INTERNATIONAL COURT OF JUSTICE

QUESTIONS RELATING TO THE SEIZURE AND DETENTION OF CERTAIN DOCUMENTS AND DATA

TIMOR-LESTE v AUSTRALIA

ANNEXURES TO THE MEMORIAL OF THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE

Annex No.	**Document description**	**Date**
1.	Expert report of Gaffney, Cline & Associates submitted in the TST Arbitration [not reproduced]	18 February 2014
2.	Commonwealth of Australia, Parliamentary Debates, The Senate, Petroleum (Timor Sea Treaty) Bill 2003, Petroleum (Timor Sea Treaty) (Consequential Amendments) Bill 2003, Passenger Movement Charge (Timor Sea Treaty) Amendment Bill 2003, Second Reading	6 March 2003
3.	P. Cleary, Shakedown: Australia's Grab for Timor Oil, pp. 84-87	2007
4.	ABC Online, 'Aust on Political Collision Course with East Timor'	19 April 2004
5.	Timor-Leste's Statement of Claim in the TST Arbitration [not reproduced]	18 February 2014
6.	Application filed by Australia in the TST Arbitration for an Order to Disallow the Giving of Potential Evidence [not reproduced]	31 January 2014
7.	Redacted copy of the Consultancy Agreement between the Government of Timor-Lester and Bernard Collaery & Associates, Trading as Collaery Lawyers	17 September 2012
8.	Letter from B. Collaery to I. Carnell [not reproduced]	2 April 2008
9.	Letter from B. Collaery to I. Carnell [not reproduced]	1 May 2008

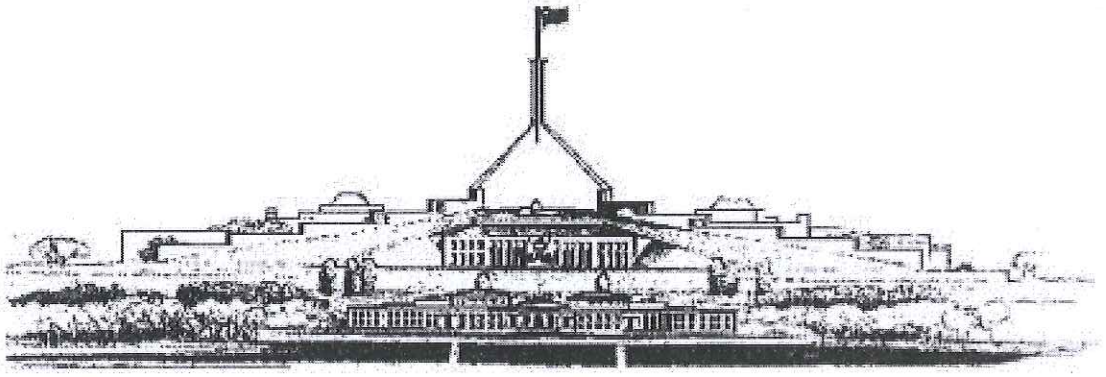
Annex No.	Document description	Date
10.	German Introductory Act to the Civil Code, Article 43	Undated
11.	Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd (No 2) [2008] WASC 10	1 February 2008
12.	Breen v Williams [1994] 35 NSWLR 522	7 November and 23 December 1994
13.	Chantrey Martin (A Firm) v Martin [1953] 2 QB 286, pp. 292-293	3 July 1953
14.	Wentworth v De Montfort [1988] 15 NSWLR 348, pp.353, 357-361	17 November and 16 December 1988
15.	Legal Profession (Solicitors) Rules 2007 (ACT), Rule 6	2007
16.	Australian Foreign States Immunities Act 1985	1985
17.	US Foreign Sovereign Immunity Act 1976	1976
18.	Israel Foreign States Immunity Law 5769-2008	January 2009
19.	UK State Immunity Act 1978	1978
20.	Indian Code of Civil Procedure 1908, Section 86	1908
21.	Foreign and Commonwealth Office, Written Statement of D. Lidington	27 November 2013
22.	DLA Piper, Legal Privilege Handbook 2013	2013
23.	Linklaters, Privileged, Privilege review 2009	2009
24.	Norton Rose, Disclosure and Privilege in Asia Pacific	2010

Annex 1 [not reproduced]

Annex 2

COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



THE SENATE

PETROLEUM (TIMOR SEA TREATY) BILL 2003

PETROLEUM (TIMOR SEA TREATY) (CONSEQUENTIAL AMENDMENTS) BILL 2003

PASSENGER MOVEMENT CHARGE (TIMOR SEA TREATY) AMENDMENT BILL 2003

Second Reading

SPEECH

Thursday, 6 March 2003

BY AUTHORITY OF THE SENATE

SPEECH

Date Thursday, 6 March 2003 **Source** Senate
Page 9384 **Proof** No
Questioner **Responder**
Speaker Brown, Sen Bob **Question No.**

Senator BROWN (Tasmania) (12.10 pm)—Last night, as the newspaper reports tell us, the Prime Minister phoned his opposite number in East Timor to deliver blackmail. What the Prime Minister effectively did was to coerce a poor and weak neighbour, through blackmail, into accepting an agreement to develop the fossil fuels—

Senator Abetz—Mr Acting Deputy President, I rise on a point of order. This is clearly casting an aspersion on the Prime Minister, accusing him of engaging in blackmail. Not only is it illegal but it is casting an aspersion on the Prime Minister and ought be withdrawn.

The ACTING DEPUTY PRESIDENT (Senator Watson)—Senator Brown, you should not accuse the Prime Minister of blackmail. I ask you to withdraw that.

Senator BROWN—I believe that that is what happened.

The ACTING DEPUTY PRESI-DENT—That is my ruling.

Senator BROWN—I am not going to withdraw that. That is exactly what happened last night. It would be a breach of faith, in my own view of the matter, to withdraw that statement.

The ACTING DEPUTY PRESI-DENT—For a second time, Senator Brown, I ask you to withdraw the blackmail allegation against the Prime Minister, or rephrase it.

Senator BROWN—Last night the Prime Minister made a call to his opposite number in East Timor to effectively coerce East Timor into making an agreement which was against its own interests.

Senator McGauran—Mr Acting Deputy President, I rise on a point of order.

The ACTING DEPUTY PRESI-DENT—Senator Brown, there is another point of order.

Senator BROWN—Yes, but I am making my point of order.

The ACTING DEPUTY PRESI-DENT—It is a point of order being made against you whilst you are on your feet.

Senator BROWN—A point of order cannot intervene on a point of order.

The ACTING DEPUTY PRESI-DENT—Yes, it can. That is the whole purpose of points of order.

Senator McGauran—Quite obviously Senator Brown, if I can garnish what he was trying to say, is debating your instruction, which was to withdraw and rephrase if he wishes to. Surely he has enough grasp of the English language to find another word that is within the standing orders. I put it to you, Mr Acting Deputy President Watson, that he is challenging your ruling.

The ACTING DEPUTY PRESI-DENT—Your point of order is that he is debating the issue. Senator Brown, you cannot debate my ruling. I have made a ruling; I have given you an option. It is up to you to either withdraw the term or to use some alternative phraseology.

Senator BROWN—Last night the Prime Minister used blackmail on East Timor, and I will not withdraw that. It is a matter of fact. This is such a serious matter; it is such deplorable behaviour by Australia against our poor East Timorese neighbour. We have to call a spade a spade, and that is what I am doing. I do not believe that is outside standing orders. I am prepared to further fill out the reasons for my making that statement, but it would be not proper for me to withdraw a statement which is factual in effect.

The ACTING DEPUTY PRESI-DENT—Senator Brown, you are impugning a motive against the Prime Minister—accusing him of blackmail. That is

unacceptable, and I ask you to withdraw it or to use some alternative language. I am sorry.

Senator BROWN—The motive of the Prime Minister last night was to coerce East Timor, in terms of resources and money, through a threat to withdraw this legislation if the East Timorese government did not agree to sign the agreement today. That is why Mr Downer has gone to Bali. That is a statement of fact. That is what the Prime Minister did. I will not withdraw.

The ACTING DEPUTY PRESI-DENT—Senator Brown, you are challenging the authority of the chair. I have asked you to withdraw. You can withdraw and then use alternative language if you wish, but it is a requirement that you should respect the decision of the chair.

Senator BROWN—Chair, I believe you are wrong in your ruling. I stand by my statement. The Prime Minister and the government of Australia are involved in blackmail of the clearest order against our poor East Timorese neighbour. That is what has happened. I am not going to withdraw that. I am prepared to elaborate on it if you will give me the opportunity to do so, but I will not withdraw a statement of fact.

The ACTING DEPUTY PRESI-DENT—If you are going to dissent, it is necessary to put your dissent in writing.

Senator BROWN—No, Chair, I am not dissenting; I am not accepting the ruling. I will leave that matter for you to determine.

The ACTING DEPUTY PRESI-DENT—You are refusing to withdraw, and I have asked you to withdraw. If you are going to dissent from my ruling, your next stage is to put it in writing, I have been advised by the Clerk.

Senator BROWN—I will reiterate, with the greatest respect to you, Mr Acting Deputy President: this is a matter of enormous importance. As I said earlier today, I am very angry about—

Senator Abetz—Mr Acting Deputy President, I raise a point of order: I think you have been very lenient with the honourable senator. You have given him a course of action to withdraw and then, if he wishes to, to use alternative language. He has now defied your ruling on a number of occasions and repeated the word. We have all had to withdraw from time to time when we do not like to; yet 24 hours later we usually go back to our offices and say, `Yep, that was a fair cop and it should have been withdrawn.' The honourable senator has been given the opportunity to withdraw. If he does not, quite frankly, Mr Acting Deputy President, he should not be given the opportunity to flagrantly violate your ruling, disregard it and, as a result, hold not only you but the standing orders and this whole place in contempt.

The ACTING DEPUTY PRESI-DENT—I will read standing order 198, `Objection to ruling', for the clarification of the Senate:

> (1) If an objection is taken to a ruling or decision of the President, such objection must be taken at once and in writing, and a motion moved that the Senate dissent from the President's ruling.
>
> (2) Debate on that motion shall be adjourned to the next sitting day, unless the Senate decides on motion, without debate, that the question requires immediate determination.

Senator BROWN—Thank you, Mr Acting Deputy President. I say again, with great respect, that I am not complying with your ruling. I do not withdraw. But I am not issuing a dissent with that. Somebody else can do that if they wish to. My position is clear: I am not withdrawing the comments I made, because they are factual. *(Quorum formed)*

The ACTING DEPUTY PRESI-DENT—Senator Brown, under the circumstances, I have no alternative other than to name you for persistently disobeying a ruling of the Acting Deputy President. I am therefore required to report that to the Senate. Following that, you will be given an opportunity to make an explanation and then it will be up to the minister to move a motion which I presume will be debated at the next day of sitting. I report to the Senate that Senator Brown has persistently disobeyed a ruling of the Acting Deputy President, and I now call on Senator Brown to make an explanation.

Senator BROWN—I thank you, Mr Acting Deputy President. You required me to withdraw the word `blackmail' as applied to the Prime Minister. I had made the statement to the Senate that the Prime Minister had engaged in overnight blackmail by ringing his opposite number in East Timor to apply pressure to have the East Timorese sign an agreement today for the development of the Timor Gap oil and gas fields in return for having this bill go through the Senate today, as reported by today's *Age* newspaper. The chamber should know that the East Timorese government has been put under unacceptable—

Senator Faulkner—Mr Acting Deputy President, I raise a point of order. I would like to be clear that you are taking this action under standing order 203(3).

The ACTING DEPUTY PRESI-DENT—That is correct.

Senator Faulkner—My point of order— and this has been raised previously as a point of order in this place

when in the unusual circumstance these sorts of matters have been before us—is this: you called on Senator Brown to make an explanation. I think I heard you correctly.

The ACTING DEPUTY PRESI-DENT—Correct.

Senator Faulkner—Under standing order No. 203(3), it is competent for that to occur. But it is also competent when you invoke that standing order after a senator has been reported to call upon the senator concerned, in this case Senator Brown, to make an explanation or an apology.

The ACTING DEPUTY PRESI-DENT—He is doing that.

Senator Faulkner—I do not believe that was done. He was called on to make an explanation. I am not suggesting that Senator Brown would necessarily—

Senator Abetz—He's not big enough to apologise.

Senator Faulkner—This is a procedural point that has been raised before in this circumstance.

Senator Abetz—You're right.

Senator Faulkner—I know I am right. Whether Senator Brown avails himself of such an opportunity is entirely a matter for him. My point of order is that that opportunity should be extended to a senator in this circumstance. That is my only point of order. I am not suggesting for one moment that in this instance, or in any other instance, a senator might necessarily avail themselves of that opportunity. But I like to be consistent in the way these matters are dealt with. I think that in the most recent circumstance when a senator was reported we had the then President call on the senator to make an apology. Of course the point was taken quite properly that that senator could have made an explanation or an apology. I believe the Acting Deputy President called on Senator Brown in this instance to make an explanation. I think, if we are going to conform strictly to the standing orders, either is appropriate.

The PRESIDENT—Senator Faulkner, I believe that what you have just said is correct. Therefore, I call upon—

Senator Faulkner—In that instance. Thank you for ruling that way, Mr President. This may not seem to be a major point, but it has been raised before; therefore, I think Senator Brown ought to be called upon to make an explanation or an apology, not called upon to make an explanation.

The PRESIDENT—That is what I intend to do. I call upon Senator Brown to make an explanation or an apology, as it says in the standing orders.

Senator BROWN—I thank Senator Faulkner for drawing our attention to that option. I do not make an apology, but I will make an explanation. I said in the debate earlier that the Prime Minister had been engaged in overnight blackmail of his opposite number in the East Timorese government, and I stand by that. The reasons I made that statement are very clear. We are debating today a piece of legislation that will involve, according to the Minister for Foreign Affairs, Mr Downer, a $50 billion break for Australia from the development of the oil and gas fields which are wholly within East Timorese waters, according to my interpretation and the interpretations of a number of international jurists.

But the boundaries were moved to exclude part of those oilfields during the period of the Indonesian occupation of East Timor, and this treaty effectively excludes the lot and gives to Australia if not fifty-fifty then the majority of the profits that will flow to governments from those oilfields. This is Australia being involved in a grand theft of the resources of our small neighbour East Timor—the most impoverished neighbour in the neighbourhood having its one resource that is going to help it get up off the ground in the future taken by its richest neighbour.

This is Prime Minister Howard, on behalf of the oil corporations, ringing the Prime Minister of East Timor, Dr Alkatiri, and saying to Dr Alkatiri, according to the *Age* report, `If you do not sign the agreement for the development of the Greater Sunrise field'—which is the biggest field and which is East Timorese—`and give that resource in the major part to Australia, then we won't have this legislation go through the Senate today,' which allows for the development of the other, smaller oilfield, which the East Timorese want to see developed. That is the Prime Minister saying, `Do as we want or we will take away a potentially lucrative contract with the Japanese for development of the Bayu-Undan oilfield.' That is blackmail—that is overnight blackmail. The Senate may ask me to withdraw that comment, but to do so would be to ask me to withdraw a factual comment which accurately describes the Prime Minister's behaviour in this affair and I will not do so.

Senator IAN CAMPBELL (Western Australia—Manager of Government Business in the Senate) (12.31 p.m.)—Under standing order 204, I move:

That Senator Brown be suspended from the sitting of the Senate.

Question put.

Annex 3

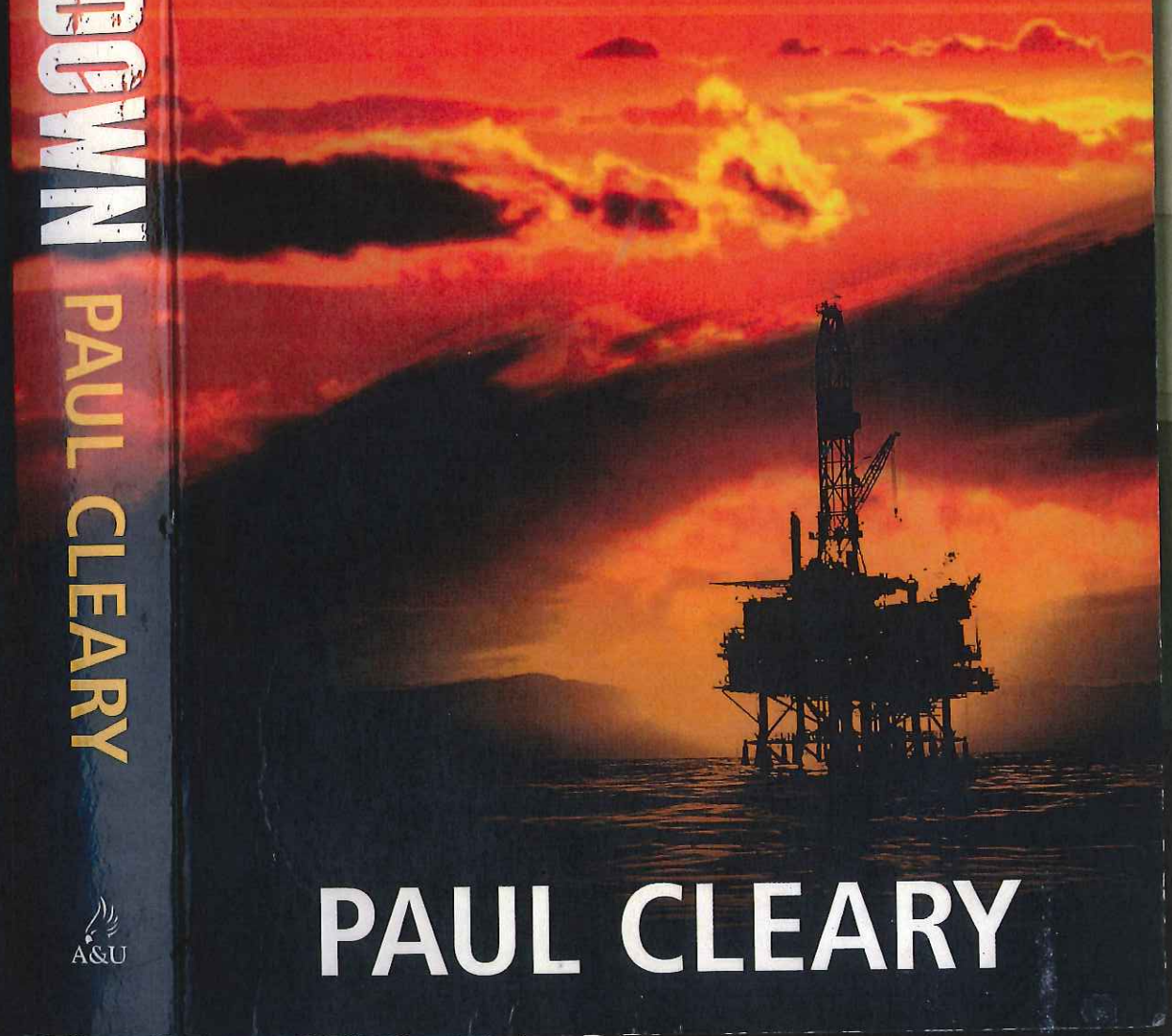
SHAKEDOWN

PAUL CLEARY

A&U

SHAKEDOWN

Australia's grab for Timor oil



PAUL CLEARY

the gaffe ended his leadership. Little wonder that staffers continually advise him 'no jokes, no laughing', when giving interviews on serious matters.

* * *

By early March 2003 contracts for the sale of gas from Bayu Undan were still to be signed, and Japanese buyers had issued an ultimatum to both governments that they would walk away if the treaty was not ratified by 11 March. East Timor's economic lifeline was about to be severed because Australia was being very 'tough' indeed, as Downer had promised. The Australian government, after gaining huge international recognition for its leadership in helping to liberate East Timor, stood ready and willing to choke the new country's development in order to get control of Sunrise.

This deliberate strategy was laid out in detail by Dr Geoff Raby, a DFAT first assistant secretary (now a deputy secretary), in evidence before the Joint Standing Committee on Treaties (JSCOT) hearings on the Timor Sea Treaty in October 2002. When asked by Labor MP for Swan, Kim Wilkie, if it was worthwhile putting 'at risk' the Bayu-Undan development in order to secure ratification by East Timor of the Sunrise agreement, the exchange went:

> **Raby:** All I can say on that is that the government's position is that Australia's national interest is maximised through the development of all the fields and particularly by the development of Greater Sunrise.
> **Wilkie:** So it is the government's view that the risk is worth taking?
> **Raby:** Yes. The bigger field [Sunrise] is of great national interest to us.[4]

* * *

Late one afternoon in the first week of March 2003, the Australian ambassador to East Timor, Paul Foley, banged on the door of the Timor Sea Office, and informed two advisers working there that

the Australian foreign minister wanted an urgent meeting in Dili to sign the Sunrise agreement after the conclusion of negotiations on the previous Sunday night. At this final meeting, the Australian negotiators, after breaking off the talks, had finally accepted East Timor's request to have the linchpin paragraph included in the preamble about the respective claims. The Australian cabinet had approved the agreement on the Monday, and Downer wanted it to be signed in Dili the following Wednesday before bills for the Timor Sea Treaty were tabled in parliament.

Foley was not exactly the most accomplished diplomat to have in this role. Before landing in Dili he had only served overseas as a low-level third secretary, and his position prior to Dili was assistant secretary for dealing with the Year 2000 (Y2K) computer bug. The advisers, Philip Daniel, an Oxford economist who had advised developing countries on oil negotiations for 20 years, and Jonathan Morrow, told Foley that the day chosen by Downer was in fact Ash Wednesday, a public holiday in Catholic East Timor. Ministers would be out of Dili on that day, and the signing would have to be held at another time. Foley was operating under strict instructions and did not seem to take on board the significance of Ash Wednesday. He said Downer wanted East Timor's signature on the Sunrise agreement before Australia began the process of ratifying the treaty. This was because Downer thought that East Timor's advisers would 'play tricks', Foley told them.

Later that night the ambassador went searching for other East Timor advisers and found a group in the newly built, waterfront restaurant in the tropical chic Esplanada Hotel. Foley, accompanied by another DFAT official, vented his minister's rage, telling the group that the Australian foreign minister was 'fed up' with the 'lies and dishonesty' of the new government and its prime minister and that Downer was insisting on the Wednesday meeting.

Seated at the table was Einar Risa, an agreeable and high-calibre Scandinavian who had served as a diplomat and Secretary of State for Development Cooperation in the Norwegian government, and

in senior management positions in the national oil company Statoil. Risa had just been appointed executive director of the Timor Sea Designated Authority (TSDA), the joint authority established to manage the treaty area. While Foley also represented one of his employers, Risa told him that he had never before seen or heard an ambassador issue such insulting comments about his host country. While he did not know what was meant by diplomacy in Australia, he said, Foley's 'schoolyard bullying' was not the international norm. Norway and Australia, two countries ranked by the UN at the very top of its human development index, had recently clashed over human rights and tension would reverberate throughout the Timor Sea dispute. In August 2001 the Norwegian freighter the *Tampa*, captained by Arne Rinnan, was at the centre of an international storm when it was boarded by SAS troops and refused entry to Australia after rescuing 438 asylum seekers from a sinking fishing boat. In his three years in Dili the narrow 'national interest' mantra that dominated every facet of the Australian government's foreign policy constantly dismayed Risa. With strikingly similar looks to Rinnan—a weathered face, high cheek bones and a shock of silver hair—Risa developed a fascination with the mentality of the Australian government. He would talk about this at length with other Norwegians who had worked in Australia. He could not believe that Downer had released a foreign policy white paper plainly called 'In the National Interest';[5] it was something that no other sophisticated western democracy would ever do. An example of Risa's observation is that even the Australian government aid agency AusAID says the people of Australia only give aid because it is in their national interest to do so.

As Australia held off ratifying the treaty, Alkatiri wrote to Howard on Tuesday 4 March and said he would be 'submitting the IUA immediately to my Council of Ministers for its approval'. He was trying to buy time. This was not enough to satisfy Downer who wanted East Timor's signature on the agreement immediately.

The next morning, 5 March, Ash Wednesday, Howard telephoned Alkatiri from his office in Parliament House, Canberra. At

the time Alkatiri was refusing to take calls from Downer, but now he was about to receive another tutorial in politics. That morning the Australian government had tabled in the House of Representatives bills for the ratification of the Timor Sea Treaty. Howard told Alkatiri that unless East Timor signed the Sunrise agreement the bills for the treaty would remain 'stalled' in the lower house, which meant that the Bayu-Undan development would collapse. 'It was an ultimatum. Howard said that unless we agreed to sign the new deal immediately, he would stop the Senate approving the treaty,' a senior Timorese official was reported as saying.[6]

Downer spoke to Ramos-Horta, and the two agreed that East Timor would call an extraordinary Council of Ministers meeting the following morning, Thursday 6 March, to endorse the Greater Sunrise deal. It was agreed that Downer would fly to Dili that day for the signing, but Alkatiri remained unconvinced, and it took the combined weight of Ramos-Horta, the president of the parliament, Francisco 'Lu Olo' Guterres, and Xanana Gusmão, who was now president of the republic, to persuade him to proceed with the signing. Philip Daniel briefed the council in the morning with both presidents in attendance. The tension in the room was so great that the meeting burst into spontaneous applause at the conclusion of the briefing. Later that day Downer signed the agreement in the same room.

Back in Canberra in the Senate that day, the Greens, the Australian Democrats and Labor spoke out strongly against the Australian government's tactics. It was evident to the opposition parties that the Australian government was prepared to sacrifice the Bayu-Undan development in order to lock in its 79.9 per cent of the Sunrise field. Senator Bob Brown of the Australian Greens launched a spirited attack on the government that culminated in his accusing Prime Minister John Howard of having engaged in 'blackmail' against East Timor. Brown told the Senate:

> I believe we are being ambushed with this legislation . . . we are being ambushed, in the interests of big oil companies, to cheat East

Annex 4

ABC Online

PM - Aust on political collision course with East Timor

[This is the print version of story http://www.abc.net.au/pm/content/2004/s1090518.htm]

PM - Monday, 19 April , 2004 18:33:26

Reporter: Anne Barker

MARK COLVIN: Australia and East Timor appear to be on a potential collision course over the future of a seabed boundary between the two countries.

Officials from both countries are in Dili today for the start of new talks to resolve what's shaping up as a major thorn in bilateral relations.

East Timor is now threatening to delay ratification of a crucial oil and gas agreement, unless Australia offers it a fairer deal and a bigger share of the spoils.

And as Anne Barker reports, the $8-billion project to develop the Greater Sunrise field could be scrapped if the agreement isn't ratified soon.

ANNE BARKER: About the only thing East Timor and Australia can agree on in today's talks is that they're likely to drag on for years. Border talks can famously take decades, and Australia's in no hurry to speed up the process because the current arrangement already gives it majority control over vast oil and gas fields, and it's precisely because of those oil fields that East Timor's Prime Minister, Mari Alkatiri, is suddenly taking a much harder line in his dealings with Australia.

MARI ALKATIRI: My first concern is to defend the interests of my people and to get better resources that belong to my people.

ANNE BARKER: East Timor's wish for a boundary half way between the two countries would force Australia to surrender control of the most lucrative oil fields to Dili, including the Greater Sunrise field.

East Timor has already signed an agreement that would give 80 per cent of the Greater Sunrise revenue to Australia, but it's now threatening to delay ratification in the hope of getting a better deal.

MARI ALKATIRI: Timor Leste is a sovereign country. It's not Indonesia. It's not Papua New Guinea, and as the newest countries we would like to apply the current international law. This is our right to do it.

ANNE BARKER: But East Timor's gamble carries an $8-billion risk. That's how much it would stand to gain if Australia agreed to the midway boundary, in accordance with international law. But if the Greater Sunrise agreement isn't ratified by the end of the year, it could fall through altogether.

Woodside Petroleum, the leading partner in the joint venture, says without the legal and fiscal certainty the agreement brings, the whole project could be scrapped.

Don Rothwell is a professor of international law at Sydney University who has a keen interest in the Timor Sea negotiations.

DON ROTHWELL: Given the uncertainty that now exists over this area, the fact that there's been longstanding uncertainty over a number of years about these matters, there will clearly have to become a point in time when the operators have to conclude whether they wish to stick with it, or whether they wish to withdraw for the time being, until such time as the political and legal issues are finally solved.

ANNE BARKER: What sort of leverage does this threat give East Timor though over Australia, if any, especially if it does jeopardise the Greater Sunrise project?

DON ROTHWELL: Well, legally it doesn't give East Timor any leverage at all because Australia has removed one of the major options available to East Timor to take this case before the International Court of Justice for example.

But I think it's a very important negotiating ploy, and politically it will place some pressure on Australia because now this is going to be some economic and political disadvantage for Australia because of the failure to get the unitisation agreement concluded.

It will force Australia to go back and rethink the unitisation agreement negotiations, but also in the broader sense, the issues that East Timor has raised in terms of the long term viability of the joint development zone in the Timor Sea between Australia and East Timor.

MARK COLVIN: Don Rothwell, Professor of International Law at Sydney University, with Anne Barker.

Annex 5 [not reproduced]

Annex 6 [not reproduced]

Annex 7

1 January 2013

31 December 2015

Government of the Democratic Republic of Timor-Leste

Consultant: The BERNARD COLLAERY & ASSOCIATES, Trading as Collaery Lawyers represented by Bernard Collaery

Consultancy Agreement Contract Agreement No. _____

FORMAL INSTRUMENT OF AGREEMENT

BETWEEN

The Government of the Democratic Republic of Timor Leste (**RDTL**)

AND

The BERNARD COLLAERY & ASSOCIATES, Trading as Collaery Lawyers represented by Bernard Collaery (**Consultant**)

This Agreement is made this 17th day of September 2012.

1 This Formal Instrument of Agreement and the General Terms and Conditions of the Consultancy Agreement, constitute the agreement between RDTL and the Consultant (**Parties**) which includes all schedules and all documents incorporated by reference.

2 The Consultant agrees to perform its obligations and the Consultancy Services in accordance with the General Terms and Conditions of the Consultancy Agreement and as described in **schedule 1**, to the satisfaction of RDTL.

3 In consideration of the performance of the Consultancy Services, RDTL shall pay the Consultancy Fees and any other relevant expenses from time to time in accordance with the General Terms and Conditions of the Consultancy Agreement.

4 Without limiting the Consultant's obligations under the General Terms and Conditions of the Consultancy Agreement, it is a fundamental condition of the agreement that the Consultant provides the services of the Principal Employees, set out in **schedule 2**, to deliver the Consultancy Services.

Executed as an agreement:

.....
Signed On behalf of the RDTL

Date: 17/09/12

.....
Witness

.....
Name of Witness

.....
Signed on behalf of Consultant

Date 17 Sept 2012

.....
Witness

.....
Name of Witness

Contents

Agreed terms

1 Interpretation

1.1 Definitions

The terms listed below shall bear the meaning, as follows:

Approved Expenses means the approved expenses specified in **schedule 2**.

Agreement means the agreement constituted by documents referred to in **clause 1** of the Formal Instrument of Agreement.

Business Day means a day other than a Saturday or Sunday in RDTL.

Commencement Date means the Commencement Date specified in **schedule 2**.

Confidential Information means all information that is not public knowledge at the Commencement Date or comes into existence at a later date (whether that information is written or unwritten) relating to the business interests, methodology or affairs of RDTL or any person or entity with which it deals or is concerned, including:

(a) the terms of this agreement;

(b) all information, documents, materials or items of any nature and in any format which are provided by RDTL to the Consultant;

(c) all information, documents, materials or items which are designated by RDTL as confidential or otherwise imparted in circumstances in confidence to the Consultant by RDTL;

(d) all information of a confidential character which has been communicated to RDTL by any other person.

Consultancy Fees means the fees specified in **schedule 2**.

Consultancy Services means the services specified in **schedule 1**.

Expiry Date means the expiry date specified in **schedule 2** or the expiry date as extended by agreement between the parties.

Formal Instrument of Agreement means the document entered into between RDTL and the Consultant which incorporates these General Terms and Conditions.

Nominated Contact Person means the nominated contact person specified in **schedule 2**.

Principal Employees means the principal employees specified in **schedule 2** or such other persons as may replace these persons pursuant to **clause 2.2**.

Term means the period from the Commencement Date until the Expiry Date or the date of termination of the Consultant's engagement in accordance with **clause 10**, whichever is the earlier.

1.2 Construction

Unless expressed to the contrary, in this document:

(a) words in the singular include the plural and vice versa;

(b) any gender includes the other genders;

(c) if a word or phrase is defined its other grammatical forms have corresponding meanings;

(d) a party may give or withdraw any consent to be given under this agreement in its absolute discretion and may impose any conditions on that consent;

(e) "includes" means includes without limitation;

(f) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it; and

(g) headings will be ignored in construing this agreement;

(h) a reference to:

  (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;

  (ii) a person includes the legal personnel representatives, successors and assigns of that person;

  (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced; and

  (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation;

  (v) this agreement includes all schedules and annexures to it;

  (vi) "$" and "dollar" is a reference to US Dollars;

  (vii) a right includes a remedy, discretion, authority or power;

(i) if the date on or by which any act must be done under this agreement is not a Business Day, the act must be done on or by the next Business Day;

(j) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded; and

(k) any obligation of two or more persons will bind them separately and together.

2 Engagement of Consultant

2.1 Duration

RDTL will engage the Consultant and the Consultant will provide the Consultancy Services during the Term in accordance with this agreement, and is extendable.

2.2 Principal Employees

(a) The Consultant must provide the services of the Principal Employees to perform the Consultancy Services on behalf of the Consultant.

(b) The Consultant warrants that the Principal Employees are appropriately qualified, knowledgeable and experienced in the fields necessary to and will perform the Consultancy Services:

(i) in a careful, diligent, proper and efficient manner in accordance with the highest professional standards applying to those services; and

(ii) in accordance with all reasonable directions of RDTL and, in compliance with relevant legislation, regulations, codes of conduct and industry standards.

(c) The Consultant will promptly notify RDTL if on any day the Principal Employees are or will be unable to perform the Consultancy Services.

2.3 Replacement of Principal Employees

(a) If at any time:

(i) a Principal Employee for any reason is or will be unable to perform the Consultancy Services (including by reason of illness) for [*5*] consecutive Business Days or for an aggregate of [*10*] Business Days during the Term; or

(ii) in the reasonable opinion of RDTL, a Principal Employee fails to perform the Consultancy Services to the required standard,

the Consultant will, at RDTL's request and at no additional cost to RDTL, replace the Principal Employee with other person(s) acceptable to RDTL at the earliest opportunity.

(b) RDTL has an absolute discretion as to whether it accepts any replacement Principal Employee proposed by the Consultant.

(c) The Consultant must not engage any subcontractors or agents to perform any or all of the Consultancy Services without the prior written consent of RDTL.

3 Obligations of the Consultant

3.1 Times and locations

(a) The Consultant will provide RDTL with the Consultancy Services during the Term at such times as may be required by RDTL.

(b) The Consultancy Services will be provided at the location or locations specified in **schedule 2** and such other locations as RDTL may reasonably require.

3.2 Standard of Performance

The Consultant must ensure that it and the Principal Employees observe the highest standards of ethics when providing the Consultancy Services during the Term. This includes no occurrence of corrupt, fraudulent, collusive and coercive practices, and conflict of interest in the provision of the Consultancy Services.

3.3 Performance of Consultancy Services

(a) The Consultant must ensure that the Consultancy Services are performed in a careful, diligent, proper and efficient manner in accordance with the highest professional standards applying to the Consultancy Services.

(b) Whilst performing the Consultancy Services, the Consultant must not, and must ensure that the Principal Employees do not, intentionally do anything which is or may be harmful to or adversely affect the interests of RDTL, its Ministries or their employees..

(c) The Consultant must and must ensure that the Principal Employees:

(i) act with the utmost good faith in all of the Consultant's dealings with RDTL, its Ministries or their employees;

(ii) comply with all reasonable directions, policies, procedures and standards of conduct given or determined by RDTL from time to time;

(iii) devote such time, attention and abilities during business hours and such other hours as may be necessary to perform the Consultancy Services in the agreed manner; and

(iv) attend all training programs as required from time to time by RDTL.

3.4 Time for Performance

The Consultant must comply and ensure that the Principal Employees comply with any time limits for the performance of the Consultancy Services as required by RDTL from time to time.

3.5 Delegation

(a) The Consultant must not delegate all or any part of the Consultancy Services without the prior written approval of RDTL.

(b) If RDTL permits the Consultant to delegate all or part of the Consultancy Services, the Consultant will be liable and responsible for all acts, omissions and work of any sub-contractor. For the avoidance of doubt, any external supplies to the Consultant are sub-contractors of the Consultant.

3.6 Statutory obligations, licences and registrations

(a) The Consultant must comply with its statutory obligations in respect of the Consultancy Services, including compliance with:

(i) any applicable industrial awards and agreements;

(ii) minimum terms and conditions of employment;

(iii) industrial relations laws;

(iv) any applicable environmental laws;

(v) occupational health and safety laws; and

(vi) any applicable international laws or standards that have been entered into by RDTL.

(b) The Consultant must obtain and maintain and ensure that the Principal Employees obtain and maintain during the Term any licences or registrations required for the Consultant and the Principal Employees to perform the Consultancy Services.

3.7 Reporting to RDTL

The Consultant must promptly report to the Nominated Contact Person or such other person as may be nominated by RDTL from time to time, such information as RDTL may reasonably require, or as to which RDTL should properly be informed, in relation to:

(a) the Consultant's engagement;

(b) the provision of the Consultancy Services; and

(c) the business of RDTL or any of its Ministries.

4 Fees for Consultancy Services

4.1 Amount payable

(a) Subject to **clauses 4.1(b)** and **5**, in consideration of the Consultancy Services, RDTL will pay to the Consultant the Consultancy Fees. The amount of the Fees has been established based on the understanding that it includes all of the Consultant's costs and profits, as well as any tax obligation that may be imposed on the Consultant

(b) No Consultancy Fees are payable in respect of any period in which the Consultant does not, for any reason, provide the Consultancy Services.

(c) RDTL will pay the Consultancy Fees in accordance with **schedule 2**.

(d) If RDTL requires the Consultant and/or the Principal Employees to perform any services in addition to the Consultancy Services, additional fees will be payable to the Consultant. Such fees will be agreed with the Consultant prior to the Consultant providing the additional services.

4.2 Approved Expenses

(a) RDTL will reimburse the Consultant for all Approved Expenses properly incurred by the Consultant or the Principal Employees in the provision of the Consultancy Services in accordance with the terms of this agreement.

(b) Any reimbursement claimed by the Consultant under **clause 4.2(a)** must be detailed in a suitably formatted invoice submitted by the Consultant and must be substantiated to RDTL's reasonable satisfaction.

(c) The Government may at its discretion request the Consultant to perform additional work covered by the Contract. Should the Consultant be requested to perform such additional work by the Government, payment shall be made in advance provided that advance payment shall not exceed US$100,000.00 at any particular time.

5 Equipment and resources

5.1 Access to and use of RDTL resources

RDTL will provide the Consultant with the equipment, materials and resources listed in **schedule 2**. RDTL may at its sole reasonable discretion amend, add to or delete from the list in **schedule 2**. The Consultant will comply with and will ensure that the Principal Employees comply with all directions of RDTL from time to time in relation to the security of and access to RDTL's property, office facilities, services, materials and personnel.

5.2 Resources provided by Consultant

Subject to **clause 5.1**, the Consultant will provide at its own expense and apply to the performance of its obligations under this agreement all equipment, hardware, software, implements, materials, services and labour (including office facilities, motor vehicles and telecommunications equipment) required or desired in the performance of its obligations under this agreement.

5.3 Disbursements

Except as otherwise expressly provided for in this agreement, the Consultant is responsible for the payment of all costs, expenses or disbursements incurred by the Consultant or the Principal Employee as a result of and in connection with the Consultant entering into this agreement or the performance of its obligations under this agreement.

6 Indemnity

6.1 Indemnity

The Consultant will indemnify, keep indemnified, defend and hold harmless RDTL and its Ministries and all of their respective officers, employees, agents, successors and assigns from all and any liability or for any claims associated with or arising from provision of the Consultancy Services which relate to:

(a) any failures by the Consultant to comply with its obligations under **clause 3.6**; or

(b) any injury to any person or the death of any person, or loss or damage to RDTL or any of its Ministries or to a third party's real, personal, tangible or intangible property (including data and computer programs), caused by any act or omission of the Consultant or any of the Consultant's employees, servants or agents; or

(c) any breach by the Consultant of this agreement.

7 Insurances

(a) Prior to the Commencement Date the Consultant must obtain and must maintain during the Term current policies of professional indemnity and public liability insurance of the type and level of cover specified in **schedule 2** in respect of the Consultancy Services.

(b) The Consultant will provide RDTL with written evidence of the currency of such insurance policies prior to the Commencement Date and at any time upon request.

