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The International Comparative Legal Guide to:

Litigation & Dispute Resolution 2016

9th Edition

A practical cross-border insight into litigation and dispute resolution work

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Litigation & Dispute Resolution*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of litigation and dispute resolution.

It is divided into two main sections:

Two general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting litigation and dispute resolution work.

Country question and answer chapters. These provide a broad overview of common issues in litigation and dispute resolution in 49 jurisdictions, with the USA being sub-divided into 11 separate state-specific chapters.

All chapters are written by leading litigation and dispute resolution lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Greg Lascelles of King & Wood Mallesons LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk.

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Privilege: An International Perspective

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Introduction

This chapter provides an overview of the doctrine of privilege worldwide, with particular focus on English and US law. We contrast the rules in these, and other, common law jurisdictions but also consider the position in countries with civil law systems. We address some of the issues and pitfalls that can arise in the context of international litigation and arbitration, and in internal or regulatory investigations. Recent important developments are highlighted throughout.

The Doctrine of Privilege

England and Wales

In English law, privilege is a legal right that permits a party to refuse to testify about a particular matter or to refuse to disclose a particular document.

The doctrine encompasses legal professional privilege, joint and common interest privilege, without prejudice privilege and the privilege against self-incrimination. There are two types of legal professional privilege: legal advice privilege; and litigation privilege.

Legal advice privilege applies to confidential communications between a lawyer and his client that are for the purpose of obtaining or providing legal advice, whether or not legal proceedings are contemplated or in progress. It also applies to documents evidencing such communications and to a lawyer's working papers.

Litigation privilege is broader. Litigation privilege applies not only to confidential communications between a lawyer and his client, but also to communications that either the lawyer or the client conducts with a third party, provided that these communications take place for the sole or dominant purpose of obtaining or providing legal advice or evidence for use in contemplated or existing legal proceedings.

The English Courts have grappled with a range of issues regarding legal advice privilege, including the meaning of "the client". Whilst the identity of the client is obvious where the client is an individual, the matter is less straightforward where the client is an organisation such as a company, possibly with many employees. The controversial decision of the Court of Appeal in *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474 established that only a limited class of employees with express or implicit authority to seek and receive legal advice on behalf of the company qualify as "the client" for the purpose of legal advice privilege; communications with other officers or employees cannot benefit from legal advice privilege.

What constitutes "legal advice"? In *Balabel v Air India* [1988] 1 Ch 317 the Court of Appeal held that legal advice "*is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context*". The House of Lords endorsed this approach in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 4. Accordingly, advice given about the commercial aspects of a transaction can attract privilege; as can advice on presentational or strategic matters, for example concerning the optimal approach when responding to a public inquiry or regulatory investigation.

The English High Court found that a "*relevant legal context*" existed in the recent case of *Property Alliance Group Ltd v The Royal Bank of Scotland Plc* [2015] EWHC 3187 (Ch) (5 November 2015), which concerned the status of documents produced by external counsel for a committee of the Royal Bank of Scotland in the context of regulatory investigations into alleged manipulation of the LIBOR benchmark. The bank claimed legal advice privilege over (i) confidential memoranda for the purpose of updating the committee on the nature and progress of the regulatory investigations, and (ii) confidential minutes of meetings between the committee and external counsel regarding the investigations. Both categories of document were prepared and communicated to the committee by external counsel. Significantly, both included substantial reportage of purely factual matters.

The Court focused on the relevance and purpose of the communications in question. In the context of the regulatory investigations and given the potential legal ramifications of those investigations for the bank, the communications formed a part of the "*necessary exchange of information*" between the bank and its lawyers for the purpose of obtaining legal advice.

Joint privilege and common interest privilege may arise where two or more parties have a shared interest in an issue to which privileged material relates and can be used by one party to share privileged material with the other without affecting its privileged status, or (in the case of joint privilege) to compel another party to produce privileged material for inspection.

Without prejudice privilege applies to all communications between parties (or their lawyers) that are aimed at settlement of a dispute. There must be a genuine attempt at settlement for this privilege to apply.

