.[42] The legal basis of the local bar associations to require permission through Article 38.2 of the Attorney-At-Act is debated but the practice continues. In practice, many companies have in-house attorneys establish an individual office like a sole proprietorship, hire them like external counsel, and then have them obtain "concurrent appointment" permission from the local bar association to work at the company. Under this type of arrangement, the in-house attorney acts like an external attorney, but also has a "concurrent appointment" like an employee. The Korean Bar Association's Code of Ethics includes a provision that states that in-house counsel must carry out their duties independently.[43] Some question whether ACP-type protections could exist for communications between a company and its in-house counsel.[44] To what extent communications with in-house counsel are protected remains unclear, particularly given the different type of arrangements that exist, although it would not go beyond legal advice as in some jurisdictions.

Both the Civil Procedure Act and Criminal Procedure Act provide attorneys with the right to not be compelled to testify about secrets. Under the Civil Procedure Act[45], Article 315(1) titled "Right to Refuse Testimony" provides that an attorney may refuse to testify if "examined on matters falling under the secrets of his or her official functions". The right to refuse testimony does not apply where an attorney has been exempted from the liability for maintaining secrecy such as when the client granted permission. Under Article 367, a party may be subject to examination but whether a

40) Korean Bar Association, Code of Ethics, amended 31 May 2021.
41) Foreign Legal Consultant Act. Act No. 15153, 12 December 2017.
42) In-house counsel that are working for a company are even limited to ten litigation cases a year, and this limit applies for the entire company regardless of the number of in-house counsel. Sohng, p. 330. Art. 16.1, Seoul Bar Association, Regulations on the Approval and Notification of Concurrent Holding of Offices; Chai Woo Sohng, "Restriction of Authority and Power to Litigate by the In-house Counsel", Vol. 59, Law Review, Pusan National University, 2018, p. 331.
43) Art. 51, Korean Bar Association, Code of Ethics, amended 31 May 2021.
44) DLA, p. 200.
45) Criminal Procedure Act, Act No. 17572, 8 December 2020.

party can refuse to testify about communications exchanged with its attorney remains unclear.[46]

The Criminal Procedure Act[47] states that counsel may (1) freely meet with criminal defendants or suspects under arrest or exchange documents or objects with them (Article 34); (2) refuse to allow the seizure of objects held in their custody or possession obtained in the course of their professional mandate that relates to secrets of others (Article 112): or (3) refuse to testify in respect to facts they have obtained knowledge as a consequence of a mandate they received in the course of their profession and that relates to secrets of others (Article 149). Again, the focus is on what attorneys can do with respect to objects given by their clients, and how they can refuse to allow the seizure of such objects or to testify regarding communications with their clients. It is even considered that an attorney's communications with a client by email or text message may not qualify as protected "objects".[48] If the client, and not the attorney, possesses the attorney's communications then they would not be necessarily exempt from seizure or would not be able to refuse to testify.

In terms of the statutory framework for arbitration law, Korea has adopted the 2006 version of the UNCITRAL International Model Law on International Commercial ("Model Law").[49] Accordingly, the Korean Arbitration Act ("Act") almost follows verbatim the relevant provisions in the Model Law with some innovative variations. Yet, the Act does not include any specific provisions related to ACP, legal impediment, or similar attorney-related secrecy protections.

In terms of the arbitral institutions, KCAB International operates as Korea's only formally recognized institution for international arbitration and it has a separate set of rules for international cases.[50] Yet, it follows the example of most other leading institutions, and its rules do not include any specific provisions related to ACP or similar protections.[51]

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46) Seo, Jooyeon, Yoon, Jonghaeng, and Cheon, Haram, A Study on the Attorney-Client Privilege, Korean Institute of Criminology and Justice, 2020, p. 37.

47) Civil Procedure Act, Act No. 18396, 17 August 2021.

48) Seo, Yoon, and Cheon, p. 32.

49) Korea adopted the 1985 version in 1999 and the 2006 version in 2016.

50) KCAB International Arbitration Rules (2016).

51) The International Center for Dispute Resolution (ICDR) is among the few leading institutions that provides detailed guidance on ACP and similar protections. ICDR, Article 25 provides that "The arbitrator shall take into account applicable principles of privilege, such as those involving the

2. Court Cases

(1) Supreme Court Judgment, 18 May 2012, No. 2009 Do 6788[52)]

In 2012, the Korean Supreme Court rendered a highly-anticipated judgment concerning ACP. Although analyzed within the context of criminal law, the Supreme Court pronounced its view on whether ACP existed under Korean law. It specifically overturned, the judgments of the lower courts that found that ACP existed. The case concerned whether a legal opinion that a company received from an attorney at a law firm could be admitted as evidence. To date, it remains the only Supreme Court case related to ACP.