8 Confidentiality

8.1 Confidentiality Obligations

The Consultant must:

(a) keep confidential all Confidential Information; and

(b) not disclose the Confidential Information to any person except:

(i) as required by law;

(ii) with the prior written consent of RDTL; or

(iii) to its employees for the purposes of this agreement.

8.2 Confidential Information in the Public Domain

If Confidential Information is lawfully within the public domain, then to the extent that the Confidential Information is public the Consultant's obligations under **clause 8.1** in relation to that Confidential Information ceases.

8.3 Use of Confidential Information

The Consultant must not use, permit the use of or modify any Confidential Information except for the purposes of and in accordance with this agreement.

8.4 Security

The Consultant must:

(a) maintain proper and secure custody of all Confidential Information; and

(b) prevent the disclosure of the Confidential Information to third parties.

8.5 Delivery

The Consultant must immediately deliver all Confidential Information including any copies to RDTL:

(a) at the expiration or earlier termination of this agreement; or

(b) at any time at the request of RDTL.

8.6 Employees

Notwithstanding any other clause of this agreement:

(a) the Consultant undertakes to ensure that all of its employees and any person to whom Consultancy Services have been delegated in accordance with **clause 3.5**, who use or have access to the Confidential Information are informed of the confidential nature of the Confidential Information and keep the Confidential Information strictly confidential in accordance with **clause 8** and **clause 9**; and

(b) the Consultant must indemnify RDTL against any loss or damage which RDTL may sustain or incur as a result of any failure of the Consultant to comply with its undertaking under paragraph (a).

8.7 Breach of confidence

The Consultant must promptly notify RDTL if it becomes aware of any breach of confidence by any person to whom it has divulged all or any part of the Confidential Information and must give RDTL all reasonable assistance in connection with any action, demand, claim or proceeding which RDTL may institute against any such person for breach of confidence.

8.8 Obligation to disclose

Where the Consultant creates or develops any Confidential Information, the Consultant must immediately disclose that Confidential Information to RDTL.

8.9 Equitable relief

The Consultant acknowledges that RDTL shall be entitled to equitable relief against the Consultant (in addition to any other rights available under this agreement or at law) if the Consultant breaches the Consultant's obligations contained in this **clause 8**.

8.10 Obligations to continue

The obligations of the Consultant under this **clause 8** shall survive the expiration or termination of this agreement and shall be enforceable at any time at law or in equity and shall continue for the benefit of and be enforceable by RDTL.

9 Intellectual Property

9.1 Ownership of intellectual property

(a) The Consultant assigns to RDTL all right, title and interest, in all intellectual property rights and other proprietary rights (**Rights**) in all works, documents, computer programs, items or things produced or

created by the Consultant, the Principal Employees or created on behalf of the Consultant in the course of providing the Consultancy Services (**Works**). The Consultant also agrees that it will not, without written authority from RDTL, provide the Works to any other person or use the Works except in providing the Consultancy Services to RDTL.

(b) The Rights include patent, copyright, trademark, design and eligible layout rights including any applications or rights to apply for registration of the same.

(c) The Consultant must sign all documents and do anything reasonably required by RDTL to give effect to the assignment of the Rights.

(d) The Consultant warrants that the Works:

(i) are not copies taken wholly or substantially from other work, document, computer program, item or thing anywhere in the world;

(ii) do not infringe any other person's rights in any other work, document, computer program, item or thing anywhere in the world; and

(iii) have not had any right in them granted, transferred or assigned by the Consultant to any third party.

(e) If the Consultant is unable, for any reason, to assign the Rights to RDTL, the Consultant or the Principal Employees must, prior to producing or creating any works, notify RDTL in writing. The Consultant must describe each of the Works and give RDTL reasons as to why it cannot assign the Rights in them to RDTL.

(f) RDTL will then decide whether it will insist on an assignment of the Rights in those Works or whether it will be satisfied with a licence to use the relevant Works. RDTL will notify the Consultant, in writing, of its decision. If RDTL decides that a licence will be satisfactory, the Consultant agrees to assist RDTL in negotiating the terms of the licence with the owner of the Rights in the Works.

9.2 Licence of background Consultant intellectual property

(a) The Consultant grants to RDTL a perpetual, non-exclusive, royalty-free and transferable licence of all its background Rights, which are in existence prior to the commencement of the Consultancy Services and which form part of the Works, including any template documents or databases.

(b) In addition to any other terms of this agreement intended to survive expiration or termination, this provision survives the expiration or termination of this agreement.

10 Termination of the Consultant's engagement

10.1 Immediate termination by RDTL

RDTL may at any time immediately terminate the Consultant's engagement by giving written notice to the Consultant if any of the following events occur:

(a) the Consultant or the Principal Employees commit any serious or persistent breach of this agreement which is, in the reasonable opinion of RDTL, incapable of rectification;

(b) the Consultant or the Principal Employees commit any serious or persistent breach of this agreement which continues un-remedied for 10 Business Days after the Consultant receives notice from RDTL of that breach;

(c) the Principal Employees in the performance of Consultancy Services commit any act of serious misconduct, fraud or dishonesty;

(d) the Consultant or any of the Principal Employees fail or refuse to comply with any lawful direction given by RDTL;

(e) the Consultant is placed under some form of official management or insolvency administration or the bankruptcy of any of the Principal Employees;

(f) the conviction of any of the Principal Employees for a criminal offence which in the reasonable opinion of RDTL will detrimentally affect RDTL or any of its Related Corporations; or

(g) the Principal Employees use or abuse alcohol or drugs to the extent that, in the reasonable opinion of RDTL, it materially affects the Principal Employees' performance of the Consultancy Services or the Principal Employees' ability to carry out the Consultancy Services.

10.2 Immediate termination by the Consultant

The Consultant may at any time immediately terminate the Consultant's engagement by giving written notice to RDTL, if:

(a) RDTL commits any serious or persistent breach of this agreement, which is in the reasonable opinion of the Consultant incapable of rectification; or

(b) RDTL commits any serious or persistent breach of this agreement which continues un-remedied for 21 days after RDTL receives written notice from the Consultant of that breach.

10.3 Termination on notice by RDTL

RDTL may at any time and for any reason terminate the Consultant's engagement on the provision of four weeks' written notice to the Consultant or immediately upon payment of an amount equal to four weeks' Consultancy Fees.

10.4 Entitlements on termination and expiry

On expiry or termination of the Consultant's engagement pursuant to this **clause 10**, RDTL will pay to the Consultant the amount of any Consultancy Fees and reimbursement of Approved Expenses owing pursuant to **clause 4** up to and including the date of expiry or termination of the Consultant's engagement. Payment of this amount is acknowledged to be in full satisfaction and discharge of all claims and demands of the Consultant against RDTL in respect of this agreement.

10.5 Survival of provisions

The obligations of the Consultant and the Principal Employees under **clauses 6, 8, 9** and **12** survive the termination of the Consultant's engagement.

11 RDTL property

Upon the expiry or termination of the Consultant's engagement, irrespective of the time, manner, or cause of that termination, the Consultant must immediately return to RDTL any Confidential Information or other documentation or property of RDTL or its Ministries which is in the possession, custody or control of the Consultant, including any property of RDTL which is in the possession, custody or control of the Principal Employees.

12 Dispute resolution

12.1 Overview

In the case of any breach, claim, controversy or dispute arising out of or in connection with this agreement (**Dispute**), the following procedure for resolution of the Dispute shall apply.

12.2 Notification of Dispute

The aggrieved party will immediately notify the other party, in writing, of any Dispute within seven days of becoming aware of such a Dispute.

12.3 Consultation

Upon receipt of the notice referred to in **clause 12.2**, RDTL and the Consultant will enter a process of consultation to resolve the Dispute amicably and without disruption to the Consultancy Services.

12.4 Conciliation

If RDTL and the Consultant are unable to amicably resolve the Dispute, either party may request the Dispute be submitted to conciliation in accordance with the UNICITRAL Rules of Conciliation.

12.5 Arbitration

Any claim, controversy or dispute that is not resolved amicably in accordance with the provisions of this Agreement may be referred to arbitration by either party in accordance with the current UNCITRAL Arbitration Rules. The arbitration shall be conducted in RDTL, in the English or Portuguese language

at the option of either party with appropriate translation in the other. The appointing authority shall be the President of the Court of Appeals of Timor Leste. The parties agree to be bound by the arbitral award and the final resolution of the claim, controversy or dispute, subject to any rights of recourse to judicial review, as provided by Law.

12.6 Governing Law

The governing law for the purposes of this Agreement shall be the law of RDTL, including the conflicts rules, as determined by the arbitrators to be applicable, in the case of diversity of parties to any arbitration.

12.7 Survival Clause

This **clause 12** survives termination of this Agreement.

13 General

13.1 Set-off

The Consultant authorises RDTL to set-off against and deduct from all or any amounts payable to the Consultant any amount owing by the Consultant to RDTL on any account.

13.2 Amendment

This agreement may only be varied, supplemented or replaced by a contract executed by the parties.

13.3 Waiver and exercise of rights

(a) The failure of a party to insist upon strict performance of any of the terms or provisions of this agreement will not be deemed a waiver of any subsequent breach or default in the terms or provisions of this agreement.

(b) A party is not liable for any loss, cost or expense of any other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

13.4 Assignment

The Consultant must not assign or deal with any right or obligation under this agreement without the prior written consent of RDTL. Any dealing in breach of this clause is of no effect.

13.5 Counterparts

This agreement may consist of a number of counterparts and, if so, the counterparts taken together constitute one agreement.

13.6 Severability

If a provision of this agreement is illegal or unenforceable in any relevant jurisdiction, it may be severed for the purposes of that jurisdiction without effecting the enforceability of the other provisions of this agreement.

13.7 Entire understanding

(a) This agreement contains the entire understanding between the parties as to the subject matter of this agreement.

(b) All previous negotiations, understandings, representations, warranties, memoranda or commitments in relation to, or in any way affecting the subject matter of this agreement are merged in and superseded by this agreement and are of no effect. No party is liable to any other party in respect of those matters.

(c) No oral explanation or information provided by any party to another:

(i) affects the meaning or interpretation of this agreement; or

(ii) constitutes any collateral agreement, warranty or understanding between any of the parties.

13.8 Relationship of parties and Principal Employees

(a) This agreement is not intended to create a partnership, joint venture or agency relationship between RDTL and the Consultant or the Principal Employees.

(b) The relationship between the Consultant and RDTL is and shall remain that of principal and independent Consultant and the Principal Employees shall not be deemed to be the legal representative, agent, servant or employee of RDTL for any purpose whatsoever, whether by virtue of this agreement or for any other reason.

14 Notices

14.1 General

A notice, demand, certification or other communication under this agreement shall be in writing, in the English language and may be given by an agent of the sender.

14.2 Method of Service

In addition to any means authorised by law a communication may be given by:

(a) being personally served on a party:

(b) being left at the party's current address for service;

(c) being sent the party's current address for service by pre-paid ordinary mail or if the address is outside the Democratic Republic of Timor-Leste, by pre-paid air mail; or

(d) cable, telex or if by facsimile, to the party's current facsimile number for service.

14.3 Address for Service

(a) The addresses and numbers for service of RDTL and the Consultant are initially the addresses and facsimile numbers set out in **schedule 2**.

(b) Any party may from time to time change its address or facsimile number for service by written notice to the other party.

14.4 Service

A communication given shall be deemed to be received when delivered or on the effective date stipulated in the notice, whichever is later.

14.5 Form Received

A communication given by facsimile, cable or telex shall be deemed given in the form transmitted unless the message is not fully received in legible form and the addressee immediately notifies the sender of that fact.

14.6 Service After Hours

If a communication to a party is received by it:

(a) after 5:00 pm; or

(b) on a day which is not a Business Day,

it will be deemed to have been received at the commencement of the next Business Day.

Schedule 1

Consultancy Services

The Consultant will provide the following services to RDTL through the Principal Employee:

- Assist to develop international legal expertise required by RDTL and procure the services of eminent international legal advice as requested by RDTL.
- Coordinate the advisory team and oversee the provision of legal advice to the work and concerns of the Office of the Prime Minister and/or any relevant Ministry/Secretary of State of the Government of Timor-Leste.
- Gather, consolidate and analyze information with bearing on legal issues confronting the Government of Timor-Leste, and propose concrete recommendations and possible legal actions to the Office of the Prime Minister to pursue the remedy of these issues.
- Support the Office of the Prime Minister and/or any relevant Ministry/Secretary of State in all their legal requirements, as may be delegated from time to time by the Office of the Prime Minister.
- Act on behalf of the Government of Timor-Leste on any legal representation required by them, as may be delegated by the Office of the Prime Minister.
- Undertake such other legal tasks, which may be reasonably requested by the Office of the Prime Minister, within the term of this engagement and competence of the Consultant.

Schedule 2

Commencement, Expiry and Consultancy Fees

Commencement Date	[redacted]
Expiry Date	[redacted]
Principal Employees	
Nominated contact person	Bernard Collaery
Consultancy fees	[redacted]
Frequency of Payment of Consultancy Fees	The Consultancy fees will be paid as a lump sum within 30 days of receipt of a suitably formatted invoice from the Consultant, duly certified by the Principal.
Approved Expenses	The RDTL shall reimburse the Consultant Firm for all retained expert advise, reasonable travel and accommodation, technical support and general out-of-pocket expenses including material and machinery costs properly incurred

	by the Consultant Firm in performing the duties subject to the Consultant Firm having first obtained the consent of the RDTL Representative and upon submission by the Consultant Firm of a verifiable claim to support the expenditure.
RDTL resources to be provided to the Consultant	N/A
RDTL's Address **Details for Service**	Contact person: H.E. Alfredo Pires Title: Minister for Petroleum and Mineral Resources (MPMR) Address for Service: Office of the Prime Minister, Government of Timor-Leste, Palácio do Governo, Avenida Presidente Nicolau Lobato, Dili, Timor-Leste Contact Number: +670-77230033 Email Address: alfredopires7@hotmail.com
Consultant's Address **Details for Service**	Contact Person: Bernard Collaery Title: Bernard Collaery & Associates Address for Service: 33 Canberra Avenue Manuka ACT 2603 Tel Number: +61 2 6239 6033 Fax Number: +61 2 62396238 Email Address: bcollaery@cclaw.com.au Business Registration Number: ABN 70077219162

Annex 8 [not reproduced]

Annex 9 [not reproduced]

Annex 10

Übersetzung des ersten und zweiten Kapitels des Einführungsgesetzes zum Bürgerlichen Gesetzbuche (Inkrafttreten. Vorbehalt für Landesrecht. Gesetzesbegriff: Artikel 1 und 2 EGBGB und Internationales Privatrecht: Artikel 3 bis 47 EGBGB) durch Dr. Juliana Mörsdorf-Schulte LL.M. (Univ. of California, Berkeley).
Translation of the Introductory Act to the Civil Code, first and second Chapter (Entry into force. Reserve for the law of a Land. Definition of Statute: Articles 1 and 2 IACC and Private International Law: Articles 3 thru 47 IACC) provided by Dr. Juliana Mörsdorf-Schulte LL.M. (Univ. of California, Berkeley).
Stand: Die Übersetzung berücksichtigt die Änderung(en) des Gesetzes durch Artikel 12 des Gesetzes vom 23.5.2011 (BGBl. I S. 898)
Version information: The translation includes the amendment(s) to the Act by Article 12 of the Act of 23.5.2011 (Federal Law Gazette I p. 898)

INTRODUCTORY ACT TO THE CIVIL CODE

In the version promulgated on 21 September 1994, Federal Law Gazette [Bundesgesetzblatt] I p. 2494, last amended by Article 12 of the Act of 23 May 2011, Federal Law Gazette I p. 898

FIRST PART
GENERAL PROVISIONS

First Chapter
Entry into force. Reserve for the law of a Land. Definition of Statute

Art. 1

(1) The Civil Code enters into force on January 1st, 1900, along with a statute concerning amendments to an Act on the Constitution of the Courts, the Code of Civil Procedure and the Code of Insolvency, a Statute on Compulsory Auction and Sequestration, a Code of Registration of Real Property, and a Statute on the Procedure of Non-Contentious Matters.
(2) Insofar as, in the Civil Code or in this Act, the regulation is reserved for the Statutes of a Land or insofar as it is ordered, that the provisions of the law of a Land remain unaffected or can be decreed, the existing provisions of the law of the Land will continue to be in force and the Land can decree new statutory provisions.

Art. 2

„Statute" under the Civil Code and under this Act means any legal rule.

Second Chapter
Private International Law

FIRST SECTION
GENERAL PROVISIONS

Art. 3
Scope; Relationship with rules of the European Community and with international conventions

(1) Unless

1. immediately applicable rules of the European Community in their respective pertaining version, particularly
   a) the Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 (OJ EU L 199 of 31.7.2007 p. 40) on the law applicable to non-contractual obligations (Rome II), and

b) the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 (OJ EU L 177 of 4.7. 2008 p. 6) on the law applicable to contractual obligations (Rome I), and

c) the Council Decision of 30 November 2009 (OJ EU L331 of 16.12.2009 p. 17) on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, or

2. rules in international conventions, insofar as they have become directly applicable in national law,

are relevant, the applicable law is to be determined, where the facts of a case have a connection with a foreign country, by the provisions of this chapter (private international law).

Art. 3a
Referral to substantive provisions; single statute

(1) Referrals to substantive provisions relate to legal rules of the applicable legal system by the exclusion of its private international law.
(2) Where referrals in the third and fourth sections make the property of a person subject to the law of a country, they shall not relate to items which are not located in that country and are governed by special provisions under the law of the country where they are located.

Art. 4
Renvoi; split law

(1) If referral is made to the law of another country, the private international law of that country shall also be applied, insofar as this is not incompatible with the meaning of the referral. If the law of another country refers back to German law, the German substantive provisions shall apply.
(2) Where the parties can choose the law of a certain country, that choice may only relate to the substantive provisions.
(3) If referral is made to the law of a country having several partial legal systems, without indicating the applicable one, then the law of that country will determine which partial legal system shall be applicable. Failing any such rules, the partial legal system to which the connection of the subject matter is closest shall be applied.

Art. 5
Personal statute

(1) If referral is made to the law of a country of which a person is a national and where this person is a bi- or multinational, the law applicable shall be that of the country with which the person has the closest connection, especially through his or her habitual residence or through the course of his or her life. If such person is also a German national, that legal status shall prevail.
(2) If a person is stateless or if his nationality cannot be identified, the law of that country is applicable in which the person has his or her habitual residence or, in the absence thereof, his or her residence.
(3) If referral is made to the law of a country in which a person has his or her residence or habitual residence and a person without or under restricted capacity to contract changes his or her residence without the consent of his or her legal representative, the application of another law does not ensue from this change alone.

Art. 6
Public policy (ordre public)

A provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law. In particular, inapplicability ensues, if its application would be incompatible with civil rights.

SECOND SECTION
RIGHTS OF NATURAL PERSONS AND LEGAL TRANSACTIONS

Art. 7
Legal capacity and capacity to contract

(1) The legal capacity and capacity to contract of a person are governed by the law of the country of which the person is a national. This is also applicable where the capacity to contract is extended by marriage.
(2) The once acquired legal capacity or capacity to contract shall not be lost or restricted by the acquisition or loss of legal status as a German national.

Art. 8
[deleted]

Art. 9
Declaration of death

A declaration of death, the determination of death and of the time of death as well as presumptions of life and death are governed by the law of the country of which the missing person was a national at the latest point in time at which the person was still alive according to the available information. If the missing person was at this time a foreign national, the person may be declared dead pursuant to the German law if there is a justified interest therefore.

Art. 10
Name

(1) The name of a person is governed by the law of the country of which the person is a national.
(2) At or subsequent to the conclusion of marriage, the spouses may, by a declaration given before the Registrar's of Births, Marriages and Deaths Office choose the name they will use thereafter:

1. under the law of the country of which one of the spouses is a national, notwithstanding article 5 subarticle 1; or
2. under German law, if one of them has his habitual residence within the country.

If the declaration is made subsequent to the conclusion of the marriage, it needs to be publicly certified. As to the effect of the choice on the name of a child, § 1617 c of the Civil Code shall apply mutatis mutandis.
(3) The person having the parental authority may declare before the Registrar's of Births, Marriages and Deaths Office, that the child shall obtain the family name

1. pursuant to the law of a country of which one of the parents is a national, without regard to article 5 subarticle 1; or
2. pursuant to German law, if one of the parents has his or her habitual residence within the country; or
3. pursuant to the law of a country of which a person confering the name is a national

Declarations made subsequent to the issuing of a birth certificate need to be publicly certified.

Art. 11
Form of legal acts

(1) A legal act is formally valid if it satisfies the formal requirements of the law which is applicable to the legal relationship forming the subject matter of the legal act, or the law of the country in which the act is performed, are observed.
(2) If a contract is concluded between persons who are in different countries, it shall be formally valid if it observes the formal requirements of the law which is applicable to the legal relationship forming the subject matter of the contract, or of the law of one of these countries.
(3) If the contract is made by an agent, the determinant for the application of subarticles 1 and 2 is the country where the agent acts.
(4) Contracts, the subject matter of which is a right in immovable property or a right to use immovable property, are subject to the mandatory formal requirements of the law of the country where the property is situated, if by that law those rules are applicable irrespective of the place of conclusion of the contract or the law governing the contract.
(5) A legal transaction creating or transferring a right in rem is formally valid only if it observes the formal requirements of the law that is applicable to the legal relationship forming the subject matter of the legal act.

Art. 12
Protection of the other party

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the substantive provisions of the law of that country may invoke his incapacity resulting from the substantive provisions of another law only if the other party to the contract was aware or should have been aware of this incapacity at the time of the conclusion of the contract. This does not apply to legal transactions under family law and the law of succession neither to dispositions relating to immovable property situated in another country.

THIRD SECTION
FAMILY LAW

Art. 13
Marriage

(1) The conditions for the conclusion of marriage are, as regards each person engaged to be married, governed by the law of the country of which he or she is a national.
(2) If under this law, a requirement is not fulfilled, German law shall apply to that extent, if:

1. the habitual residence of one of the persons engaged to be married is within the country or one of them is a German national;
2. the persons engaged to be married have taken reasonable steps to fulfill the requirement; and
3. it is incompatible with the freedom of marriage to refuse the conclusion of the marriage; in particular, the previous marriage of a person engaged to be married

shall not be held against him or her if it is nullified by a decision issued or recognized here or the spouse of the person engaged to be married has been declared dead.

(3) A marriage within the country may only be celebrated subject to the form provided for here. A marriage between two persons engaged to be married, neither of whom is a German national, may however be celebrated before a person properly authorized by the government of the country of which one of the persons engaged to be married is a national, according to the formalities prescribed by the law of that country; a certified copy of the registration of the marriage in the Register of Births, Deaths and Marriages, kept by the person properly authorized therefore, furnishes conclusive evidence of the marriage celebrated in that manner.

Art. 14
General effects of marriage

(1) The general effects of the marriage are governed by:

1. the law of the country of shared nationality of the spouses or last shared nationality during the marriage if one of them is still the national of that country, otherwise
2. the law of the country in which both spouses have their habitual residence or lastly had it during the marriage, if one of them still has his or her habitual residence there,
3. otherwise, the law of the country with which the spouses are jointly most closely connected.

(2) If one of the spouses has several nationalities, the spouses may choose the law of one of these countries, without regard to the provisions of article 5 subarticle 1, if the other spouse also has that nationality.
(3) The spouses may choose the law of the nationality of one spouse if the conditions of subarticle 1 no. 1 are not met and:

1. neither of the spouses is a national of the country in which both spouses have their habitual residence; or
2. the spouses do not have their habitual residence in the same country.

The effects of choice of law end if the spouses acquire a shared nationality.
(4) The choice of law must be notarially certified. If it is not performed within the country, it is sufficient if the formal requirements of a marriage contract under the law chosen or of the place of the choice of law are observed.

Art. 15
Matrimonial property regime

(1) The matrimonial property regime is governed by the law governing the general effects of the marriage upon conclusion of the marriage.
(2) The spouses may choose for their matrimonial property regime:

1. the law of the country of which one of them is a national,
2. the law of the country in which one of them has his habitual residence,
3. as to real property the law of the country in which this is situated.

(3) Article 14 subarticle 4 shall apply mutatis mutandis.
(4) The provisions of the Act Concerning the Matrimonial Property of Displaced Persons and Refugees remain unaffected.

Art. 16
Protection of third parties

(1) If the matrimonial regime is governed by the law of another country and one of the spouses has his or her habitual residence within the country or carries a trade therein, then § 1412 of the Civil Code shall apply mutatis mutandis; the foreign matrimonial regime is considered as one contracted for.
(2) As to legal transactions undertaken within the country § 1357, as to personal property which is located in the country § 1362, and as to a business carried out for profit here, §§ 1431 and 1456 of the Civil Code shall be applied mutatis mutandis, insofar as these provisions are more advantageous to a bona fide third party than the foreign law.

Art. 17
Divorce

(1) Divorce is governed by the law governing the general effects of the marriage at the time the divorce application is served. If a divorce cannot be granted pursuant to the above, the divorce shall be governed by German law, if the spouse requesting the divorce is at this time a German national or was one when the marriage was concluded.
(2) Within this country a divorce may only be decreed by a court.
(3) The balancing of future pensions of husband and wife is governed by the law applicable under subarticle 1 first sentence; it shall only be carried out if accordingly German law is applicable and if such balancing is recognized by the law of one of the countries of which the spouses were nationals at the time when the divorce petition was served. Otherwise the balancing of future pensions of husband and wife shall be carried out pursuant to German law on application of a spouse:

1. if the other spouse has acquired during the subsistence of the marriage an inland future pension right; or
2. if the general effects of the marriage during part of the period of the marriage were governed by a law which provides for a balancing of future pensions of husband and wife,

insofar as carrying it out would not be inconsistent with equity in light of the economic circumstances of both sides also during the time not spent within the country.

Art. 17a
Marital home and household goods

The right to use the marital home that is located in the country and the household goods that are in the country as well as pertaining prohibitions as to trespass, approaching and contact are governed by German substantive law.

Art. 17b
Registered life partnership

(1) The formation of a registered life partnership, its general effects and property regime, as well as its dissolution are governed by the substantive provisions of the country in which the life partnership is registered. Matters related to succession shall be governed by the law designated as applicable by the general rules; if under these rules, the life partnership fails to qualify for statutory rights to succession, the first sentence of this Article shall apply mutatis mutandis. The balancing of future pensions is governed by the law applicable under sentence 1; it shall only be carried out if accordingly German law is applicable and if the law of one of the countries, whose nationals the life partners are at the time when the application for termination

of the life partnership is filed, recognizes a balancing of future pensions of life partners. Otherwise, it shall be carried out pursuant to German law on application of a life partner if the other life partner has acquired during the subsistence of the life partnership an inland future pension right insofar as carrying it out would not be inconsistent with equity in light of the economic circumstances of both sides also during the time which was not spent within the country.
(2) Article 10 subarticle 2 and article 17 a shall apply accordingly. If the general effects of the life partnership are governed by the law of another country, personal property that is located in this country shall be governed by § 8 subparagraph 1 of the Registered Partnership Act, and legal transactions that have taken place in this country shall be governed by § 8 subparagraph 2 of the Registered Partnership Act in connection with section 1357 of the Civil Code, insofar as these rules are more favorable to third parties acting in good faith as compared to the foreign law.
(3) If a life partnership between the same persons is registered in different countries, the effects specified in subarticle 1 shall, from the time of its registration on, be determined on the basis of the last life partnership entered into.
(4) The effects of a life partnership registered abroad shall not exceed those arising under the provisions of the German Civil Code and the Registered Partnership Act.

Art. 18
[deleted]

[now see Art. 15 EU Regulation on Maintenance Obligations in conjunction with the 2007 Hague Protocol on Maintenance Obligations in conjunction with the Council Decision mentioned in Art 3, see above]

Art. 19
Descent

(1) The descent of a child is governed by the law of the place where the child has his or her habitual residence. In relation to each parent the descent can also be determined by the law of the country of this parent's nationality. If the mother is married, the descent can also be determined by the law that governs the general effects of the marriage under article 14 subarticle 1 at the time of the birth of the child; if the marriage was dissolved before by death, the relevant time is the time of dissolution.
(2) If the parents are not married to each other, the obligations of the father towards the mother because of the pregnancy are governed by the law of the country of the mothers habitual residence.

Art. 20
Challenge of the descent

The descent can be challenged according to any one of the laws, that govern its preconditions. The child, in any event, can challenge the descent under the law of his or her habitual residence.

Art. 21
Effects of parent-child-relationship

The legal relationship between a child and her parents is governed by the law of the country in which the child has her habitual residence.

Art. 22
Adoption

(1) The adoption of a child is governed by the law of the country of which the adopter is a national at the time of the adoption. The adoption by one or both spouses is governed by the law which applies to the general effects of the marriage under article 14 subarticle 1.
(2) The consequences as to the legal relationship between the child and the adopter and the persons, to whom the child has a legal relationship within the meaning of family law, are governed by the law that is determined by subarticle 1.
(3) With respect to succession to the adopter, his spouse or relatives, the adoptee, irrespective of the law applicable according to subarticles 1 and 2 has a position equal to the one of a child adopted under German substantive rules, if the deceased had decreed this by way of a will and if the succession is governed by German law. Sentence 1 shall apply mutatis mutandis, if the adoption is based on a foreign decision. Sentences 1 and 2 don't apply, if the adoptee is 18 years or older at the time of the adoption.

Art. 23
Consent

The necessity and the granting of the consent of the child, and of a person who is related to the child under family law, to a declaration of descent, to conferring a name, or to an adoption are additionally governed by the law of the country of which the child is a national. Where the best interest of the child so requires, German law shall be applied instead.

Art. 24
Guardianship, protective care and curatorship

(1) The creation, modification and termination of guardianship, protective care and curatorship, as well as the substance of legal guardianship and curatorship, are governed by the law of the country of which the ward, the person under protective care or the charge, is a national. A protector may be appointed pursuant to German law for a foreign national who has his or her habitual residence or, in the absence thereof, his or her residence within the country.
(2) If a curatorship is required due to the fact that it is not clear who is a party to an issue, or because a party is presently in another country, the law applicable is the one that governs the issue.
(3) Interim measures as well as the substance of protective care and the ordered guardianship and curatorship are governed by the law of the country which issued the order.

FOURTH SECTION
SUCCESSION

Art. 25
Succession

(1) Succession is governed by the law of the country of which the deceased was a national at the time of his death.
(2) As to immovables located within the country, the testator may, in the form of a testamentary disposition, choose German law.

Art. 26
Dispositions mortis causa (wills)

(1) A testamentary disposition, also when it is made by several persons in the same document, is valid as regards form if its form complies with the formal requirements

1. of the law of the country of which the testator, without regard to article 5 subarticle 1, was a national at the time when he made the testamentary disposition or at the time of his death,
2. of the law of the place where the testator made the testamentary disposition,
3. of the law of the place where the testator had his domicile or habitual residence either at the time when he made the testamentary disposition, or at the time of his death,
4. so far as immovables are concerned, of the law of the place where they are situated, or
5. of the law which governs the succession or would govern at the time when the disposition was made.

The determination of whether or not the testator had his domicile in a particular place is governed by the law of that place.
(2) Subarticle 1 is also applicable to testamentary dispositions revoking an earlier testamentary disposition. The revocation is also valid as regards form if it complies with any one of the laws according to the terms of which, under subarticle 1, the testamentary disposition that has been revoked was valid.
(3) Any provision of law which limits the permitted forms of testamentary dispositions by reference to the age, nationality or other personal conditions of the testator, shall be deemed to pertain to matters of form. The same rule shall apply to the qualifications that must be possessed by witnesses required for the validity of a testamentary disposition.
(4) Subarticles 1 to 3 shall apply mutatis mutandis to other dispositions mortis causa.
(5) Otherwise the validity of a disposition mortis causa and its binding force are governed by the law which would have been applicable to the succession at the time the disposition was made. The testamentary capacity, once it has been acquired, shall not be adversely affected by the acquisition or loss of legal status as a German.

FIFTH SECTION
OBLIGATIONS

First Subsection
Non-Contractual Obligations

Art. 27-37
[deleted]

[now see Rome I Regulation]

Art. 38
Unjust enrichment

(1) Claims of unjust enrichment arising out of rendered performance are governed by the law that governs the underlying legal relationship to which the performance is related.
(2) Claims of unjust enrichment arising out of an infringement to a protected interest are governed by the law of the country, where the infringement occurred.
(3) In other cases claims of unjust enrichment are governed by the law of the country, in which the enrichment took place.

Art. 39
Negotiorum gestio

(1) Legal claims arising out of acts performed without due authority in connection with the affairs of another person are governed by the law of the country in which the transaction was performed.
(2) Claims deriving from satisfying debts of another person are governed by the law that governs the debt.

Art. 40
Tort

(1) Tort claims are governed by the law of the country in which the liable party has acted. The injured party can demand that instead of this law, the law of the country in which the injury occurred is to be applied. The option can be used only in the first instance court until the conclusion of the pretrial hearing or until the end of the written preliminary procedure.
(2) If, at the time of the occurrence of the event underlying the liability, the liable party and the injured party both had their habitual residence in the same country, the law of that country shall apply. For companies or firms and other bodies incorporate or unincorporate, the principal establishment, or where a branch is involved, this establishment, shall be treated as the place of the habitual residence.

(3) Claims governed by the law of another country cannot be raised insofar as they

1. go substantially beyond what is necessary for an adequate compensation of the injured party,
2. obviously serve purposes other than an adequate compensation of the injured party or
3. collide with liability rules under a convention in force in the Federal Republic of Germany.

(4) The injured party may bring his or her claim directly against the insurer of the person liable to provide compensation if the applicable tort law or the law applicable to the insurance contract so provides.

Art. 41
Substantially closer connection

(1) If there is a substantially closer connection with the law of a country other than that applicable under articles 38 to 40 subarticle 2, then the law of that other country shall apply.
(2) A substantially closer connection may be based in particular

1. on a special legal or factual relationship between the persons involved in connection with the obligation or
2. in the cases of article 38 subarticles 2 and 3 and of article 39 on the fact, that the persons involved had their habitual residences in the same country at the time of the pertaining facts; article 40 subarticle 2 sentence 2 shall apply mutatis mutandis.

Art. 42
Choice of law by the parties

After the event giving rise to a non-contractual obligation occurred, the parties may agree to submit it to the law of their choice. Rights of third parties shall not be prejudiced.

SIXTH SECTION
PROPERTY

Art. 43
Rights in rem

(1) Interests in property are governed by the law of the country in which the property is situated.
(2) If an item, to which property interests attach, gets into another country, these interests cannot be exercised in contradiction to the legal order of that country.
(3) If a property interest in an item that is removed from another country to this country, has not been acquired previously, as to such acquisition in the country, facts that took place in another country are considered as if they took place in this country.

Art. 44
Intromissions emanating from real property

As to claims arising from adverse impacts that proceed from a plot of land, the provisions of Regulation (EC) No. 864/2007 except for chapter III shall apply mutatis mutandis.

Art. 45
Means of transport

(1) Interests in airborne, waterborne and rail borne vehicles are governed by the law of the country of origin. This is

1. as to aircrafts the country of their nationality,
2. as to watercrafts the country where they are registered, otherwise the home port or home location,

as to rail vehicles the country of licensing.
(2) The coming into existence of statutory security interests in these vehicles underlies the law applicable to the underlying claim. The ranking among several securities follows article 43 subarticle 1.

Art. 46
Substantially closer connection

If there is a substantially closer connection with the law of a country other than that which would apply under articles 43 and 45, then that law shall apply

SEVENTH SECTION
SPECIAL PROVISIONS IMPLEMENTING RULES OF THE EUROPEAN COMMUNITY ACCORDING TO ARTICLE 3 No. 1

First Subsection
Implementation of Regulation (EC) No. 864/2007

Art. 46a
Environmental damage

The person sustaining damage can invoke his or her right unter Article 7 of the Regulation (EC) No. 864/2007 to base his or her claim on the law of the country in which the event giving rise to the damage occurred, only in the first instance court until the conclusion of the pretrial hearing or until the end of the written preliminary procedure.

Second Subsection
Implementation of Regulation (EC) No. 593/2008

Art. 46b
Consumer protection for particular areas

(1) If a contract, due to choice of law, is governed by the law of a country which is neither a Member State of the European Union, nor another Contracting State of the Agreement on the European Economic Area, yet if the contract shows a close connection to the area of one of theses states, then the provisions of this particular state that have adopted in implementation of the consumer protection directives are nevertheless applicable.

(2) A close connection must be assumed particularly where the entrepreneur[1]

1. carries on a professional or commercial activity in a Member State of the European Union or in a Contracting State of the Agreement on the European Economic Area in which the consumer has his or her habitual residence, or
2. directs such activity in some way towards this Member State of the European Union or towards another Contracting State of the Agreement on the European Economic Area or towards several states including this state,

and the contract falls within the scope of this activity.

[1]The notion of „entrepreneur" used here is equivalent to the notion of „professional" used in Art 6 Rome I Regulation.

(3) Consumer Protection Directives in the meaning of this article are in their respectively updated version:

1. Directive 93/13/EEC of the Council of April, 5, 1993 on unfair terms in consumer contracts (OJ EC No. L 95 of 21.4.1993, p. 29)
2. 2. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ EC No. L 144 of 4.6.1997, p. 19)
3. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ EC No. L 171 of 7.7.1999, p. 12)
4. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ EC No. L 271 of 2002, p. 16)
5. Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ EC No. L 133 of 22.5.2008, p. 66)

(4) If a timeshare contract, a long-term holiday product contract, a resale contract or an exchange contract in the meaning of Art 2 para. 1 (a) to (d) of Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (OJ L 33 of 3.2.2009, p. 10) is governed by the law of a country which is neither a Member State of the European Union, nor another Contracting State of the Agreement on the European Economic Area, then the consumers shall not be deprived of the protection granted in implementation of this directive, if

1. any of the immovable properties concerned is located in the sovereign territory of a Member State of the European Union or of another Contracting State of the Agreement on the European Economic Area, or
2. in the case of a contract not directly related to an immovable property, the entrepreneur pursues commercial or professional activities in a Member State of the European Union or another Contracting State of the Agreement on the European Economic Area or where he, by any means, directs such activities to such a state, and the contract falls within the scope of such activities.

Art. 46c
Compulsory insurance contracts

(1) An insurance contract, covering risks for which a Member State of the European Union or another Contracting State of the Agreement on the European Economic Area has established an obligation to insure, is governed by the law of this state provided that this law holds itself applicable.
(2) A contract on a compulsory insurance is governed by German law, if the statutory obligation to conclude the contract is based on German law.

Third Chapter
Adaptation

Art. 47
First and Family Names

(1) Where a person under an applicable foreign law has obtained a name and the name is henceforth governed by German law, the person may, by a declaration given before the Registrar of Births, Marriages and Deaths,

1. determine a first and a family name from out of the name
2. choose a first or a family name where such name does not exist
3. give up components of the name that German law does not provide for
4. adopt the original version of a name that has been modified according to the sex or the family relationship
5. accept a German version of his or her first or his or her family name; where such a version of his or her first name does not exist, he or she can accept new first names.

Where the name is a marital name, during the marriage only both spouses may give the declaration.
(2) Subarticle 1 is applicable mutatis mutandis as to the formation of a name under German law, if it is derived from a name which has been obtained under an applicable foreign law.
(3) § 1617c of the Civil Code applies mutatis mutandis.
(4) The declarations made under Subarticles 1 and 2 need to be publicly authenticated or certified.