The privilege against self-incrimination may be invoked by an individual or a company where to answer a question or provide information would tend to expose the individual or company to a criminal charge.

Although privilege is an absolute right under English law (and not therefore subject to the discretion of the Court, or public policy considerations), the right can be waived or lost. Since confidentiality

is a necessary precondition to privilege, loss of confidentiality often means loss of privilege. A party can waive privilege, for example by choosing to deploy and rely upon privileged documents in support of his case, or by disclosing privileged material to a regulator. Note that intentional waiver of privilege over one document can lead to the unintentional waiver of privilege over other documents if a party attempts to selectively waive privilege in a manner that could lead to unfairness or misunderstanding. Where a privileged document is disclosed to a third party for a particular purpose, advice should be sought as to whether it may be possible to retain privilege in the document as against the rest of the world via a confidentiality agreement with the third party, and/or as a result of an express or implied limited waiver. Where a privileged document is accidentally disclosed it may still be possible to prevent its use, either by agreement with the party to whom the document has been disclosed or by Court application.

There are very few exceptions to English legal professional privilege but it cannot apply where the documents or communications are part of a crime or fraud, or seek or contain legal advice to assist such illegitimate activity.

Continental Europe

Most countries in continental Europe operate civil law systems. Unlike common law jurisdictions, civil law systems do not generally oblige parties to disclose all documents relevant to a dispute, which explains why the doctrine of privilege has not developed in these countries in the same way that it has developed in common law jurisdictions. That said, most European states do require lawyers to preserve the confidentiality of documents and communications to which they are privy as a result of their relationship with their clients. Whilst this may be described locally as privilege, it is not the same concept as the common law doctrine.

By way of example, in France the parties to civil proceedings are generally only required to disclose those documents that they wish to disclose in support of their position, although a Court application may be made for an order that particular documents be produced. At the same time, a lawyer's legal and professional obligations of confidentiality towards his client mean that communications between the lawyer and his client, or the opposing lawyers, are protected from disclosure at the risk of criminal sanction. The position is similar in Belgium, Germany, Italy, Luxembourg, the Netherlands and Spain. A limited form of privilege is recognised in Sweden.

Proceedings before the European Court of Justice (as opposed to before the national Courts of European states) have seen the development of a limited doctrine of privilege. In broad terms, a document may be privileged where it is a communication created for the purpose, and in the interests, of the client's rights of defence and the communication is to, or from, an independent lawyer qualified in an EU Member State. Note, however, the decision in *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* (Case C-550/07 P) [2010], where the European Court of Justice affirmed that communications between a company and its in-house lawyers could not attract privilege on the basis that in-house lawyers are (apparently) insufficiently independent of their employers. Whilst this decision related to an EU antitrust investigation, it is probable that the EC Courts and Commission will apply the same approach in all types of case where the Commission has powers to seize documents.

United States

The US attorney-client privilege and work product doctrine have their broad equivalents in the English legal advice and litigation privileges. There are, however, important differences, for example as regards the range of company employees that English and US law will regard as "the client". In *Upjohn Co v United States*, 449 U.S. 383 (1981), the United States Supreme Court adopted a broader approach to this issue than the English Court of Appeal in *Three Rivers No 5*. The Supreme Court held that the attorney-client privilege applies to corporate clients and that communications between legal counsel and any employee of a company potentially could fall within the scope of the attorney-client privilege. The Supreme Court set forth a five-factor test to guide Courts in making privilege determinations. Factors include whether the information possessed by the employee is necessary for counsel to provide legal advice to the company and whether the employee is aware that he is providing information in order for the company to secure legal advice. The *Upjohn* approach is followed by federal Courts where federal privilege law applies to a cause of action; state privilege law varies from state to state and may be similar to the *Upjohn* approach or more restrictive. In contrast, as explained above, the English Court of Appeal in *Three Rivers No 5* held that only documents created by those employees tasked with specific responsibility for communicating with lawyers could attract the privilege.