Notably, the Seoul District Court and the Seoul High Court both found that an attorney's legal opinion that was attached to an email and sent to a corporate client could not be admitted as evidence based on ACP. The lower courts found that ACP could be deemed to exist under Korean law. The Seoul District Court and Seoul High Court decisions stood as the first times where a court even used the term ACP (*byeonhoin-uiroein teukgwon* 變護人-議賴人 特權).

The lower courts' unprecedented findings on ACP warrant a closer review. The lower courts first acknowledged that a specific statutory provision regarding common law-style ACP did not exist. Yet, the lower courts outlined in detail the basis of ACP and how ultimately a privilege of ACP could be derived from fundamental rights guaranteed under the Constitution. They specifically described that ACP was a privilege of a client to refuse to disclose communications exchanged in private with an attorney for the purposes of legal advice. They found that such a privilege was part of the right to receive assistance from counsel as provided under Article 12.4 of the Constitution.

As a further basis for support, the Seoul District Court judgment, which was affirmed by the Seoul High Court, cited (1) the Constitutional Court's rulings on the scope of the right to counsel; and (2) the statutory basis and limitations of the confidentiality

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confidentiality of communications between a lawyer and client. When the parties, their counsel, or their documents would be subject under applicable law to different rules, the arbitrator should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection".

52) Seoul High Court, 26 June 2009, 2008 No 2778; Seoul District Court, 9 October 2008, 2007 Gohab 877.

requirements for counsel. In obiter dicta, the lower courts even went so far as to refer to jurisprudence of common law countries such as the U.S. and U.K. for support and described how they recognized ACP and legal professional privilege through case law.

In a unanimous en banc decision, however, the Supreme Court rejected the lower courts' finding that ACP existed under Korean law based on Article 12.4 of the Constitution.[53] The court first reconfirmed that the confidentiality of "legal advice" and "legal consultation" exchanged between an attorney and client was protected to a certain extent under the Constitution and Criminal Procedure Act. The court explained that attorney-client communications were protected accordingly. The court added that under the Criminal Procedure Act attorneys may freely meet with criminal defendants or suspects under arrest or exchange documents or objects with them (Article 34); refuse to allow the seizure of objects held in their custody or possession obtained in the course of their professional mandate that relates to secrets of others (Article 112): or refuse to testify in respect to facts they have obtained knowledge as a consequence of a mandate they received in the course of their profession and that relates to secrets of others (Article 149).

Yet, the Supreme Court explained that a client did not have a privilege that it could not be compelled to disclose secrets as part of their right to counsel for legal advice obtained from an attorney. The attorney's duty of secrecy did not mean that a client could assert such secrecy obligations as a basis to refuse disclosure of communications. The court specifically stated that ACP, particularly as deemed to exist by the lower courts, could not be derived from Article 12.4 of the Constitution. Although analyzed within the context of criminal law, since the court found that ACP did not exist under the Constitution, it may be argued that this finding would likely apply to civil cases in the same manner.

Interestingly, the Supreme Court did suggest that their finding that ACP did not exist might be limited to cases where a client received "legal advice from a consultation with an attorney as part of their everyday life relationships" and where a criminal investigation or proceedings had not yet commenced against them. It remains unclear whether ACP would not exist where legal advice had been given after criminal

53) Although the Supreme Court rejected the lower courts' findings on ACP, it ultimately decided to reject the admissibility of the evidence based on different grounds.

proceedings had already begun.

In the end, based on the Supreme Court judgment several conclusions can be reached. First, attorney-client communications are protected by the attorney's right against compelled disclosure. Second, this right is exercised by the attorney and not the client. Third, although the protection of the communications takes a different form than it does in common law countries, to some extent the ultimate effect of the protection is similar to ACP because the client can protect attorney-client communications by directing his or her attorney to abide by his or her duty not to testify regarding these communications.

(2) Seoul District Court Decision, 2021 Bo 2, 11 May 2022[54]

In a recent 2022 court decision, the Seoul District Court found that the seizure of a recording of a conversation between a client and an attorney was unconstitutional and had to be denied. The case involved the seizure of a recording of a telephone conversation that a suspect made with the suspect's attorney. Notably, the communication was made in preparation of an interrogation of the suspect that was to occur the next day.