Annex 11

[2008] WASC 10

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	:	AREVA NC (AUSTRALIA) PTY LTD -v- SUMMIT RESOURCES (AUSTRALIA) PTY LTD [No 2] [2008] WASC 10
CORAM	:	MARTIN CJ
HEARD	:	ON THE PAPERS
DELIVERED	:	1 FEBRUARY 2008
FILE NO/S	:	COR 112 of 2007
BETWEEN	:	AREVA NC (AUSTRALIA) PTY LTD (ACN 003 337 782) Plaintiff AND SUMMIT RESOURCES (AUSTRALIA) PTY LTD (ACN 009 188 078) First Defendant SUMMIT RESOURCES LTD (ACN 009 474 775) Second Defendant

Catchwords:

Corporations - Inspection of books - *Corporations Act 2001* (Cth), s 247A - Whether draft witness statement in possession of a party's former solicitor are 'books' of the party

Legislation:

Corporations Act 2001 (Cth), s 237, s 247A, s 431

Result:

The draft witness statement or statements are 'books of' the defendants

Category: B

Representation:

Counsel:

Plaintiff	:	No appearance
First Defendant	:	No appearance
Second Defendant	:	No appearance

Solicitors:

Plaintiff	:	Minter Ellison
First Defendant	:	Clayton Utz
Second Defendant	:	Clayton Utz

Case(s) referred to in judgment(s):

Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd [2007] WASC 207
Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485
Breen v Williams (1996) 186 CLR 71
Chantrey Martin (A Firm) v Martin [1953] 2 All ER 691; [1953] 3 WLR 459; [1953] 2 QB 286
Czerwinski v Syrena Royal Pty Ltd (No 1) [2000] VSC 125; (2000) 34 ACSR 245
Ex Parte Horsfall (1827) 108 ER 20
Finn v Firefast Pty Ltd [2004] QSC 203
Hall v Sherman [2001] NSWSC 810; (2002) 40 ACSR 40
Leicestershire County Council v Michael Faraday and Partners Ltd [1941] 2 KB 205
Re Jet Corporation of Australia Pty Ltd [1985] VR 716
Wentworth v De Montfort (1988) 15 NSWLR 348

1 **MARTIN CJ**: On 3 September 2007, I granted, in part, an application by Areva NC (Australia) Pty Ltd (Areva) for inspection of documents pursuant to s 247A of the *Corporations Act 2001* (Cth). I reserved to Areva liberty to apply to inspect other categories of documents. Areva asserts that drafts of a statement of the evidence to be given by a Mr Alan Eggers either should have been produced for inspection pursuant to the orders which I made, or, alternatively, if they do not fall within the scope of those orders, should be the subject of a further order granted pursuant to the liberty to apply. Because it is clear that the drafts of any statements of the evidence to be given by Mr Eggers would be directly relevant to Areva's assessment of the legal merits of the Summit parties' (being Summit Resources (Australia) Pty Ltd and Summit Resources Ltd) claims in proceedings CIV 2021 of 2006 (the substantive proceedings), it is clear that if they come within the scope of s 247A of the *Corporations Act*, their production for inspection would be consistent with the views I formed and expressed in ***Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd*** [2007] WASC 207. Accordingly, it is unnecessary to determine whether the drafts fall within the scope of the orders already made, as if they do not, and they are within s 247A, it is clear that they should be the subject of such an order, consistently with the views expressed in my earlier reasons.

2 However, the Summit parties resist an order for inspection of the draft statements on two grounds. The first is the assertion that the draft statements are not 'books' of the Summit parties and cannot therefore be the subject of an order made pursuant to s 247A of the *Corporations Act*. The second ground of opposition is that the draft statements are the subject of legal professional privilege which has not been waived by the Summit parties.

3 The Summit parties rely upon an affidavit of Mr David Shaw, a solicitor and principal of the firm which had previously acted for Summit Resources (Australia) Pty Ltd in the substantive proceedings. He deposes that in or around late December 2006 and early January 2007, he met with Mr Eggers for the purpose of preparing his witness statement. He further deposes that in early January 2007, he commenced the drafting of Mr Eggers' statement. He further deposes that after reviewing the hard copy files and electronic records maintained by his firm, to the best of his knowledge and belief, the incomplete draft witness statement was never provided to Mr Eggers, or to any other officer or employee of the Summit parties, or to Mr Michael Lishman, or any other partner or employee of Cochrane Lishman.

Are the draft statement 'books' of the Summit parties?

4 Section 247A of the *Corporations Act* empowers the court to make an order authorising the inspection of 'books of' a company. The word 'books' is given an expansive definition by s 9 of that Act, and includes:

> (a) a register; and
>
> (b) any other record of information; and
>
> (c) financial reports or financial records, however compiled, recorded or stored; and
>
> (d) a document
>
> ...

5 It is clear that the draft or drafts of the statements of the evidence to be given by Mr Eggers are 'books'. In this case, the critical question is whether they are the books *of* the Summit parties.

6 In ***Hall v Sherman*** [2001] NSWSC 810; (2002) 40 ACSR 40, the same question arose in the context of s 431 of the *Corporations Act*. That section provides that a controller of property of a corporation is entitled to inspect at any reasonable time 'any books of the corporation that relate to that property'. The question in issue in that case was whether the expression 'books of the corporation' included not only books which were owned by the corporation, but also books which were in the possession of the corporation at the time of the appointment of the relevant controller.

7 Austin J followed the decision of Gobbo J in ***Re Jet Corporation of Australia Pty Ltd*** [1985] VR 716 and held that the expression 'books of the corporation' extended only to books which belonged to the company. Accordingly, his Honour concluded that books which did not belong to the company in question, but which were in its possession at the time of the appointment of the controller were outside the scope of s 431 of the *Corporations Act*.

8 Of course, those cases concern access to books by a controller of property. Section 247A is concerned with access to books by a member of a company or registered managed investment scheme. However, I can see no reason why the expression 'books of' would be given a broader meaning in the former context than in the latter. The decisions to which I have referred have stood unchallenged for some time. Although I am not, of course, bound to follow those decisions, uniformity of decision in the interpretation of uniform national legislation is an important consideration

(***Australian Securities Commission v Marlborough Gold Mines Ltd*** (1993) 177 CLR 485, 492), as is judicial comity. I would therefore only depart from those decisions if I was satisfied that they were wrong. I am not so satisfied.

9 Accordingly, in the present case the question becomes whether the draft or drafts of the statements of the evidence to be given by Mr Eggers 'belong' to the Summit parties in the sense that they are the property of those parties.

10 In ***Wentworth v De Montfort*** (1988) 15 NSWLR 348, the Court of Appeal of New South Wales was required to determine whether documents in the possession of a firm of solicitors were the property of the client. Hope JA, with whom Samuels and Mahoney JJA agreed, reviewed the authorities and texts on the subject. After that review, his Honour concluded that there were a number of factors relevant to the determination of ownership, including whether or not the client was charged with the creation of the document, and whether the solicitor created the document for his client's benefit and protection, or did so for his own benefit and protection. In the case of mixed purposes, Hope JA concluded that the client would ordinarily be entitled to the original of the document, but the solicitor would be entitled to retain a copy for his own benefit.

11 In the present case, I have no evidence as to whether or not the Summit parties were charged for the creation of the drafts of Mr Eggers' statement of evidence. However, as there is no evidence to the contrary, I am disposed to infer from the usual course of dealings between solicitor and client that Mr Shaw would have charged the Summit parties and been paid for the work that he did in relation to the preparation of the drafts of Mr Eggers' statement.

12 Some of the documents at issue in ***Wentworth v De Montfort*** included notes of conversations between the solicitors and persons other than the client. In that context, Hope JA observed at 358 - 359:

> Again a solicitor may interview a witness and take a statement from him. I would have thought that such a statement was taken for the benefit of the client as well as by the solicitor for his own purposes and undoubtedly the client would be charged for the taking of the statement. If a new solicitor took over a client's business, the former solicitor having been paid his fees, I would have thought that the former solicitor would be bound to hand over the statement to the new solicitor, although he could keep a copy for which he had not charged.

> As I have indicated, *Cordery* suggests that both that 'entries of attendance' and 'proofs of evidence' are the property of the solicitor. No authority is cited for these suggestions, and I would have thought that they both fell squarely within the first of the four categories described by *Cordery* and that they each belonged to the client. The '*Guide to the Professional Conduct of Solicitors*' issued by the (English) Council of the Law Society (1974) stated (at 39) that a memorandum of a telephone conversation with a third party made by a solicitor is the property of the client, and is accordingly to be handed over on a change of solicitors.

13 The Summit parties seek to avoid the application of the principles enunciated by Hope JA in ***Wentworth v De Montfort*** by pointing to the fact that the documents in question are a draft or drafts of a proposed witness statement. They submit that there is no evidence that the solicitor intended to provide this draft or a copy of it to the Summit parties or anyone else. They submit that the evidence sustains an inference that the solicitor was still working on the draft, and did not intend to part with it until he had completed his work.

14 However, it seems that the conclusions to be drawn in respect of the intentions of the solicitor as to the future use to which the document would be put are not to the point of the principles enunciated by Hope JA in ***Wentworth v De Montfort***. Those principles turn upon the question of the identification of the person for whose benefit the document was prepared. The decision in ***Wentworth v De Montfort*** stands for the proposition that a proof of evidence should be taken to be prepared by the solicitor for the benefit of the client and therefore belonged to the client. I can see no reason why any different conclusion should be reached in respect of the draft or drafts of a proof of evidence. In the present case, it is to be inferred from Mr Shaw's affidavit that the draft or drafts record statements made by Mr Eggers during the course of his meetings with Mr Shaw in late December 2006 and early January 2007. To that extent, the documents also fall within the category of documents identified by Hope JA as having been taken for the benefit of the client as well as for the solicitor. In respect of that category, Hope JA was of the view that property in the document belonged to the client, subject to the right of the solicitor to retain a copy for his own purposes.

15 The Summit parties also relied upon the observation of Brennan CJ in ***Breen v Williams*** (1996) 186 CLR 71 at 80:

> Documents prepared by a professional person to assist the professional person to perform his or her professional duties are not the property of the lay client; they remain the property of the professional.

16 Brennan CJ cited two authorities for that proposition. The first, ***Leicestershire County Council v Michael Faraday and Partners Ltd*** [1941] 2 KB 205, concerned the question of property in books and records prepared by valuers who had been engaged to undertake the valuation of property on behalf of a local authority. MacKinnon LJ observed at 216:

> If an agent brings into existence certain documents while in the employment of his principal, they are the principal's documents and the principal can claim that the agent should hand them over, but the present case is emphatically not one of principal and agent. It is a case of the relations between a client and a professional man to whom the client resorts for advice. … These pieces of paper, as it seems to me, cannot be shown to be in any sense the property of the plaintiffs, any more, as I suggested to Mr Macaskie during the argument, that his solicitor client or his lay client could assert that his notes of the argument he addressed to us could be claimed to be delivered up by him when the case is over either to the solicitor or to the lay client. They are documents which he has prepared for his own assistance in carrying out his expert work, not documents brought into existence by an agent on behalf of his principal, and, therefore they cannot be said to be the property of the principal.

17 That passage is entirely consistent with the principles enunciated by Hope JA in ***Wentworth v De Montfort***, which focused critically upon the identification of the person for whose benefit the documents were produced.

18 The second case cited by Brennan CJ, ***Chantrey Martin (A Firm) v Martin*** [1953] 2 All ER 691; [1953] 3 WLR 459; [1953] 2 QB 286 concerned working papers brought into existence by chartered accountants in the preparation of an audit of a client's books. The Court of Appeal held that those working papers were the property of the chartered accountants and not the client. After referring to the decision in ***Ex Parte Horsfall*** (1827) 108 ER 20, which concerned the drafts of deeds, Jenkins LJ (giving the judgment of the court) observed at 293:

> Even in the case of a solicitor there must, we should have thought, be instances of memoranda, notes, etc., made by him for his own information in the course of his business which remains his property, although brought into existence in connexion with work done for clients.

19 Again, this passage seems to me to be entirely consistent with the principles enunciated by Hope JA in ***Wentworth v De Montfort.***

20 Accordingly, when regard is had to the authorities cited by Brennan CJ in support of the observations which he made in ***Breen v Williams***, it is clear that he was not advancing any proposition

inconsistent with that enunciated in ***Wentworth v De Montfort***. Rather, properly construed, he was reinforcing that proposition, by emphasising the importance of the identification of the person for whose benefit the document was produced.

21 In the present case, it seems to me that the proper inference to be drawn from the limited evidence before me is to the effect that the draft or drafts of the statement of the evidence to be given by Mr Eggers were prepared for the benefit of the Summit parties or, perhaps, for the benefit of both the Summit parties and their solicitor. As the decision in ***Wentworth v De Montfort*** establishes that in both cases, property in the original of the document resides with the client - in this case the Summit parties, I conclude that the draft or drafts of the statements of the evidence given by Mr Eggers and prepared by Mr Shaw at a time when he was acting for and on behalf of the Summit parties in relation to the relevant litigation are the property of and belong to those parties, and are therefore 'books of' those parties for the purposes of s 247A of the *Corporations Act*.

Legal professional privilege

22 It is surprising that the Summit parties have raised an objection to inspection on the ground of legal professional privilege at this stage of these proceedings. That is because no similar objection was taken to the application for authority to inspect books and records which are plainly within the scope of legal professional privilege (see the description of the categories of documents, the subject of the orders which I made on 3 September 2007 - ***Areva NC (Autralia) Pty Ltd v Summit Resources (Australia) Pty Ltd*** [2007] WASC 207, [32]).

23 As a result of orders already made, Areva has been entitled to inspect a vast array of information which is the subject of legal professional privilege in favour of the Summit parties and which bears upon the substantive proceedings which Areva seeks to conduct for, and on behalf of, Summit Resources (Australia) Pty Ltd pursuant to the relief which it seeks in the proceedings which it has brought under s 237 of the *Corporations Act* (COR 114 of 2007).

24 Significantly, the Summit parties do not submit that legal professional privilege is an insurmountable barrier to the making of an order for inspection under s 247A of the *Corporations Act*. They appear to accept, by their written submissions, that the decisions in ***Finn v Firefast Pty Ltd*** [2004] QSC 203 and ***Czerwinski v Syrena Royal Pty Ltd*** (No 1) [2000] VSC 125; (2000) 34 ACSR 245 correctly assume that an

order can be made for the inspection of documents pursuant to s 247A of the *Corporation Act*, notwithstanding that they are the subject of legal professional privilege.

25 So, the position of the Summit parties appears to be that the existence of legal professional privilege is a relevant matter to be taken into account in exercising the discretion conferred by s 247A, and in determining the conditions upon which authority to inspect will be granted.

26 Taking that approach to the matter, in the context of the vast array of privileged information which has already been provided to Areva, I cannot see any basis upon which it could be concluded that the provision of authority to inspect the draft or drafts of the statements of the evidence to be given by Mr Eggers could cause any significant prejudice to the Summit parties. The stance taken by Mr Eggers, and the importance of his evidence is one of the issues identified by Mr Lishman in his letter of advice to the directors of the Summit parties of 5 July 2007. It is therefore reasonable to infer that it will be a topic of significance in the litigation of Areva's application under s 237 of the *Corporations Act*. The forensic purpose to be served by the provision of inspection of those documents to Areva is therefore potentially significant. On the other hand, there does not appear to me to be any basis for inferring that Areva will take any step which could result in the abrogation of legal professional privilege in the draft or drafts of the witness statements. And if the Summit parties have any particular concerns in that regard, they are matters that can be addressed by the imposition of conditions upon the authority to inspect. I will invite the Summit parties to make submissions on that subject before making any final orders.

27 Areva also submits that the Summit parties have in any event waived the legal professional privilege which attaches to the documents in question. The propositions advanced by Areva in support of that submission appear to me to be somewhat tenuous, but in light of the view which I have formed, it is unnecessary to resolve those questions.

Summary

28 In my opinion, the draft or drafts of the statements of the evidence to be given by Mr Alan Eggers which were prepared by Mr Shaw at a time when he was acting as solicitor for the Summit parties, are 'books of' those parties and can and should be the subject of an order for inspection by Areva made pursuant to s 247A of the *Corporations Act*. However, before making orders for inspection, I will invite the Summit parties to

make submissions in respect of the conditions upon which inspection should be provided.

Annex 12

A

BREEN v WILLIAMS †

Court of Appeal: Kirby P, Mahoney JA and Meagher JA

7 November, 23 December 1994

Medicine — Medical practitioners — Doctor patient relationship — Medical records — Access by patient — No implied contractual obligation — No common law obligation — Scope of accessible records — Fiduciary relationship not requiring giving of access.

B

Equity — Fiduciary obligations — Doctor and patient — Whether relationship fiduciary — Whether gives rise to right in patient to inspect medical records.

C

Public International Law — International Covenant on Civil and Political Rights — Principles of covenant — Whether principles part of local law.

Practice — Amicus curiae — Appearance as — Present day role — Discussion of.

Held: (1) There was no implied term in a contract between a doctor and a patient that the latter could have direct access to the information in the original material of the doctor's file on the patient. (538B, 562D, 569F)

D

Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337, applied.

Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985] AC 871, considered.

Wasson v Commercial & General Acceptance Ltd (1985) 2 NSWLR 206 at 214; *McInerney v MacDonald* (1992) 93 DLR (4th) 415 at 421, referred to.

E

(2) (Mahoney JA not deciding) A patient does not have any proprietary right and interest in the actual information contained in the records of his or her doctor. (538E, 569F)

Wentworth v De Montfort (1988) 15 NSWLR 348 at 357, applied.

Leicestershire County Council v Michael Faraday and Partners, Ltd [1941] 2 KB 205 at 216; *Chantrey Martin (a firm) v Martin* [1953] 2 QB 286 at 293, referred to.

F

(3) (Mahoney JA not deciding) No common law right of access to medical records arises from the *International Covenant on Civil and Political Rights* as the principles of that instrument, even if applicable, have not been incorporated into local law. (539B, 569F)

(4) (Mahoney JA not deciding) There is no innominate common law right in a patient to have direct access to his or her medical records kept by the patient's doctor. (540G, 569F)

G

R v Mid Glamorgan Family Health Services Authority; Ex parte Martin ([1995] 1 WLR 110; [1995] 1 All ER 356, considered.

(5) (Mahoney JA not deciding) A doctor's obligation to provide information to a patient concerning medical procedure does not give rise to an affirmative

† [EDITORIAL NOTE: An application for special leave to appeal to the High Court has been filed.]

obligation to give the patient access to information about the patient in the doctor's records. (541E, 569F)

Rogers v Whitaker (1992) 175 CLR 479, distinguished.

(6) (Kirby P dissenting) Though (per Kirby P and Meagher JA; contra Mahoney JA) for some purposes the relationship between a doctor and patient is a fiduciary one which can give rise to applicable fiduciary duties, the relationship does not generate in a patient a right to inspect the doctor's notes and records about the patient. (568E, 570E)

McInerney v MacDonald (1992) 93 DLR (4th) 415, not followed.

R v Mid Glamorgan Family Health Services Authority; Ex parte Martin [1995] 1 WLR 110; [1995] 1 All ER 356, considered.

Gaskin v Liverpool City Council [1980] 1 WLR 1549, referred to.

Consideration by Kirby P of the present day role of amicus curiae appearances. (532E)

Discussion by Mahoney JA of the types of relationship between a professional person and that person's client.

Note:

A Digest — PROFESSIONS AND TRADES (3rd ed) [201]; MEDICINE (2nd ed) [23]; EQUITY (3rd ed) [34-36]; (2nd ed) [1]; PROCEDURE (3rd ed) [45]; PRACTICE (2nd ed) [2]; COURTS AND JUDGES (2nd ed) [36]

CASES CITED

The following cases are cited in the judgments:

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Ballina Shire Council v Ringland (1994) 33 NSWLR 680.

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582; [1957] 2 All ER 118.

Breen v Williams (Bryson J, 10 October 1994, unreported).

Burnie Port Authority v General Jones Pty Ltd (1994) 68 ALJR 331; 120 ALR 42.

C v C [1946] 1 All ER 562.

Cannell v Medical and Surgical Clinic 315 NE 2d 278 (1974).

Chantrey Martin (a firm) v Martin [1953] 2 QB 286.

Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1.

Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337.

Commonwealth of Australia v Sterling Nicholas Duty Free Pty Ltd (1972) 126 CLR 297.

Commonwealth v Tasmania (1983) 158 CLR 1.

Coomber, Re; Coomber v Coomber [1911] 1 Ch 723.

Corporate Affairs Commission v Bradley; Commonwealth of Australia (Intervener) [1974] 1 NSWLR 391.

Derbyshire County Council v Times Newspapers Ltd [1992] QB 770.

Duncan v Medical Practitioners Disciplinary Committee [1986] 1 NZLR 513.

Dyson v Attorney General [1911] 1 KB 410.

E I Du Pont de Nemours v Commissioner of Patents [No 5] (1989) 17 NSWLR 389.

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F v R (1983) 33 SASR 189.

Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421.

Gaskin v Liverpool City Council [1980] 1 WLR 1549.

Gaskin v United Kingdom (Access to Personal Files) (1989) 12 EHRR 36.

Gibbon v Pease [1905] 1 KB 810.

Hartigan Nominees Pty Ltd v Rydge (1992) 29 NSWLR 405.

Hawkins v Clayton (1988) 164 CLR 539.
Health and Community Services, Secretary, Department of v JWB and SMB (Marion's case) (1992) 175 CLR 218.
Henderson v Johnston [1956] OR 789.
Hospital Products Pty Ltd v United States Surgical Corporation (1984) 156 CLR 41.
Hyundai Heavy Industries Co Ltd v Papadopoulos (1980) 1 WLR 1129; [1980] 2 All ER 29.
Johnson v Sammon (1973) 7 SASR 431.
Keech v Sandford (1726) Sel Cas Ch 61; 25 ER 223.
Kelly v Cooper [1993] AC 205.
Kenny v Lockwood [1932] OR 141.
Leicestershire County Council v Michael Faraday and Partners, Ltd [1941] 2 KB 205.
London School Board v Northcroft (1889) Hudson's BC (4th ed) vol 2, 147; (10th ed) 174; 192.
Mabo v Queensland [No 2] (1992) 175 CLR 1.
McInerney v MacDonald (1990) 66 DLR (4th) 736.
McInerney v MacDonald (1992) 93 DLR (4th) 415.
Moorgate Tobacco Co Ltd v Philip Morris Ltd (1982) 64 FLR 387.
Moorgate Tobacco Co Ltd v Phillip Morris Ltd (1984) 156 CLR 414.
Naylor v Preston Area Health Authority [1987] 1 WLR 958; [1987] 2 All ER 353.
Neeta (Epping) Pty Ltd v Phillips (1974) 131 CLR 286.
New Zealand Netherlands Society "Oranje" Inc v Kuys [1973] 1 WLR 1126; [1973] 2 All ER 1222.
Norberg v Wynrib; Women's Legal Education and Action Fund, Intervener (1992) 92 DLR (4th) 449.
Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197.
P D v Australian Red Cross Society (New South Wales Division) (1993) 30 NSWLR 376.
R v Cook; Ex parte Twigg (1980) 147 CLR 15.
R v Mid Glamorgan Family Health Services Authority and South Glenmorgan Health Authority; Ex parte Martin (1993) 16 BMLR 81.
R v Mid Glamorgan Family Health Services Authority; Ex parte Martin [1995] 1 WLR 110; [1995] 1 All ER 356.
R v Murphy (1986) 5 NSWLR 18.
Reibl v Hughes (1980) 114 DLR (3rd) 1.
Rogers v Whitaker (1992) 175 CLR 479.
Rushby v Roberts [1983] 1 NSWLR 350.
Sankey v Whitlam (1978) 142 CLR 1.
Schloendorff v Society of New York Hospital 105 NE 92 (1914).
Shepperd v Council of the Municipality of Ryde (1952) 85 CLR 1.
Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985] AC 871.
Smith Kline and French Laboratories Ltd v Attorney- General [1989] 1 NZLR 385.
Taxation, Federal Commissioner of v United Aircraft Corporation (1943) 68 CLR 525.
Thompson, Re (1855) 20 Beav 545; 52 ER 714.
Tindle v Ansett Transport Industries (Operations) Pty Ltd (1990) 21 NSWLR 492.
United States Tobacco Co v Minister for Consumer Affairs (1988) 20 FCR 520; 83 ALR 79.
United States Tobacco Co v Minister for Consumer Affairs (1988) 19 FCR 184; 82 ALR 509.
Wasson v Commercial & General Acceptance Ltd (1985) 2 NSWLR 206.
Watkins v Olafson (1989) 61 DLR (4th) 577.
Wentworth v De Montfort (1988) 15 NSWLR 348.
Wickstead v Browne (1992) 30 NSWLR 1.
Young v Registrar, Court of Appeal [No 3] (1993) 32 NSWLR 262.

A The following additional cases were cited in argument and submissions:
Esanda Finance Corporation Ltd v Carnie (1992) 29 NSWLR 382.
Lamb v Cotogno (1987) 164 CLR 1; (affirming) *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559.
Londonderry's Settlement, Re; Peat v Walsh [1965] Ch 918.
Troja v Troja (1994) 33 NSWLR 269.

B APPEAL

A patient's application to have her doctor provide her with access to her medical records was refused by Bryson J in the Equity Division. She appealed against that decision.

P K Cashman (solicitor), for the appellant.

S D Rares SC with *P Durack* and *J S Gleeson*, for the respondent.

C P W Bates, for the Public Interest Advocacy Centre (applicant for amicus curiae).

Cur adv vult

23 December 1994

KIRBY P. This appeal concerns the right of a patient, otherwise than by statute, to have access to information in medical records held by a private D medical practitioner concerning the patient.

Legislation in this country, generally restricted to the health records held by public authorities, sometimes provides the facility of access to the records: see, eg, *Freedom of Information Act* 1982 (Cth), ss 11, 41, 48; *Freedom of Information Act* 1989, ss 16, 31; see also Schedule 1, cl 6. In many non-common law systems, the patient's right of access has been upheld and enforced: see, eg, D Giesen *International Medical Malpractice Law*, Mohr, E Tubingen (1988) at 424f. Policy documents of the State Department of Health support the right of a patient to see "what information is held about him or her by a health institution", except where disclosure might harm the patient's health: see New South Wales Department of Health, Circular 90/126 *Confidentiality of Health Records* (17 December 1990). Many opinions have been expressed supporting the general utility of patient access to information in medical records concerning their health. Such opinions F extend to the journal of the insurer which stands behind the medical practitioner now before the Court: see C Lillienthal, "Patient Access to Medical Record", *NSW Medical Defence Union Journal*, (1994) vol 8 (2), at 20-21; cf *Journal of the MDU* (UK) (1986) vol 2, No 20, at 2; see also "Patient access to medical records" (1994) *Australian Health Law Bulletin*, vol 3, No 3 at 21; "Breen v Williams; right of access to medical records denied" (1994) *Privacy Law and Policy Reporter*, vol 1, No 8 at 141. On some occasions, doubtless by prior express arrangement, subsequent agreement or G individual practice, original medical records are provided by medical practitioners to their patients or to persons (such as other health care workers or legal practitioners) acting on their behalf. By subpoena, discovery and other legal process, courts in this country may generally procure such access, even against a reluctant record holder.

But the question posed by this appeal, from the Equity Division of the

Supreme Court (Bryson J) (*Breen v Williams* (Bryson J, 10 October 1994, unreported)), is not whether access to information in medical records apart from the foregoing instances *should* be provided upon patient demand. It is whether, by the law of this Australian jurisdiction, it *must* be provided. What this Court has to decide, in light of the demand of the patient, is not whether there should be a right of access; but whether there is: cf *R v Mid Glamorgan Family Health Services Authority and South Glenmorgan Health Authority; Ex parte Martin* (1993) 16 BMLR 81 at 95. The case does not concern generalities or a hypothetical question. It concerns the rights of an actual patient to have access to records in the possession of her medical practitioner. She asserts the right; he denies it.

Bryson J rejected the patient's claim. He did so upon each of the several bases of the common law, of equity and of fundamental rights which the patient propounded. He upheld the medical practitioner's refusal to give access to the records. By this appeal, the patient challenges his Honour's conclusions and orders. This Court has been greatly assisted by the analysis of the issues provided by Bryson J in his reasons. But for such assistance, the Court could not have dealt with the matter with such expedition. His Honour's reasons demonstrate that there are formidable legal and other arguments supporting refusal of access. No authority of the High Court of Australia or of this Court resolves the point. It is therefore necessary for this Court to review Bryson J's decision taking into account the usual considerations of "legal principle, decided authority and policy": see *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252.

A "test case" on access to medical records:

The facts may be taken from the reasons of Bryson J. So far as relevant, they were not in dispute.

In October 1977, the appellant, Ms Julie Breen, underwent bilateral augmentation mammaplasty performed by Dr C Sharp, a plastic surgeon. By this procedure, a small silicon implant was inserted in her left breast and a larger implant in her right breast to augment their size. After the operation, Ms Breen noticed the development of breast capsules. These caused her to consult Dr Cholmondeley Williams, the respondent. He advised her to undergo compression of the capsules. The application by him of pressure occasioned severe pain. As a result, an operative procedure was carried out by Dr Williams in November 1978. He neither inserted implants nor removed those inserted by Dr Sharp. After the operation (bilateral capsulotomy) Dr Williams gave advice to Ms Breen concerning an unrelated medical condition. Over subsequent years she had correspondence with Dr Williams concerning removal of the implants. However, there were no further consultations with, or operations by, him.

In 1984, Ms Breen noticed the development of a lump under her left breast. This was diagnosed as a leakage of silicon gel from the breast implant. An operative procedure was performed by Dr I A McDougall which it is unnecessary to detail.

In 1993, Ms Breen became involved, with many others, in litigation against the manufacturer of the breast implants contending that they were defective. The Court was told that at least 2,000 women in Australia, amongst the 50,000 to 80,000 who had received such implants in this country, were

A engaged in the litigation. Their claims represent part of a large litigious enterprise in the United States of America known as the "Silicon Gel Breast Implant Products Liability Litigation". That litigation, begun in the United States District Court for the Northern District of Alabama sub nom *Lindsey et al v Dow Corning Corp et al*, has been heard by the Honorable S C Pointer Jr, a United States District Judge. It is one of his orders which has occasioned the urgency of the present proceedings.

B Until Judge Pointer's order, dated 1 September 1994, Ms Breen, and other Australian litigants, were treated as members of an "opt out class" in the United States litigation. That litigation was proceeding towards settlement for which conditional approval had been given by the Court in a proposed amount of $US4.2 billion. Judge Pointer excluded the Australian litigants (and certain Canadian claimants) from the settlement. However, he afforded them an opportunity to "opt in", provided they did so before 1 December 1994. If they do so, within time, they will be entitled to participate in the C benefits available under the settlement of the class action approved by the United States court.

It is a term of "opting in" proposed that each claimant must file with the United States court, copies of medical records in support of any claim which they wish to propound under the orders made. Only if this requirement is satisfactorily complied with will the claimant be eligible for payment over the next thirty years out of the settlement moneys approved. This Court was told D that, in the United States (and presumably elsewhere if patients can secure the agreement of treating medical practitioners or rely upon legal rights or court process), the practice has been followed that the original treating doctors' records have been produced and filed. Ms Breen sought to have access to her medical records in this case both to secure the basis for advice on whether she should "opt in" to the United States settlement and, if she decides to do so, to comply with the procedure laid down for that purpose.

E There is no doubt that access to the medical records could be secured by compulsory court process. Letters rogatory were secured from Judge Pointer in the case of several litigants. These, in turn, resulted in orders by judges of the Supreme Court of this State for compulsory production of medical records to the Court in aid of the United States proceedings. The costs, delays and complications of this procedure were, self-evidently, significant. The time available was short. It was therefore decided by those advising F Ms Breen and others in a like position (said to number 2,000 in a group represented by Ms Breen's solicitors and others in co-operation) to launch a "test case".

In a sense, the choice of Dr Williams was a trifle curious. He was neither the surgeon who inserted the original implant nor the surgeon who removed that object and replaced it. Perhaps he was chosen because of his relatively minor part in the treatment of Ms Breen and hence for the removal of a prospect (never entirely disclaimed) that he might himself be sued for G professional negligence. However that may be, the demand for access was made upon him, by the representatives of Ms Breen. Those appearing in Dr Williams' interest treated the case as presenting an issue of general principle. No point was taken at first instance, or in this Court, that the facts did not properly present an important question for decision. Each side recognised, and co-operated in, the urgent resolution of the issue.

I am content to approach the matter, as Bryson J did, as one of principle. The resolution of the principle, in the case of Ms Breen, may have consequences for the many other litigants in the silicon gel breast implant litigation. But, as will be shown, the consequences potentially stretch far beyond, to medical practice, record keeping and patients' rights more generally.

The records are refused:

In August 1993, Ms Breen commenced her effort to gain access to the medical records held about her case by Dr Williams. She caused her solicitor to write to him requesting copies of all primary records and emphasising that it was not a medical report (that is, interpretative summary) that was being sought. Dr Williams replied to Ms Breen directly. He stated that it was a "longstanding legal tradition" that such records were the "property" of the medical practitioner, "an aide memoire to his treatment of the patient". They could only be released on production of a court subpoena. The letter went on:

> "Accordingly, the advice which I have received from my Medical Defence legal advisers is that this situation still holds, but that they would be very happy for me to release your records were you to supply me with a document which would release me from any claim that might arise in relation to my treatment of you."

If such a release were provided, Dr Williams promised to send copies of his records "forthwith". He acknowledged that this would "avoid the necessity" of the solicitors "seeking a subpoena through the US legal system". Further contact with the NSW Medical Defence Union was suggested.

This letter eventually produced the summons in May 1994 which, with expedition, took the matter before Bryson J. His Honour recorded the fact that, during the hearing, Dr Williams made an open offer to provide a report to Ms Breen. The offer was not then accepted. At the close of the hearing before this Court, such a report was produced to the Court. It comprises less than two pages of content. Although marked, it was not received into evidence. As it was not before Bryson J, I do not consider that this Court should pay regard to it. It does not advance the competing cases of the parties. It certainly does not meet Ms Breen's asserted "right" to "... have all information relating to my personal health at my disposal which will, in turn, ensure that I am able to make decisions regarding my future treatment".

In an affidavit read before Bryson J, Dr Williams described his practice in the maintenance of patient medical files. Ordinarily, they comprise his handwritten notes; copies of letters reporting to referral medical practitioners; hospital advice slips; correspondence with the patient; reports received from other medical practitioners; communications with the Medical Defence Union; photographs and account cards with information relevant to charges and payments.

So far as the handwritten notes were concerned, Dr Williams described these as typically including notes about the description by the patient of the medical condition; other relevant information given by the patient; observations on examination, a note of conclusions including "comments to myself and what I call my medical musings about the patient's condition";

notes on proposed operative treatment; notes on the patient's funds; a short note of any operation carried out; and notes on other information obtained from sources other than the patient relevant to the treatment or management, for example, from a family or friend ("not infrequently such information is supplied to me by these sources on the basis that they do not wish the patient to be aware that they are supplying information to me or that I am aware of such information"). In circumstances of belief or suspicion of any criticism of the treatment, Dr Williams deposed that he kept short notes "of any information or developments of which I become aware which may bear upon an inquiry or dispute that may arise in the future". Speaking generally of these notes he said:

> "All of these notes are written in an abbreviated way which is meaningful to me and my secretary but which, in some respects at least, would be difficult for others to follow. ... Often the information I received from [family and friends] ... is what I would regard as sensitive and confidential and I would not wish to divulge my knowledge of it or sources unless I judged it necessary to do so in the interests of the patient. In some cases because of the state of mind or health of the patient these records will contain information and disclosure of which in my judgment might be detrimental to the patient's well-being if disclosed at all or if disclosed without full explanation ... I would be concerned that these notes and some of the other records maintained by me might, at least in some cases, cause confusion and unnecessary worry and stress to patients if they were made available to them without adequate explanation. ... If patients were entitled to a copy of my records I have no doubt that the content of my records would in many cases change substantially, including the exclusion of sensitive information supplied by other sources and by noting comments and musings (if to be done at all) by paying careful regard to the sensitivities and ... understanding of each patient and the meaning that is likely to be conveyed to each patient by such notes. I would be concerned that in many cases the records may become of less value to the medical practitioner in his or her treatment, advice and ongoing management of patients."

In addition to these general statements, Dr Williams deposed that it was his policy not to give records to the patient. The provision of a summary report was, in his view, adequate. Indeed, until about 1991, it had not been his experience that anything more had ever been demanded.

Bryson J found that Dr Williams kept records concerning Ms Breen in the various categories stated. He determined that the legal ownership of those records, in the sense of ownership of the paper upon which they were written, remained with Dr Williams. He made no decision concerning the ownership of any test results for which a patient had paid separately but which were kept in the medical practitioner's files. So far as any reports held by Dr Williams from other consultants, for example, Dr McDougall, he concluded that it was: "Extremely unlikely that he [ie Dr McDougall] intended that the letter should become the property of the plaintiff."

As I approach this appeal, it is unnecessary to enter the controversial area of the ownership of information, as such. I am content to accept the conclusion of Bryson J that the media in which the medical information

about Ms Breen were kept by him were exclusively his own property: see generally, A W Branscomb, *Who Owns Information: from Privacy to Public Access*, Basic (1994) at 54ff. But that does not meet Ms Breen's claim which, at no time, has been to take away Dr Williams' original records. Although a claim of proprietary right and interest in the information contained in the records was asserted, this was incidental to the basic relief which Ms Breen sought. That was to have access to the information and to copy, or be provided with copies of, it for use in decisions affecting her health and choices urgently to be made in respect of the pending United States litigation.

The primary judge's decision:

Bryson J reviewed the four bases upon which the claim by Ms Breen was argued before him:

(a) That there was a common law right of access;

(b) That the common law would provide such a right in furtherance of the fundamental rights contained in the *International Covenant on Civil and Political Rights* which Australia has ratified and which may thereby influence our law;

(c) That the right arose as an incident of the fiduciary duty owed by a medical practitioner to a patient; and

(d) That the right was necessarily implied in the patient's common law right to know relevant information about treatment before, during and after the treatment was given.

In respect of (a), Bryson J reviewed a recent decision of the English Court of Appeal in *R v Mid Glamorgan Family Health Services Authority; Ex parte Martin* [1995] 1 WLR 110; [1995] 1 All ER 356 where remarks were made supportive of a common law right to access. His Honour was not impressed:

> "The Court of Appeal, in a situation where there was no authority, developed the common law of England influenced by legislative changes and an international Covenant which are not parallelled in New South Wales. A decision to make a development of that kind is an appropriate occasion to survey and consider the positions of the parties under the common law as it hitherto could be seen, and the contractual and other legal relationships among the parties and what they implied for their duties and rights, and to address and express the value attributed to property rights and explain what countervailing values and other considerations require that those property rights be overridden. I am unpersuaded. In my opinion I ought not to make a corresponding development to the common law of New South Wales and I should continue to enforce the rights which flow from the defendant's legal ownership of notes which he made and papers which he collected."

So far as (b) the suggested fundamental rights under the International Covenant which were invoked, particularly the peoples' right to self-determination, Bryson J was referred to the decision of the English Court of Appeal in *Gaskin v Liverpool City Council* [1980] 1 WLR 1549. That decision was, in effect, disapproved by the European Court of Human Rights in *Gaskin v United Kingdom (Access To Personal Files)* (1989) 12 EHRR 36. It was the disapproval voiced in that opinion (by majority vote of the judges)

which occasioned the amendment of English law by the enactment of the *Access to Health Records Act* 1990 (UK).

Bryson J considered that, as the European Convention did not apply to Australia and, as the International Covenant was likewise inapplicable of its own force (and was in any case differently expressed), nothing useful to local law was to be derived by him from the European court's decision. Correctly, in my respectful view, his Honour rejected Ms Breen's argument based upon the self-determination of peoples. Although part of the international law of human rights, this right is addressed to a different subject matter and concerns a different object: see H Hannum, "Rethinking Self-determination" 34 *Virginia Journal of International Law* 1 (1993); C Tomuschat, "Self determination in a Post-Colonial World", in C Tomuschat (ed) *Modern Law of Self-determination* (1993) Klewer; M Koskenniemi, "National Self-determination Today: Problems of Legal Theory and Practice" (1994) 43 ICLQ 241.

So far as (c), fiduciary duty, was concerned, Bryson J was taken to recent legal decisions in the United States and Canada. Two recent decisions of the Supreme Court of Canada have contained holdings or dicta that a medical practitioner and a patient are involved in a fiduciary relationship for the purpose of the law of fiduciary obligations: see *McInerney v MacDonald* (1992) 93 DLR (4th) 415; *Norberg v Wynrib; Women's Legal Education and Action Fund, Intervener* (1992) 92 DLR (4th) 449; see also D W M Waters, *Law of Trusts in Canada*, 2nd ed, Carswell, Toronto, (1984) at 733. *McInerney* actually concerned a patient's request for copies of medical records held by her medical practitioner. The patient's right to oblige the medical practitioner to accede to the request, with certain limitations, was upheld by a unanimous decision of the Supreme Court of Canada. This was so upon the footing that it was an incident of the fiduciary duty owed by the medical practitioner to the patient, in the circumstances, grounded in the very nature of the patient's interest in the information in his or her medical records.

Again, Bryson J was unimpressed.

Of *McInerney*, his Honour said that La Forest J, who wrote the Supreme Court's opinion, had "dealt dismissively with the concern that disclosure would lead to a decrease in completeness, candour and frankness". He pointed out that his Lordship had not addressed the question "of candour of persons other than the patient furnishing information to the doctor":

> "To me it appears that the Supreme Court of Canada has given primacy to a perceived claim by and on behalf of patients for a general right of access without giving appropriate weight to many countervailing considerations. In doing so they have greatly changed the nature of medical records and the circumstances in which communication to doctors takes place, and have made it quite unlikely that much confidential material, and much significant material, will be recorded at all, or recorded in a candid and objective manner. Unless medical practitioners welcome inquiry and debate and have much time to give to delivering examinations to persons with limited understanding of the matters explained, there will be a strong tendency to reduce what is recorded to very bare orations."

As to *Norberg*, Bryson J concluded that the (minority) view in that case,

founded on fiduciary obligation and expressed by MacLachlin J (with the concurrence of l'Heureux-Dubé J), did not represent the law of Australia in respect of equitable remedies. He went on:

> "... Although the relationship between doctor and patient does give rise to some fiduciary duties, a general characterisation of the relationship as fiduciary and of all obligations arising on breach as breaches of fiduciary duty has not been made; and in my opinion should not be made."