Another difference is that US work product doctrine is not absolute in the same way as English legal advice and litigation privilege. There are two types of work product in the US – "ordinary work product" and "opinion work product". Opinion work product contains or reflects the mental impressions, legal theories, conclusions, or opinions of counsel. Ordinary work product is fact-based work product such as witness statements, recordings, and objective data prepared in anticipation of litigation. Opinion work product receives almost absolute protection, but opposing counsel may discover ordinary work product by showing substantial need and undue hardship.

US law also recognises the concepts of joint defence privilege and common interest privilege (which are broadly similar to the English concepts of joint privilege and common interest privilege); governmental deliberative process privilege, which may allow a federal agency to withhold disclosure of documents that would otherwise be subject to production following a request under the US Freedom of Information Act; and self-critical analysis privilege, which is designed to encourage organisations to undertake thorough internal investigations and self-critical reviews on matters of public importance by reducing the likelihood that damaging conclusions will be subject to disclosure. Whilst without prejudice privilege does not exist in the US, the content of settlement dialogue is generally inadmissible in evidence.

In the US, the protection of attorney-client privilege or work product doctrine can be lost or waived. Waiver of the attorney-client privilege can occur where a communication is disclosed to a third party. However, work product protection is waived only where the disclosure substantially increases the likelihood that an opponent will gain access to the material.

Whilst traditionally the disclosure of privileged communications could result in a waiver of attorney-client privilege over all related communications regarding the same subject matter, Federal Rule of Evidence 502, which was enacted in 2008, prevents waiver extending to undisclosed documents and communications where disclosure has been made to a federal office or agency in a federal proceeding. Rule 502(a) provides that disclosure will lead to waiver of attorney-client privilege and work product protection for undisclosed communications only if the waiver is intentional, the disclosed and undisclosed communications relate to the same subject matter, and they ought in fairness to be considered together. In cases of inadvertent disclosure, Rule 502(b) may also be invoked to preserve privilege over the disclosed material itself, provided a party took reasonable steps to prevent and correct the disclosure of

privileged material. The amendments to the Federal Rules of Civil Procedure, effective December 2015, encourage parties to agree on privilege and work product issues at the outset of a case in order to minimise the costs and burden of discovery, and to have such agreement enshrined by the Court pursuant to Rule 502(d). Notably, an agreement that disclosure of privileged material will not waive privilege binds not only the parties to the agreement, but also third parties, once it has been entered as a Court order under Rule 502(d).

As in England, US privilege does not apply to communications between a lawyer and his client that take place for the purpose of furthering an illegal or fraudulent act.

Other countries

Generally, common law jurisdictions such as Australia, Canada, Hong Kong, India, Singapore, South Africa and New Zealand recognise and promulgate the doctrine of privilege in the same way as the English and US Courts. That is not to say that all of these jurisdictions operate the same rules. So, for example, the Australian 1995 Evidence Act defines "the client" for the purpose of client-legal privilege in much broader terms than English law. Similarly, the Hong Kong Courts have recently rejected a restrictive definition of "the client" and gone so far as to hold that the organisation itself is "the client" for these purposes – see *CITIC Pacific Limited v Secretary for Justice and Commissioner of Police* (unreported, 29 June 2015).

In civil law jurisdictions the position is generally similar to that in continental Europe, as described above. So, for example, in China and Japan, where privilege itself is not recognised, confidentiality requirements do provide some protection. In Russia, there is a limited recognition of privilege for those lawyers registered as advocates (criminal lawyers) but no general obligation of disclosure. The position in the Middle East varies. The doctrine of privilege does not exist in the UAE, Bahrain or Saudi Arabia, although these jurisdictions impose obligations of confidence on practitioners; but privilege is recognised by the Courts of the Dubai International Financial Centre, which operate a common law system.

Cross-border Issues

Litigation

The fact that a document or communication attracts privilege in jurisdiction A does not necessarily mean that privilege can be claimed in jurisdiction B, and *vice versa*. Where a party seeks to invoke privilege in cross-border litigation, the position will depend on the approach of the Courts in the jurisdiction where the litigation is taking place.