The court stated that since the suspect was already under investigation the suspect had the right to counsel as guaranteed under Article 12.4 of the Constitution. The court then cited the same provisions of the Criminal Code, Criminal Procedure Act and Attorney-at-Law Act, that were cited by the lower courts as described above, in addition to the decisions of the Constitutional Court and the Supreme Court. All of these laws provided the right to counsel and the right to secrecy of communications between a client and counsel. Although the court did not use the term ACP or similar terms, the court said that, under the circumstances where a suspect was under investigation, the right to counsel under Article 12.4 included the right of the attorney, and the client, to refuse to disclose a communication that was exchanged for the purpose of receiving legal advice in confidence. The court noted that both the client and attorney did not consent to the seizure of the recording and instead objected.

54) 2021 Bo 2, 11 May 2022 (Seoul Western District Court).

3. Other Jurisprudence

(1) Investment Treaty Cases: *Elliott and Mason*

In addition to commercial arbitration, ACP issues have arisen in two recent investment arbitrations that were brought against Korea under the Korea-U.S Free Trade Agreement ("KORUS FTA").[55] Most of the disputes related to privilege and secrecy protections focused on whether personal information of the parties or whether information possessed by the prosecutor's office, special prosecutor, or the courts could be disclosed.[56] Although the scope of attorney-related privileges and secrecy protections were not directly explored in depth from a Korean law perspective, the potential for the issue to arise in future cases remains.

In *Elliott v. Korea*, for instance, the tribunal denied a request by the investor based on legal impediment. The tribunal cited Art. 9(2)(b) of the IBA Rules, which the tribunal stipulated it would refer to under Procedural Order No. 1, and confirmed that whether the principle of secrecy of criminal investigations was a legal impediment should be determined based on Korean law. The tribunal found that there was a legal impediment because the documents sought pertained to an ongoing criminal investigation where an indictment and commencement of criminal proceedings had yet to be made.[57] Nevertheless, the case suggests that a similar analysis would be made to determine how the principle of secrecy related to attorney-client communications would apply.

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55) Article 11.28 of the KORUS FTA defines "protected information" as "confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law". *Mason v. Korea*, Procedural Order No. 11, para. 6. 8 July 2022. Retrieved 15 July 2023, https://pca-cpa.org/en/cases/198/. As a contracting party to KORUS FTA, this of course would include the law of Korea. Based on the transparency provisions under the KORUS FTA, the procedural orders rendered by the tribunal in both cases are available on the PCA website. *Elliott Associates, L.P. (U.S.A.) v. Republic of Korea ("Elliott v. Korea")*, PCA Case No. 2018-51, Retrieved 15 July 2023, https://pca-cpa.org/en/cases/197; Procedural Order No. 1, para. 10; *1. Mason Capital L.P. (U.S.A.) 2. Mason Management LLC (U.S.A.) v. Republic of Korea ("Mason v. Korea")*, PCA Case No. 2018-55, Retrieved 15 July 2023, https://pca-cpa.org/en/cases/198/; Some debate exists whether the scope of ACP should differ between commercial or investment arbitration. Shehata, 383-385.

56) Procedural Order No. 8, para. 14, 13 January 2020. Retrieved 15 July 2023, https://pca-cpa.org/en/cases/197/.

57) Procedural Order No. 14, para. 72. 24 June 2020. Retrieved 15 July 2023, https://pca-cpa.org/en/cases/197/.

(2) *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92 (S.D.N.Y 2002).

The existence and scope of ACP in Korea has been examined in U.S. courts. The Federal District Court for the Southern District of New York, for instance, was required to determine if certain documents were protected by attorney-client privilege under Korean law. The court acknowledged that numerous declarations by Korean counsel were provided supporting the claim of attorney-client privilege, but they ultimately refused to find that the attorney-client privilege existed under Korean law given the lack of a Korean statute specifically providing such protection.

Ⅳ. Impact on International Arbitration related to Korea

Korea's lack of a common-law type of ACP under its statutory regime and the restrictive interpretation of the Supreme Court has various implications upon international arbitrations with a Korean element. The implications, for example, could extend to both commercial and investment arbitrations that may be seated in Korea, where Korean attorneys or parties are involved, and where the governing law is Korean law. To some extent, it could even have an impact upon Korea's future of becoming a more competitive hub for international arbitration.

First, for Korean parties involved in international arbitration, they may be disadvantaged because they may be unable to claim the same scope of privileges or protections. A tribunal may, in theory, not recognize an ACP-type of privilege or protection claimed during document disclosure based on the 2012 Supreme Court judgment. When faced with disputes with counterparties from jurisdictions that have wider-ranging ACP, this creates an imbalance between the parties.