Finally, in respect of (d), the "right to know", this was asserted by the Public Interest Advocacy Centre whom Bryson J permitted to appear before him as amicus curiae. The Public Interest Advocacy Centre argued that the patient's "right to know" was to be inferred from the reasoning of the High Court of Australia in *Rogers v Whitaker* (1992) 175 CLR 479. Bryson J rejected the terminology of "right to know". He did not consider that a general right of access by patients to medical records was supported by the reasoning of the High Court in *Rogers*. Gaudron J (at 493) had referred to the duty to provide the information reasonably required by the patient. But that duty, incidental to proper treatment, did not extend to access to actual records, as Ms Breen asserted and the Public Interest Advocacy Centre supported.

In the result, Bryson J dismissed each of the bases advanced by Ms Breen for her claim (outside court process) for access to the information in the actual medical records of Dr Williams:

> "In my opinion there is no ground in the facts of this case on which the defendant's ownership of the documents should not be recognised as entitling him to control access to them. The existing legal process for compelling production of documents for the purpose of the conduct of litigation is not inadequate."

It is from his Honour's consequent dismissal of the summons that the appeal to this Court comes.

Application for amicus curiae intervention:

When the appeal was called, the Public Interest Advocacy Centre renewed its application to be heard as amicus curiae. Although Bryson J had permitted that course, some of his comments encouraged Dr Williams to object to a repetition of the leave in this Court. It was urged that the Public Interest Advocacy Centre was no more than a second voice for the appellant. Ordinarily, if not invariably, a court will refuse to allow the same interest to be represented by different legal practitioners: see *Tindle v Ansett Transport Industries (Operations) Pty Ltd* (1990) 21 NSWLR 492 at 496. It was submitted that the Public Interest Advocacy Centre's intervention was contrary to the authority of the Court: see, eg, *Corporate Affairs Commission v Bradley; Commonwealth of Australia (Intervener)* [1974] 1 NSWLR 391.

Since *Bradley* was decided, this Court, and other Australian courts, have adopted a less rigid view of amicus curiae appearances than was expressed by Hutley JA in that case: see, eg, *Rushby v Roberts* [1983] 1 NSWLR 350 at 354; *R v Murphy* (1986) 5 NSWLR 18; *E I Du Pont de Nemours and Co v Commissioner of Patents [No 5]* (1989) 17 NSWLR 389. The Federal Court of Australia has followed a similar course: see, eg, *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184 at 199; 82 ALR 509

A at 522; see also *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520; 83 ALR 79. The High Court of Australia has done likewise on occasion: see, eg, *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 17f; *Commonwealth v Tasmania* (1983) 158 CLR 1 at 50.

The power of courts to permit amicus curiae appearances is well established throughout the common law world. In the United States of America it is a regular feature of litigation involving matters of general
B public interest — particularly in the higher appellate courts. That practice has spread to Canada as the proceedings in *Norberg* themselves indicate. It is also sometimes found in England, although rarely: see, eg, *Allen v Sir Alfred McAlpine and Sons Ltd* [1968] 2 QB 229 at 244f; see also *Johnson v Sammon* (1973) 7 SASR 431.

Especially because the Public Interest Advocacy Centre had been permitted to appear at the trial, I was of the view that it should be allowed a
C similar privilege on the appeal. The Court retains full control over the length of any oral intervention. It would have postponed such intervention by the Public Interest Advocacy Centre until a convenient time. It might impose conditions or burdens of costs if the appearance were abused or unnecessarily protracted.

As it transpired, the oral hearing of the appeal involving the parties ran into a second day. The addition of short oral submissions for the Public Interest Advocacy Centre would not have extended the hearing time
D significantly. The courts should not turn a blind eye or a deaf ear to the assistance that they might receive from amicus curiae on matters of general principle in test cases. This was avowedly a test case for both parties. Behind Ms Breen stood 2,000 litigants in a similar position. Behind Dr Williams stood the interests of medical practitioners of like opinion and the Medical Defence Union. In these circumstances, to exclude the assistance of the Public Interest Advocacy Centre evidences (in my respectful view) the
E procedural formalism and rigidity which limits the utility of the courts to modern dispute resolution. Had the Australian Medical Association sought to appear as amicus curiae I should have taken the same view and welcomed its assistance. Views differ upon procedural innovation. But the courts should not forfeit the adaptation of their procedures to slavish adherence to methodologies adopted far away, in different times for different problems.

Counsel for Dr Williams did not object to the Court's receiving the written
F submissions which the Public Interest Advocacy Centre's solicitors had prepared. However, the Public Interest Advocacy Centre's counsel was not permitted to address the Court. He therefore withdrew.

Argument in the Court of Appeal:

Before this Court, the arguments of the parties were somewhat refined. Thus, Ms Breen confined the arguments based upon fundamental rights to the suggestion, now widely accepted, that where there is an ambiguity of
G legislation or a gap in the common law affecting basic rights, it is legitimate for Australian courts to have regard to international human rights jurisprudence in resolving the ambiguity or filling the gap: see *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38; *Young v Registar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 274, 290;

cf *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770 at 811, 829.

The claim based upon the peoples' right to self-determination was properly not pressed. Instead, it was asserted that the Court would approach the issues before it informed by the fundamental right to privacy enshrined in art 17.1 of the International Covenant, as understood in the wide sense by which the right to individual privacy has been approached in international law. There, it is taken to include the capacity of the individual to control, or influence, the perceptions of the individual made through information concerning, relevantly, intimate medical data about the individual.

By art 17.1 it is provided: "No one shall be subjected to arbitrary or unlawful interference with his privacy ...."

By art 17.2 it is provided that everyone has the right to protection of the law against such interference or attacks. It was not said for Ms Breen that this article imported a general right of privacy into Australian municipal law. Neither the International Covenant nor art 17 has been incorporated, as such, into Australian law, either by Federal legislation (assuming that to be possible) or by State enactment. But, in the sense explained by Brennan J in *Mabo*, the principle stated in art 17 remains a proper influence upon the development of the general law by this Court. In that sense only was the issue of fundamental rights advanced for Ms Breen. I would accept that proposition whilst acknowledging its limited utility in the resolution of the issue which stands for decision.

Ms Breen did add one ground of support for her asserted right of access. It does not appear to have been canvassed at length before Bryson J although it was certainly asserted in the originating summons. This was the claim that it was an implied term of the contract between Ms Breen and Dr Williams that, upon demand and with specified exceptions, Dr Williams would provide Ms Breen with access to the information contained in his medical records about her. The implied contract claim is that which succeeded in the New Brunswick Court of Appeal in *McInerney v MacDonald* when the case was before that court: see (1990) 66 DLR (4th) 736.

Otherwise, the appellant supported each of the grounds for relief which had been advanced in her interest at the trial. After the Public Interest Advocacy Centre was excluded, she took up the argument which the Public Interest Advocacy Centre had there advanced, viz, that the right of access was within the necessary implications of the obligations imposed upon medical practitioners by the High Court's decision in *Rogers v Whitaker*.

Dr Williams supported the decision of Bryson J as being correct for the reasons which his Honour had given. He accepted that there was a relationship with Ms Breen both in contract and in tort. But he asserted that the purpose of obtaining the information from the patient was to enable him, as a medical practitioner, to discharge the duty owed to the patient. The records, and by inference the information within them, belonged to the medical practitioner. The provision of an obligation to allow access to a patient had not hitherto been afforded by the law. It was incompatible with the incidents of ownership which reserved to the owner the right to afford or decline access to the owner. It should not be "invented" by the courts.

This Court was reminded that it was for the legislature to make significant

A developments in legal rights. Dr Williams expressly supported the dissenting opinion of Rice JA in *McInerney v MacDonald* in the New Brunswick Court of Appeal. At the close of his opinion, Rice JA had invoked an earlier decision of McLachlin J in *Watkins v Olafson* (1989) 61 DLR (4th) 577 at 583f:

> "There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the
B best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task
C which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is a long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform."

Although expressed in a different realm of discourse, Dr Williams urged that this Court would adopt a similar attitude of restraint to Ms Breen's invitation
D to "find" a right of access to information in medical records which had not been provided by Parliament and which medical practice in Australia had not hitherto assumed to exist. Attention was drawn to the applicable resolution of the Australian Medical Association (Federal Council) evidencing past and current medical practice. At a meeting in October 1993, the Council had resolved:

> "The patient has a right to be informed of all relevant factual
E information contained in the medical record, but all deductive opinion therein recorded remains the intellectual property of the doctor and doctors contributing to, or recognised employing hospital or other organisation maintaining the record. ... On request, the patient should be informed of any or all contents of the following sections of the medical record: history, physical examination findings, investigation results, diagnosis (diagnoses), proposed management plan. The patient
F should be allowed access to any other comments of the medical record (such as reports by specialists) beyond the material above specified only at the discretion of the doctor or doctors who completed such additional section or sections or by the hospital administration after consultation with the doctor(s) who completed such section or sections or as the result of a legal requirement."

However, most of the respondent's fire was targeted at the Canadian
G decisions of *McInerney* and *Norberg*. An extra-curial comment of Mason CJ was invoked to suggest that Bryson J had been correct in rejecting the importation into the law of Australia, of the fiduciary obligation found in Canada. At a conference in Canada, Sir Anthony Mason said: "My impression is that there has been in Canada a greater willingness to find a fiduciary relationship than in Australia and New Zealand." He went on: "The third area into which the fiduciary relationship has ventured (in

Canada, as in the United States though not as yet in Australia) is that of fundamental human and personal interests." See A F Mason, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: An Australian Perspective" in D W M Waters (ed), *Equity, Fiduciaries and Trusts 1993*, Carswell (1993) 3 at 11f; reprinted in (1994) 110 LQR 238.

So far as the suggested "right to know" was concerned, Dr Williams urged that, far from providing support, the High Court's decision in *Rogers* was fatal to the claim advanced by Ms Breen. The Court (at 490) said in that case:

> "Except in those cases where there is a particular danger that provision of all relevant information will harm an unusually nervous, disturbed or volatile patient, no special medical skill is involved in disclosing the information, including the risks attending the proposed treatment Rather, the skill is in *communicating the relevant information to the patient in terms which are reasonably adequate for that purpose* having regard to the patient's apprehended capacity to understand that information." (Emphasis added.)

It was suggested that the High Court in *Rogers* thereby acknowledged the so-called "therapeutic privilege", whereby medical practitioners were not only *entitled* but perhaps *bound* to withhold information which would harm, disturb or confuse a patient's treatment. Furthermore, part of the actual skill of a medical practitioner, in Australia at least, was taken to be in communicating the medical information in an appropriate way. This, it was argued, negatived a right of access to the raw information itself, still less the records. It recognised and accepted the entitlement (even obligation) of the medical practitioner to bring his or her skill to bear upon the exposition, interpretation and communication of the information to the patient.

As for the claim of an implied term in the contract between Ms Breen and Dr Williams, it was pointed out that the suggested term fell far short of the stringent requirements imposed by the common law in Australia for the importation of implied terms: see *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 353f; *Shepperd v Council of the Municipality of Ryde* (1952) 85 CLR 1. Far from saying "of course" to the inclusion of such an implied term in a contract of engagement of a specialist medical practitioner in Australia in 1978 (when Ms Breen first consulted Dr Williams) the assertion of such a term would, at the time (and it was argued, still), have produced protests of rejection by the medical practitioner and a delineation of the traditional Australian basis of medical record ownership and provision to which Dr Williams adhered.

The reformulated claim of the patient:

In the course of the hearing of the appeal, it became obvious from the arguments for Ms Breen that the sometimes absolute terms in which the demand for access to the information in Dr Williams' records had earlier been asserted did not represent what she now actually sought. Just as in *McInerney v MacDonald*, in the Supreme Court of Canada, it was acknowledged by La Forest J (at 429f) that exceptions to, and limitations upon, access existed, so it became clear that Ms Breen acknowledged such exceptions and allowed such limitations.

At the invitation of the Court, Ms Breen's representative

(Dr P K Cashman) reformulated the orders which he claimed, to take into account the exceptions which he had acknowledged during argument. Essentially, the Court was urged to make a declaration that Ms Breen had a right, upon request, to be given reasonable access by Dr Williams to examine and/or copy records or information concerning her, created or obtained by Dr Williams except where he had a lawful excuse for not providing access:

(a) where the information had been created or obtained solely for his own benefit (for example, fees and administrative records);

(b) where the disclosure would, in the reasonable belief of Dr Williams, be likely to cause serious harm to the physical or mental health of Ms Breen; or

(c) where the disclosure would found an action for breach of confidence, that is, by a third person.

As it had been accepted before Bryson J that, in this case, there was no reason to withhold records from Ms Breen on the basis of the so-called "therapeutic privilege", exception (b) had no application to these facts. However, it was included out of recognition of the nature of the case as a "test case". Exception (a) was agreed for Ms Breen to include the communications between Dr Williams and the NSW Medical Defence Union. Bryson J found that one letter had been received by Dr Williams concerning Ms Breen, namely a letter from Dr McDougall written to Dr Williams probably in 1991. Whether the disclosure of that letter would found an action for breach of confidence was not determined in the view which Bryson J took.

By acknowledging the need to exclude from access information provided to a medical practitioner by a third person upon a legally enforceable expectation of confidence, Ms Breen sought to meet one of the main policy objections advanced persuasively for Dr Williams for refusing her claim. This was that many compilations of private medical records had proceeded until now upon an expectation that they could not be demanded by the patient and that medical practitioners and others had written to the record-holder upon that assumption which should not retrospectively be set aside with the potential to cause harm, embarrassment and even the risk of litigation.

As refined, Ms Breen's claim for a declaration is rather more precisely stated than it was in the summons, than was apparently the case before Bryson J or when the appeal opened in this Court. For Dr Williams, it was urged that the need for refinement and the risk of retrospective operation demonstrated the unsuitability (and undesirability) of ex post curial "invention" of a new legal right. Such a development of the law was too substantial. The Court should not distort the principles of common law or fiduciary obligations. It should be left to the legislature, in the knowledge that in some areas of record keeping the legislature has already acted (by the freedom of information statutes). In other jurisdictions legislatures have specifically enacted statutory rights of access to information in medical records. But they have done so on appropriate conditions, with appropriate exceptions and with appropriate exclusion of records prepared in the expectation that they belonged to, and were controlled by, the medical practitioner who held them, not the patient.

Rejection of the common law claims:

It is convenient to deal first with the claims put for Ms Breen based upon the common law.

Claim in contract:

So far as the most obvious common law foundation for the suggested obligation of Dr Williams to provide the refined access to the information on Ms Breen in his records as now claimed by her, that is, contract is concerned, I share the same hesitation that La Forest J expressed in *McInerney* (at 421). His Lordship said that he was "not entirely comfortable" with that approach. Doubtless this was because of the persuasion of the dissenting opinion of Rice JA in the New Brunswick Court of Appeal (at 739). It would not be consonant with the rules binding on this Court for the finding of an implied term in a contract between a patient and a specialist medical practitioner in 1978 to hold that it included an implied term that the patient would have direct access to the information in the raw material of the medical practitioner's files: cf *Wasson v Commercial & General Acceptance Ltd* (1985) 2 NSWLR 206 at 214. Such a term was not necessary to give efficacy to the arrangement between the parties. It was far from self-evident. Indeed, I believe it was contrary to the then existing (and possibly still existing) practice affecting the relationship of medical practitioner and patient. I do not consider that the common law of contract affords a viable basis for Ms Breen's asserted claim. I do not say that henceforth, in rather different social conditions and a different legal environment, the implied term argued for the appellant would not be accepted. But at the time the present relationship was established by contract, the suggested term, not being expressly specified, would not be implied.

Claim of proprietary right:

Nor am I convinced that Ms Breen has established a "proprietary right and interest" in the actual information contained in Dr Williams' records. The information cannot in this case be disembodied from the medium in which it is contained. That medium appears, in this case, to be exclusively paper with typed or handwritten notes. The paper appears in this case exclusively to belong to Dr Williams. Ordinarily, therefore, at common law, what Dr Williams does with the paper is within his control and decision: see, eg, *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 357; see also *Leicestershire County Council v Michael Faraday and Partners, Ltd* [1941] 2 KB 205 at 216; *Chantrey Martin (a firm) v Martin* [1953] 2 QB 286 at 293. Normally, the right of ownership of the paper would afford the owner the right to provide or refuse access to a third person, either freely or at a fee. In the case of personal medical records the law of confidence (not to say of professional obligations and statutory duties) would restrain use contrary to the interests of the patient: see generally, I Kennedy and A Grubb, *Medical Law: Text and Materials*, Butterworths, London (1989) at 540f. But the owner of the record would, special agreement or other legal categories apart, at common law ordinarily have a full right to control access to the record and the information contained in it.

Fundamental human rights:

To the extent that any claim at common law was founded upon the International Covenant as such, it would have to be dismissed. The relevant principles of that instrument, even if applicable, have not been incorporated into local law, as such.

Innominate common law right:

The main way in which Ms Breen supported the claim at common law was by reference to recent dicta of the English Court of Appeal in *R v Mid Glamorgan Family Health Services Authority*. That was an appeal from a decision of Popplewell J in the Queen's Bench Division reported (1993) 16 BMLR 81. A psychiatric patient sought access to records which had come into existence before the *Access to Health Records Act* 1990 (UK) came into operation. His claim to access had therefore to be determined according to the common law of England, not the statute. Popplewell J dismissed the claim on the basis that, prior to the Act, there was no right at common law to secure access to medical records of a public health authority. He also dismissed the contention that the refusal of access was in breach of art 8 of the *European Convention on Human Rights*. This latter finding was based upon the fact that the authority had offered the patient an opportunity for inspection of the records to be given to an independent medical adviser, nominated by him, who could judge whether, as asserted, the information was likely to cause him harm. The patient had refused that facility.

The English Court of Appeal dismissed the patient's appeal. But in the course of doing so, each of the judges made remarks favourable to a patient's right to access to medical records. The expressed opinions were apparently founded in some innominate basis of the common law.

Thus, Nourse LJ, after citing Lord Templeman's speech in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 at 904, antagonistic to an implied contract for patient access, went on (at 117; 363):

> "It is inherent in the views above expressed that I do not accept that a health authority, any more than a private doctor, has an absolute right to deal with medical records in any way that it chooses. As Lord Templeman makes clear, the doctor's general duty, likewise the health authority's, is to act at all times in the best interests of the patient. Those interests would usually require that a patient's medical records should not be disclosed to third parties; conversely, that they should usually, for example, be handed on by one doctor to the next *or made available to the patient's legal advisers if they are reasonably required for the purposes of legal proceedings in which he is involved*." (Emphasis added.)

Evans LJ concurred and said (at 119; 365):

> "In my judgment, there is no good reason for doubting either that a right of access does exist or that it is qualified to [the extent at least expressed now in the statute s 5(1)(c)]. The record is made for two purposes which are relevant here: first, to provide part of the medical history of the patient, for the benefit of the same doctor or his successors in the future; and, secondly, to provide a record of diagnosis and treatment in case of future inquiry or dispute. Those purposes

would be frustrated if there were no duty to disclose the records to medical advisers or to the patient himself, or to his legal advisers, if they were required in connection with a later claim. Nor can the duty to disclose for medical purposes be limited, in my judgment, to future medical advisers ...." A

Sir Roger Parker, the third member of the Court of Appeal, rejected both the claim of absolute property in medical records of a "doctor or health authority" and the claim of a patient to have "unfettered right of access to his medical records at all times and in all circumstances". He went on (at 119; 366): B

"... In my view the circumstances in which a patient or former patient is entitled to demand access to his medical history as set out in the records will be infinitely various, and it is neither desirable nor possible for this or any court to set out the scope of the duty or afford access or, its obverse, the scope of a patient's right to demand access. Each case must depend on its own facts. There can, I think, be no doubt for example that a doctor should, if required by the patient, or perhaps by a patient's doctor for the time being, afford access to such doctor but not necessarily of the entire contents of the records. There may, however, be circumstances where direct access to the records or some part of them should be given to the patient himself. If, for example, he is about to emmigrate and his condition is such that he might need treatment before he can nominate a successor doctor, it would, it seems to me, be probable that the doctor with the records would be obliged either to give access to the records or to provide his departing patient with a letter giving the information necessary to enable a doctor, faced with his collapse, eg, on board ship, to treat him properly." C D

It is fairly clear that the English Court of Appeal was influenced, in expressing its above opinions, both by the passage of the statutory rights of access in England (both the *Access to Health Records Act* 1990 (UK) and the earlier *Data Protection Act* 1984 (UK)) and by the strictures of the European Court of Human Rights which had proved so critical of the English common law in *Gaskin*. E

The difficulty of giving effect to their Lordships' opinion in this jurisdiction is that they nowhere identified the precise basis in the common law for what they appear to have assumed to be the right of access which they favoured. A basis in implied contract was rejected. No other basis was nominated. The case was one where the holding of the court must be derived from the dismissal of the appeal from Popplewell J. Most importantly, the case involved public law. It was a claim for judicial review directed to a local health authority. To that extent, I infer that the "right of access" to which their Lordships were referring was probably one to be implied in the public purposes of record keeping which, by or under legislation, the local health authority in question was obliged to maintain. Although it is true that some of the expressions of reasons go beyond the duties of the public authority and appear directed to medical practitioners generally, they are not explained in terms of any known common law basis of right. F G

I therefore agree with Bryson J that the decision in *R v Mid Glamorgan Family Health Services Authority; Ex parte Martin* does not provide, in this case, involving as it does a private medical practitioner, a holding which

A would persuade this Court to affirm the patient's right of access which the Court of Appeal in *R v Mid Glamorgan* seemed willing to assume existed at common law. The most that can be derived from *R v Mid Glamorgan* is that it is an indication, at a high level of the English courts, and outside the obligations of statute, that an assertion by a medical practitioner of absolute ownership and control of "his" medical records concerning a patient, is unacceptable to the common law of England. But *R v Mid Glamorgan* fails to
B provide the conceptual explanation, by reference to a known legal classification, which will support the conclusions expressed in a way that is coherent and convincing in terms of legal principle.

The "right to know":

Finally, so far as common law entitlements were concerned, Ms Breen relied (as the Public Interest Advocacy Centre had done before Bryson J) upon the implication said to be derived from the potential liability of
C Dr Williams in the tort of negligence and his duty, before, during and after treatment of Ms Breen, to provide her with necessary information concerning his treatment — including, where requested, access to the records containing that information.

I do not accept the arguments for Dr Williams that *Rogers v Whitaker* spells out, in emphatic and conclusive terms, the entire perimeters of a medical practitioner's obligation to provide information to a patient
D concerning a medical procedure. To assert this is to misunderstand both the special features of that case (as Bryson J pointed out) and the limited purpose of the High Court's exposition of the law relating to patient access to medical information applicable in the circumstances of *Rogers*. That was not a case (as this is) where a patient sought access to raw medical material in the possession of her surgeon. It was a case of alleged failure on the part of the surgeon to provide appropriate advice to the patient, as his duty of
E care demanded and as the patient was found repeatedly to have requested. To elevate the remarks made in resolving the claim in *Rogers* to a conclusive definition of the entire duty of a medical practitioner in respect of a claim such as the present is to distort the judicial process and the role in it of legal precedent.

By the same token, there is insufficient in the dicta in *Rogers* to sustain Ms Breen's contention that, in some way inherent in it, is a general "right to
F know" which the common law will, upon demand, uphold and enforce even to the extent of requiring access to medical records. The case did not deal with the "right to know" as such. The High Court specifically held back, as the Supreme Court of Canada had earlier done, from the United States doctrine of patients' "informed consent": see *Reibl v Hughes* (1980) 114 DLR (3rd) 1. In *Rogers*, the High Court was resolving a claim, relevantly, in negligence. No such claim has been made against Dr Williams. Although not disclaimed, it is not asserted in the present proceedings that Dr Williams'
G medical procedures were in any way careless or that his advice to Ms Breen fell short of his professional duty to her.

I cannot derive from *Rogers* the general "right to know" which Ms Breen asserts. It would be curious and unconvincing to derive that right from the law of negligence, via a case of such peculiarity and then to embellish it to provide the foundation for an asserted right of access to information in

private medical records. There is a quantum leap from the entitlement of a proper explanation by a medical practitioner about the dangers of medical procedures as incidental to treatment to an affirmative obligation to give access to information in records by a medical practitioner who has not been sued and who has never been said to have failed in his duty of explanation to his patient. A

Nevertheless, there are important indications in *Rogers v Whitaker* of the direction in which the law in Australia, governing the relationship between medical practitioners and patients, is travelling. Most importantly, the High Court embraced the exposition of the law in the judgment of King CJ in *F v R* (1983) 33 SASR 189 at 194. In that case, as in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218 at 234, the High Court showed its sympathy to the "principle of personal inviolability" which had been expressed long ago by Cardozo J in the famous passage in *Schloendorff v Society of New York Hospital* 105 NE 92 (1914) at 93. In *Rogers* the High Court rejected the paternalistic approach of the English courts in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; [1957] 2 All ER 118 and in the majority speeches in the House of Lords in *Sidaway*. It rejected the notion that the patient's right to advice depended upon a standard exclusively fixed within the medical profession. It upheld the right of the courts, representing the community, to set the standards of reasonable care on the part of medical practitioners and what that meant for the duty to provide advice and information to the patient in a particular case. It is to that extent that *Rogers*, with its signal of a more modern approach of the law (and one more respectful of patient autonomy) is relevant to the present case. B C D

But as the foundation for an innominate common law right of access to a medical practitioner's records, I do not believe that *Rogers* provides the basis for the claim asserted by Ms Breen. That basis must be found elsewhere in legal principle. E

Medical practitioner and patient: a fiduciary relationship?

In *Sidaway*, Lord Scarman, in a dissenting speech which was highly influential upon the thinking of the High Court of Australia in *Rogers*, rejected the notion that the relationship of the kind that existed between Ms Breen and Dr Williams could properly be described as fiduciary in character. His Lordship said (at 884): F

> "Counsel for the appellant referred to *Nocton v Lord Ashburton* [1914] AC 932 in an attempt to persuade your Lordships that the relationship between doctor and patient is of a fiduciary character entitling a patient to equitable relief in the event of a breach of fiduciary duty by the doctor. The attempt fails: there is no comparison to be made between the relationship of doctor and patient with that of solicitor and client, trustee and *cestui qui trust* or the other relationships treated in equity as of a fiduciary character. Nevertheless the relationship of doctor and patient is a very special one, the patient putting his health and his life in the doctor's hands." G

For Dr Williams it was acknowledged that equity would restrain a medical practitioner from publishing a patient's medical records or information to unauthorised third persons. However, it was submitted that restraint would

not arise out of the generality of a fiduciary relationship between them but out of equity's more specific relief against the abuse of confidential information.

Bryson J accepted this submission. He rejected the Canadian and United States holdings to the contrary.

Certain propositions can be stated to evaluate the assertion that a fiduciary relationship existed here and that one of its incidents has been breached:

1. The fiduciary principle is in a state of development whose impetus has not been spent to the present day: cf E J Weinrib, "The Fiduciary Obligation" (1975) 25 *Uni Toronto LJ* 1. The development of the principle, and its application to different relationships, must proceed in a coherent manner avoiding the "jungle of slogans and shibboleths": see ibid (at 22). The "vague protean ethical standard embodied by the fiduciary obligation should not exist in an analytic vacuum";

2. As society becomes more complex, it is both necessary and appropriate for courts of equity to recognise new fiduciary obligations and to protect incidents of new or changing relationships: cf P D Finn, *Fiduciary Obligations*, Law Book Co, Sydney (1977) at 4. The stamp of history may be strong in the cases. But it does not freeze the development of equitable principle. How could it do so when the current doctrine on fiduciary obligations is itself nothing more than the creation, by earlier judges, of such principle? That is why the courts are constantly presented with borderline questions: see Finn (at 145). It is to meet new circumstances that the criteria of fiduciary relationships, and the duties thereby imposed, remain rather vague: see Finn (at 266);

3. What began with the trustee-beneficiary relationship in *Keech v Sandford* (1726) Sel Cas Ch 61; 25 ER 223 has extended, by analogical reasoning, to other relationships involving trust and confidence: see L Sealy, "Fiduciary Relationships" [1962] *Cambridge LJ* 69 at 70f. Courts have thereby imposed a standard of conduct upon trusted parties from whom there are demanded obligations of honesty, care and diligence and loyalty. The unifying concept behind the imposition of fiduciary obligations appears to be to secure observance of these fundamental duties in relationships in which it is the role of one party to act in the service and interests of the other who is specially vulnerable to harm if that party does not conform to such duties: see P Finn, "The Fiduciary Principle" in T Youdan, *Equity, Fiduciaries and Trusts* (1989) 1 at 27; see also R S Magnusson, *Protecting Privacy and Confidentiality in the Age of HIV/AIDS: Some Legal Issues*, unpublished doctoral thesis, Melbourne (1993), 205.

4. Certainly, the courts of equity began their development of the obligations of fiduciaries in the context of many commercial relationships, such as partners, principal and agent, director and — company, and solicitor and client. But, clearly, these are mere species of the genus. They cannot possibly define and limit the fiduciary relationship: see D A De Mott, "Fiduciary Obligation under Intellectual Siege: Contemporary Challenges to the Duty to be Loyal" (1992) 30(2) *Osgoode Hall LJ* 471 at 473. "Like most heads of exclusive equitable jurisdiction, its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was

communicated or obtained": see *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 156 CLR 414 at 437. A unifying notion must be found in the character common to the diverse relationships held to be fiduciary and in the needs to which the law thereby responds. I accept Professor Finn's analysis (in *Youdan* (at 46f)):

> "What must be shown ... is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence and dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that the foundation exists for the 'fiduciary expectation'.

5. A fiduciary relationship may co-exist with a contractual or other relationship: see *Kelly v Cooper* [1993] AC 205 at 215; *Hospital Products Pty Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 97. The fiduciary relationship will not be superimposed on the contract so as to distort the latter. By the same token, there will not be implied into the contract terms which are not expressly agreed to and which negate the fiduciary obligation to the disadvantage of the vulnerable; and

6. A person may be in a fiduciary position in some parts of his or her activities and not other parts. Once a fiduciary relationship has been established, it is still necessary to have regard to the particular transaction or group of transactions impugned: see *New Zealand Netherlands Society "Oranje" Incorporated v Kuys* [1973] 1 WLR 1126 at 1130; [1973] 2 All ER 1222; *Hospital Products* (at 73). It is for that reason that it is necessary, in each case, carefully to examine all the facts and circumstances to see whether a fiduciary relationship exists and, if so, whether it applies to the particular transactions in question: cf *Hospital Products* (at 72).

A series of decisions, in a number of jurisdictions, have lately extended the fiduciary relationship to medical practitioner and patient. They have applied its obligations to the transactions involved in the making and gathering of intimate medical information by the practitioner concerning the patient. There are a few scattered remarks in earlier cases: see, eg, *Kenny v Lockwood* [1932] OR 141 at 155 and *Henderson v Johnston* [1956] OR 789 at 799. But the relevant exposition can be traced to United States decisions which coincided with important legislative and administrative developments in that country designed to enhance access to personal information and to increase the accountability of people with authority over others.

In *Emmett v Eastern Dispensary and Casualty Hospital* 396 F 2d 931 (1967), a claim by a deceased's son for access to hospital and medical records in respect of his father was upheld on the basis of the fiduciary nature of the relationship between the deceased and his medical advisers: "We find in the fiducial qualities of that relationship the physician's duty to reveal to the patient that which in his best interests it is important that he should know."

The court held that the son ought not to be obliged to engage in legal

A proceedings but that the record-keeper was obliged to "place the decedent's medical records at his disposal".

That decision was followed by the Appellate Court of Illinois in *Cannell v Medical and Surgical Clinic* 315 NE 2d 278 (1974). A party authorised to obtain medical records of a patient brought an action against the medical clinic when it refused to make them available. The Circuit Court dismissed the claim. But the Appellate Court held that the "fiducial" qualities of the
B patient-physician relationship required disclosure of medical data to a patient or to his agent on request. The actual records themselves did not have to be "turned over" to the patient. To that extent, the agent had sought too much. But the relief should be fashioned to uphold the right to disclosure which was sought. Dixon J (with the concurrence of Scott PJ and Stouder J) followed *Emmett*.

C It was this line of authority which was influential in Canada in *McInerney*. Building on these decisions, La Forest J, writing for a unanimous Supreme Court, held that the fiduciary duty of a medical practitioner to provide access to medical records was ultimately grounded in "the nature of the patient's interests in his or her records":

> "... Information about one's self revealed to a doctor acting in a professional capacity remains, in a fundamental sense, one's own. The
D doctor's position is one of trust and confidence. The information conveyed is held in a fashion somewhat akin to a trust. While the doctor is the owner of the actual record the information is to be used by the physician for the benefit of the patient. The confiding of the information to the physician for medical purposes gives rise to an expectation that the patient's interest in and control of the information will continue. The trust-like 'beneficial interest' of the patient in the information
E indicates that, as a general rule, he or she should have a right of access to the information and that the physician should have a corresponding obligation to provide it."

I find this analysis wholly convincing. It does not stand alone. Both in New Zealand and indeed, in this Court, it has been stated, or inferred, that for some purposes the relationship of medical practitioner and patient is a
F fiduciary one or can give rise to applicable fiduciary duties: see, eg, *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513 at 520f; *Smith Kline and French Laboratories Ltd v Attorney-General* [1989] 1 NZLR 385 at 396; *Wickstead v Browne* (1992) 30 NSWLR 1 at 19. A court of common law may not be able to disentangle the ownership of the paper or other medium in or on which intimate personal information about the patient is kept and the right of access to that information against the reluctance of the owner. But a court of equity can do so. It can do so in an
G established fiduciary relationship, out of regard to the special and intimate interests of the patient in the content of the medical information which concerns nobody more directly than the patient. Fletcher-Moulton LJ, in *In re Coomber; Coomber v Coomber* [1911] 1 Ch 723 pointed out (at 728) that the nature of the curial intervention which is justifiable will vary from case to case appropriate to the circumstances: see also *Hospital Products* (at 102).

Access to records: policy considerations:

Assuming a fiduciary relationship to be established, it was said for Dr Williams that there were strong policy reasons why the Court would hold back from imposing, as an incident of that relationship, an obligation to provide direct access to the information in his actual files and records. Some of the arguments are akin to those which were dealt with, satisfactorily in my view, by La Forest J in *McInerney*. But in summary they were:

(1) That the nature of the relationship required respect for the so-called "therapeutic privilege" to withhold access to information which might harm the patient. That privilege was, effectively, recognised by the High Court of Australia in *Rogers*. However, this concern is met by the acknowledgment for Ms Breen that access to any such information as she seeks might be denied. It was common ground, that there was no such information in her case;

(2) Then it was said that access might expose a medical practitioner to the risk of being sued. But that risk exists, in any case, in court procedures which are available to a patient, including discovery and subpoenas. Thus the issue is not whether the patient can gain access but when and by what means. Ms Breen acknowledges, by the reformulated orders which she seeks, that records and information created or obtained solely for the benefit of Dr Williams' practice would be immune from inspection. She does not seek access to his correspondence with the NSW Medical Defence Union. Claims of legal professional privilege and other lawful exemption would remain untouched by this decision. The Court can fashion appropriate restrictions and safeguards to protect third parties from unnecessary disclosure: see *PD v Australian Red Cross Society (New South Wales Division)* (1993) 30 NSWLR 376 at 382; *F v R* (at 193). I therefore find this ground of resistance unconvincing;

(3) More persuasive is the argument that, until now, it has not been thought in Australia to be the patient's right to have access directly to information in most of the records of a medical practitioner and that such records might have been written or prepared in a more guarded manner had the right of access existed and been known. This is certainly a consideration which must be taken into account. But it is a common consequence of a development of legal obligations that, for a transitional period, they may cause unexpected difficulties. Given the exceptions acknowledged by Ms Breen (including the "therapeutic privilege" and the protection of the confidences of third parties) I would not be prepared to accept that the suggested difficulties provide a sufficient reason for withholding relief that would otherwise be granted. If this were so, the law would forever stand still for fear of disturbing the expectations of parties or their settled practices; and

(4) Then it was said that the imposition of such legal rights and duties was a matter for parliament not the courts. I disagree. This country has no tribunal equivalent to the European court nor any international obligation that would give the impetus to the passage of legislation equivalent to that which has now been enacted in the United Kingdom. In this matter of detail of the law's operation, it is unrealistic to wait for parliament to act. For centuries, courts have been imposing duties, notably in the case of fiduciary relationships. In the past, those relationships have, it is true, been mainly concerned with commercial or economic activities. But there is no reason in

A legal concept why that should be so. I agree with MacLachlin J in the Supreme Court of Canada that fiduciary principles: "... are capable of protecting not only narrow legal and economic interests, but can also serve to defend fundamental human and personal interests." See *Norberg* (at 499). The appropriateness of this development can be seen in the instant case. Dr Williams' resistance to the production of the records to Ms Breen was presented as being based upon an incident of ownership of the records, established medical practice, concern to defend the therapeutic privilege and to prevent harm or confusion to patients. But the actual letter written to Ms Breen acknowledged that she could secure the record by the expensive process of court orders following letters rogatory from the United States. Moreover, he was willing to release the records on condition that she would release him from any personal liability. In my respectful view this condition was incompatible with the duties of honesty and loyalty that Dr Williams owed to Ms Breen as his patient facing very serious decisions plainly important for her medical welfare and legal rights. In seeking to impose that condition, Dr Williams was defending his personal interests where his duty was to protect and advance those of his patient.

There are many reasons of principle and policy why, with the exceptions acknowledged here, the law should uphold the patient's right of access to information in his or her medical records held by a medical practitioner:

(1) The duty of the medical practitioner is at all times to act in the patient's best interests. The proper discharge of that duty will limit and control any unnecessary collection of information harmful, or prejudicial, to a patient: cf *C v C* [1946] 1 All ER 562; *Naylor v Preston Area Health Authority* [1987] 1 WLR 958 at 967; [1987] 2 All ER 353 at 360. In any case, the medical practitioner will retain the so-called "therapeutic privilege" and the protection of the confidences of third parties;

(2) The information concerns the personal integrity and autonomy of the patient. Whilst the medical practitioner has some interest in the records, that interest is secondary to the patient's, whose physical and mental well-being is the very subject of them;

(3) Our society is more mobile today. Patients moving from one place to another should not be obliged to depend upon the willingness of a medical practitioner to provide access or to offer a summary. Whatever may have been appropriate in earlier times, a summary is not now an effective or adequate discharge of the duties to the patient inherent in the medical relationship;

(4) Changes in technology, including information technology and the technology of medical practice, make the provision of access to a patient's information file (and, ordinarily, the provision of a printout or copy) more realistic and inexpensive today than was hitherto the case: see *Branscomb* (at 69);

(5) Patients typically enjoy a different relationship to medical practitioners (and other professionals) today than was the case in earlier generations. Patients, mirroring the rest of the community, are typically better educated, less blindly trustful, more assertive of their entitlements to information about themselves and medical care and to legal or other redress where this is not adequately provided. *Rogers*, in the High Court of Australia, illustrates the way in which our law upholds patients' reasonable rights, even as against

settled practices and opinions of the organised medical profession. To the extent that English common law and equitable principles (before statute) are less supportive of patients' rights than are decisions of the courts of the United States and Canada, I believe that the latter are more likely to reflect the norms and values of Australian society than the former: cf *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 421. Lord Templeman's speech in *Sidaway*, which appears to have greatly affected Bryson J's response to the present case, reflects attitudes to the medical relationship which do not express Australian law: see *Rogers* (at 485f);

(6) As La Forest J pointed out in *McInerney*, medical information is sometimes shared on a "need to know" basis with a range of persons involved in the treatment of the patient: see *McInerney* (at 421). This statement was criticised by Dr Williams as a feature of medical practice in North America not found in Australia. But I think that criticism was based upon a misunderstanding of what La Forest J actually meant. He was not suggesting that medical practitioners in Canada, any more than in Australia, shared patient confidences irrelevantly with other persons: see discussion: R Gillon, "Health Care Ethics and Society" in R Gillon (ed) *Principles of Health Care Ethics*, John Wiley, Chichester (1994) 801. He was simply pointing to the commonly known feature of medical practice today, with inter-related teams of pathologists, radiologists, specialist and para-medicals, with whom the medical records of the patient may be shared, as needed. They are shared with perfect legality with the implied consent of the patient — which consent is inferred from the medical relationship. The point being made was that, in this context, it seems a trifle unpersuasive that the person most intimately involved (the patient) should be denied access when so many others may, in a given case, lawfully gain that access;

(7) The principles of common law and of equity should, so far as possible, develop in an harmonious way with developments of statute law. Such law has now afforded enforceable rights to access to medical records held on a patient in a public hospital or in other public records, both Federal and State. The Court was not made aware of any particular difficulties which this development of the law had occasioned either for the medical practitioners involved or for their relationships with patients;

(8) I have already mentioned the fact that the patient is entitled to invoke court procedures to secure access to the information in the original records. In the present case, Ms Breen could invoke those procedures, as could the many other persons in a similar position. Why should they be put to such inconvenience and expense if the law provides extra-curial access with similar protections? and

(9) To the claim that medical records will become briefer and less candid, I am content to rely upon the answer given by La Forest J derived from Krever J's Report in Canada: see *McInerney* (at 429). Knowledge of a right of access, and of accountability, may actually improve medical record keeping to the advantage of medical practitioner and patient alike, in the knowledge that access to information in the records may be obtained and that the record-keeper is more accountable for their contents and sufficiency. Access may, on occasion, permit correction of a medical record which, with or without fault, is inaccurate or incomplete. According to a reported survey, most medical practitioners asked in the United States had no objection to

A having their patients see their own records: see *Branscomb* (at 57). If time or costs is involved, particularly the cost of copying, such burdens as would be reasonable, must be borne by the patient. This was not contested by Ms Breen.