The English Courts determine questions of privilege by reference to English principles, and irrespective of whether the material attracts privilege elsewhere. So communications that take place outside England and/or with a non-English lawyer or client and/or regarding foreign proceedings may be privileged in English litigation, even if the same communications would not be privileged in the jurisdiction in which they take place. Similarly, the waiver or loss of privilege in another country does not automatically prevent the English Court from finding that the document or communication in question is privileged. An English Court may be prepared to grant an injunction to prevent the use of privileged documents in foreign proceedings (see for example *Bourns Inc v Raychem Corp* [1999] 3 All ER 154 (CA)) and the English Court will not order the disclosure of documents that are privileged under English law in response to a request for such an order from a foreign Court.

The Courts in Australia, Canada, Hong Kong, Singapore and New Zealand can also generally be expected to apply their own rules when determining a claim for privilege over foreign communications or with a foreign lawyer, although in none of these jurisdictions is the position as settled as it is in England and local advice must always be obtained. For example, in Australia it is currently unclear whether this will be the approach in a case where the relevant foreign legal system does not itself recognise privilege.

The US Courts take a different approach and will generally apply foreign rules and recognise foreign privilege based on principles of comity, even if doing so will result in a greater level of protection than under US law. Note, however, that if communications are sufficiently connected with the US (for example, because they arise in connection with an activity performed in the US) US Courts will apply US privilege law rather than the law of the foreign jurisdiction.

Generally, Courts in civil law jurisdictions will not recognise privilege acquired in foreign jurisdictions.

Arbitration

International commercial arbitration involving parties from different jurisdictions with different rules on privilege presents special difficulties. Absent agreement between the parties, the tribunal must first choose which law to apply in determining any privilege claim. Is it the law of the seat of the arbitration; is it the law of the country in which the documents or communications were created or conducted; or is there some other jurisdiction with sufficient nexus to the dispute such that its rules ought to prevail?

Certain of the institutional rules do, to an extent, indicate the approach to be taken by the tribunal when deciding issues of privilege. Article 22 of the International Arbitration Rules 2014 of the ICDR and also Article 9 of the IBA Rules on the Taking of Evidence in International Arbitration 2010 provide for (but do not mandate) the recognition of privilege. Most, however, allow the tribunal a wide discretion – including the rules of the ICC, LCIA, ICSID and UNCITRAL.

England and Wales

Section 34 of the Arbitration Act 1996 states that the tribunal has responsibility for deciding all procedural and evidential matters and specifically includes within this "*whether any and if so which documents or classes of documents should be disclosed*". Where the arbitration is governed by English law, the tribunal can be expected to apply English rules on privilege, unless an agreement between the parties or the applicable institutional rules provide otherwise.

United States

The rules of some US arbitral institutions provide guidance on the approach to be adopted. For example, Rule 34 of the Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association require the tribunal to have regard to "*applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client*".

Where the tribunal has discretion

Unless the applicable rules clearly prescribe (or the parties have agreed) the approach to choice of law, issues of privilege will generally be determined at the tribunal's discretion, subject always to the requirement that discretion must be exercised fairly and equally. For this reason, the working assumption for lawyers and their clients should be that documents and communications may not enjoy protection, particularly where the arbitration involves a party, a lawyer and/or an arbitrator from a civil law jurisdiction.

A common approach when faced with a choice of laws is to apply the law that offers the greatest protection for privileged material

to both parties, sometimes described as the most favoured nation approach. The International Arbitration Rules 2014 of the ICDR follow this route.

Whilst a tribunal may be entitled to order disclosure of privileged material, it is of course the case that such an approach could render the award susceptible to challenge.

Internal investigations

Unless an internal investigation is properly designed and managed there is a risk that privileged (or potentially privileged) documents and communications might lose (or never attain) that status. This risk is a particularly important consideration in cases where the subject matter of the investigation, and/or the investigation work product, could lead to regulatory action or legal proceedings in a common law jurisdiction. This is because it is in those jurisdictions where there may be a right to privilege that is at risk of being waived or lost.

Generally, and because of the requirement that communications take place between the lawyer and the client only, English legal advice privilege and its US equivalent, attorney-client privilege, will be more difficult to establish over documents and communications generated in the course of an internal investigation than English litigation privilege or US work product doctrine. However, for these latter types of privilege to apply legal proceedings must be in contemplation or existence at the time of the investigation. As noted above, it is also the case that US work product doctrine is not absolute. In rare circumstances, the US privilege of self-critical analysis may also apply to prevent the disclosure of investigatory material.