Some may suggest that the imbalance can be countervailed by a tribunal through the "most protection privilege" standard. Under the most protection privilege standard that tribunals often employ, for example, the highest privilege standard that may exist will be applied to both parties equally. While this may equalize the treatment to the

parties, this is not without its issues. At the outset, from the Korean parties' perspective they have no guarantee that the tribunal will adopt this standard. As an ex post standard, it does not cure the ex ante circumstances. Korean parties may be disadvantaged from the beginning when seeking legal advice and opinions. They will face greater uncertainty and unpredictability on whether a communication or opinion will be covered by ACP-type of protections, which might make them more reluctant to seek advice. The frequency, depth, and breadth of matters they will seek advice may become more limited. This will all constitute an additional risk and burden and transaction cost.

Second, Korean parties will have lesser expectations of the scope of possible protections. This may affect tribunals that apply the IBA standards under Article 9.4(c) that allow tribunal to take into account the "the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen". Korean parties will be considered to have a lower expectations "at the time the legal impediment or privilege is said to have arisen".

Third, given the uncertainty related to the status of in-house counsel, Korean companies may be disadvantaged when they seek advice from their in-house counsel. According to one estimate, Korea has 4,000 in-house counsel who are employed in companies around the country.[58] For global Korean companies, the uncertainty may affect the interaction between in-house counsel at home and foreign affiliates or subsidiaries, and between in-house counsel and their in-house counsel colleagues employed at these foreign affiliates. Similarly, foreign companies operating in Korea may be surprised and disadvantaged by the lack of protections, particularly if they come from a common law jurisdictions and have far greater expectations.

Notably, many senior attorneys at major Korean law firms at the partner level, particularly those who serve as counsel in international arbitration, are dual qualified in common law jurisdictions. Most are members of the New York State Bar Association and California State Bar Association in the U.S. or England and Wales Bar Council in the U.K.[59] As members of the New York State Bar, for instance, they would be

58) Seunghwan Chung, "Former Legal Professionals Who Have Become Transparent Management CEOs are Highly Sought After", Maeil Business News, 31 January 2021.

59) As of 31 March 2023, out of the 224 registered Foreign Legal Consultants practicing in Korea, for instance, 163 are members of the New York State Bar Association, 37 are members of the

subject to the same ethical obligations and duties. Hence, arguably Korean clients receiving advice from them could assert ACP in an international arbitration.[60] Yet it will be the transactional attorneys, in particular, who will often be the ones providing legal advice and opinions that would be the potential subject of ACP. Transactional attorneys are relatively less likely to be dual qualified. Even if they were, some attorneys are known to not pay their foreign bar association dues or to meet minimum continuing legal education obligations such that their status may be inactive or suspended. This could potentially affect the application of ACP that was based on membership in these foreign bars. The scope of ACP may also be more limited because they would generally only provide advice on Korean law and domestic issues.

Fourth, international arbitration related to Korea may become less attractive. Parties may be less likely to consider Korea as a place of arbitration or the law governing the arbitration agreement. For jurisdictions that consider ACP-type protections a procedural matter, in particular, the Korea may be considered a less attractive choice as a seat of arbitration given that some tribunals may give weight to the seat as a factor in determining the applicable law for ACP. In a similar fashion, the choice of Korean law as the governing law for a dispute would become less attractive. This would be particularly the case for parties from jurisdictions where ACP is considered a matter of substantive law. Similarly, KCAB International as an arbitral institution may be naturally affected.

Ⅴ. Legislative Initiatives

The recent legislative initiatives related to ACP are a reaction to use of documents and opinions that were seized or obtained by various government authorities from companies. These include seizures conducted at the corporate offices by prosecutors and administrative agencies such as financial regulators and the competition authoritie

California State Bar Association and 36 are member of the England and Bar Council. Most Korean attorneys that have obtained an LLM degree in the U.S. are members of the New York State Bar Association.

60) Some debate could exist as to whether the privilege would only apply to advice pertaining to the applicable law of the foreign bar association and not to Korean law.

s.[61] Companies operating in highly-regulated sectors are also known to feel compelled to "voluntarily" provide otherwise "privileged" or confidential communications out of fear of regulatory retaliation.[62] The focus of the proposals thus have been directed at such criminal and administrative actions and less toward cross-border civil litigation or arbitration.