I therefore conclude that there is no reason of legal principle or policy which would suggest that this Court should refrain from taking the step, which the Supreme Court of Canada, by unanimous opinion, took in
B *McInerney*. For Dr Williams, mention was made of the holding of the Court in *Hartigan Nominees*. But that case is distinguishable. There the instigator of the discretionary trust in question provided a memorandum to the trustee which was expected to be confidential and kept from the beneficiaries. Whilst I adhere to the minority opinion which I expressed in *Hartigan Nominees*, I see no analogy to the conditions upon which the medical information relevant to a patient is kept by that patient's medical practitioner. The analogy breaks down when it is remembered that the
C patient does have a legal and enforceable right of access but must pay the price of initiating (if it be relevant and proper) legal process to secure the benefits of discovery and subpoenas.

Breach of fiduciary duty:

There is no doubt that Dr Williams is in breach of the obligations arising from the fiduciary relationship he had with Ms Breen in respect of her
D medical information in his files. Not only did he decline to provide her with access to that information. He made it clear that he would provide such access only if she would release him from any claim that might arise not from the access but "in relation to my treatment of you".

In that sense, Dr Williams placed the protection of his own position before his duty of loyalty and care to his patient who was embarking upon a major enterprise of litigation allegedly arising from a health condition. As he knew, she was claiming access to the information in his files in order to receive
E advice so that she could make informed decisions of considerable importance and urgency. Instead of acting with full loyalty and care, as his duty required, Dr Williams (doubtless being advised to do so) sought only to protect his own position or to deflect Ms Breen to the expensive necessity of "subpoena through the US legal system".

In this response, I consider that Dr Williams fell short of the high duty which I would hold that he owed to his patient, Ms Breen, as a fiduciary.

F

Conclusions and orders:

Most patients in Australia will not wish to have access to the information in the original records held by their medical advisers. Many would be perfectly content with a summary report as proffered in this case by the respondent. But where the request for access is pressed, and, as in this case, has a sound and reasonable basis, it is the patient's right, with appropriate conditions and exceptions as specified, to have access to his or her medical
G information, as demanded. Our law will uphold that right. Where necessary, it will enforce it. Judges in the United States and Canada have held that the law affords this right to patients in those countries. The fact that some judges in England have not been willing to go so far is more a commentary on that society, and on judicial attitudes within it, than it is upon the legal rights of patients in a modern community. Australian courts are not bound by English

court decisions, however useful they still are as a source of principle. In this particular matter, the United States and Canada are more similar to our society than is England. Our law likewise upholds the rights of patients as do the laws of Canada and the United States. This appeal provides the opportunity to say so.

The fulfilment of the right asserted by a patient ought not to be frustrated by requiring cumbersome, dilatory and expensive court process to be issued. It ought not to be withheld in a purported bargain to provide it only if the patient, who is vulnerable, provides the medical practitioner with a release from all possible claims, whatever they may be. This Court should uphold that patient's right in the present case by appropriately precise equitable relief.

I favour the following orders:

1. Appeal allowed;

2. Set aside the orders of Bryson J dated 10 October 1994;

3. In lieu thereof:

(a) DECLARE that the appellant has a right, upon request, to be given reasonable access by the respondent to examine, copy and/or at reasonable cost, to obtain copy of records or information concerning her, created or obtained by the respondent in the course of providing medical treatment or advice to her, being recorded in the medical records or in other tangible form in the possession, custody or control of the respondent, subject the exclusion therefrom of such records or information as the respondent may lawfully exclude from such access;

(b) DECLARE that the respondent may lawfully refuse to provide access to the appellant to records and information in his possession:

(i) created or obtained solely for the benefit of the respondent in the conduct of his practice or in respect of which he may lawfully claim legal professional or other privilege;

(ii) the disclosure of which the respondent reasonably believes is likely to cause serious harm to the physical or mental health of the appellant; and

(iii) the disclosure of which would found an action for breach of confidence;

(c) ORDER that the respondent provide the appellant with reasonable access to records or information in his possession, custody or control as aforesaid concerning the appellant, subject to the exclusion therefrom of records and information in respect of which the respondent has a lawful excuse for not providing access;

(d) GRANT LIBERTY to apply to the Equity Division for further or other orders upon one days notice;

4. Order that the defendant pay the plaintiff's costs of the proceedings in the Equity Division; and

5. Order that the respondent pay the appellant's costs of the appeal but have, in respect thereof, a certificate under the *Suitors' Fund Act* 1951.

MAHONEY JA. Some years ago the plaintiff Mrs Breen, sought medical advice and attention from several medical practitioners. One of them was the defendant Dr Williams. He was, to that extent, "her doctor". Dr Williams

holds a file of documents arising from that relationship. (I shall refer to this as the medical file.) Some fifteen or so years later, Mrs Breen wrote to the doctor claiming that she was entitled, as of right, to inspect the medical file. Dr Williams refused to allow her to do so; he denied that she had that right.

Mrs Breen then brought the present proceeding against Dr Williams to establish that she had the right that she had claimed. She did not bring the proceeding because of any complaint in respect of what he did as her doctor; she has brought no other proceedings against him. Her claim is made because she has become associated with litigation in the United States of America in which a number of women have sued, inter alia, a manufacturer of breast implant implements.

Bryson J held that Mrs Breen did not have the right she claimed. He dismissed the proceeding. Mrs Breen has appealed to this Court against his Honour's judgment.

The appeal has been argued at length by Dr Cashman for Mrs Breen and by Mr Rares SC for Dr Williams. The Court has had the benefit of written submissions prepared by the parties and in addition has been furnished with a large quantity of written information. It has, with the consent of the parties, been furnished in addition with submissions prepared by a body not a party to the proceeding, viz, the Public Interest Advocacy Centre.

In relation to the matters in dispute between the parties, my conclusions may be summarised as follows:

1. What is to be determined in this appeal is whether Mrs Breen is entitled as of right to inspect the medical file held by Dr Williams.

2. Whether a patient has the right to inspect a medical file does not depend upon generalities; it depends upon the contents of and the circumstances affecting the creation and maintenance of the particular file.

3. A patient does not have the right to inspect the medical file held by her doctor merely because she has been his patient.

4. However, in some circumstances, a patient may have or acquire the right to inspect a medical file. That right may exist because she is in law the owner of the particular file; because of the terms of the contractual arrangements existing between the patient and the doctor in respect of it; because the relationship between her and the doctor is of such a nature as to give rise to that right; or for other sufficient reasons. None of those reasons has been established in the present case.

5. A patient who does not have the right to inspect a medical file ordinarily will have the right to be told of the information relevant to her medical condition or history which is contained in that file. On the evidence before the Court in the present case, Mrs Breen has the right to be informed of such matters. But she is not entitled as of right to inspect the file for the purpose of satisfying herself or others that the information supplied to her is all of the information to which in this regard she is entitled.

6. By reason of what has occurred in the present proceeding, the plaintiff's claim should be dismissed and she should bear the costs of the proceeding before the trial judge and before the Court of Appeal.

1. Preliminary matters:

Before coming to consider these conclusions and the reasons for them, it is appropriate to refer to certain general considerations which arise from the submissions made by the parties.

It is important — in my opinion it is crucial — to understand what is the issue in the present dispute. Dr Cashman has, I think, sought to make clear what that issue is. However, during argument, and in some of the material provided to the Court, the issue as Dr Cashman has tendered it has become obscured. Generalities have been introduced which, important though they be in other respects, do not help to determine the legal issue which has been tendered to the Court.

Two things are to be borne in mind: the issue relates, not to medical files in general, but to the medical file held by Dr Williams; and what is sought is not the information contained in that file, but a declaration that Mrs Breen is entitled, as of right, to physical access to that file. Dr Cashman has posed the issue as one of principle and it is proper that the issue be determined as such.

(a) The nature of the present dispute:

This proceeding is brought to enforce a claim for relief in respect of a specific medical file. It is not a proceeding in which a general declaration of right is sought: cf *Dyson v Attorney General* [1911] 1 KB 410; *Commonwealth of Australia v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297. For the reasons which will appear, this is not a case in which a general declaration of right would be appropriate. His Honour did not purport to lay down, nor should this Court, the rights which a patient may have with respect to medical files in general. The reason for this is that, as was said by Sir Roger Parker in *R v Mid Glamorgan Family Health Services Authority; Ex parte Martin* [1995] 1 WLR 110 at 119-120; [1995] 1 All ER 356 at 366:

> "... the circumstances in which a patient or former patient is entitled to demand access to his medical history as set out in the records will be infinitely various, and it is neither desirable nor possible for this or any court to attempt to set out the scope of the duty to afford access or, its obverse, the scope of the patient's rights to demand access. Each case must depend on its own facts."

No doubt the principles enunciated by this Court in determining the plaintiff's rights in respect of this file will assist in the determination of claims made in respect of other files or in other circumstances. But in the end what is to be here determined is the plaintiff's rights in respect of the file which the evidence shows to be in the defendant's possession.

In the proceeding before Bryson J, the plaintiff's medical file was not in evidence. It was therefore necessary for the judge to determine, by inference, the contents of that file. The judge referred to the "categories of documents" which, Dr Williams said, were frequently included in such files. In respect of these, the judge recorded what the doctor had said as follows.

Handwritten notes by the doctor were kept "as an aid to the ongoing and/or possible future treatment of the patient (whether by myself or to enable me to prepare reports to others) and for the proper management of administration of my practice". Such notes were also "a source of information for me in the event that questions or complaints are

A subsequently raised about my treatment or advice". The doctor referred to letters reporting to referral doctors, including reports dealing with future treatment and management of the patient and "a means of maintaining relations with referring doctors". He referred to "hospital advice slips", which provided access to medical and hospital records in relation to the patient. The doctor referred to correspondence with the patient: there was, as to this no contest. He referred to reports to him from other doctors relevant to ongoing treatment and management of the patient but
B occasionally resulting from matters giving him reason to believe "that there may be enquiries or complaint about treatment or advice I have given or provided in the past". The file might include communications with the NSW Medical Defence Union, the body from which the doctor was apt to seek insurance or similar cover. It included photographs of the patient's medical condition. And the doctor maintained also account cards with information relevant to charges and payments.

C Upon the evidence before him, the trial judge found that the particular file was as follows:

> "(a) The defendant has handwritten notes of his own.
>
> (b) There may be letters reporting to referral doctors although the evidence does not clearly show this.
>
> (c) There may be hospital advice slips but the evidence does not clearly show this.

D (d) There is correspondence with the patient, and the defendant does not resist inspection of these and annexed copies to his affidavit.

> (e) There is no evidence whether there are reports to the defendant from other doctors. Dr McDougall wrote him a letter (probably in 1991) about the plaintiff.
>
> (f) There are probably communications with the NSW Medical Defence Union.

E (g) There probably are photographs."

Therefore, what strictly is in issue is the right of the plaintiff to have the access claimed by her to a file containing such materials.

In view of what has been said, in argument and otherwise, it is proper to record what the defendant said in evidence in relation to the records kept by him. It is proper to do this in particular because, in some of the submissions, resort has been had to generalities derived from, as it would appear, medical
F files in general. What is here in question is a practical working file containing, in accordance with the particular doctor's practice, material directed to the doctor's own purposes as well as material related to the patient's medical condition and treatment. His evidence included the following:

> "8. The handwritten notes ... are prepared and maintained by me, along with the other documents described above in the belief that such
G records belong to me and are private to me. As described above, some of these records will contain information supplied to me in confidence by family and friends of the patient in circumstances where I have been told by such persons that they do not wish the patient to be aware of their communications with me. Often the information I receive from such sources is what I would regard as sensitive and confidential, and I would not wish to divulge my knowledge of it or source unless I judged

it necessary to do so in the interest of the patient. In some cases because of the state of mind or health of the patient these records will contain information the disclosure of which in my judgment might be detrimental to the patient's well-being if disclosed at all or if disclosed without full explanation. Because these notes are prepared by me in the belief that they will remain private to me, they often contain conclusions, commentary and musing which might well be different in form and substance if the notes were prepared by me in the knowledge that the patient was entitled to a copy of my records. I would be concerned that these notes and some of the other records maintained by me might, at least in some cases, cause confusion and unnecessary worry and stress to patients if they were made available to them without adequate explanation. Finally, in part, these notes contain information which relates solely to the business and administration of my practice and not to aspects of the treatment and management of my patients.

9. If patients were to be entitled to a copy of my records, I have no doubt that the content of my records would in many cases change substantially, including the exclusion of sensitive information supplied by other sources and by noting comments and musings (if to be done at all) by paying careful regard to the sensitivities and level of understanding of each patient and the meaning that is likely to be conveyed to each patient by such notes. I would be concerned that in many cases the records may become of less value to the medical practitioner in his or her treatment, advice and ongoing management of patients."

(b) The relief sought by the plaintiff in respect of that file:

It is relevant to record the form of the relief which, initially and subsequently, the plaintiff has claimed. This assists in the understanding of the purpose of her proceeding, of the submissions that have been made, and of the difficulties which, in my opinion, exist in giving effect to what has been her essential claim. It is relevant also in relation to the costs of the proceeding.

The plaintiff's proceeding was commenced by summons: there has not been any document of the nature of a pleading or formal statement of issues. It is therefore necessary to consider the course which the proceeding took. Bryson J recorded in his judgment that the plaintiff's original claim was that she had "a right of access to all information in medical records maintained by the patient's treating doctor". His Honour said:

> "It was the wish of the plaintiff and those representing her to treat the litigation as an opportunity to test whether a patient has a right of access to all information in medical records maintained by the patient's treating doctor, and to test the contrary proposition that it is within the power of the treating doctor to grant or withhold access to those records as the doctor decides."

He referred to the right or duty of a doctor to refuse to disclose information "inconsistent with the doctor's obligation to have regard to the patient's best interests", the "so-called therapeutic privilege": *Rogers v Whitaker* (1992) 175 CLR 479 at 486; his Honour then said:

> "Advocacy for each party sought to present a case of abstract simplicity, the plaintiff's in terms of an absolute right of access irrespective of

A there being any use to which it was intended that the information be put, and the defendant's in terms of there being an absolute right to decide whether or not to give access. The plaintiff's evidence puts her requirement for access to the records themselves in terms of her wish for information about her own well-being and her body. The defendant said in evidence that he is willing to provide a report, and both at an interlocutory stage and during the hearing his counsel made open offers to do so, but the report offered would be composed by him and he would control what went into a report."

B

However, as his Honour recorded, the plaintiff conceded that there was a qualification to the generality of the right which she claimed: she accepted that "a doctor may withhold information where disclosure would be adverse to the patient's interests" and referred to this as "the therapeutic privilege". However, the substantial position taken by the plaintiff at the trial was that she claimed a right herself to inspect the medical file, whether with or without this limited qualification. It was this right which the judge held did not exist.

C

The position taken by the defendant also varied somewhat during the trial. As his Honour recorded, it was initially that "it is within the power of the treating doctor to grant or withhold access to those records as the doctor decides". Prior to the commencement of the hearing, the doctor had offered to produce the file to her "were you to supply me with a document that would release me from any claims that might arise in relation to my treatment of you". That offer was refused by the plaintiff. However, during the hearing a further open offer was made. His Honour said:

D

"During the hearing counsel for the defendant made an open offer that the defendant would provide a report in writing to the plaintiff as to the contents of the file maintained by the defendant relating to the plaintiff, excluding his correspondence with New South Wales Medical Defence Union and with the plaintiff's solicitors. The offer related to the contents of the file as to history, physical examination findings, investigation results, diagnosis, proposed management plan, treatment or advice furnished by the plaintiff.

E

This offer was not accepted, but has not been withdrawn. Unlike the letter of 10 August 1993, it is not conditioned on any release to be given by the plaintiff to the defendant; it is not subject to any condition but of course, the report would be compiled by the defendant, and the plaintiff and her legal advisers would not see the records themselves."

F

His Honour recorded:

"The plaintiff does not wish to have such a report and the defence to her claim does not depend on discretionary considerations, so I am not called on to consider whether the defendant's readiness to provide a report is reasonable or extends sufficiently far, or whether he in fact has a contractual or other duty to provide a report. The evidence shows that it is the defendant's practice and that it is good practice to provide such reports when requested, for various purposes including litigation."

G

During argument before this Court, it was suggested that, were such a report to be prepared or contemplated, it was the right of the plaintiff to inspect the records to satisfy herself that the report properly dealt with all of the matters with which it should deal: that right was denied by the defendant.

During argument Dr Cashman for the plaintiff considered the possibility that, if the plaintiff had a right to inspect the medical file, that right was a qualified right: it was suggested that that right, if it existed, would be qualified by (as I shall for convenience describe them) the therapeutic privilege and the confidentiality privilege. The latter refers to the right or duty of a doctor to keep secret information received by him in circumstances of relevant confidentiality. Dr Cashman was asked to consider the impact upon the suggested right of access to the file of the acceptance by the plaintiff that the doctor would have the therapeutic privilege, the confidential privilege and perhaps other reasons for withholding some or all of the information or portions of the file; he was asked to consider the effect of this concession upon her claim to have access to the file as of right for the purpose of checking any report prepared by the doctor. At the Court's suggestion, Dr Cashman reconsidered the form of the relief which, before this Court, was ultimately to be sought. He formulated the final form of the relief sought in the following terms:

"1. Declaration that the Appellant has a right, upon request, to be given reasonable access by the Respondent to examine and/or copy records or information concerning the Appellant created or obtained by the Respondent for the benefit of the Appellant in providing treatment, information or advice to the Appellant and recorded in the medical-records or in other tangible form in the possession, custody or control of the Respondent, subject to the exclusion of such records or information as the Respondent has lawful excuse for not providing access to.

2. Declaration that such information is required to be provided:

(a) because it is the property of the Appellant; and/or

(b) as an implied term of the contract between the Appellant and the Respondent; and/or

(c) pursuant to the duty of care owed by the Respondent to the Appellant; and/or

(d) as an incident of the fiduciary obligation on the Respondent to act in the best interest of the Appellant, such obligation arising out of the doctor/patient relationship; and/or

(e) because the Appellant has a common law right and entitlement to it.

3. Declaration that the Respondent has lawful excuse for not providing access to records and information:

(a) created or obtained solely for the benefit of the Respondent; and/or

(b) the disclosure of which the Respondent reasonably believes is likely to cause serious harm to the physical or mental health of the Appellant; and/or

(c) the disclosure of which would found an action for breach of confidence.

4. An order that the Respondent provide the Appellant with reasonable access to such records as may exist which fall into the categories: (a), (b), (c), (e), (g) referred to on page 19 of the judgment of the Honourable Justice Bryson dated 10 October 1994."

A It is apparent, therefore, that the plaintiff, by this proceeding, claims, and seeks relief based upon, a right of inspection of the medical file.

She makes this claim as of right and not because of any default which the defendant doctor has made in advising or treating her. It has been accepted that in other circumstances or for particular purposes she can or may be able to secure access to the medical file. Thus, if she were to sue the doctor for default by him in his treatment of her, she would have the usual right to have
B the file produced as on discovery. In aid of the American proceedings, she may have the file produced. She has disclaimed reliance upon any such matters. She has sought the ruling which she claims as a matter of principle.

In my opinion, she and those advising her are entitled to take such a position. There may be reasons why, in the context of the American litigation, it is desirable that she be able to show that she has the right to have access to the medical file as of right and in the manner that she has
C suggested. I do not decide whether she has: that matter has not been litigated and I would not wish to prejudice the plaintiff's right to claim such access in other proceedings. Whether she has such a right, she is, in my opinion, entitled to have her present claim determined by this Court. Bryson J held that there was appropriate utility in her proceeding, sufficient to warrant the making of declarations of such rights as she may have. The *Supreme Court Act* 1970, s 75, and the general law gives to this Court wide
D powers in respect of the declaration of the rights of parties: see generally, *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421. There are cases in which the Court will, in its discretion, refuse to make the declarations sought by parties in respect of the existence or non-existence of particular rights: see, eg, *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286; compare *Commonwealth of Australia v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297. This Court has from time to time referred to the dangers inherent
E in declarations made in general terms where the generality of the rights declared is subject to qualification, either in statement of the relevant principle or because the facts on which the declaration is based may change from time to time. Any declarations made in this proceeding would necessarily be subject to qualifications: the terms of the declarations as now sought make this clear. Were the making of declarations to be otherwise appropriate, it would be necessary to consider whether the qualifications
F which would have to be added would be in such terms that it would not be practicable to frame them as part of an order of the Court.

(c) The Court's function:

In view of some of the submissions made and the implications of them, it is proper to stress the function which the Court performs in considering the making of declarations of the kind now sought. Three things may be said in this regard: it is the function of the courts to decide cases coming before
G them according to law; the courts may develop the common law and in the course of doing so may change the existing law; but, in my opinion, it is not the function of the courts to change the law by processes which are legislative rather than judicial.

Under the existing constitutional division of powers, the function of the courts is to apply the law, not to legislate for the change of it. In a

democratic society, the responsibility for what the law is lies ultimately with the legislature. It is its right to decide what the law should be. A

I am conscious of the role which the courts have in developing the common law and of the extent to which the restrictions imposed by the doctrine of precedent are now seen to qualify it. The courts may, in developing the common law, reverse or modify what previously had been accepted to be the law. In doing this they may increase the uncertainty of the law and may — in a pragmatic sense — take away rights or protections which previously citizens had: see, eg, *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 507-508. B

"In a sense, what a court can do is what the court does": *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 733. But there are limits. At least, in my respectful opinion, there should be. In some cases, it is proper that changes be made: this may be so where the existing principles of the common law are producing injustice or, even, where they are working less efficiently than they should. Judge-made law may be adapted by those who have made it: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 541. C

However, what is here in question is a competition between competing social claims. Mrs Breen desires to establish a principle: she seeks to establish, as it has been put, the right to control what is done to her body. Dr Williams desires to ensure that he may carry on his practice in the way he thinks best: he seeks this because, it is said, that will conduce to the proper practice of medicine and the good of the community. The choice between their competing claims involves the making of a general social judgment. It is claimed that changes should be made in the legal rights of parties to give effect to the social judgment which is preferred. In my opinion, if such changes are to be made, they should be made by a body which, in a democratic fashion, is accountable to the community and to those in it whose rights will be affected. In *Ballina Shire Council v Ringland* (at 731-733), I detailed my views on this matter and I shall not repeat what I there said. D E

In saying this, I express no opinion upon what, as a general social judgment, should be preferred by the legislature. The courts have, I believe, favoured the full availability of information to members of the community: see, for example, the cases discussed in *Sankey v Whitlam* (1978) 142 CLR 1, and the references to "candour" and the like at, for example, 62-63. On the other hand, if a factual investigation established that the right of access to medical records in this way would in truth affect the quality or cost of medical practice, the legislature might well hesitate to adopt the generality of free availability of information at the price of less effective and efficient — or more costly — medical procedures. The solution adopted might involve, not the one or the other, but a more complex system of rights and obligations which accommodated, but only in part, each of the competing claims. In my opinion, such matters are properly to be decided by the legislature. F G

I come now to consider the context of legal rights in which the present dispute arises and the conclusions which I have expressed as to the right of Mrs Breen to inspection of the medical file.

2. The right of a patient as such to inspect a medical file:

The present problem is not new. The rights and obligations created by the existence of a professional or similar relationship have been the subject of consideration for some 150 years. The problem has arisen in various contexts: in relation to solicitors: *Re Thomson* (1855) 20 Beav 545; 52 ER 714; accountants: *Chantrey Martin (a firm) v Martin* [1953] 2 QB 286; quantity surveyors: *London School Board v Northcroft* (1889) Hudson's BC (4th ed) vol 2 at 147; rating valuers: *Leicestershire County Council v Michael Faraday and Partners Ltd* [1941] 2 KB 205; and the like: see generally the cases referred to in *Wentworth v De Montfort* (1988) 15 NSWLR 348. It is necessary in the present case to consider the application of the principles which the law has developed to records created and kept by medical practitioners.

The rights of (as I shall describe them) professionals and clients in relation to documents may — special cases apart — derive from three sources: ownership of the documents; contractual rights created in respect of them; and other principles arising from the particular relationship and is what is done pursuant to it. In most cases, the courts have been concerned to determine the ownership of the documents in question: whether they are owned by the professional or the client. Where it has been held that they are owned by the professional, the courts have considered whether the right of a person to do what he wishes with his property should be qualified because of the rights of the client and, if so, why. Therefore, I shall consider first how, as between such professionals and their clients, the ownership of documents has been determined. I shall then consider the application of the relevant principles to medical practitioners.

In considering the ownership of such documents, it is, I think, of assistance to consider at least three things: the nature of the relationship between the parties; the purpose to be achieved by that relationship; and the particular terms of the contract between them. Viewed conceptually, the relationship between such parties may be that of master and servant, of principal and agent or of the vendor and the purchaser of the services in question. In more practical terms, the relationship between a professional and his client may be one or other of these or involve incidents of each of them.

In principle, where the relationship is one of master and servant, what the servant does is done as the alter ego of the master and accordingly what is produced is ordinarily the property of the master. Where the professional acts as a mere agent and as an agent produces a document in the course of or for the purpose of his engagement, the same result will obtain. Thus, a person engaged merely to draft and forward a letter may do so as agent for the client. What is done is done as the alter ego of the client and accordingly the letter is the property of the client: see, eg, *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 353F and 354G-355B.

However, when the client engages a person who practices a profession or the like, the position is ordinarily different. The relationship that exists between a professional and a client is, as such, not one of mere agency. In a professional relationship, the object to be achieved will ordinarily be the supply of expert advice: see *Leicestershire County Council v Michael Faraday and Partners Ltd*; the preparation and delivery of skilled plans: *Gibbon v Pease* [1905] 1 KB 810; or the like. The client is concerned with the

achievement of that purpose rather than with what the professional does in achieving it. In such a case the purpose of the contract is not the creation of such documents; the documents have come into existence only because the professional has, in the particular circumstances, deemed it expedient to create them in order to achieve the true purpose of the contract: see generally, *Chantrey Martin v Martin* (at 292) et seq. In such cases, the documents created by the professional in the course of preparing to give the advice or to furnish the plans will ordinarily remain the property of the professional.

However, there may, in a professional relationship, be aspects of what is done in which the professional acts merely as the agent of the client. In such cases, what he does may, as in mere agency relationships, bring into existence documents which, created by him as her alter ego, become the property of the client. See the reference to such matters in *Wentworth v De Montfort*: see generally, *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129; [1980] 2 All ER 29 (the melding of different relationships in a contract to build a ship).

The relationship of solicitor and client illustrates the differing capacities in which the professional may act. The relationship of a solicitor and client differs in fundamental respects from that of a doctor and patient, but assistance may be had from the principles developed and the basis of them. Thus the solicitor may be engaged merely to prepare a document or to send a letter. His retainer may be more complicated and involve the solicitor in recording facts or bringing into existence documents for use by the client in litigation. Thus, at least in circumstances referred to in *Wentworth v De Montfort*, records such as notes of telephone conversations, perhaps statements by some witnesses, and other documents may be the property of the client because it was the purpose of the relationship and the contract that they be brought into existence for the purposes of the client: see, for example, at 358-359. On the other hand, internal notes executed for the solicitor's own purposes will remain his property (at 359).

How do these considerations apply to the case of a general medical practitioner of the present kind? A medical practitioner is ordinarily not a mere agent for the patient. He is a professional. The purpose of the professional relationship is ordinarily to diagnose, to recommend treatment, and to treat the patient. What the doctor does, and the documents he creates, are ordinarily directed essentially to the achievement of these purposes. Subject to what I shall say, the documents are created for the purpose of such diagnosis and treatment and they are merely what the doctor uses to achieve those purposes. Accordingly, in my opinion, prima facie, a medical file kept by s doctor is the property of the doctor.

However, the position is, of course, more complicated. It is necessary to examine the circumstances surrounding the creation of each document. Documents created merely for the purposes of the doctor, for example, as records of his practice, as material from which to assess charges and the like will be the property of the doctor. On the other hand, some documents created for the purpose of enabling the doctor to diagnose and to determine the treatment to be recommended may be the property of the patient. Thus, a document, though held by the doctor, may be the property of the patient because it was procured by or for the patient and has been paid for by her.

A X-rays, pathology reports and some reports by consultant specialists may be such: cf as to the case of a solicitor *Wentworth v De Montfort* (at 356B). Correspondence with consultant specialists or with treating hospitals may, if of this kind, be the property of the patient.

More difficult questions arise in relation to matters such as those particularly referred to by Dr Cashman in the present case, namely, notes taken by the doctor to record the patient's medical history and her signs and
B her symptoms. In one sense, such records are made for the purposes of the patient; the making of them is one of the things which the doctor, by his engagement, may undertake to do. In this sense, the document is created so that there may be a record of what the patient has told the doctor and her signs and symptoms at the time. The record may not merely help in the instant diagnosis and a selection of treatment; it may provide a valuable resource for future purposes. Considered in isolation, a record of this kind, if it were contained in a separate document, would, I think, be the property of
C the patient.

On the other hand, the doctor may — as Dr Williams has said he ordinarily will — include with the record of the history and the signs and the symptoms of the patient, comments and observations which are made and recorded for the purpose of helping the doctor form the diagnosis and the opinion to be formed as to treatment. There may be observations — Dr Williams used the term "musings" — which, if standing alone, would
D ordinarily be the property of the doctor and not of the patient. It is the fact that these things are combined in the documents which illustrates the nature of the problem in a case such as this.

The combination of such things: the history, signs and symptoms on the one hand and the "musings" and other things on the other hand; may be accidental in the sense that the combination of the two in the one record is not inherent in the process of medical knowledge. But the thrust of
E Dr Williams' evidence is, I think, that such a combination is not accidental. His evidence suggests that the combination of these two things is inherent in the way medical practice is conducted or, at least, in the way he conducts his practice. The trial judge accepted this portion of the judge's evidence.

If the records kept by the doctor be in this form, then, in my opinion, the records remain the property of the doctor. In so far as the purpose of the making of the records may be, as I have said, one of the things which the
F contract between the doctor and the patient requires the doctor to do, it will ordinarily be implied that information as to the relevant portion of it, viz, that relating to history, signs and symptoms, will be made available to the patient as and when required for medical purposes. But, by reason of the nature of the record and the circumstances of its creation, the record is in my opinion in principle the property of the doctor.

I have dealt at length with the ownership of the portion of the medical file which is here mainly in question. I have done so because, in my opinion,
G Mrs Breen's rights in respect of the medical file depend primarily upon considerations of this kind. However, it is proper to record that, as the appeal has been conducted, Dr Cashman has not contended for ownership of the relevant records as such. He has sought to base the claim to inspection of the medical file upon other considerations. To these I shall now come.

A right of inspection such as is now claimed may, in particular

circumstances, arise from *the contractual arrangements* which, expressly or by implication, have been made between doctor and patient.

It is, of course, possible for a patient to stipulate expressly for the right to inspect a medical file. But that seldom happens. What are here in question are the terms which are to be implied from the relationship and from the purpose of the contract between doctor and patient: as to the implication of terms, see generally, *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

What are to be implied in such a contract has not been the subject of authoritative consideration in this country. It may be that, by implication, a doctor is contractually obliged to make some, or some appropriate, records relating to the patient. This has not been the subject of argument and I do not express any opinion upon it. The present submissions have suggested that, if records have been made, it is to be implied that they will be made available — or that the medical information contained in them will be made available — in relation to the patient's ongoing medical care. In the present case, Dr Williams has agreed to make such information available. But it remains to be determined whether and to what extent he is contractually bound to do so.

As at present advised, I am of opinion that a doctor is contractually bound to make such information available. That, I think, is one of the objectives to be achieved by the keeping of such records, at least in so far as they go to the ongoing medical care of the patient. However, it is not clear what precisely is the content of that obligation: for example, it is not clear whether the information is to be made available for a fee, in what form and in what circumstances. Uncertainty as to content of the suggested term is sometimes a reason for not making an implication as to the term in question. In view of the approach taken by Mrs Breen, it is not necessary to pursue this question to a conclusion.

However, I am satisfied that no term is to be implied that the patient is to have the legal right to compel inspection of the file. Various tests have been proposed for the implication of terms in contracts: see generally, Greig & Davis, *The Law of Contract*, Sydney, Law Book Co (1987) at 517 et seq; 539 et seq; and the cases there referred to. Whatever be the appropriate test for determining, in a contract such as the present, whether a term should be implied, the term proposed is not derived from it. The right to compel inspection would not appear obvious to the officious bystander; it is not necessary in order to ensure the proper working of the contract; it is not a term which previous dealings between patient and doctor have accepted as to govern their relationship, and the difference of opinion between Mrs Breen and Dr Williams and those in the medical profession to whom he has referred indicates, I think, that there is no generally understood basis for such term in such a contract.

In *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871, in the course of considering a patient's right to be informed, Lord Templeman (at 904) said:

> "I do not subscribe to the theory that the patient is entitled to know everything nor to the theory that the doctor is entitled to decide everything. The relationship between doctor and patient is contractual in origin, the doctor performing services in consideration for fees

A payable by the patient. The doctor, obedient to the high standards set by the medical profession impliedly contracts to act at all times in the best interests of the patient. No doctor in his senses would impliedly contract at the same time to give to the patient all the information available to the doctor as a result of the doctor's training and experience and as a result of the doctor's diagnosis of the patient. An obligation to give a patient all the information available to the doctor would often be
B inconsistent with the doctor's contractual obligation to have regard to the patient's best interests. Some information might confuse, other information might alarm a particular patient. Whenever the occasion arises for the doctor to tell the patient the results of the doctor's diagnosis, the possible methods of treatment and the advantages and disadvantages of the recommended treatment, the doctor must decide in the light of his training and experience and in the light of his knowledge of the patient what should be said and how it should be said."

C His Lordship's views as to the right of a patient to have information may require consideration in the light of the decision of the High Court in *Rogers v Whitaker*. But his Lordship's conclusion that "no doctor in his senses" would contract in the manner referred to indicates, in my opinion, that it does not "go without saying" that a doctor and a patient, contracting together, would accept that the patient had the right of access to the medical file that is here in question.

D Therefore, in my opinion, the right proposed for Mrs Breen does not arise by implication from the present contract.

I come now to consider whether such a right arises because of the application of *other principles which govern the doctor and patient relationship*. This basis for the right to compel inspection has been pressed in the present case.

There can be no objection to a process of reasoning whereby a court
E derives from a general principle which governs a particular relationship a conclusion as to what, in a particular situation, a party to that relationship is obliged to do or not to do. Thus, when the relationship between the parties is one of trustee and beneficiary, the inference may be drawn that the beneficiary has certain rights of inspection relating to part of that property, viz, the record which the trustee has kept of his dealings with the trust property. A beneficiary ordinarily has a beneficial interest in the property of
F the trust. From that premise it is proper to infer that he may have rights relating to the trust property, and it has been held that those rights include certain rights in respect of inspection: see generally, *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 especially at 432 et seq.

It is a process of this kind which has been relied upon for Mrs Breen in the present case. It is therefore necessary to examine the premises which have been relied upon as the basis for such a right of inspection and the process by which the right of inspection is said to be derived from them.

G The Court has had the benefit of argument at length concerning the decision of the Supreme Court of Canada in *McInerney v MacDonald* (1992) 93 DLR (4th) 415; and of the English Court of Appeal in *R v Mid Glamorgan Family Health Services Authority; Ex parte Martin* [1995] 1 WLR 110; [1995] 1 All ER 356. These decisions have been relied upon to support the premises — the principles — on which reliance has been placed and the

inferences to be drawn from them. In view of the submissions made in relation to those decisions it is, I think, of assistance to consider the structure of the argument followed by those courts. For Mrs Breen considerable weight was placed upon the decision of the Supreme Court of Canada and it is therefore appropriate to consider in detail what was there decided. A

In that case, the patient had been treated by the doctor. She requested the contents of her complete medical file. The doctor delivered to her copies of notes and reports that she, the doctor, had prepared but refused to provide copies of reports and records that she had received from other physicians. The court ordered the doctor to provide a copy of the entire medical file. The judgment of the court was delivered by La Forest J. His Lordship saw the central issue in the case to be whether "a patient is entitled to inspect and obtain copies of his or her medical records upon request" (at 417). His Lordship accepted that such records were owned by the doctor (at 421). He did not "find it particularly helpful" to see the right claimed as based on "an implied contractual term" (at 421). Accordingly, he considered whether, if the records be the property of the doctor, "a patient nevertheless (has) the right to examine and obtain copies of all documents in the physician's medical record, including records that the physician may have received which were prepared by other physicians" (at 420). B C

The basic reasoning of the court proceeded in the following way (at 421d-427g). The court saw medical records of this kind as serving several important purposes (at 421); and as containing "sensitive information covering personal aspects of his or her life" (at 422c). In providing such information to the doctor, the patient places "trust and confidence" in the doctor (at 423b). It saw the relationship between the doctor and the patient as being "that which exists in equity between a parent and his child, a man and his wife, an attorney and his client, a confessor and his penitent, and a guardian and his ward" (at 423c). It saw the relationship "as a fiduciary or trust relationship" (at 423d). D E

The court inferred that, this being the nature of the relationship, the parties had certain rights or obligations. It saw these as involving "the duty of the doctor to act with utmost good faith and loyalty and to hold information received from or about a patient in confidence" (at 423h). It inferred also that the doctor was obliged "to make proper disclosure of information to the patient", that duty extending beyond "information concerning his or her health in the physician's medical record" and extending to "the obligation to grant access to the information the doctor uses in administering in treatment" (at 424b). F

The court relied upon an additional premise as basing its inference as to the right of access to the records. It said (at 424e):

> "The fiduciary duty to provide access to medical records is ultimately grounded in the nature of the patient's interest in his or her records. As discussed earlier, information about oneself revealed to a doctor acting in a professional capacity remains, in a fundamental sense, one's own. The doctor's position is one of trust and confidence. The information conveyed is held in a fashion somewhat akin to a trust." G

It saw the doctor as "merely a custodian of medical information" and saw "the trust like beneficial interests of the patient in the information" as

indicating the existence of "a right of access to the information" and an obligation on the doctor to provide it (at 425e).

The court then referred to a further factor as warranting disclosure of the records, viz, "the duty of the doctor to act with utmost good faith and loyalty" (at 425g). It saw access to the records as ensuring "the proper functioning of the doctor-patient relationship" and the protection of the "well being of the patient" (at 425h).

The court, in addition, relied upon "the duty of confidentiality": it saw in it the source of an obligation of disclosure and communication between doctor and patient and concluded that "the trust reposed in the physician by the patient mandates that the flow of information operate both ways" (at 426c).

The court then considered the qualifications to the patient's right of access to the records: it saw the policy of disclosure which it adopted as not to "be pursued blindly" (at 426h). It said:

> "Similarly, the patient's general right of access to his or her records is not absolute. The patient's interest in his or her records is an equitable interest arising from the physician's fiduciary obligation to disclose the records upon request. As part of the relationship of trust and confidence, the physician must act in the best interests of the patient"

and accordingly may "consider it necessary to deny access to the information" (at 427b). The court then examined reasons which, in its judgment, would or would not warrant the withholding of records from the patient (at 428a-430c).

The court then concluded (at 430f):

> "Since I have held that the tangible records belong to the physician, the patient is not entitled to the records themselves. Medical records play an important part in helping the physician to remember details about the patient's medical history. The physician must have continued access to the records to provide proper diagnosis and treatment. Such access will be disrupted if the patient is able to remove the records from the premises. Accordingly, the patient is entitled to reasonable access to examine and copy the records, provided the patient pays a legitimate fee for the preparation and reproduction of the information. Access is limited to the information the physician obtained in providing treatment. It does not extend to information arising outside the doctor-patient relationship."

The court saw the onus as upon the doctor to justify denial of access and concluded that, in the instant case, there were no reasons which would support a denial of access (at 430-431).

It is not the function of Australian courts, a fortiori of this Court, to consider the correctness of the reasoning of the Supreme Court of Canada in so far as it details the law of Canada. Nor is it the function of this Court to consider whether, for the purposes of Canadian law, the premises on which the court relied warranted the conclusions which it drew from them. In what I say in that regard, I am not to be taken as criticising that decision or the reasoning on which it is based. However, it is the duty of this Court to determine whether, in this State, the premises relied on by that court represent the law here and whether the conclusions drawn from them are, for the purposes of the present case, warranted by them.