Steps that may be taken to maximise the scope to claim privilege over internal investigation communications and work product include: the early documentation by the organisation's in-house legal function that the purpose of the investigation is to allow the provision of legal advice to the organisation and (if appropriate) that legal proceedings are anticipated; the formal authorisation of the conduct of the investigation by the Board or senior management; the routing of all instructions to, and communications with, external lawyers via in-house counsel; and the preparation of detailed written guidelines by internal or external lawyers regarding the investigation's scope, purpose, communication lines, in-house legal team, document handling/circulation procedures and confidentiality requirements. The preparation of *verbatim* interview notes or witness statements should if possible be avoided; and the practice of incorporating legal analysis, opinions or impressions into records of meetings and discussions with employees or other personnel cannot be guaranteed to cloak the material with privilege.

If the investigation is taking place in England, or involves communications with individuals in England, special care must be taken in light of the decision in *Three Rivers No 5*. Material should only be circulated to those individuals within the organisation that are part of the team formally responsible for seeking and receiving legal advice. The internal circulation of such material should take place subject to an express written notice (whether on the face of the material itself or within a covering note or letter) that such circulation does not amount to a waiver of privilege and is for the purpose of seeking or providing legal advice.

In the US, some Courts will apply attorney-client privilege or work product protection to confidential communications between company employees and in-house or outside counsel that take place during the course of an internal investigation, provided the investigation is conducted or overseen by lawyers for the purpose of providing legal advice to the company and the employee is informed that the communication is necessary to provide legal advice to the company, among other factors (see *Upjohn* and also *In re Kellogg, Brown & Root Inc, et al*, 756 F.3d 754 (D.C. Cir. 2014)).

Given the decision in *Akzo Nobel*, organisations undertaking internal investigations in relation to EU antitrust issues (or other matters that could attract the interest of the European Commission) should take a number of precautions. Such precautions will typically include: involving external counsel at an early stage; appropriately marking and segregating documents and communications that are privileged and confidential; and minimising the production of internal documentation and communications (including documents that reproduce or summarise external legal advice).

Regulatory investigations

Regulators and government authorities usually request the disclosure of material that may be privileged, such as a report containing the conclusions of an internal investigation. Whilst in most cases the regulator or authority cannot compel disclosure, an organisation may want to comply because cooperation may reduce or avoid enforcement action, for example via a Deferred Prosecution Agreement. The use of these sorts of agreements is well-established in the US but until very recently had not been a feature of the English legal landscape. However, in November 2015, the first application by the UK Serious Fraud Office for a Deferred Prosecution Agreement was approved – see *Serious Fraud Office v Standard Bank Plc*, Case No U20150854 (unreported, 30 November 2015).

Under English law it may be possible to disclose privileged material without losing privilege if the disclosure is effected pursuant to a confidentiality agreement and/or limited waiver, although once material has been disclosed there is always a risk that it will be disseminated further or used for some other purpose, meaning that privilege may still be lost. Note that where a prosecutor holds privileged material, and subsequently commences criminal proceedings against a third party, the prosecutor may be required or ordered to disclose that material to the third party if those proceedings concern facts to which the material relates.

In the US, a clear majority of Courts have rejected the selective waiver doctrine and held that the disclosure of material to a government agency waives attorney-client privilege as regards third party litigants. The work product doctrine may apply to protect materials disclosed to the government if the government and the disclosing party share a common interest.

The recent English High Court decision in *Property Alliance Group*, discussed above, has been welcomed by practitioners acting for clients that may be the subject of regulatory investigations. The lawyer's role in these circumstances typically extends beyond that of legal adviser. The lawyer will often need to exchange factual information and briefings with the client, and to act as a member of the investigatory team with responsibility for fact-finding. The decision is therefore helpful in confirming that legal advice privilege can protect a relatively broad population of documents and communications created and exchanged in the context of a regulatory investigation.

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