This article considers the two most recent proposals from National Assembly members. National Assembly members Unha Hwang ("Hwang's Proposal") and Kangwook Choe ("Choe's Proposal") made proposals that focus on amending Article 26 of the Attorney-at-Law Act to include a right related to the maintenance of confidentiality in addition to the duty to maintain confidentiality. Both proposals are quite comprehensive and do not substantially differ. They call for a right to apply to communications exchanged between a client and an attorney as part of the attorney's work. Hwang's Proposal qualifies that the the communications must be made in confidence. Both proposals state the right should apply to documents or materials (including those made or maintained in electronic format) or objects received by the attorney from the client in their work.[63] Hwang's Proposal states that it also applies to those that assist an attorney in carrying out his or her functions.

The proposals, however, focus on amending the Attorney-At-Law Act, which of course are tailored to the regulation of the conduct attorneys. They would only grant the attorney the right to not be compelled to disclose communications or testify. As considered, they do not appear to directly address the ability of a client to assert a privilege regarding communications that might be in the client's possession, custody, or control. It may be suggested that Korea should eventually consider following the approach of countries like Germany and extending the protection to both legal, economic, business, and financial advice, but this would most likely be too ambitious in the short-term.

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61) Young-Ik Choi, "What if the FSS requests submission of memorandum written by a lawyer?", Law Times, 20 January 2015; DLA, p. 199.

62) DLA, p. 199; Chung, Joon Hyung and Kim, Seul-ki, "Attorney-Client Privilege for In-house Counsels", Korean Journal of Criminology, Vol. 32, No. 4, 2021 ("Chung & Kim"), p. 118.

63) According to one academic proposal, documents prepared by an attorney should be excluded from the scope of search warrants at the outset. Under the warrant, unclear documents would be sealed and submitted for court review. Aera Han, "A Study on the Attorney-client Privilege and Its Improvement", Korean Lawyers Association Journal, Vol. 68, No. 4, 2019.

Furthermore, neither proposal clarifies whether it applies to in-house counsel or foreign qualified attorneys. For the benefit of Korean parties, the status of in-house counsel should be clarified and at a minimum their communications related to legal advice should more expressly benefit from comparable protections. The status of communications between in-house counsel and external attorneys or between a Korean attorney and a foreign legal consultant or foreign attorney also remain unclear. One suggestion is to clarify that the privilege or right would only apply when an in-house counsel acts independently and provides professional legal advice.[64]

Both proposals provide various exceptions such as where the client consents to the disclosure, where an attorney must defend themselves such as in a dispute with the client, or where necessary for important public interests. Hwang's Proposal adds as an example of important public interest the case where a client seeks legal advice to commit a crime. Hwang's Proposal also provides that an attorney could disclose communications for purposes of realizing his or her own rights and when information is forwarded to, or to be taken care of by, a third party to carry out ones job within a socially reasonable scope.

The Korean Bar Association provides another proposal that is quite detailed. It provides for documents that have been seized or obtained to be sealed and transferred to the courts or a third person referee for review before the authorities can view them. It also includes provisions to deal with potential abuses.

Overall, while promising, if adopted, the various statutory proposals should help to alleviate the uncertainty that surrounds ACP in Korea and to expand its scope. Yet, the proposals have not placed much focus on the need to address the privilege or confidentiality from the perspective of cross-border litigation or arbitration.

Ⅵ. Conclusion

Given that document production has become a standard feature in international arbitration, the legal impediment exceptions that may apply such as attorney-client related confidentiality and privilege continue to generate a host of issues. The lack of

64) Chung & Kim, p. 145.

predictability of the process in terms of what will be accepted or excluded remains a concern. Tribunals face the challenge of needing to provide equality of arms and procedural fairness between the parties to try to reach a workable solution. For arbitration to continue to thrive in an internationally-competitive environment, the more clarity that can be provided will help overcome these uncertainties.

Even when compared with other civil law jurisdictions, Korea's legal jurisprudence concerning the attorney-client related legal impediment and privilege remains relatively restrictive and narrow in scope. The current legislative initiatives show promise in shedding light on the issues to expand the protections. This will help provide much needed clarity and help resolve the unpredictability that remains. Yet, most of the focus has thus far been on preventing Korean prosecutors or regulatory authorities from obtaining privileged information in the criminal or regulatory context. More attention needs to be focused on how to address the additional concerns that arise for parties involved in international arbitration or cross-border litigation. The impact of the issues has wider implications that go beyond the domestic realm. This includes the ramifications related to in-house counsel, and advice provided to foreign affiliates, and even third-party companies doing business with Korean companies.

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