With the greatest respect, I do not agree that all of the premises relied on

by the Supreme Court of Canada in that case correctly state the law in this State; I do not agree that the conclusions drawn by that court follow from those premises.

It may be accepted that, in this State, the law requires a doctor to act with the utmost good faith and loyalty to his patient and to hold information given to him by the patient in confidence. Those obligations will, if necessary, be enforced by injunction or the award of damages. But, with respect, it is wrong to infer from such obligations that a more general relationship — trustee or fiduciary — exists. The relationship between doctor and patient is not, in this State, "the same relationship as that which exists in equity between" the persons in question: it is not "a fiduciary or trust relationship" as those terms are used in the law of this State. A doctor is plainly not a trustee vis-à-vis his patient. In this State, the term "fiduciary" is not one proper to be applied to that relationship: see *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, where the meaning of the term was discussed at length; see generally, *Hawkins v Clayton* (1988) 164 CLR 539 at 553-554. The apparent disparity in the use of terms of this kind in courts in Canada and elsewhere has been noted in: A F Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 Law Quarterly Review 238 at 246. A doctor may, because of instant circumstances, owe fiduciary duties to a person who is or has been his patient in respect of particular items of property although ordinarily he will not be presumed so to be. That relationship does not arise from the fact, as such, that he is "her doctor".

Nor do I accept the premise that, in this State, the information provided by a patient to a doctor is properly described as "in a fundamental sense" the property of the patient. What a doctor is told is to be held in confidence but the fact that it is to be so held does not, on proper analysis, mean that there is in law something which remains, in any sense, the property of the patient. In my respectful submission, the use of metaphors of this kind confuses rather than assists proper legal analysis of relationships and of what, in law, results from them.

In my respectful opinion, the Supreme Court of Canada, in using these terms as it did, used them rather as metaphors or epithets than as accurate statements of the law. To say that is not criticism of the reasoning it adopted. It is not unusual for courts to articulate generalities, of legal principle or of social policy, as supporting the conclusions of law at which they have arrived. The generalities drawn from international conventions, text writers and similar sources are sometimes used in this way. But, if the correctness of the premises employed and the validity of the inferences drawn are to be examined, it is important that it be recognised that the statements made are of this nature.

In my respectful opinion, in drawing the inferences it did from the premises on which it there relied, the court failed to consider whether and to what extent they were justified by the premises on which it relied. I shall take but one example of this. It would not be doubted that, if a doctor has a duty to act with utmost good faith and loyalty to a patient, he will, in ordinary circumstances, have a duty "to make proper disclosure of information to the patient". But the court (see, for example, at 424b) went further. It inferred from the duty of good faith and loyalty not merely a duty to convey

information but also a duty "beyond this to include the obligation to grant access to the information the doctor uses in administering treatment" (at 424b). The court, without there distinguishing between the provision of information and the right of physical access to records, concluded that the duty of good faith and loyalty required "the disclosure of medical data to a patient or his agent upon request". It asserted the withholding of documents to be inconsistent with "the proper functioning of the doctor-patient relationship".

As I have indicated, it is not in question now — nor should it be — that the patient has a right to be informed of her medical details for the purposes of her ongoing care and the like. As I have emphasised the issue to be here determined is whether the considerations which warrant the one require the conclusion that she has the other, that is, that she has the legal right to inspect the medical file. The premises which may justify the one do not necessarily justify the other. The judgment of the court, in my opinion, does not address the substance of the distinction between them.

The Supreme Court of Canada properly articulated the considerations which, in any recasting of the law, would weigh in favour of the grant of some form of right to have information and, in some circumstances, physical access to information contained in medical records. The court does not, in my respectful opinion, articulate the considerations here urged in support of the claim by the doctor, as owner of the records, to exercise control over them. At least, in so far as such interests are referred to, they are, in my opinion, given less than appropriate weight. For myself, I am conscious of the importance of duties such as good faith and loyalty, confidence, and the like; but I do not find in the articulation of them a reason for dealing with the property of Dr Williams in the way suggested by *McInerney v MacDonald*.

I find more convincing the reasoning of the English Court of Appeal in *R v Mid Glamorgan*. In that case, Popplewell J had held that a patient did not have an unconditional right of access at common law to the medical records held by the relevant authority: see *R v Mid Glamorgan Family Health Services Authority; Ex parte Martin* (1993) 16 BMLR 81. His Lordship concluded (at 95) that he should come to "the clearest possible conclusion that there is no right at common law in this patient to access any records which pre-exists" the 1990 legislation then before him. His Lordship (at 97) saw the common law as "quite clear".

The decision of Popplewell J was affirmed by the Court of Appeal. The Court of Appeal accepted that the doctor or authority and not the patient was the owner of such medical records. What it saw necessary to consider was whether the owner of them was "entitled to deny him access to them on the ground that there disclosure would be detrimental to him".

Nourse LJ concluded (at 117; 363) that a doctor does not have "an absolute right to deal with medical records in any way that it chooses". This is because of a doctor's duty "to act at all times in the best interests of the patient". But his Lordship agreed that the doctor "may deny the patient access to them if it is in his own best interests to do so, for example if their disclosure would be detrimental to his health".

Evans LJ (at 119; 365) saw no reason to doubt that a right of access existed and that it was qualified to the extent at least that access might be

refused on the grounds of the patient's interest. But his Lordship saw the duty of disclosure to be limited to cases where "the records are required for medical purposes or in connection with any dispute or projected litigation". In the case of a mere claim to inspect records, for example, because of personal curiosity, his Lordship concluded that the right of inspection did not exist. A

His Lordship was not, for the purposes of the case before him, required to consider — nor did he consider in detail — the distinction between the provision of information and the grant of physical access to the records. The conclusion of his Lordship and of Nourse LJ that access could be refused for the reasons to which they referred suggests, I think, that the conclusions they drew related primarily to the provision of information as distinct from physical access. B

Sir Roger Parker, the third judge of the Court of Appeal, directed his attention (at 119-120; 366) to issues of the kind here in question. He saw the right of a doctor to ownership of medical records to be qualified by his obligation to provide information. He saw as "untenable" the proposition that "a patient has an unfettered right of access to his medical records at all times and in all circumstances". Sir Roger Parker concluded that a doctor "should ... afford access to" the patient's records for the time being "but not necessarily of the entire contents of the records". His conclusion was, as I have previously indicated, that the circumstances in which a patient "is entitled to demand to his medical history as set out in the records will be infinitely various and it is neither desirable nor possible for this or any court to attempt to set out the scope of the duty to afford access or, its obverse, the scope of the patient's right to demand access. Each case must depend on its own facts". C D

I have considered these decisions at length because they detail the considerations which, in the present case, have been suggested as warranting the conclusion in law that Mrs Breen has a right of physical access to the medical file and focus attention upon the force of them, or otherwise. In my respectful opinion, it is a mistake to treat the doctor-patient relationship as relevantly equivalent to a trustee-beneficiary relationship: the two are fundamentally different. It is wrong to infer from, for example, a duty to treat information received as confidential, that a doctor is generally in the position of a fiduciary and so has also the duties which a fiduciary has. It is wrong to infer from a duty, contractual or otherwise, to make information available a right to physical access to all sources of that information. E F

One further matter may be referred to. Dr Cashman has, in my opinion, correctly and inevitably, conceded that there are and must be exceptions to any claim by a patient to have information or, a fortiori, to inspect records. Those exceptions include those to which I have referred, viz, the therapeutic exception and the confidentiality exception. There are, no doubt, others. If those exceptions exist then, in my opinion, it must follow that, when such exceptions are relied on, the patient does not have the right to examine the records herself to determine whether those exceptions have, in the particular case, been properly relied upon. The basis of the therapeutic exception and the confidentiality exception would be defeated if the patient, declaring dissatisfaction with the doctor's decision that such circumstances existed, G

might herself examine the records. She would then know what those exceptions are designed to keep from her.

In the present case, the medical file contains material which Mrs Breen is not entitled to see: correspondence with the insurer is of this nature. There is, I think, other material of which she would not be entitled to be informed: I have referred generally to what the doctor has said and the judge has found. That of which she is entitled to be informed is mixed with such matters. In such circumstances, she is not entitled to have physical inspection of the medical file. If the medical file consisted only of material of which she should in the circumstances be informed, she would be entitled to full information for relevant purposes on proper terms, but she would not have the right to compel inspection of the file by her. It has not been necessary for me to pursue the conditions, as to fee, circumstances, and the like, which could or should be imposed upon any request for such information.

I have referred to the application to allow argument by an amicus curiae. That application was refused. There is, I think, no doubt that this Court may allow argument to be advanced on an amicus curial basis. That has not been in question. What was decided was that, in this case, further oral argument should not be accepted. There are no doubt interests which can be pressed, or served, when non parties are allowed to participate in the litigation of others. Such interests will be served at the cost of the parties and will take the time of the Court. The proposed amicus curiae was invited to indicate whether it would bear the costs of the intervention. It did not do so. The Court, in considering such an application as was here made, will take into account, inter alia, the right of a party to the litigation to have his litigation decided within the time and at the cost ordinarily incidental to it and the rights of the other litigants who have a proper call upon the time of the Court. It did so in this case.

I have, in deference to the arguments advanced by Dr Cashman and Mr Rares SC, dealt with the issues here involved at length. In the end, I am with respect satisfied that the right which in this case is claimed does not in law exist. Therefore, the appeal should be dismissed with costs.

MEAGHER JA. As the judgments in this case are sought in some hurry, I shall briefly outline the conclusions at which I have arrived, without any of the detail which would have been appropriate had I the opportunity to consider the matter at leisure.

I am of the view that the appeal should be dismissed with costs, and for the reasons given by Bryson J.

I am also of the view that Kirby P is correct in repelling every suggestion that Mrs Breen has any common law or statutory rights to obtain the orders she wishes. The sole matter which causes any problem, and the matter in which I am in disagreement with Kirby P, concerns fiduciary duties.

However, at the outset it is necessary to stress how narrow — and, I think, artificial, — the debate is. This Court is not concerned about Mrs Breen's right to know what Dr William's records contain. He is prepared to tell her. Both sides concede that. The debate is said to be about whether in addition Mrs Breen may rummage about in her doctor's records. Even Mrs Breen is prepared to agree that this right — if it exists — is not unconfined. She acknowledges she has no right to inspect any documents which contain

information created or obtained solely for Dr Williams' own purposes — for example, administrative records or private musings. Likewise she acknowledges her doctor may refrain from permitting her to inspect any documents which are reasonably covered by the so-called "therapeutic privilege". And finally, she acknowledges that she has no right to see such records as would found an action for breach of confidence by a third party. But, subject to these exceptions, she asserts that she has a right to inspect the doctor's records concerning her. She did not explain why she wants to see the documents as well as to know their contents. Her attitude is all the more bizarre when, obviously, it is common ground that if the doctor is served with a subpoena to produce the documents in question to the Court, he must comply with it. Indeed, the longer the case proceeded the more my view firmed that Mrs Breen was asserting a purely theoretical right.

Whether or not that right has any utility (and in my opinion it has not), it is alleged to be an equitable right. No body of equitable doctrine in Australia or in the United Kingdom exists to support the supposed right. The lady's counsel said as much. However, she relied on the recognition of the decisions of certain Canadian courts as to the existence of such a right. These, on examination, do not explain either the origins or the boundaries of the supposed right, or even provide a description (much less a definition) of it. They merely assert it exists. They illustrate a tendency, which has been commented on elsewhere, to widen the equitable concept of a fiduciary relationship to a point where it is devoid of all reasoning. In other words, when analyzing the Canadian jurisprudence in this field, one has the uneasy feeling that the courts of that country, wishing to find for a plaintiff, but unable to discover any basis in contract, tort or statute for his success, simply assert that he must bear the victor's laurels because his opponent has committed a breach of some fiduciary duty, even if hitherto undiscovered.

It is, in my opinion, difficult to understand the concept of fiduciary duty in the context of the present case. Whilst we must, of course, acknowledge that the list of persons owing fiduciary duties is not closed, and the boundaries of fiduciary duties uncertain in many respects, I can discover no principle analogous to that which Mrs Breen asserts. A fiduciary relationship usually arises where one dominant partner has some control over the property (and perhaps the person) of another. In that respect one could not quibble about a doctor being treated as owing a fiduciary duty towards his patient. But, if this be so, it is generally only to generate the usual fiduciary duties in certain circumstances — not to profit at his patient's expense (beyond his agreed fees) and not to put himself in a position where his interest would conflict with his patient's. So also, it must go without saying that his duty is to preserve whatever confidences his patient confides in him. Moreover, the doctor patient relationship is a relationship of influence. All this may be conceded, but it does not amount to a demonstration that the doctor-patient relationship is of a fiduciary nature such as to generate in the patient a right to inspect the doctor's notes and records.

At one point in the argument it was asserted by Mrs Breen's counsel that the information contained in the doctor's records was knowledge which was the property of Mrs Breen. In my view, this can hardly be so. The High Court has held that mere knowledge cannot be property: *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525

A at 534-536. So did the New South Wales Court of Appeal in *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1982) 64 FLR 387.

Finally, it should not pass without notice that decided cases in England and Australia tend against any principle such as that contended for by Mrs Breen. Such a right does not exist in a client against his solicitor: *Wentworth v De Montfort* (1988) 15 NSWLR 348; a client against a valuer: *Leicestershire County Council v Michael Faraday and Partners, Ltd* [1941] 2 KB 205; or a client against an auditor: *Chantry Martin (a firm) v Martin* B [1953] 2 QB 286. The English Court of Appeal came to the same conclusion in *Gaskin v Liverpool City Council* [1980] 1 WLR 1549, in the case of a doctor and a patient. Even a beneficiary's right to inspect trust documents is an incident of a trustee's duty to account, which has no analogue in a doctor-patient relationship.

It should perhaps be added that different considerations might apply if Mrs Breen had been suing this defendant in a class action, but, despite the original entitulment of the proceedings, her counsel eschewed any such role.

C I propose that the appeal should be dismissed with costs.

Appeal dismissed

Solicitors for the appellant: *Cashman & Partners*.

Solicitor for the respondent: *E H Pike* (Australasian Medical Insurance).

R J DESIATNIK,
Barrister.

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Annex 13

C. A.
1952
ÉTABLISSEMENT BAUDELOT v. R. S. GRAHAM & CO. LD.
Morris L.J.

"the heirs of an individual who carry on his business, the "instrument of incorporation being a testamentary document of "the late Monsieur Baudelot." They made it clear that they had been advised that those for whom they acted were the heirs of the individual, Monsieur Baudelot, who carried on his business, and who, as a result, by French law, were incorporated. The solicitors thereupon issued the writ in the name of "Établissement Baudelot."

The judge, having heard the whole of the evidence, including the evidence of French law, decided, though not without some hesitation, that "Établissement Baudelot" was not in fact an incorporated body. It does not follow from that that this writ was issued in the name of a non-existent company. It was not. It was issued in the name, or the trading name, used in their continuing trading activities by three living trading active persons.

I concur fully with all that my Lords have said.

Appeal dismissed.

Solicitors: *Crawley & de Reya; Keene, Marsland & Co.*

C. G. M.

C. A.
1953
July 3, 14.
Somervell and Jenkins L.JJ.

CHANTREY MARTIN (A FIRM) *v.* MARTIN.

Practice—Discovery—Chartered accountant—Audit of client's accounts—Working accounts and other papers produced in preparation of final audit—Property in—Disclosure.

Working accounts and other papers which are brought into existence by chartered accountants in the preparation of a final audit of a client's books are the property of the accountants and not of the client; and in the event of litigation to which the accountants are party, such accounts and papers, if relating to matters in question in the litigation, are proper to be disclosed to the other party.

Leicestershire County Council v. *Michael Faraday & Partners Ld.* [1941] 2 K.B. 205; 57 T.L.R. 572; [1941] 2 All E.R. 483 followed.

Gibbon v. *Pease* [1905] 1 K.B. 810; 21 T.L.R. 365 and *Ex parte Horsfall* (1827) 7 B. & C. 528 distinguished.

Decision of Barry J. reversed.

C. A.
1953
CHANTREY MARTIN v. MARTIN.

no order for production could properly be made in respect of the private ledgers of the client company comprized in items (F) and (K) above, for these are clearly the property of the client company and not of the plaintiffs. This is recognized by the defendant, who makes no claim to production in respect of items (F) and (K).

We have no note of the judge's reasons for deciding that the remainder of the documents listed above should not be produced, but we were told by counsel that his decision was based on *Gibbon* v. *Pease*,[2] where it was held that the plans prepared by an architect, employed by a building owner to carry out alterations to certain houses, were the property of the building owner. It would seem, therefore, that the judge took the view that the working papers, drafts, notes, calculations, and typed final accounts, brought into being by the plaintiffs in the course of, or as preliminaries to, the auditing of the client company's accounts, and the ascertainment of its tax liability, were by parity of reasoning the property of the client company, and accordingly that on the principle above stated the plaintiffs should not be compelled to produce them.

The ratio decidendi in *Gibbon* v. *Pease* is thus stated by Lord Collins M.R.[3]: "In my opinion the contract in this case "resulted in the making of plans the property in which passed "to the building owner on payment of the remuneration provided "under the contract. I find a difficulty in distinguishing this "case from that of a contract to paint a picture or to design a "coat of arms, as to which no question of ownership could "arise." There are, however, other cases, to which we understand the judge was not referred, in which a different conclusion was reached in circumstances bearing a closer resemblance to those of the present case. In *Leicestershire County Council* v. *Michael Faraday & Partners Ld.*,[4] rating valuers were employed by a county council for five years to give advice and assistance in connexion with the valuation of hereditaments in the council's area, and at the termination of the five years' agreement the council claimed to be entitled to all documents, books, maps and plans which had been prepared by or had come into the possession of the valuers in the course of, or for the purpose of, the performance of their duties. The Court of Appeal (affirming Macnaghten J.) rejected that claim, and held that the relationship between the county council and the valuers

[2] [1905] 1 K.B. 810; 21 T.L.R. 365.
[3] [1905] 1 K.B. 810, 813.
[4] [1941] 2 K.B. 205; 57 T.L.R. 572; [1941] 2 All E.R. 483.

was that of client and professional man and not that of principal and agent; that the documents which the valuers had prepared in carrying out their expert work were their own property; and that, as the agreement did not contain any provision requiring the valuers to hand over the documents to the plaintiffs, they were not bound to hand them over.

In an earlier case, *London School Board* v. *Northcroft*,[5] of which approval was expressed in the *Leicestershire County Council* case,[4] a similar conclusion was reached by A. L. Smith J. with respect to certain papers of calculations and memoranda prepared by quantity surveyors in the course of their employment by building owners on work which they had duly completed. Having regard to these two authorities we think that the proper conclusion in the present case is that (apart from correspondence with the Inland Revenue comprised in item (E), to which we will return) all the documents listed above, other than the client company's ledgers, are the property of the plaintiffs.

This conclusion is not, we think, displaced by *Ex parte Horsfall*,[6] to which we were also referred, where drafts and copies of deeds prepared by an attorney were held to be the property of the client. The case proceeded on the short ground that "he who pays for the drafts, etc., by law has a right to "the possession of them," and was, we think, rightly explained by Mr. Ashe Lincoln, for the defendant, as turning upon the nature of the services rendered by an attorney or solicitor and the system upon which he is remunerated for those services. Even in the case of a solicitor there must, we should have thought, be instances of memoranda, notes, etc., made by him for his own information in the course of his business which remain his property, although brought into existence in connexion with work done for clients.

It was, however, contended for the plaintiffs that even though these documents were their own property they should not be ordered to be produced, because they embodied information which was the subject of professional confidence as between the plaintiffs and the client company, and their production, and the consequent disclosure of their contents, would be a breach by the plaintiffs of their duty to the client company. Outside the area of legal professional privilege, which is not in question

[4] [1941] 2 K.B. 205.
[5] Hudson on Building Contracts, 4th ed., Vol. 2, p. 147.
[6] 7 B. & C. 528.

Annex 14

A

WENTWORTH v DE MONTFORT AND OTHERS

Court of Appeal: Hope, Samuels and Mahoney JJA

17 November, 16 December 1988

Legal Practitioners — Solicitor and client — Ownership of documents in possession of solicitor.

B

Held: (1) Where a solicitor is acting only as an agent for a client who is his principal in the doing of some act, the ordinary rules of agency apply to him and a document brought into existence or received by him when so acting belongs to the client. (353G)

Chantrey Martin (A Firm) v Martin [1953] 2 QB 286, followed.

(2) Where a solicitor is acting for a client other than as agent for the client, property in documents brought into existence or received by him when not so acting depend on principles referable to the relationship of a professional person and his client (353G), as to which relevant considerations include whether or not the client was charged for the creation of the document and whether the solicitor created the document for his client's benefit and protection, or did so for his own benefit and protection. (355G)

C

(3) A solicitor's trust account records of his dealings with a client's money is the property of the solicitor but the client is entitled to inspect them and to have information about them and to be provided with copies if asked for. (356D-G)

D

Re Londerry's Settlement; Peat v Walsh [1964] Ch 594, referred to.

(4) A solicitor's cheque requisition form is an internal record made for his own purposes and benefits and cannot be said to be a document made by him on behalf of his client. Therefore, it is the property of the solicitor. (357A)

(5) Financial records, whether kept pursuant to statutory duty or otherwise, and whether computerised or otherwise, which a solicitor keeps in relation to transactions concerning the moneys of a client held by him in his trust account and the disbursement of these moneys, are the property of the solicitor and not the client. However, the client is entitled to information concerning his financial affairs as appear on the records and, where appropriate, to copies of them. (358A-B)

E

(6) Notes made by a solicitor of telephone attendances on other persons, records of personal attendances on persons other than the client or at court and correspondence with persons other than the client may be the property of the solicitor or the client depending on the nature and content and whether they were made for the primary benefit or purposes of the solicitor or the client. (359F-360F)

F

(7) The internal records and memoranda of a solicitor as to work done or work to be done are documents which are created by the solicitor for his own benefit and not for the benefit of his client and are, therefore, the property of the solicitor. (359G)

(8) Generally, documents involving counsel are documents created or received for the benefit of the client, even though they may also be for the benefit of the solicitor. The client is entitled to the original or a copy of them. Counsel's brief belongs to the client. (360G)

G

(9) Generally, any correspondence between a solicitor and officers of the court, and any notes of conversations by someone on the part of the solicitor and an officer of the court belongs to the client, although the solicitor would be able to keep copies of them. (361B)

(10) Requisitions made for internal photocopying of documents by an employee of the solicitor belong to the solicitor. (361C)

A belonged to Messrs Northcroft, and I want to know how that document which came into existence ever became the property of the plaintiffs. In my judgment it never did, and therefore the demand which was made ... for the return of this manuscript was illfounded in law."

This approach was affirmed by the Court of Appeal in *Chantrey Martin (A Firm) v Martin* [1953] 2 QB 286. Martin had been an employee of Chantrey Martin and had been dismissed for alleged breach of contract. B Chantrey Martin sued their former employee to recover salary which had been paid in advance and otherwise and Martin counter-claimed for wrongful dismissal. In his particulars Martin made certain allegations about irregularities he claimed to have found in the books of a company client of Chantrey Martin. He made an application for the production of certain documents relating to the auditing of the client company's accounts, but for which Chantrey Martin claimed privilege on the ground that they were the property of the company client. The judgment of the Court of Appeal was C given by Jenkins LJ who, having discussed *Leicestershire County Council* and *London School Board*, concluded that apart from correspondence with the Inland Revenue and the client company's own ledgers the documents were the property of Chantrey Martin. His Lordship distinguished *Ex parte Horsfall* (1827) 7 B & C 528; 108 ER 820, as turning on the nature of the services rendered by an attorney or solicitor and the system upon which he is remunerated for those services. His Lordship went on to say (at 293):

D "... Even in the case of a solicitor there must, we should have thought, be instances of memoranda, notes, etc, made by him for his own information in the course of his business which remain his property, although brought into existence in connexion with work done for clients."

As regards the Inland Revenue documents, which comprised letters received from the Inland Revenue and copies of letters written to the Inland E Revenue, his Lordship held that in conducting this correspondence the plaintiffs must have been acting as agents for the client company for the purpose of settling with the Inland Revenue the client company's tax liability. It was held that these letters were the property of the client company.

It thus appears that if a solicitor is acting only as agent for a client who is his principal in the doing of some act, the ordinary rules of agency apply to F him, and documents brought into existence or received by him when so acting belong to the client. However in other cases, different principles apply, those principles being referable to the relationship between a professional person and his client.

The principles which are to be applied do not form a coherent whole, and some of them have been formulated in a context which no longer exists. However it is clear that documents including financial records which a solicitor holds relating to the affairs (including litigation) of a client do not G necessarily belong to the client. The passages which I have quoted from judgments of the English Court of Appeal clearly establish this position.

There are a number of reports of decisions on particular matters which throw some light on the question. I have already referred to *Ex parte Horsfall* where Lord Tenterden held that drafts and copies of certain deeds in the custody of an attorney were the property of his client on the ground

requisition, the name of the client, the nature of the relevant business of the client, the name of the payee, and the purpose of the payment and the amount. The requisition then goes to the relevant employee of the firm who makes out the cheque and enters on the cheque requisition form the date and number of the cheque. In my opinion this form is the property of the solicitors. It is an internal record made for their own purposes and benefit and cannot be said to be a document made by them as agent for Ms Wentworth. The decision in *Re Ellis & Ellis* does not apply, for that was a case where the solicitor was acting only as an agent. I can see no basis on which Ms Wentworth can claim to be the owner of any such form.

2. Computer printouts:

The financial records of Sly & Russell are computerised and the firm holds copies of the printouts of the information stored in the computer, and presumably can make as many copies of them as it wishes. I do not know the details of the way in which the computer records information but examples of printouts produced by Sly & Russell show that they can relate solely to Ms Wentworth's affairs. It may be that other computer printouts relate to the affairs of other clients as well as those of Ms Wentworth. I do not understand how any distinction in principle can be made between these records and records in documents such as cash books, ledgers and journals. Whatever may be the position in relation to ordinary trustees, solicitors who hold money in trust for their clients have two roles and are subject to special duties, and they are entitled to and indeed must retain their financial records.

Until the *Legal Profession (Trust Accounts and Controlled Money) Regulation* 1988 came into force, the trust account regulations made under the *Legal Practitioners Act* 1898 required solicitors to keep or cause to be kept at their registered office the following documents:

(a) a receipt book;
(b) a bank deposit book;
(c) a cash book, or receipts cash book and payments cash book;
(d) trust ledger;
(e) a trust cheque book;
(f) trust ledger trial balance statements;
(g) a trust journal.

These records were required to be retained for a period of five years after the last entry had been made in them. Although it may not be relevant for present purposes, I would have thought that this last provision did not mean that trust account records could be disposed of even though trust money was still held by the solicitor, simply because nothing had happened requiring any entry to be made during the last five years. The last entry must refer to the last entry clearing the account.

Those regulations did not make provision in respect of computerised accounts. The 1988 regulations enlarge to some extent the nature of the trust records to be kept, require records to be retained for a period of six years, and make special provision in relation to computerised accounts.

As it seems to me the records, whether computerised or otherwise, which a solicitor keeps in relation to transactions concerning the moneys of a client held in his trust account and the disbursement of those moneys are his property and not the property of his client. This result can be arrived at

whether the principles which relate to trustees and beneficiaries are applied or those relating to solicitor and client are applied. In so far as the records are those of a continuing trustee, they belong to the trustee, the beneficiary is entitled to information concerning their contents and where appropriate to copies of them but the beneficiary does not own them. In so far as the solicitor has ceased to be a trustee, he is still required by law to maintain and to retain proper financial records. Looked at as a solicitor's records, no doubt they are kept in part for the benefit of the client but they are also kept for the benefit of the solicitor who must know and be able to establish not only to the client but to persons exercising the relevant powers under the *Legal Practitioners Act* precisely what he has done with moneys in his trust account. His liability to account to inspectors and others pursuant to the *Legal Practitioners Act* is not a liability which has been created solely for the benefit of the solicitor's client. It is for the client's benefit, but it is also for the benefit of the public generally, which has a considerable interest in ensuring the integrity of solicitors and their observance of their professional and other obligations.

Accordingly, whilst Ms Wentworth is entitled to information concerning her financial affairs as appearing on the records kept by Sly & Russell, whether computerised or otherwise, she does not own those records. Having regard to technological advances and the ease with which copies can now be made, I should have thought that the solicitor who keeps computerised accounts should supply his client with a copy of the relevant printout, but at the client's expense. That however is not the issue in the present case; the issue is simply whether any printout of the computerised records concerning Ms Wentworth's affairs belongs to the solicitors. In my opinion it does, unless it is a copy which has been made for and at the expense of Ms Wentworth.

3. Notes of Sly & Russell relating to telephone attendances on persons other than Ms Wentworth:

The notes made by a solicitor of telephone conversations with persons other than his client, but relating to the client's affairs, may obviously fall into an almost indefinite number of classes. On the one hand, a solicitor could have a telephone conversation with a person whom the client alleges owes him money. The alleged debtor may give the solicitor his version of the matter, make admissions, deny his obligation or make a counter-claim. As it seems to me the solicitor's record of conversations of these kinds, although made in part for his benefit or purposes, are of primary benefit to the client. If the client determined the solicitor's retainer and went to another solicitor, it could be critical to that other solicitor to have the record which the solicitor has made of the conversation. Again a solicitor may interview a witness and take a statement from him. I would have thought that such a statement was taken for the benefit of the client as well as by the solicitor for his own purposes and undoubtedly the client would be charged for the taking of the statement. If a new solicitor took over a client's business, the former solicitor having been paid his fees, I would have thought that the former solicitor would be bound to hand over the statement to the new solicitor, although he could keep a copy for which he had not charged.

As I have indicated *Cordery* suggests that both that "entries of attendance" and "proofs of evidence" are the property of the solicitor. No

A authority is cited for these suggestions, and I would have thought that they both fell squarely within the first of the four categories described by *Cordery* and that they each belonged to the client. The "*Guide to the Professional Conduct of Solicitors*" issued by the (English) Council of the Law Society (1974) states (at 39) that a memorandum of a telephone conversation with a third party made by a solicitor is the property of the client, and is accordingly to be handed over on a change of solicitors. On the other hand, B a solicitor may well make a note of a telephone conversation which he has with a person relating to the work he is doing for a client, but the conversation may be solely for the benefit of the solicitor and not be chargeable to the client.

Between this class of case and the former there are no doubt cases where questions of degree are involved, and where predominant purpose may resolve the issue. Thus one of the examples provided by Sly & Russell falling C within this category was a note of a conversation with senior counsel in respect of the payment of his fees. Counsel look primarily to solicitors for the payment of their fees and solicitors have a professional responsibility for their payment. Clients of course have an interest, and a very real interest, in counsel's fees, but I should think that a record of a conversation by a solicitor with senior counsel concerning the non-payment of his fees would be a record belonging to the solicitor. On the other hand a record of a conversation between the solicitor and the director of a legal aid D organisation discussing a costs position seems to me to be the property of the client. If the solicitor had written a letter rather than had a telephone conversation and received a letter in reply, I would have thought that both belong to the client although the solicitor would be entitled to retain a copy of each.

It appears from this discussion that it is not possible to give a single answer to the question whether a document falling within this category is E the property of Ms Wentworth or of the solicitors unless its nature and the relevant facts are known. Some guidance however may be obtained from the particular examples which I have discussed.

4. Internal Sly & Russell records and memoranda as to work done or work to be done:

These records in my opinion fall within the category of documents which F are created by solicitors for their own benefit and not for the benefit of their client, and there is no principle upon which Ms Wentworth could base her claim to ownership. If there were no special arrangement as to fees, I do not think that the solicitor would be entitled to charge for making these records. If there is an arrangement that fees are to be charged upon a time basis which would include the time for making these records, I do not think that on that account alone, the records would become the property of the client. Thus a barrister may make written notes of arguments he proposes to G submit to a court and if he charges upon a time basis for out of court work, the client has in a sense been charged for that work. However I do not think that that makes those notes the property of the client; they would be made by the barrister entirely for his own professional purposes even though they are made in the course of carrying out work for the client. The position is the same in the case of the internal records as in relation to the analogous

internal records of a solicitor. Records falling within this category belong to Sly & Russell.

5. Records of personal attendances by Sly & Russell on any person other than Ms Wentworth or at court:

The ownership of the records of personal attendances on persons other than Ms Wentworth is to be determined on the same principles as those applying to records of telephone attendances. As in the case of those records, it is not possible to give a single answer in relation to the records falling within this category, but the examples I have discussed in relation to category 3 are equally applicable to records falling within category 5.

Similarly the question of the ownership of records of attendances at court do not admit of a single general answer. A record of such a proceeding may be made for the benefit of both client and solicitor; for the client because it is important for a client to know and to have a record of what has happened in court, and his solicitor is a person on whom he must be entitled to rely for information about what has happened. No doubt also such a record would be valuable for any new solicitor. On the other hand the solicitor would want a record for his own purposes in order to be able to establish what has taken place and as a basis for future action on behalf of the client. In these cases in my opinion the client is entitled to the original record and the solicitor is entitled to retain a copy. No doubt there may be some records of court attendances which are made primarily for the benefit or protection of the solicitor. Thus notes made by a solicitor when at court to remind him of what matters he should attend to seem to me to be a record wholly or substantially for his benefit or purposes and not for the benefit of the client. Such a record would in my opinion belong to the solicitor.

6. Correspondence by Sly & Russell with any person other than Ms Wentworth:

These communications are subject to the same principles as those in category 3, that is, notes of telephone conversations by Sly & Russell with persons other than Ms Wentworth. No single answer can be given; as appears from the authorities to which I earlier referred, this correspondence is often sent or received by a solicitor as agent for his client. In such a case the correspondence belongs to the client. No doubt there are cases where it would be the solicitor who would be entitled to the property.

7. Any document held by Sly & Russell involving counsel:

Generally speaking documents involving counsel would be documents created or received for the benefit of the client, even though they may also be for the benefit of the solicitor, and the client would be entitled to the originals or a copy of them. Thus counsel's brief must belong to the client. If in the middle of litigation the client changed its solicitor, the new solicitor would be entitled to a copy of the brief and upon its return the original brief of counsel. Notes of conferences held by solicitors with counsel, either in counsel's chambers or by telephone, would likewise generally belong to the client, as would correspondence between counsel and solicitor. As I have previously indicated in relation to a record of a conversation about non-payment of counsel's fees, records and notes of some conversations and

A some correspondence may in particular circumstances belong to the solicitor but this would not generally be the position.

8. Communications between Sly & Russell and any officer of the court:

Any correspondence between Sly & Russell and officers of the court, and any note of the conversation by someone on the part of Sly & Russell and an officer of the court, would be subject to the same principles which I have discussed in relation to other correspondence or records of conversations
B with third parties. Generally they would belong to the client although the solicitor would be entitled to keep a copy of them. Here again there may be some particular letters or records which are solely for the solicitor's benefit in which event the solicitor would be entitled to them.

9. Photocopy requisitions of any matter in relation to litigation:

In my opinion requisitions made for the photocopying of documents, by
C an employee of Sly & Russell are the records of Sly & Russell. They relate essentially to its own internal conduct of its business, and no relevant principle entitles the client to them. Requisitions to copiers outside the firm are to be dealt with in accordance with the principles applying to communications with third parties.

10. Internal Sly & Russell attempted financial reconciliation documents:

These documents belong to Sly & Russell and not to Ms Wentworth.
D They are in effect the working papers of Sly & Russell in relation to their accounting obligations and are either wholly or predominantly for their benefit.

11. Any financial records that do not fall within the definition of cash book, ledger or journal:

I have earlier discussed the principles that apply to these records. In my
E opinion, apart from exceptional cases such as receipts for money paid for the client to third parties, Sly & Russell's financial records concerning Ms Wentworth's affairs, all of which relevantly concern litigation, are their property. In so far as Sly & Russell have records concerning money held in their trust account for Ms Wentworth, the principles I have referred to earlier apply. Ms Wentworth is entitled to inspect the records and to have information about them, and to have Sly & Russell render accounts in respect of the moneys but the records themselves belong to Sly & Russell.

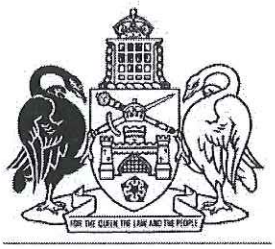
F

12. All trust account bank statements or any other bank account statement relating to an amount of money held for Ms Wentworth:

Applying the principles which I have described, these bank statements (which would normally relate to moneys of other clients, as well as Ms Wentworth) belong to Sly & Russell, but Ms Wentworth is entitled to inspect them and to be given information about them.

G The parties told the Court that the resolution of the issues as to property in the documents would go a long way to resolving most of the issues in the application by Ms Wentworth to adduce fresh evidence. Hopefully this will prove to be correct. However I do not think that it is possible for the Court to make any orders in that application at this stage, save to stand the application over to a date to be fixed by the Registrar, and to reserve the costs.

Annex 15



Australian Capital Territory

Legal Profession (Solicitors) Rules 2007

Subordinate Law SL2007- 31

made under the

Legal Profession Act 2006

(a) served notice in writing on the client of the practitioner's intention to terminate the retainer and withdraw from the proceedings at the expiration of seven (7) days if the client fails, within that time, to make satisfactory arrangements for payment of the practitioner's costs; and

(b) delivered a copy of that notice to the Registrar of the Court in which the trial is listed to commence.

5.3 Without limiting the general application of Rule 5.1, a practitioner, who is acting for a legally assisted client in any proceedings, may terminate the practitioner's retainer upon giving reasonable notice in writing to the client of the practitioner's intention so to do, if the client's grant of legal aid is withdrawn, or otherwise terminated, and the client is unable to make any other satisfactory arrangements for payment of the practitioner's costs which would be incurred if the retainer continued.

6. Ownership of Clients' Documents - Termination of Retainer

6.1 A practitioner must retain, securely and confidentially, documents to which a client is entitled, for the duration of the practitioner's retainer and at least seven years thereafter, or until such time as the practitioner gives them to the client or another person authorised by the client to receive them, or the client instructs the practitioner to deal with them in some other manner.

6.2 Upon completion or termination of a practitioner's retainer, a practitioner must, when requested so to do by the practitioner's client, give to the client, or another person authorised by the client, any documents related to the retainer to which the client is entitled, unless :

(a) the practitioner has completed the retainer; or

(b) the client has terminated the practitioner's retainer; or

(c) the practitioner has terminated the retainer for just cause and on reasonable notice; and

the practitioner claims a lien over the documents for costs due to the practitioner by the client.

6.3 Despite Rule 6.2, a practitioner who claims to exercise a lien for unpaid costs over a client's documents, which are essential to the client's defence or prosecution of current proceedings, must:

(a) deal with the documents as provided in Rule 26, if another practitioner is acting for the client; or

(b) upon receiving satisfactory security for the unpaid costs, deliver the documents to the client.

6.4 The documents to which a client of a practitioner should be entitled will usually include:

(a) documents prepared by a practitioner for the client, or predominantly for the purposes of the client, and for which the client has been, or will be, charged costs by the practitioner; and

(b) documents received by a practitioner from a third party in the course of the practitioner's retainer for or on behalf of the client or for the purposes of a client's business and intended for the use or information of the client.

7. Acting for more than one party

7.1 For the purposes of this Rule:

Annex 16

Foreign States Immunities Act 1985

Act No. 196 of 1985 as amended

This compilation was prepared on 3 March 2010
taking into account amendments up to Act No. 8 of 2010

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Contents

An Act relating to foreign State immunity

Part I—Preliminary

1 Short title [*see* Note 1]

This Act may be cited as the *Foreign States Immunities Act 1985*.

2 Commencement [*see* Note 1]

The provisions of this Act shall come into operation on such day as is, or such respective days as are, fixed by Proclamation.

3 Interpretation

(1) In this Act, unless the contrary intention appears:

agreement means an agreement in writing and includes:

(a) a treaty or other international agreement in writing; and

(b) a contract or other agreement in writing.

Australia when used in a geographical sense, includes each of the external Territories.

bill of exchange includes a promissory note.

court includes a tribunal or other body (by whatever name called) that has functions, or exercises powers, that are judicial functions or powers or are of a kind similar to judicial functions or powers.

Department of Foreign Affairs means the Department administered by the Minister who administers the *Diplomatic Privileges and Immunities Act 1967*.

diplomatic property means property that, at the relevant time, is in use predominantly for the purpose of establishing or maintaining a diplomatic or consular mission, or a visiting mission, of a foreign State to Australia.

foreign State means a country the territory of which is outside Australia, being a country that is:

(a) an independent sovereign state; or

(b) a separate territory (whether or not it is self-governing) that is not part of an independent sovereign state.

initiating process means an instrument (including a statement of claim, application, summons, writ, order or third party notice) by reference to which a person becomes a party to a proceeding.

law of Australia means:

(a) a law in force throughout Australia; or

(b) a law of or in force in a part of Australia;

and includes the principles and rules of the common law and of equity as so in force.

military property means:

(a) a ship of war, a Government yacht, a patrol vessel, a police or customs vessel, a hospital ship, a defence force supply ship or an auxiliary vessel, being a ship or vessel that, at the relevant time, is operated by the foreign State concerned (whether pursuant to requisition or under a charter by demise or otherwise); or

(b) property (not being a ship or vessel) that is:

(i) being used in connection with a military activity; or

(ii) under the control of a military authority or defence agency for military or defence purposes.

Minister for Foreign Affairs means the Minister who administers the *Diplomatic Privileges and Immunities Act 1967*.

proceeding means a proceeding in a court but does not include a prosecution for an offence or an appeal or other proceeding in the nature of an appeal in relation to such a prosecution.

property includes a chose in action.

separate entity, in relation to a foreign State, means a natural person (other than an Australian citizen), or a body corporate or corporation sole (other than a body corporate or corporation sole that has been established by or under a law of Australia), who or that:

(a) is an agency or instrumentality of the foreign State; and

(b) is not a department or organ of the executive government of the foreign State.

(2) For the purposes of the definition of ***separate entity*** in subsection (1), a natural person who is, or a body corporate or a corporation sole that is, an agency of more than one foreign State shall be taken to be a separate entity of each of the foreign States.

(3) Unless the contrary intention appears, a reference in this Act to a foreign State includes a reference to:

(a) a province, state, self-governing territory or other political subdivision (by whatever name known) of a foreign State;

(b) the head of a foreign State, or of a political subdivision of a foreign State, in his or her public capacity; and

(c) the executive government or part of the executive government of a foreign State or of a political subdivision of a foreign State, including a department or organ of the executive government of a foreign State or subdivision;

but does not include a reference to a separate entity of a foreign State.

(4) A reference in this Act to a court of Australia includes a reference to a court that has jurisdiction in or for any part of Australia.

(5) A reference in this Act to a commercial purpose includes a reference to a trading, a business, a professional and an industrial purpose.

(6) A reference in this Act to the entering of appearance or to the entry of judgment in default of appearance includes a reference to any like procedure.

4 External Territories

This Act extends to each external Territory.

5 Act to bind Crown

This Act binds the Crown in all its capacities.

6 Savings of other laws

This Act does not affect an immunity or privilege that is conferred by or under the *Consular Privileges and Immunities Act 1972*, the *Defence (Visiting Forces) Act 1963*, the *Diplomatic Privileges and Immunities Act 1967* or any other Act.

7 Application

(1) Part II (other than section 10) does not apply in relation to a proceeding concerning:

(a) a contract or other agreement or a bill of exchange that was made or given;

(b) a transaction or event that occurred;

(c) an act done or omitted to have been done; or

(d) a right, liability or obligation that came into existence;

before the commencement of this Act.

(2) Section 10 does not apply in relation to a submission mentioned in that section that was made before the commencement of this Act.

(3) Part III and section 36 do not apply in relation to a proceeding instituted before the commencement of this Act.

(4) Part IV only applies where, by virtue of a provision of Part II, the foreign State is not immune from the jurisdiction of the courts of Australia in the proceeding concerned.

8 Application to courts

In the application of this Act to a court, this Act has effect only in relation to the exercise or performance by the court of a judicial power or function or a power or function that is of a like kind.

Part II—Immunity from jurisdiction

9 General immunity from jurisdiction

Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.

10 Submission to jurisdiction

(1) A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.

(2) A foreign State may submit to the jurisdiction at any time, whether by agreement or otherwise, but a foreign State shall not be taken to have so submitted by reason only that it is a party to an agreement the proper law of which is the law of Australia.

(3) A submission under subsection (2) may be subject to a specified limitation, condition or exclusion (whether in respect of remedies or otherwise).

(4) Without limiting any other power of a court to dismiss, stay or otherwise decline to hear and determine a proceeding, the court may dismiss, stay or otherwise decline to hear and determine a proceeding if it is satisfied that, by reason of the nature of a limitation, condition or exclusion to which a submission is subject (not being a limitation, condition or exclusion in respect of remedies), it is appropriate to do so.

(5) An agreement by a foreign State to waive its immunity under this Part has effect to waive that immunity and the waiver may not be withdrawn except in accordance with the terms of the agreement.

(6) Subject to subsections (7), (8) and (9), a foreign State may submit to the jurisdiction in a proceeding by:

(a) instituting the proceeding; or

(b) intervening in, or taking a step as a party to, the proceeding.

(7) A foreign State shall not be taken to have submitted to the jurisdiction in a proceeding by reason only that:

(a) it has made an application for costs; or

(b) it has intervened, or has taken a step, in the proceeding for the purpose or in the course of asserting immunity.

(8) Where the foreign State is not a party to a proceeding, it shall not be taken to have submitted to the jurisdiction by reason only that it has intervened in the proceeding for the purpose or in the course of asserting an interest in property involved in or affected by the proceeding.

(9) Where:

(a) the intervention or step was taken by a person who did not know and could not reasonably have been expected to know of the immunity; and

(b) the immunity is asserted without unreasonable delay;

the foreign State shall not be taken to have submitted to the jurisdiction in the proceeding by reason only of that intervention or step.

(10) Where a foreign State has submitted to the jurisdiction in a proceeding, then, subject to the operation of subsection (3), it is not immune in relation to a claim made in the proceeding by some other party against it (whether by way of set-off, counter-claim or otherwise), being a claim that arises out of and relates to the transactions or events to which the proceeding relates.

(11) In addition to any other person who has authority to submit, on behalf of a foreign State, to the jurisdiction:

(a) the person for the time being performing the functions of the head of the State's diplomatic mission in Australia has that authority; and

(b) a person who has entered into a contract on behalf of and with the authority of the State has authority to submit in that contract, on behalf of the State, to the jurisdiction in respect of a proceeding arising out of the contract.

11 Commercial transactions

(1) A foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction.

(2) Subsection (1) does not apply:

(a) if all the parties to the proceeding:

(i) are foreign States or are the Commonwealth and one or more foreign States; or

(ii) have otherwise agreed in writing; or

(b) in so far as the proceeding concerns a payment in respect of a grant, a scholarship, a pension or a payment of a like kind.

(3) In this section, ***commercial transaction*** means a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes:

(a) a contract for the supply of goods or services;

(b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and

(c) a guarantee or indemnity in respect of a financial obligation;

but does not include a contract of employment or a bill of exchange.

12 Contracts of employment

(1) A foreign State, as employer, is not immune in a proceeding in so far as the proceeding concerns the employment of a person under a contract of employment that was made in Australia or was to be performed wholly or partly in Australia.

(2) A reference in subsection (1) to a proceeding includes a reference to a proceeding concerning:

(a) a right or obligation conferred or imposed by a law of Australia on a person as employer or employee; or

(b) a payment the entitlement to which arises under a contract of employment.

(3) Where, at the time when the contract of employment was made, the person employed was:

(a) a national of the foreign State but not a permanent resident of Australia; or

(b) an habitual resident of the foreign State;

subsection (1) does not apply.

(4) Subsection (1) does not apply where:

(a) an inconsistent provision is included in the contract of employment; and

(b) a law of Australia does not avoid the operation of, or prohibit or render unlawful the inclusion of, the provision.

(5) Subsection (1) does not apply in relation to the employment of:

(a) a member of the diplomatic staff of a mission as defined by the Vienna Convention on Diplomatic Relations, being the Convention the English text of which is set out in the Schedule to the *Diplomatic Privileges and Immunities Act 1967*; or

(b) a consular officer as defined by the Vienna Convention on Consular Relations, being the Convention the English text of which is set out in the Schedule to the *Consular Privileges and Immunities Act 1972*.

(6) Subsection (1) does not apply in relation to the employment of:

(a) a member of the administrative and technical staff of a mission as defined by the Convention referred to in paragraph (5)(a); or

(b) a consular employee as defined by the Convention referred to in paragraph (5)(b);

unless the member or employee was, at the time when the contract of employment was made, a permanent resident of Australia.

(7) In this section, permanent resident of Australia means:

(a) an Australian citizen; or

(b) a person resident in Australia whose continued presence in Australia is not subject to a limitation as to time imposed by or under a law of Australia.

13 Personal injury and damage to property

A foreign State is not immune in a proceeding in so far as the proceeding concerns:

(a) the death of, or personal injury to, a person; or

(b) loss of or damage to tangible property;

caused by an act or omission done or omitted to be done in Australia.

14 Ownership, possession and use of property etc.

(1) A foreign State is not immune in a proceeding in so far as the proceeding concerns:

(a) an interest of the State in, or the possession or use by the State of, immovable property in Australia; or

(b) an obligation of the State that arises out of its interest in, or its possession or use of, property of that kind.

(2) A foreign State is not immune in a proceeding in so far as the proceeding concerns an interest of the State in property that arose by way of gift made in Australia or by succession.

(3) A foreign State is not immune in a proceeding in so far as the proceeding concerns:

(a) bankruptcy, insolvency or the winding up of a body corporate; or

(b) the administration of a trust, of the estate of a deceased person or of the estate of a person of unsound mind.

15 Copyright, patents, trade marks etc.

(1) A foreign State is not immune in a proceeding in so far as the proceeding concerns:

(a) the ownership of a copyright or the ownership, or the registration or protection in Australia, of an invention, a design or a trade mark;

(b) an alleged infringement by the foreign State in Australia of copyright, a patent for an invention, a registered trade mark or a registered design; or

(c) the use in Australia of a trade name or a business name.

(2) Subsection (1) does not apply in relation to the importation into Australia, or the use in Australia, of property otherwise than in the course of or for the purposes of a commercial transaction as defined by subsection 11(3).

16 Membership of bodies corporate etc.

(1) A foreign State is not immune in a proceeding in so far as the proceeding concerns its membership, or a right or obligation that relates to its membership, of a body corporate, an unincorporated body or a partnership that:

(a) has a member that is not a foreign State or the Commonwealth; and

(b) is incorporated or has been established under the law of Australia or is controlled from, or has its principal place of business in, Australia;

being a proceeding arising between the foreign State and the body or other members of the body or between the foreign State and one or more of the other partners.

(2) Where a provision included in:

(a) the constitution or other instrument establishing or regulating the body or partnership; or

(b) an agreement between the parties to the proceeding;

is inconsistent with subsection (1), that subsection has effect subject to that provision.

17 Arbitrations

(1) Where a foreign State is a party to an agreement to submit a dispute to arbitration, then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding for the exercise of the supervisory jurisdiction of a court in respect of the arbitration, including a proceeding:

(a) by way of a case stated for the opinion of a court;

(b) to determine a question as to the validity or operation of the agreement or as to the arbitration procedure; or

(c) to set aside the award.

(2) Where:

(a) apart from the operation of subparagraph 11(2)(a)(ii), subsection 12(4) or subsection 16(2), a foreign State would not be immune in a proceeding concerning a transaction or event; and

(b) the foreign State is a party to an agreement to submit to arbitration a dispute about the transaction or event;

then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding concerning the recognition as binding for any purpose, or for the enforcement, of an award made pursuant to the arbitration, wherever the award was made.

(3) Subsection (1) does not apply where the only parties to the agreement are any 2 or more of the following:

(a) a foreign State;

(b) the Commonwealth;

(c) an organisation the members of which are only foreign States or the Commonwealth and one or more foreign States.

18 Actions *in rem*

(1) A foreign State is not immune in a proceeding commenced as an action *in rem* against a ship concerning a claim in connection with the ship if, at the time when the cause of action arose, the ship was in use for commercial purposes.

(2) A foreign State is not immune in a proceeding commenced as an action *in rem* against a ship concerning a claim against another ship if:

(a) at the time when the proceeding was instituted, the ship that is the subject of the action *in rem* was in use for commercial purposes; and

(b) at the time when the cause of action arose, the other ship was in use for commercial purposes.

(3) A foreign State is not immune in a proceeding commenced as an action *in rem* against cargo that was, at the time when the cause of action arose, a commercial cargo.

(4) The preceding provisions of this section do not apply in relation to the arrest, detention or sale of a ship or cargo.

(5) A reference in this section to a ship in use for commercial purposes or to a commercial cargo is a reference to a ship or a cargo that is commercial property as defined by subsection 32(3).

19 Bills of exchange

Where:

(a) a bill of exchange has been drawn, made, issued or indorsed by a foreign State in connection with a transaction or event; and

(b) the foreign State would not be immune in a proceeding in so far as the proceeding concerns the transaction or event;

the foreign State is not immune in a proceeding in so far as the proceeding concerns the bill of exchange.

20 Taxes

A foreign State is not immune in a proceeding in so far as the proceeding concerns an obligation imposed on it by or under a provision of a law of Australia with respect to taxation, being a provision that is prescribed, or is included in a class of provisions that is prescribed, for the purposes of this section.

21 Related proceedings

Where, by virtue of the operation of the preceding provisions of this Part, a foreign State is not immune in a proceeding in so far as the proceeding concerns a matter, it is not immune in any other proceeding (including an appeal) that arises out of and relates to the first-mentioned proceeding in so far as that other proceeding concerns that matter.

22 Application of Part to separate entities

The preceding provisions of this Part (other than subparagraph 11(2)(a)(i), paragraph 16(1)(a) and subsection 17(3)) apply in relation to a separate entity of a foreign State as they apply in relation to the foreign State.

Part III—Service and judgments

23 Service of initiating process by agreement

Service of initiating process on a foreign State or on a separate entity of a foreign State may be effected in accordance with an agreement (wherever made and whether made before or after the commencement of this Act) to which the State or entity is a party.

24 Service through the diplomatic channel

(1) Initiating process that is to be served on a foreign State may be delivered to the Attorney-General for transmission by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department.

(2) The initiating process shall be accompanied by:
  (a) a request in accordance with Form 1 in the Schedule;
  (b) a statutory declaration of the plaintiff or applicant in the proceeding stating that the rules of court or other laws (if any) in respect of service outside the jurisdiction of the court concerned have been complied with; and
  (c) if English is not an official language of the foreign State:
    (i) a translation of the initiating process into an official language of the foreign State; and
    (ii) a certificate in that language, signed by the translator, setting out particulars of his or her qualifications as a translator and stating that the translation is an accurate translation of the initiating process.

(3) Where the process and documents are delivered to the equivalent department or organ of the foreign State in the foreign State, service shall be taken to have been effected when they are so delivered.

(4) Where the process and documents are delivered to some other person on behalf of and with the authority of the foreign State, service shall be taken to have been effected when they are so delivered.

(5) Subsections (1) to (4) (inclusive) do not exclude the operation of any rule of court or other law under which the leave of a court is required in relation to service of the initiating process outside the jurisdiction.

(6) Service of initiating process under this section shall be taken to have been effected outside the jurisdiction and in the foreign State concerned, wherever the service is actually effected.

(7) The time for entering an appearance begins to run at the expiration of 2 months after the date on which service of the initiating process was effected.

(8) This section does not apply to service of initiating process in a proceeding commenced as an action *in rem*.

25 Other service ineffective

Purported service of an initiating process upon a foreign State in Australia otherwise than as allowed or provided by section 23 or 24 is ineffective.

26 Waiver of objection to service

Where a foreign State enters an appearance in a proceeding without making an objection in relation to the service of the initiating process, the provisions of this Act in relation to that service shall be taken to have been complied with.

27 Judgment in default of appearance

(1) A judgment in default of appearance shall not be entered against a foreign State unless:

(a) it is proved that service of the initiating process was effected in accordance with this Act and that the time for appearance has expired; and

(b) the court is satisfied that, in the proceeding, the foreign State is not immune.

(2) A judgment in default of appearance shall not be entered against a separate entity of a foreign State unless the court is satisfied that, in the proceeding, the separate entity is not immune.

28 Enforcement of default judgments

(1) Subject to subsection (6), a judgment in default of appearance is not capable of being enforced against a foreign State until the expiration of 2 months after the date on which service of:

(a) a copy of the judgment, sealed with the seal of the court or, if there is no seal, certified by an officer of the court to be a true copy of the judgment; and

(b) if English is not an official language of the foreign State:

(i) a translation of the judgment into an official language of the foreign State; and

(ii) a certificate in that language, signed by the translator, setting out particulars of his or her qualifications as a translator and stating that the translation is an accurate translation of the judgment;

has been effected in accordance with this section on the department or organ of the foreign State that is equivalent to the Department of Foreign Affairs.

(2) Where a document is to be served as mentioned in subsection (1), the person in whose favour the judgment was given shall give it, together with a request in accordance with Form 2 in the Schedule, to the Attorney-General for transmission by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department.

(3) Where the document is delivered to the equivalent department or organ of the foreign State in the foreign State, service shall be taken to have been effected when it is so delivered.

(4) Where the document is delivered to some other person on behalf of and with the authority of the foreign State, service shall be taken to have been effected when it is so delivered.

(5) The time, if any, for applying to have the judgment set aside shall be at least 2 months after the date on which the document is delivered to or received on behalf of that department or organ of the foreign State.

(6) Where a judgment in default of appearance has been given by a court against a foreign State, the court may, on the application of the person in whose favour the judgment was given, permit, on such terms and conditions as it thinks fit, the judgment to be

enforced in accordance with this Act against the foreign State before the expiration of the period mentioned in subsection (1).

29 Power to grant relief

(1) Subject to subsection (2), a court may make any order (including an order for interim or final relief) against a foreign State that it may otherwise lawfully make unless the order would be inconsistent with an immunity under this Act.

(2) A court may not make an order that a foreign State employ a person or re-instate a person in employment.

Part IV—Enforcement

30 Immunity from execution

Except as provided by this Part, the property of a foreign State is not subject to any process or order (whether interim or final) of the courts of Australia for the satisfaction or enforcement of a judgment, order or arbitration award or, in Admiralty proceedings, for the arrest, detention or sale of the property.

31 Waiver of immunity from execution

(1) A foreign State may at any time by agreement waive the application of section 30 in relation to property, but it shall not be taken to have done so by reason only that it has submitted to the jurisdiction.

(2) The waiver may be subject to specified limitations.

(3) An agreement by a foreign State to waive its immunity under section 30 has effect to waive that immunity and the waiver may not be withdrawn except in accordance with the terms of the agreement.

(4) A waiver does not apply in relation to property that is diplomatic property or military property unless a provision in the agreement expressly designates the property as property to which the waiver applies.

(5) In addition to any other person who has authority to waive the application of section 30 on behalf of a foreign State or a separate entity of the foreign State, the person for the time being performing the functions of the head of the State's diplomatic mission in Australia has that authority.

32 Execution against commercial property

(1) Subject to the operation of any submission that is effective by reason of section 10, section 30 does not apply in relation to commercial property.

(2) Where a foreign State is not immune in a proceeding against or in connection with a ship or cargo, section 30 does not prevent the arrest, detention or sale of the ship or cargo if, at the time of the arrest or detention:

(a) the ship or cargo was commercial property; and

(b) in the case of a cargo that was then being carried by a ship belonging to the same or to some other foreign State—the ship was commercial property.

(3) For the purposes of this section:

(a) commercial property is property, other than diplomatic property or military property, that is in use by the foreign State concerned substantially for commercial purposes; and

(b) property that is apparently vacant or apparently not in use shall be taken to be being used for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes.

33 Execution against immovable property etc.

Where:

(a) property:

(i) has been acquired by succession or gift; or

(ii) is immovable property; and

(b) a right in respect of the property has been established as against a foreign State by a judgment or order in a proceeding as mentioned in section 14;

then, for the purpose of enforcing that judgment or order, section 30 does not apply to the property.

34 Restrictions on certain other relief

A penalty by way of fine or committal shall not be imposed in relation to a failure by a foreign State or by a person on behalf of a foreign State to comply with an order made against the foreign State by a court.

35 Application of Part to separate entities

(1) This Part applies in relation to a separate entity of a foreign State that is the central bank or monetary authority of the foreign State as it applies in relation to the foreign State.

(2) Subject to subsection (1), this Part applies in relation to a separate entity of the foreign State as it applies in relation to the foreign State if, in the proceeding concerned:

(a) the separate entity would, apart from the operation of section 10, have been immune from the jurisdiction; and

(b) it has submitted to the jurisdiction.

Part V—Miscellaneous

36 Heads of foreign States

(1) Subject to the succeeding provisions of this section, the *Diplomatic Privileges and Immunities Act 1967* extends, with such modifications as are necessary, in relation to the person who is for the time being:

(a) the head of a foreign State; or

(b) a spouse of the head of a foreign State;

as that Act applies in relation to a person at a time when he or she is the head of a diplomatic mission.

(2) This section does not affect the application of any law of Australia with respect to taxation.

(3) This section does not affect the application of any other provision of this Act in relation to a head of a foreign State in his or her public capacity.

(4) Part III extends in relation to the head of a foreign State in his or her private capacity as it applies in relation to the foreign State and, for the purpose of the application of Part III as it so extends, a reference in that Part to a foreign State shall be read as a reference to the head of the foreign State in his or her private capacity.

37 Effect of agreements on separate entities

An agreement made by a foreign State and applicable to a separate entity of that State has effect, for the purposes of this Act, as though the separate entity were a party to the agreement.

38 Power to set aside process etc.

Where, on the application of a foreign State or a separate entity of a foreign State, a court is satisfied that a judgment, order or process of the court made or issued in a proceeding with respect to the foreign State or entity is inconsistent with an immunity conferred by or under this Act, the court shall set aside the judgment, order or process so far as it is so inconsistent.

39 Discovery

(1) A penalty by way of fine or committal shall not be imposed in relation to a failure or refusal by a foreign State or by a person on behalf of a foreign State to disclose or produce a document or to furnish information for the purposes of a proceeding.

(2) Such a failure or refusal is not of itself sufficient ground to strike out a pleading or part of a pleading.

40 Certificate as to foreign State etc.

(1) The Minister for Foreign Affairs may certify in writing that, for the purposes of this Act:

(a) a specified country is, or was on a specified day, a foreign State;

(b) a specified territory is or is not, or was or was not on a specified day, part of a foreign State;

(c) a specified person is, or was at a specified time, the head of, or the government or part of the government of, a foreign State or a former foreign State; or

(d) service of a specified document as mentioned in section 24 or 28 was effected on a specified day.

(2) The Minister for Foreign Affairs may, either generally or as otherwise provided by the instrument of delegation, delegate by instrument in writing to a person his or her powers under subsection (1) in relation to the service of documents.

(3) A power so delegated, when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the Minister.

(4) A delegation under subsection (2) does not prevent the exercise of the power by the Minister.

(5) A certificate under this section is admissible as evidence of the facts and matters stated in it and is conclusive as to those facts and matters.

41 Certificate as to use

For the purposes of this Act, a certificate in writing given by the person for the time being performing the functions of the head of a foreign State's diplomatic mission in Australia to the effect that property specified in the certificate, being property:

(a) in which the foreign State or a separate entity of the foreign State has an interest; or

(b) that is in the possession or under the control of the foreign State or of a separate entity of the foreign State;

is or was at a specified time in use for purposes specified in the certificate is admissible as evidence of the facts stated in the certificate.

42 Restrictions and extensions of immunities and privileges—general

(1) Where the Minister is satisfied that an immunity or privilege conferred by this Act in relation to a foreign State is not accorded by the law of the foreign State in relation to Australia, the Governor-General may make regulations modifying the operation of this Act with respect to those immunities and privileges in relation to the foreign State.

(2) Where the Minister is satisfied that the immunities and privileges conferred by this Act in relation to a foreign State differ from those required by a treaty, convention or other agreement to which the foreign State and Australia are parties, the Governor-General may make regulations modifying the operation of this Act with respect to those immunities and privileges in relation to the foreign State so that this Act as so modified conforms with the treaty, convention or agreement.

(3) Regulations made under subsection (1) or (2) that are expressed to extend or restrict an immunity from the jurisdiction may be expressed to extend to a proceeding that was instituted before the commencement of the regulations and has not been finally disposed of.

(4) Regulations made under subsection (1) or (2) that are expressed to extend or restrict an immunity from execution or other relief may be expressed to extend to a proceeding that was instituted before the commencement of the regulations and in which procedures to

give effect to orders for execution or other relief have not been completed.

(5) Regulations in relation to which subsection (3) or (4) applies may make provision with respect to the keeping of property, or for the keeping of the proceeds of the sale of property, with which a proceeding specified in the regulations is concerned, including provision authorising an officer of a court to manage, control or preserve the property or, if, by reason of the condition of the property, it is necessary to do so, to sell or otherwise dispose of the property.

(6) Regulations under this section have effect notwithstanding that they are inconsistent with an Act (other than this Act) as in force at the time when the regulations came into operation.

(7) Jurisdiction is conferred on the Federal Court of Australia and, to the extent that the Constitution permits, on the courts of the Territories, and the courts of the States are invested with federal jurisdiction, in respect of matters arising under the regulations but a court of a Territory shall not exercise any jurisdiction so conferred in respect of property that is not within that Territory or a Territory in which the court may exercise jurisdiction and a court of a State shall not exercise any jurisdiction so invested in respect of property that is not within that State.

42A Extension of immunities—emergency prevention and management

(1) This section applies if the Minister is satisfied that a foreign State (or a separate entity of a foreign State) is providing, or is to provide, assistance or facilities:

(a) to the Australian Government, or the government of a State or Territory; and

(b) for the purposes of preparing for, preventing or managing emergencies or disasters (whether natural or otherwise) in Australia.

(2) The Governor-General may make regulations excluding or modifying the application of section 13 (personal injury and damage to property) with respect to the foreign State (or the separate entity of the foreign State) in relation to acts or omissions

done or omitted to be done by the foreign State (or the entity) in the course of the provision of the assistance or facilities.

Note: Section 22 applies section 13 to a separate entity of a foreign State.

43 Regulations

The Governor-General may make regulations, not inconsistent with this Act, prescribing matters:

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Schedule

Form 1

Section 24

Request For Service Of Originating Process On A Foreign State

TO: The Attorney-General of the Commonwealth

A proceeding has been commenced in (*name of court, tribunal, etc.*) against (*here insert name of foreign State*).

The proceeding concerns (*short particulars of the claim against the foreign State*).

In accordance with section 24 of the *Foreign States Immunities Act 1985*, enclosed are:

(a) the initiating process in the proceeding;

(b) a statutory declaration;

(c) *a translation of the initiating process into (*name of language*), an official language of the foreign State; and

(d) *a certificate signed by the translator,

and it is requested that the initiating process, *the translation and the certificate be transmitted by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department.

It is further requested that, when service of the initiating process and other documents has been effected on the foreign State in accordance with that Act, the Minister for Foreign Affairs certify accordingly under section 40 of that Act, and forward the certificate to (*name and address of person to whom certificate of service should be forwarded*).

DATED this day of 19

(*signature of plaintiff or applicant*)

* delete if not applicable.

Form 2

Section 28

Request For Service Of Default Judgment On A Foreign State

TO: The Attorney-General of the Commonwealth

In a proceeding in (*name of court, tribunal, etc.*), a judgment in default of appearance has been given against (*name of foreign State*).

The proceeding concerns (*short particulars of the claim against the foreign State*).

In accordance with section 28 of the *Foreign States Immunities Act 1985*, enclosed are:

(a) a copy of the judgment, authenticated as required by that Act;

(b) *a translation of the judgment into (*name of language*), an official language of the foreign State; and

(c) *a certificate signed by the translator,

and it is requested that the judgment, *the translation and the certificate be transmitted by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department.

It is further requested that, when service of the judgment and other documents has been effected on the foreign State in accordance with that Act, the Minister for Foreign Affairs certify accordingly under section 40 of that Act, and forward the certificate to (*name and address of person to whom certificate of service should be forwarded*).

DATED this day of 19

(*signature of judgment creditor*)

* delete if not applicable.

Notes to the *Foreign States Immunities Act 1985*

Note 1

The *Foreign States Immunities Act 1985* as shown in this compilation comprises Act No. 196, 1985 amended as indicated in the Tables below.

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
Foreign States Immunities Act 1985	196, 1985	16 Dec 1985	Ss. 1–17, 18(1), (3)–(5) and 19–43: 1 Apr 1986 (*see Gazette* 1986, No. S128) S. 18(2): 1 Jan 1989 (*see Gazette* 1988, No. S359)	
Statute Law (Miscellaneous Provisions) Act 1987	141, 1987	18 Dec 1987	S. 3: Royal Assent *(a)*	S. 5(1)
Foreign States Immunities Amendment Act 2009	89, 2009	18 Sept 2009	19 Sept 2009	—
Statute Law Revision Act 2010	8, 2010	1 Mar 2010	Schedule 1 (items 30, 31): Royal Assent	—

Act Notes

(a) The *Foreign States Immunities Act 1985* was amended by section 3 of the *Statute Law (Miscellaneous Provisions) Act 1987*, subsection 2(1) of which provides as follows:

(1) Subject to this section, this Act shall come into operation on the day on which it receives the Royal Assent.

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Part I	
S. 3	am. No. 8, 2010
Part II	
S. 22	am. No. 141, 1987
Part V	
Heading to s. 42	am. No. 89, 2009
S. 42	am. No. 89, 2009
S. 42A	ad. No. 89, 2009

Annex 17

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 97. Jurisdictional Immunities of Foreign States

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

→ § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

→ § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph

(1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

(g) Limitation on discovery.--

(1) In general.--(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.--(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.--The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.--A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

➞§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) In general.--

(1) No immunity.--A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard.--The court shall hear a claim under this section if--

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred--

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) Limitations.--An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of--

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) Private right of action.--A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to--

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a) (1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) Additional damages.--After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) Special masters.--

(1) In general.--The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) Transfer of funds.--The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) Appeal.--In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) Property disposition.--

(1) In general.--In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is--

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) Notice.--A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) Enforceability.--Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) Definitions.--For purposes of this section--

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

→ § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

→ § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim--

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

➡§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

→ § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

→§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall

not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in

subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries--

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.--The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.--

(1) In general.--Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of--

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable.--Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders.--Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

➡§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may

purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

END OF DOCUMENT

Annex 18

January 2009

ISRAEL

Foreign States Immunity Law 5769-2008

Chapter One: Definitions

Definitions

1 . In this Law –

"central bank" includes any agency constituting the central monetary authority of a foreign state;

"separate entity" means a governmental authority of a foreign state having separate legal personality from that of the government of that state.

"foreign state" includes a political unit within a federal state, governmental agencies of a foreign state, official functionaries representing such a state in performing their function, and a separate entity.

"commercial asset" means any asset, excluding a diplomatic or consular asset, a military asset or an asset of a central bank which is held in Israel by a foreign state for a commercial purpose; in this matter, an asset held in Israel by a foreign state and not intended for a particular purpose shall be regarded as being held by that state for a commercial purpose, unless it is proved otherwise;

"military asset" means an asset used or intended for use in connection with military activity and which is of a military nature or is controlled by the military authorities;

"commercial transaction" means any transaction or activity within the sphere of private law which is of a commercial nature, including an agreement for the sale of goods or services, a loan or other transaction for finance, guarantee or indemnity, and which by its nature does not involve the exercise of governmental power.

Chapter Two: Immunity from Jurisdiction

Part One: Immunity of the Foreign State

Immunity of a foreign state from the jurisdiction

2. A foreign state shall have immunity from the jurisdiction of the courts in Israel, excluding jurisdiction in criminal matters (hereafter referred to as immunity from jurisdiction), subject to the provisions of this statute.

Part Two: Exceptions to Immunity

Commercial transactions

3. A foreign state shall not have immunity from jurisdiction where the cause of action is a commercial transaction

Contract of Employment

4. (a) A foreign state shall not have immunity from jurisdiction in an action by an employee or by an applicant for employment, where all the following conditions are fulfilled:

(1) the cause of action is within the exclusive jurisdiction of a Regional Labour Court, under any legal provision;

(2) the subject matter of the action is labour, all or a part of which has been performed, or is to be performed, in Israel

(3) when the cause of action arose, the employee or applicant for employment was an Israeli citizen or was habitually resident in Israel or in a region; in this context the term "region" shall be as defined in the Emergency Regulations (Extension of Validity) (Judea and Samaria – Adjudication of Offences and Legal Assistance) Law, 5728-1967.

(b) The provisions of this section shall not apply if the employee or applicant for employment was, at the commencement of the proceeding, a citizen of the foreign state and was not resident in Israel.

(c) In an action by an employee or applicant for employment where the conditions specified in this section are not fulfilled, the foreign state shall not have immunity from jurisdiction, even where the cause of action is a commercial transaction as provided in section 3.

Actions in tort

5. A foreign state shall not have immunity from jurisdiction in an action in tort where personal injury or damage to tangible property has occurred, provided the tort was committed in Israel.

Property rights

6. A foreign state shall not have immunity from jurisdiction in an action or in proceedings as detailed below:

(1) an action concerning a right or other interest that the foreign state has in immovable property situated in Israel, an action concerning possession or use by a foreign state of immovable property situated in Israel or an action concerning the obligation of a foreign state deriving from such right, other interest or use;

(2) an action or proceedings concerning a right or other interest of the foreign state in assets situated in Israel to which it is entitled by way of succession, gift or as *bona vacantia*, or an action or proceedings concerning an obligation deriving from such right or other interest;

(3) proceedings concerning estates, property of persons under guardianship, proceedings for insolvency or administration of trusts;

Intellectual property

7. A foreign state shall not have immunity from jurisdiction in an action in matters of intellectual property as defined in section 40(4)of the Courts Law{Consolidated Version}, 5744-1984, which concerns -

(1) the right of the foreign state in intellectual property;

(2) allegation of a breach, in Israel, by the foreign state of a right in intellectual property;

Action against a ship or cargo

8. (a) A foreign state shall not have immunity from jurisdiction in an action against a ship which at the commencement of the proceeding was owned or operated by that foreign state, or in an action against a cargo of a ship, which cargo was owned by that foreign state at the commencement of the proceeding, provided that at the time the cause of action arose, the ship or the cargo, whichever is applicable, was being used for a commercial purpose.

(b) In this section, "ownership" of a ship or cargo includes possession, control or other proprietary connection of the foreign state to the ship or cargo.

Part Three: Waiver of Immunity

Waiver of immunity by agreement

9. (a) A foreign state shall not have immunity from jurisdiction where it has expressly waived such immunity in writing, or where it has waived it by written or oral notice to the court.

(b) A waiver under this section may be made generally or in respect of a particular matter, in advance or *ex post factum*, and may be limited by exceptions.

(c) The head of a diplomatic mission of a foreign state in Israel or any person acting in such capacity, is authorized to waive the immunity under this section, in the name of the foreign state, and in respect of immunity in a proceeding originating in a contract to which the foreign state is a party, any person who has contracted in the name of the foreign

state shall also be so authorized; the provisions of this sub-section shall not derogate from an authority conferred on any other person to waive the immunity in the name of the foreign state.

Waiver of immunity by way of conduct

10. (a) A foreign state shall not have immunity from jurisdiction in a counterclaim or in third-party proceedings, where it was the foreign state that initiated the court proceeding or joined them, thereby becoming a party to the proceedings.
(b) The provisions of sub-section (a) shall not apply to a foreign state which joined the proceeding in one of the following circumstances:

(1) the foreign state pleads immunity from the jurisdiction;

(2) the object of the foreign state in adhering to the proceeding is to put before the court submissions regarding a right or other interest it has in assets involved in the proceeding or regarding any other right which may be affected by the proceeding.

(c) In this section, "counterclaim" means a counterclaim in a civil action having the same subject-matter, or where they both arise from the same circumstances or where the relief sought in the counterclaim is not different from and does not exceed the relief sought in the original action.

Arbitration

11. (a) Where a foreign state has agreed in writing to submit to arbitration a dispute which has arisen or is likely to arise in the future, the foreign state shall not have immunity from jurisdiction, in respect of court proceedings connected with the arbitration, unless it has been otherwise determined in the arbitration agreement.
(b) The provisions of this section shall not apply to an arbitration agreement between states to which the provisions of public international law apply, except such an agreement one of the parties to which is a separate entity, not being a central bank.

Time for raising plea of immunity

12. (a) A foreign state shall raise a plea of immunity from jurisdiction at the earliest opportunity, and no later than when it first submits its case regarding the substance of the action.
(b) Where the foreign state has not raised a plea of immunity

from jurisdiction by the time limit specified in sub-section (a), it shall be regarded as having waived its immunity.
(c) Despite the provisions of sub-section (b), a foreign state shall not be regarded as having waived its immunity if it raised a plea of immunity immediately after the facts in respect of which it is entitled to immunity became known to it, and it did not know nor was it required to know those facts at the time specified in sub-section (a).

Part Four: Procedure

Service of documents on a foreign state

13 (a) An action brought against a foreign state with the object of commencing legal proceedings against it or a judgment given against it in default of defence shall be served, through the Ministry of Foreign Affairs, on the Foreign Office of the foreign state.
(b) Court documents in a proceeding to which the foreign state is a party, not enumerated in sub-section (a), shall be served on that state through its attorney for that proceeding, but if this is not possible, they shall be served in the manner specified in sub-section (a).
(c) The response of the foreign state to the action brought against it or to a judgment in default of defence given against it shall be filed within 60 days from the day they were served on it; the court may however extend that period.
(d) This section shall not apply to service of documents on a separate entity.

Judgment in default of defence

14 Where an action has been brought against a foreign state, and that state has not submitted a defence in good time, the court shall only give judgment against it in default of defence if it is convinced that the foreign state does not have immunity from its jurisdiction under the provisions of this statute.

Chapter Three: Immunity from Execution Proceedings

Immunity of a foreign state from execution proceedings

15. (a) The assets of a foreign state shall have immunity from proceedings for execution of a judgment or other decision of a court in Israel.

(b) No fine or prison sentence shall be imposed on a foreign state or on a person acting in its name for non-compliance with a judgment or other decision of a court in Israel given against that state.
(c) The provisions of this section shall not apply to a

judgment or other decision of a court in Israel in criminal matters.

Proviso to immunity

16. Notwithstanding the provisions of section 15(a), the assets of a foreign state detailed below shall not benefit from immunity under that section:

(1) commercial assets;

(2) assets situated in Israel to which the foreign state is entitled by way of succession, gift or as *bona vacantia*;

(3) immovables situated in Israel.

Waiver of immunity

17. (a) Assets of a foreign state shall not benefit from immunity under section 15 if the foreign state has expressly waived such immunity in writing, or by written or oral notice to the court.

(b) A waiver under this section may be made generally or in respect of a specific matter, in advance or *ex post factum*, and may be limited by exceptions, provided that waiver in respect of a diplomatic or consular asset or an asset of a central bank shall be made expressly.

(c) A waiver by a foreign state of its immunity from the jurisdiction given under sections 9 or 10 shall not be considered a waiver under this section.

(d) Waiver under this section shall not apply to a military asset.

(e) The head of a diplomatic mission of a foreign state in Israel or any person acting in such capacity, shall be authorized to waive the immunity under this section, in the name of the foreign state; the provisions of this sub-section shall not derogate from the authority conferred on any other person to waive the immunity in the name of the foreign state.

Execution against assets of a separate entity

18. Notwithstanding the provisions of section 15(a), the assets of a separate entity, excluding a central bank, shall not have immunity from execution of a judgment or other decision rendered by a court in Israel, except where the jurisdiction of the court originates in waiver of the jurisdiction, given under sections 9 or 10.

Chapter Four: Miscellaneous Provisions

Notice to the Attorney General

19. (a) Where a foreign state raises a plea of immunity under this statute, it shall give notice thereof to the Attorney General.

(b) Where a question of immunity of a foreign state under this statute arises in court, and no notice thereof has been given under sub-section (a), the court shall give notice thereof to the Attorney General.

Application of immunity to a political entity which is not a foreign state

20. The Minister of Foreign Affairs, in consultation with the Attorney General and with the approval of the Government and of the Constitution and Law Committee of the Knesset, may prescribe by order that a political entity shall have immunity under Chapters Two or Three of this statute, even though its international legal status does not amount to that of a state; an order under this section may be general, for certain types of matters or for a specific matter, and may be restricted to a certain period.

Diplomatic and consular immunity

21. This statute shall not derogate from diplomatic or consular immunity or any other immunity applicable in Israel, under any law or usage.

Status of foreign military forces

22. Notwithstanding the provisions of this statute, legal actions based on any act or omission committed by foreign military forces whose rights and status in Israel were determined by agreement between the State of Israel and the state to which the foreign military forces belong shall be governed by that agreement.

Implementation and regulations

23. The Minister of Justice shall be in charge of implementing this statute, and he may, in consultation with Minister of Foreign Affairs, make regulations on any matter concerning its implementation.

Application

24. This statute shall also apply to proceedings brought before it came into force, provided that the hearing on those proceedings has not yet commenced.

Ehud Olmert
Prime Minister

Daniel Friedmann
Minister of Justice

Shimon Peres
President of the State

Dalia Itzik
Speaker of the Knesset

חוק חסינות מדינות זרות, התשס"ט–2008*

פרק א': הגדרות

הגדרות

1. בחוק זה –

"בנק מרכזי" – לרבות כל רשות המהווה את הסמכות המוניטרית המרכזית במדינה זרה;

"גוף נפרד" – רשות שלטונית במדינה זרה, שהיא בעלת אישיות משפטית נפרדת מממשלת אותה מדינה;

"מדינה זרה" – לרבות יחידה מדינית במדינה שהיא מדינה פדרלית, רשויות הממשל במדינה זרה, בעלי תפקידים רשמיים המייצגים את המדינה בביצוע תפקידם, וגוף נפרד;

"נכס מסחרי" – נכס, למעט נכס דיפלומטי, נכס קונסולרי, נכס צבאי או נכס של בנק מרכזי, המוחזק בישראל בידי מדינה זרה למטרה מסחרית; לעניין זה יראו נכס המוחזק בישראל בידי מדינה זרה ואינו מיועד למטרה מסוימת, כנכס המוחזק בידיה למטרה מסחרית, אלא אם כן הוכח אחרת;

"נכס צבאי" – נכס המשמש או המיועד לשמש בקשר לפעילות צבאית, והוא בעל אופי צבאי או שהוא בשליטת רשויות הצבא;

"עסקה מסחרית" – כל עסקה או פעולה שהיא מתחום המשפט הפרטי ובעלת אופי מסחרי, לרבות הסכם למכר טובין או שירותים, הלוואה או עסקה אחרת, למימון, ערובה או שיפוי, ואשר איננה כרוכה, במהותה, בהפעלת סמכות שלטונית.

פרק ב': חסינות מפני סמכות שיפוט

סימן א': חסינות המדינה הזרה

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* התקבל בכנסת ביום ז' בחשוון התשס"ט (5 בנובמבר 2008); הצעת החוק ודברי הסבר פורסמו בהצעות חוק הממשלה – 357, מיום ט' בשבט התשס"ח (16 בינואר 2008), עמ' 334.

חסינות מדינה זרה מפני סמכות שיפוט

2. למדינה זרה תהא חסינות מפני סמכות השיפוט של בתי המשפט בישראל, למעט סמכות השיפוט בעניינים פליליים (בחוק זה – חסינות מפני סמכות שיפוט), בכפוף להוראות חוק זה.

סימן ב': סייגים לחסינות

עסקה מסחרית

3. למדינה זרה לא תהא חסינות מפני סמכות שיפוט בתביעה שעילתה עסקה מסחרית.

חוזה עבודה

4. (א) למדינה זרה לא תהא חסינות מפני סמכות שיפוט בתביעה של עובד או של מועמד לעבודה שמתקיימים בה כל אלה:

(1) עילת התביעה היא בסמכותו הייחודית של בית דין אזורי לעבודה, לפי כל דין;

(2) עניינה של התביעה בעבודה שכולה או חלקה נעשתה או אמורה להיעשות בישראל;

(3) בעת שקמה עילת התביעה היה העובד או המועמד לעבודה אזרח ישראלי או מי שמקום מגוריו הרגיל הוא בישראל או באזור; לעניין זה, "אזור" – כהגדרתו בחוק להארכת תוקפן של תקנות שעת חירום (יהודה והשומרון – שיפוט בעבירות ועזרה משפטית), התשכ"ח–1967[1].

(ב) הוראות סעיף זה לא יחולו אם העובד או המועמד לעבודה היה, בעת פתיחת ההליך, אזרח המדינה הזרה ולא היה תושב ישראל.

(ג) בתביעה של עובד או של מועמד לעבודה שלא מתקיימים בה התנאים המפורטים בסעיף זה, תהא למדינה הזרה חסינות מפני סמכות השיפוט, גם אם עילתה עסקה מסחרית כאמור בסעיף 3.

נזיקין

5. למדינה זרה לא תהא חסינות מפני סמכות שיפוט בתביעה בשל עוולה שבשלה נגרם נזק לגוף או לרכוש מוחשי, ובלבד שהעוולה נעשתה בישראל.

זכויות בנכסים

6. למדינה זרה לא תהא חסינות מפני סמכות שיפוט בתביעה ובהליכים כמפורט להלן:

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[1] ס"ח התשכ"ח, עמ' 20; התשס"ז, עמ' 364.

(1) בתביעה שעניינה זכות או עניין אחר שיש למדינה הזרה בנכס מקרקעין בישראל, בתביעה שעניינה חזקה או שימוש של מדינה זרה בנכס מקרקעין בישראל, ובתביעה שעניינה חובה של המדינה הזרה הנובעת מזכות, מעניין אחר, מחזקה או משימוש כאמור;

(2) בתביעה או בהליכים שעניינם זכות או עניין אחר של המדינה הזרה בנכסים בישראל שהגיעו אליה בירושה, במתנה, או כזכייה ברכוש בלא בעלים, ובתביעה או בהליכים שעניינם חובה הנובעת מזכות או מעניין אחר כאמור;

(3) בהליכים שעניינם עזבונות, נכסי חסויים, הליכי חדלות פירעון או ניהול נאמנויות.

קניין רוחני

7. למדינה זרה לא תהא חסינות מפני סמכות שיפוט בתביעה בענייני קניין רוחני כהגדרתה בסעיף 40(4) לחוק בתי המשפט [נוסח משולב], התשמ"ד–1984[2], שעניינה –

(1) זכות המדינה הזרה בקניין רוחני;

(2) טענה על הפרה בישראל, בידי המדינה הזרה, של זכות בקניין רוחני.

תביעה נגד אנייה או מטען

8. (א) למדינה זרה לא תהא חסינות מפני סמכות שיפוט בתביעה נגד אנייה שבעת פתיחת ההליך היתה בבעלות המדינה הזרה או שהיתה מופעלת בידי המדינה הזרה, ובתביעה נגד מטען של אנייה שבעת פתיחת ההליך היה בבעלות המדינה הזרה, אם בעת שקמה עילת התביעה היו האנייה או המטען, לפי העניין, בשימוש למטרה מסחרית.

(ב) בסעיף זה "בעלות", באנייה או במטען – לרבות חזקה, שליטה, או זיקה קניינית אחרת של המדינה הזרה באנייה או במטען.

סימן ג': ויתור על חסינות

ויתור על חסינות מכוח הסכמה

9. (א) למדינה זרה לא תהא חסינות מפני סמכות שיפוט אם ויתרה עליה במפורש ובכתב, או אם ויתרה עליה בהודעה לבית המשפט בכתב או בעל פה.

(ב) ויתור לפי סעיף זה יכול שיינתן דרך כלל או לעניין מסוים, מראש או בדיעבד, ויכול שיוגבל בסייגים.

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[2] ס"ח התשמ"ד, עמ' 198.

(ג) ראש משלחת דיפלומטית של מדינה זרה בישראל או מי שממלא בפועל תפקיד כאמור, מוסמך לוותר על החסינות לפי סעיף זה, בשם המדינה הזרה, ולעניין חסינות בהליך שמקורו בחוזה שהמדינה הזרה צד לו – מוסמך לוותר כאמור גם מי שהתקשר בחוזה בשם המדינה הזרה; אין בהוראות סעיף קטן זה כדי לגרוע מסמכות הנתונה לאחר לוותר על החסינות בשם המדינה הזרה.

ויתור על חסינות מכוח התנהגות

10. (א) למדינה זרה לא תהא חסינות מפני סמכות שיפוט בתביעה שכנגד או בהליכי צד שלישי, אם המדינה הזרה היא שפתחה בהליך בבית משפט, או שהצטרפה להליך בבית המשפט והפכה להיות בעל דין.

(ב) הוראות סעיף קטן (א) לא יחולו על מדינה זרה שהצטרפה להליך בהתקיים באחד מאלה:

(1) המדינה טוענת לחסינותה מפני סמכות שיפוט;

(2) מטרת המדינה הזרה בהצטרפות להליך היא לטעון בפני בית המשפט לזכות או עניין אחר שיש לה בנכסים המעורבים בהליך או לזכות אחרת העלולה להיות מושפעת מההליך.

(ג) בסעיף זה, "תביעה שכנגד" – תביעה שכנגד לתביעה אזרחית שנושאן אחד או שהן נובעות מאותן הנסיבות או שהסעד המבוקש בה אינו שונה ואינו עולה על הסעד המבוקש בתביעה המקורית.

בוררות

11. (א) הסכימה מדינה זרה, בכתב, למסור לבוררות סכסוך אשר התעורר או עשוי להתעורר בעתיד, לא תהא למדינה הזרה חסינות מפני סמכות שיפוט, לגבי הליכים בבית משפט הקשורים לבוררות, אלא אם כן נקבע אחרת בהסכם הבוררות.

(ב) הוראות סעיף זה לא יחולו על הסכם בוררות בין מדינות שחלות עליו הוראות המשפט הבין-לאומי הפומבי, למעט הסכם כאמור שאחד הצדדים לו הוא גוף נפרד שאינו בנק מרכזי.

מועד לטענת חסינות

12. (א) מדינה זרה תעלה טענה לחסינות מפני סמכות שיפוט בהזדמנות הראשונה ולא יאוחר מן המועד שבו היא טוענת לראשונה לגופה של התביעה.

(ב) לא העלתה המדינה הזרה טענה לחסינות מפני סמכות שיפוט עד המועד האמור בסעיף קטן (א), יראו אותה כאילו ויתרה על חסינותה.

(ג) על אף הוראות סעיף קטן (ב), לא יראו מדינה זרה כאילו ויתרה על חסינותה אם העלתה טענה לחסינות מיד כשנודעו לה העובדות שבשלהן היא זכאית לחסינות, והיא לא ידעה ולא היתה צריכה לדעת על עובדות אלה במועד האמור בסעיף קטן (א).

סימן ד': סדרי דין

המצאת מסמכים למדינה זרה

13. (א) תובענה שהוגשה נגד מדינה זרה, במטרה לפתוח בהליך משפטי נגדה ופסק דין שניתן נגדה בהעדר הגנה, יומצאו, באמצעות משרד החוץ, למשרד החוץ של המדינה הזרה.

(ב) כתבי בי-דין בהליך שהמדינה הזרה צד לו, שאינם מנויים בסעיף קטן (א), יומצאו למדינה הזרה באמצעות בא כוחה באותו הליך, ואם הדבר אינו אפשרי – יימסרו בדרך האמורה בסעיף קטן (א).

(ג) תגובת המדינה הזרה לתובענה שהוגשה נגדה או לפסק דין שניתן נגדה בהעדר הגנה תינתן בתוך 60 ימים מיום שהומצאו לה; בית המשפט רשאי להאריך את התקופה האמורה.

(ד) סעיף זה לא יחול על המצאת מסמכים לגוף נפרד.

פסק דין בהעדר הגנה

14. הוגשה תביעה נגד מדינה זרה, ולא הגישה המדינה הזרה כתב הגנה במועד, ייתן בית המשפט פסק דין נגדה בהעדר הגנה רק אם שוכנע כי למדינה הזרה אין חסינות מפני סמכות השיפוט שלו, לפי הוראות חוק זה.

פרק ג': חסינות מפני הליכי הוצאה לפועל

חסינות המדינה הזרה מפני הליכי הוצאה לפועל

15. (א) לנכסיה של מדינה זרה תהא חסינות מפני הליכי הוצאה לפועל של פסק דין או של החלטה אחרת של בית משפט בישראל.

(ב) לא יוטל על מדינה זרה ועל אדם הפועל בשמה של מדינה זרה קנס או מאסר, בשל אי-קיום פסק דין או החלטה אחרת של בית משפט בישראל שניתן נגד המדינה הזרה.

(ג) הוראות סעיף זה לא יחולו על פסק דין או החלטה אחרת של בית משפט בישראל בעניינים פליליים.

סייג לחסינות

16. על אף הוראות סעיף 15(א), לנכסי מדינה זרה המפורטים להלן, לא תהא חסינות לפי הסעיף האמור:

(1) נכס מסחרי;

(2) נכס בישראל אשר הגיע למדינה הזרה בירושה, במתנה או כזכייה ברכוש בלא בעלים;

(3) נכס מקרקעין בישראל.

ויתור על חסינות

17. (א) לנכסי מדינה זרה לא תהא חסינות לפי סעיף 15 אם המדינה הזרה ויתרה עליה במפורש ובכתב, או אם ויתרה עליה בהודעה לבית המשפט בכתב או בעל פה.

(ב) ויתור לפי סעיף זה יכול שיינתן דרך כלל או לגבי נכס מסוים, מראש או בדיעבד, ויכול שיוגבל בסייגים, ובלבד שוויתור לגבי נכס דיפלומטי, נכס קונסולרי או נכס של בנק מרכזי, יינתן במפורש.

(ג) ויתור של מדינה זרה על חסינות מפני סמכות שיפוט, שניתן לפי סעיפים 9 או 10 לא ייחשב כוויתור לפי סעיף זה.

(ד) ויתור לפי סעיף זה לא יחול על נכס צבאי.

(ה) ראש משלחת דיפלומטית של מדינה זרה בישראל או מי שממלא בפועל תפקיד כאמור, מוסמך לוותר על החסינות לפי סעיף זה בשם המדינה הזרה; אין בהוראות סעיף קטן זה כדי לגרוע מסמכות הנתונה לאחר לוותר על החסינות בשם המדינה הזרה.

הוצאה לפועל נגד נכסי גוף נפרד

18. על אף הוראות סעיף 15(א) לא תהא לנכסי גוף נפרד, למעט בנק מרכזי, חסינות מפני הוצאה לפועל של פסק דין או של החלטה אחרת שנתן בית משפט בישראל, אלא אם כן סמכות השיפוט של בית המשפט מקורה בוויתור על חסינות מפני סמכות השיפוט, שניתן לפי סעיפים 9 או 10.

פרק ד': הוראות שונות

הודעה ליועץ המשפטי לממשלה

19. (א) העלתה מדינה זרה טענה לחסינות לפי חוק זה, תמסור הודעה על כך ליועץ המשפטי לממשלה.

(ב) עלתה בבית המשפט שאלה של חסינות מדינה זרה לפי חוק זה, ולא נמסרה על כך הודעה לפי סעיף קטן (א), ימסור בית המשפט הודעה על כך ליועץ המשפטי לממשלה.

החלת החסינות על ישות מדינית שאינה מדינה זרה

20. שר החוץ, בהתייעצות עם היועץ המשפטי לממשלה ובאישור הממשלה וועדת החוקה, חוק ומשפט של הכנסת, רשאי לקבוע, בצו, כי לישות מדינית תהא חסינות לפי פרק ב' או פרק ג' לחוק זה, אף שמעמדה המשפטי הבין-לאומי אינו עולה כדי מעמד של מדינה; צו לפי סעיף זה יכול שיהיה דרך כלל, לסוגי עניינים או לעניין מסוים, ויכול שיוגבל לתקופה קצובה.

חסינות דיפלומטית וקונסולרית

21. חוק זה אינו גורע מחסינות דיפלומטית או קונסולרית או מחסינות אחרת החלה בישראל לפי כל דין או נוהג.

מעמד כוחות צבא זרים

22. על אף האמור בחוק זה, על תביעות בשל מעשה או מחדל שבוצעו בידי כוחות צבא זרים שזכויותיהם ומעמדם בישראל נקבעו בהסכם בין מדינת ישראל לבין המדינה שלה שייכים כוחות הצבא הזרים, יחולו הוראות הסכם כאמור.

ביצוע ותקנות

23. שר המשפטים ממונה על ביצוע חוק זה, והוא רשאי, בהתייעצות עם שר החוץ, להתקין תקנות בכל עניין הנוגע לביצועו.

תחולה

24. חוק זה יחול גם על הליכים שהוגשו לבית המשפט לפני תחילתו, ובלבד שטרם החל הדיון בהם.

אהוד אולמרט
ראש הממשלה

דניאל פרידמן
שר המשפטים

שמעון פרס
נשיא המדינה

דליה איציק
יושבת ראש הכנסת

Annex 19

State Immunity Act 1978

CHAPTER 33

ARRANGEMENT OF SECTIONS

PART I

PROCEEDINGS IN UNITED KINGDOM BY OR AGAINST OTHER STATES

Immunity from jurisdiction

Exceptions from immunity

Procedure

Supplementary provisions

PART II

JUDGMENTS AGAINST UNITED KINGDOM IN CONVENTION STATES

PART III

MISCELLANEOUS AND SUPPLEMENTARY

ELIZABETH II

State Immunity Act 1978

1978 CHAPTER 33

An Act to make new provision with respect to proceedings in the United Kingdom by or against other States; to provide for the effect of judgments given against the United Kingdom in the courts of States parties to the European Convention on State Immunity; to make new provision with respect to the immunities and privileges of heads of State; and for connected purposes.

[20th July 1978]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

PROCEEDINGS IN UNITED KINGDOM BY OR AGAINST OTHER STATES

Immunity from jurisdiction

General immunity from jurisdiction.

1.—(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

Exceptions from immunity

Submission to jurisdiction.

2.—(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.

PART I

(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.

(3) A State is deemed to have submitted—

(*a*) if it has instituted the proceedings; or

(*b*) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.

(4) Subsection (3)(*b*) above does not apply to intervention or any step taken for the purpose only of—

(*a*) claiming immunity; or

(*b*) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.

(5) Subsection (3)(*b*) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

(6) A submission in respect of any proceedings extends to any appeal but not to any counter-claim unless it arises out of the same legal relationship or facts as the claim.

(7) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract.

Commercial transactions and contracts to be performed in United Kingdom.

3.—(1) A State is not immune as respects proceedings relating to—

(*a*) a commercial transaction entered into by the State; or

(*b*) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

(2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1)(*b*) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

(3) In this section " commercial transaction " means—

(*a*) any contract for the supply of goods or services;

(*b*) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation ; and

(*c*) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority ;

but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.

Contracts of employment.

4.—(1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.

(2) Subject to subsections (3) and (4) below, this section does not apply if—

(*a*) at the time when the proceedings are brought the individual is a national of the State concerned ; or

(*b*) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there ; or

(*c*) the parties to the contract have otherwise agreed in writing.

(3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, subsection (2)(*a*) and (*b*) above do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State.

(4) Subsection (2)(*c*) above does not exclude the application of this section where the law of the United Kingdom requires the proceedings to be brought before a court of the United Kingdom.

(5) In subsection (2)(*b*) above " national of the United Kingdom " means a citizen of the United Kingdom and Colonies, a person who is a British subject by virtue of section 2, 13 or 16 of the British Nationality Act 1948 or by virtue of the British Nationality Act 1965, a British protected person within the meaning of the said Act of 1948 or a citizen of Southern Rhodesia. 1948 c. 56. 1965 c. 34.

(6) In this section " proceedings relating to a contract of employment " includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee.

PART I

Personal injuries and damage to property.

5. A State is not immune as respects proceedings in respect of—

(*a*) death or personal injury; or

(*b*) damage to or loss of tangible property,

caused by an act or omission in the United Kingdom.

Ownership, possession and use of property.

6.—(1) A State is not immune as respects proceedings relating to—

(*a*) any interest of the State in, or its possession or use of, immovable property in the United Kingdom; or

(*b*) any obligation of the State arising out of its interest in, or its possession or use of, any such property.

(2) A State is not immune as respects proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or bona vacantia.

(3) The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.

(4) A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property—

(*a*) which is in the possession or control of a State; or

(*b*) in which a State claims an interest,

if the State would not have been immune had the proceedings been brought against it or, in a case within paragraph (*b*) above, if the claim is neither admitted nor supported by prima facie evidence.

Patents, trade-marks etc.

7. A State is not immune as respects proceedings relating to—

(*a*) any patent, trade-mark, design or plant breeders' rights belonging to the State and registered or protected in the United Kingdom or for which the State has applied in the United Kingdom;

(*b*) an alleged infringement by the State in the United Kingdom of any patent, trade-mark, design, plant breeders' rights or copyright; or

(*c*) the right to use a trade or business name in the United Kingdom.

PART I

Membership of bodies corporate etc.

8.—(1) A State is not immune as respects proceedings relating to its membership of a body corporate, an unincorporated body or a partnership which—

(*a*) has members other than States ; and

(*b*) is incorporated or constituted under the law of the United Kingdom or is controlled from or has its principal place of business in the United Kingdom,

being proceedings arising between the State and the body or its other members or, as the case may be, between the State and the other partners.

(2) This section does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body or partnership in question.

Arbitrations.

9.—(1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement beween States.

Ships used for commercial purposes.

10.—(1) This section applies to—

(*a*) Admiralty proceedings ; and

(*b*) proceedings on any claim which could be made the subject of Admiralty proceedings.

(2) A State is not immune as respects—

(*a*) an action in rem against a ship belonging to that State ; or

(*b*) an action in personam for enforcing a claim in connection with such a ship,

if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

(3) Where an action in rem is brought against a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State, subsection (2)(*a*) above does not apply as respects the first-mentioned ship unless, at the time when the cause of action relating to the other ship arose, both ships were in use or intended for use for commercial purposes.

(4) A State is not immune as respects—

(*a*) an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes ; or

PART I

(*b*) an action in personam for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.

(5) In the foregoing provisions references to a ship or cargo belonging to a State include references to a ship or cargo in its possession or control or in which it claims an interest; and, subject to subsection (4) above, subsection (2) above applies to property other than a ship as it applies to a ship.

(6) Sections 3 to 5 above do not apply to proceedings of the kind described in subsection (1) above if the State in question is a party to the Brussels Convention and the claim relates to the operation of a ship owned or operated by that State, the carriage of cargo or passengers on any such ship or the carriage of cargo owned by that State on any other ship.

Value added tax, customs duties etc.

11. A State is not immune as respects proceedings relating to its liability for—

(*a*) value added tax, any duty of customs or excise or any agricultural levy; or

(*b*) rates in respect of premises occupied by it for commercial purposes.

Procedure

Service of process and judgments in default of appearance.

12.—(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

(2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.

(3) A State which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) above has been complied with and that the time for entering an appearance as extended by subsection (2) above has expired.

(5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin

to run two months after the date on which the copy of the judgment is received at the Ministry.

(6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) above do not apply where service is effected in any such manner.

(7) This section shall not be construed as applying to proceedings against a State by way of counter-claim or to an action in rem; and subsection (1) above shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction.

Other procedural privileges.

13.—(1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.

(2) Subject to subsections (3) and (4) below—

(*a*) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

(*b*) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

(4) Subsection (2)(*b*) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; but, in a case not falling within section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only if—

(*a*) the process is for enforcing a judgment which is final within the meaning of section 18(1)(*b*) below and the State has made a declaration under Article 24 of the Convention; or

(*b*) the process is for enforcing an arbitration award.

(5) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) above

PART I

and, for the purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

(6) In the application of this section to Scotland—

(*a*) the reference to "injunction" shall be construed as a reference to "interdict";

(*b*) for paragraph (*b*) of subsection (2) above there shall be substituted the following paragraph—

"(*b*) the property of a State shall not be subject to any diligence for enforcing a judgment or order of a court or a decree arbitral or, in an action in rem, to arrestment or sale."; and

(*c*) any reference to "process" shall be construed as a reference to "diligence", any reference to "the issue of any process" as a reference to "the doing of diligence" and the reference in subsection (4)(*b*) above to "an arbitration award" as a reference to "a decree arbitral".

Supplementary provisions

States entitled to immunities and privileges.

14.—(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—

(*a*) the sovereign or other head of that State in his public capacity;

(*b*) the government of that State; and

(*c*) any department of that government,

but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—

(*a*) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(*b*) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.

(3) If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of procedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity.

(4) Property of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.

(5) Section 12 above applies to proceedings against the constitutent territories of a federal State; and Her Majesty may by Order in Council provide for the other provisions of this Part of this Act to apply to any such constituent territory specified in the Order as they apply to a State.

(6) Where the provisions of this Part of this Act do not apply to a constituent territory by virtue of any such Order subsections (2) and (3) above shall apply to it as if it were a separate entity.

Restriction and extension of immunities and privileges.

15.—(1) If it appears to Her Majesty that the immunities and privileges conferred by this Part of this Act in relation to any State—

(*a*) exceed those accorded by the law of that State in relation to the United Kingdom; or

(*b*) are less than those required by any treaty, convention or other international agreement to which that State and the United Kingdom are parties,

Her Majesty may by Order in Council provide for restricting or, as the case may be, extending those immunities and privileges to such extent as appears to Her Majesty to be appropriate.

(2) Any statutory instrument containing an Order under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Excluded matters.

1964 c. 81.

1968 c. 18.

16.—(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and—

(*a*) section 4 above does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968;

(*b*) section 6(1) above does not apply to proceedings concerning a State's title to or its possession of property used for the purposes of a diplomatic mission.

(2) This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952.

1952 c. 67.

PART I

1965 c. 57.

(3) This Part of this Act does not apply to proceedings to which section 17(6) of the Nuclear Installations Act 1965 applies.

(4) This Part of this Act does not apply to criminal proceedings.

(5) This Part of this Act does not apply to any proceedings relating to taxation other than those mentioned in section 11 above.

Interpretation of Part I.

17.—(1) In this Part of this Act—

"the Brussels Convention" means the International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships signed in Brussels on 10th April 1926;

"commercial purposes" means purposes of such transactions or activities as are mentioned in section 3(3) above;

"ship" includes hovercraft.

(2) In sections 2(2) and 13(3) above references to an agreement include references to a treaty, convention or other international agreement.

(3) For the purposes of sections 3 to 8 above the territory of the United Kingdom shall be deemed to include any dependent territory in respect of which the United Kingdom is a party to the European Convention on State Immunity.

(4) In sections 3(1), 4(1), 5 and 16(2) above references to the United Kingdom include references to its territorial waters and any area designated under section 1(7) of the Continental Shelf Act 1964.

1964 c. 29.

(5) In relation to Scotland in this Part of this Act "action in rem" means such an action only in relation to Admiralty proceedings.

PART II

JUDGMENTS AGAINST UNITED KINGDOM IN CONVENTION STATES

Recognition of judgments against United Kingdom.

18.—(1) This section applies to any judgment given against the United Kingdom by a court in another State party to the European Convention on State Immunity, being a judgment—

(*a*) given in proceedings in which the United Kingdom was not entitled to immunity by virtue of provisions corresponding to those of sections 2 to 11 above; and

(*b*) which is final, that is to say, which is not or is no longer subject to appeal or, if given in default of appearance, liable to be set aside.

(2) Subject to section 19 below, a judgment to which this section applies shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in such proceedings.

(3) Subsection (2) above (but not section 19 below) shall have effect also in relation to any settlement entered into by the United Kingdom before a court in another State party to the Convention which under the law of that State is treated as equivalent to a judgment.

(4) In this section references to a court in a State party to the Convention include references to a court in any territory in respect of which it is a party.

Exceptions to recognition.

19.—(1) A court need not give effect to section 18 above in the case of a judgment—

(*a*) if to do so would be manifestly contrary to public policy or if any party to the proceedings in which the judgment was given had no adequate opportunity to present his case ; or

(*b*) if the judgment was given without provisions corresponding to those of section 12 above having been complied with and the United Kingdom has not entered an appearance or applied to have the judgment set aside.

(2) A court need not give effect to section 18 above in the case of a judgment—

(*a*) if proceedings between the same parties, based on the same facts and having the same purpose—

(i) are pending before a court in the United Kingdom and were the first to be instituted ; or

(ii) are pending before a court in another State party to the Convention, were the first to be instituted and may result in a judgment to which that section will apply ; or

(*b*) if the result of the judgment is inconsistent with the result of another judgment given in proceedings between the same parties and—

(i) the other judgment is by a court in the United Kingdom and either those proceedings were the first to be instituted or the judgment of that court was given before the first-mentioned judgment became final within the meaning of subsection (1)(*b*) of section 18 above ; or

(ii) the other judgment is by a court in another State party to the Convention and that section has already become applicable to it.

PART II

(3) Where the judgment was given against the United Kingdom in proceedings in respect of which the United Kingdom was not entitled to immunity by virtue of a provision corresponding to section 6(2) above, a court need not give effect to section 18 above in respect of the judgment if the court that gave the judgment—

(*a*) would not have had jurisdiction in the matter if it had applied rules of jurisdiction corresponding to those applicable to such matters in the United Kingdom; or

(*b*) applied a law other than that indicated by the United Kingdom rules of private international law and would have reached a different conclusion if it had applied the law so indicated.

(4) In subsection (2) above references to a court in the United Kingdom include references to a court in any dependent territory in respect of which the United Kingdom is a party to the Convention, and references to a court in another State party to the Convention include references to a court in any territory in respect of which it is a party.

PART III

MISCELLANEOUS AND SUPPLEMENTARY

Heads of State.

1964 c. 81.

20.—(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—

(*a*) a sovereign or other head of State;

(*b*) members of his family forming part of his household; and

(*c*) his private servants,

as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.

(2) The immunities and privileges conferred by virtue of subsection (1)(*a*) and (*b*) above shall not be subject to the restrictions by reference to nationality or residence mentioned in Article 37(1) or 38 in Schedule 1 to the said Act of 1964.

(3) Subject to any direction to the contrary by the Secretary of State, a person on whom immunities and privileges are conferred by virtue of subsection (1) above shall be entitled to the exemption conferred by section 8(3) of the Immigration Act 1971.

1971 c. 77.

(4) Except as respects value added tax and duties of customs or excise, this section does not affect any question whether a person is exempt from, or immune as respects proceedings relating to, taxation.

(5) This section applies to the sovereign or other head of any State on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of State in his public capacity. PART III

Evidence by certificate.

21. A certificate by or on behalf of the Secretary of State shall be conclusive evidence on any question—

(*a*) whether any country is a State for the purposes of Part I of this Act, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State;

(*b*) whether a State is a party to the Brussels Convention mentioned in Part I of this Act;

(*c*) whether a State is a party to the European Convention on State Immunity, whether it has made a declaration under Article 24 of that Convention or as to the territories in respect of which the United Kingdom or any other State is a party;

(*d*) whether, and if so when, a document has been served or received as mentioned in section 12(1) or (5) above.

General interpretation.

22.—(1) In this Act "court" includes any tribunal or body exercising judicial functions; and references to the courts or law of the United Kingdom include references to the courts or law of any part of the United Kingdom.

(2) In this Act references to entry of appearance and judgments in default of appearance include references to any corresponding procedures.

(3) In this Act "the European Convention on State Immunity" means the Convention of that name signed in Basle on 16th May 1972.

(4) In this Act "dependent territory" means—

(*a*) any of the Channel Islands;

(*b*) the Isle of Man;

(*c*) any colony other than one for whose external relations a country other than the United Kingdom is responsible; or

(*d*) any country or territory outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of the government of the United Kingdom.

(5) Any power conferred by this Act to make an Order in Council includes power to vary or revoke a previous Order.

PART III

Short title, repeals, commencement and extent.

1938 c. 63.

1940 c. 42.

23.—(1) This Act may be cited as the State Immunity Act 1978.

(2) Section 13 of the Administration of Justice (Miscellaneous Provisions) Act 1938 and section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (which become unnecessary in consequence of Part I of this Act) are hereby repealed.

(3) Subject to subsection (4) below, Parts I and II of this Act do not apply to proceedings in respect of matters that occurred before the date of the coming into force of this Act and, in particular—

(*a*) sections 2(2) and 13(3) do not apply to any prior agreement, and

(*b*) sections 3, 4 and 9 do not apply to any transaction, contract or arbitration agreement,

entered into before that date.

(4) Section 12 above applies to any proceedings instituted after the coming into force of this Act.

(5) This Act shall come into force on such date as may be specified by an order made by the Lord Chancellor by statutory instrument.

(6) This Act extends to Northern Ireland.

(7) Her Majesty may by Order in Council extend any of the provisions of this Act, with or without modification, to any dependent territory.

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Annex 20

INDIAN BARE ACTS

The Code Of Civil Procedure, 1908

(Act No. 5 of 1908)

An Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature.

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; it is hereby enacted as follows:-

PRELIMINARY

1. Short title, commencement and extent- (1) This Act may be cited as the Code of Civil Procedure, 1908.

(2) It shall come into force on the first day of January, 1909.

[2][(3) It extends to the whole of India except-

(a) the State of Jammu and Kashmir;

(b) the State of Nagaland and the tribal areas :

Provided that the State Government concerned may, by notification in the Official Gazette, extend the provisions of this Code or any of them to the whole or part of the State of Nagaland or such tribal areas, as the case may be, with such supplemental, incidental or consequential modifications as may be specified in the notification.

Explanation-In this clause, "tribal areas" means the territories which, immediately before the 21st day of January, 1972 were included in the tribal areas of Assam as referred to in paragraph 20 of the Sixth Schedule to the Constitution.

(4) In relation to the Amindivi Islands, and the East Godavari, West Godavari and Visakhapatnam Agencies in the State of Andhra Pradesh and the Union territory of Lakshadweep, the application of this Code shall be without prejudice to the application of any rule or regulation for the time being in force in such Islands, Agencies or such Union territory, as the case may be, relating to the application of this Code.]

2. Definitions- In this Act, unless there is anything repugnant in the subject or context,-

(1) "Code" includes rules;

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the

(3) The provisions of sub-sections (1) and (2) shall apply in relation to an order or award as they apply in relation to a decree, if the order or award—

(a) is passed or made against the Union of India or a State or a public officer in respect of any such act as aforesaid, whether by a Court or by any other authority; and

(b) is capable of being executed under the provisions of this code or of any other law for the time being in force as if it were a decree.

Suits by Alliens and by or against Foreign Rulers, Ambassadors and Envoys

83. When aliens may sue— Alien enemies residing in India with the permission of the Central Government, and alien friends, may sue in any Court otherwise competent to try the suit, as if they were citizens of India, but alien enemies residing in India without such permission, or residing in a foreign country, shall not sue in any such court.

Explanation—Every person residing in a foreign country, the Government of which is at war with India and carrying on business in that country without a licence in that behalf granted by the Central Government, shall, for the purpose of this section, be deemed to be an alien enemy residing in a foreign country.

84. When foreign State may sue.— A foreign State may sue in any competent Court:

Provided that the object of the suit is to enforce a private right vested in the Ruler of such State or in any officer of such State in his public capacity.

85. Persons specially appointed by Government to prosecute or defend on behalf of foreign Rulers— (1) The Central Government may, at the request of the Ruler of a foreign State or at the request of any person competent in the opinion of the Central Government to act on behalf of such Ruler, by order, appoint any persons to prosecute or defend any suit on behalf of such Ruler, and any persons so appointed shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Ruler.

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of such Ruler.

(3) A person appointed under this section may authorise or appoint any other persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

86. Suits against foreign Rulers, Ambassadors and Envoys— (1) No.****[59] foreign State may be sued in any Court otherwise competent to try the suit except with consent of the Central Government certified in writing by a Secretary to that Government :

Provided that a person may, as a tenant of immovable property, sue without such consent as aforesaid [60][a foreign State] from whom he holds or claims to hold the property.

(2) Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which [61][the foreign State] may be sued, but it shall to be given, unless it appears to the Central Government that [62][the foreign State].

(a) has instituted a suit in the Court against the person desiring to sue [63][it], or

(b) [64][itself] or another, trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or

(d) has expressly or impliedly waived the privilege accorded to [65][it] by this section.

[66] [(3) Except with the consent of the Central Government, certified in writing by a Secretary to that government, no decree shall be executed against the property of any foreign State.]

(4) The proceeding provisions of this section shall apply in relation to —

[67] [(a) any Ruler of a foreign State;]

[68] [(aa)] any ambassador or Envoy of a foreign State ;

(b) any High Commissioner of a Commonwealth country; and

Annex 21

27 Nov 2013 : Column 17WS

Written Statement

Wednesday 27 November 2013

FOREIGN AND COMMONWEALTH OFFICE

Government Official Communications

The Minister for Europe (Mr David Lidington): On Friday 22 November two UK Government bags containing official correspondence and communications, and clearly marked as such, were opened by Spanish officials, while the bags were in transit. This represents a serious interference with the official correspondence and property of Her Majesty's Government, and therefore a breach of both the principles underlying the Vienna convention on diplomatic relations and the principle of state immunity. We take any infringement of these principles very seriously.

27 Nov 2013 : Column 18WS

Following reports of the incident, the Foreign and Commonwealth Office made representations to the Spanish Ministry of Foreign Affairs at senior level over the weekend of 23 and 24 November and the British embassy in Madrid submitted a formal written protest to the Ministry on 25 November. In our protests we requested an urgent explanation of this incident from the Spanish Government and sought assurances that there will be no further interference with the UK's official correspondence. We have now received that explanation from the Spanish and have been assured that we will not see a repeat of these actions.

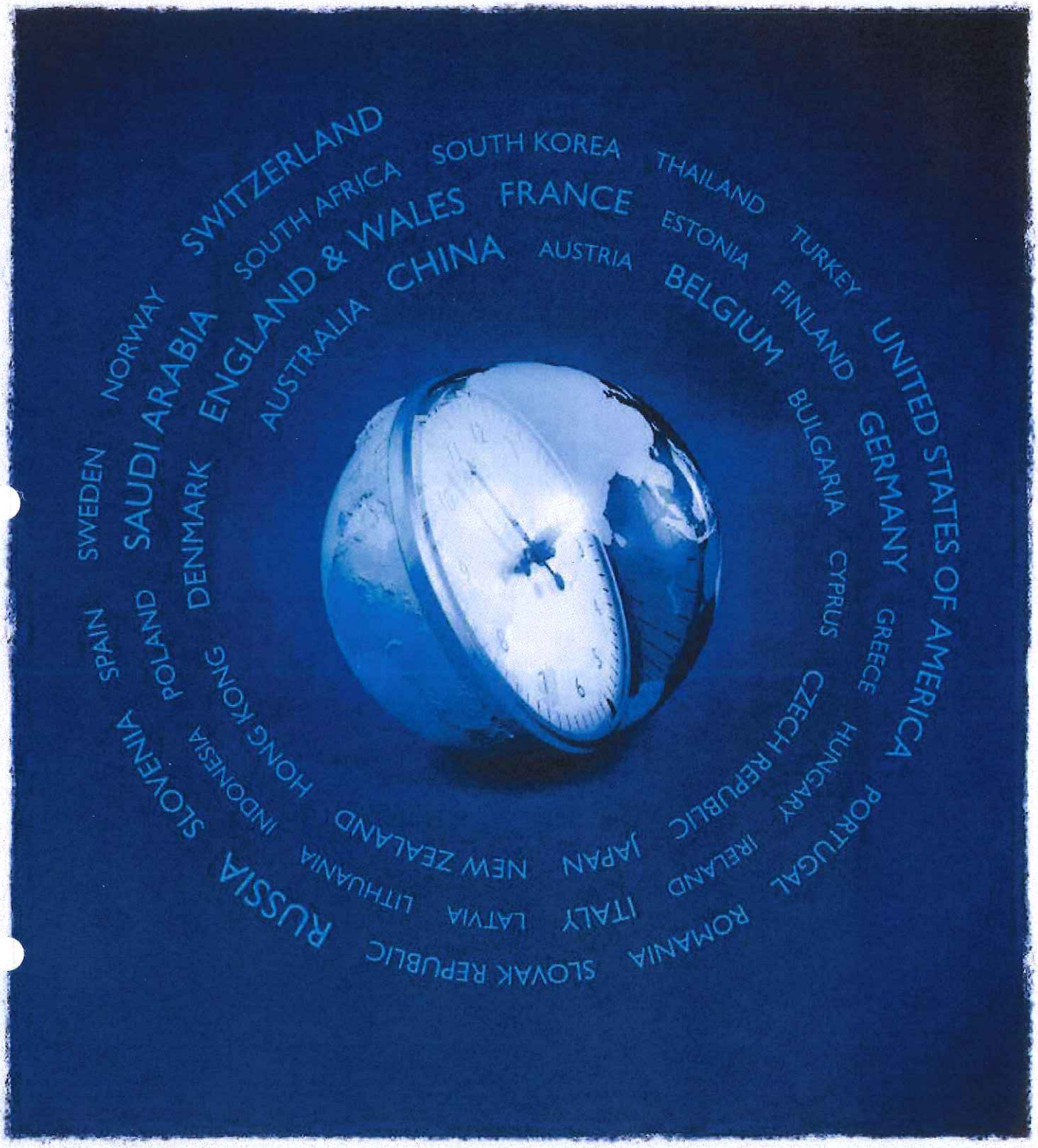
The Vienna convention on diplomatic relations provides a legal framework for diplomatic relations between countries, including the privileges that enable diplomats to perform their functions, including official correspondence and the diplomatic bag. It embodies important international principles that protect official correspondence and communication between a state and its representatives. The UK strictly adheres to these principles and we expect other states to do the same.

Index
Home Page

Footer links

- A-Z index
- Glossary
- Contact us
- Freedom of Information
- Jobs
- Using this website
- Copyright

Annex 22



LEGAL PRIVILEGE HANDBOOK 2013

Your guide to legal privilege around the world

DLA PIPER

CONTENTS

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FOREWORD

Walking on a minefield – Legal Privilege, access to documents and class actions

In today's world, we communicate more than ever before. There is no need to write something on a piece paper and post it in the mail; a quick informal e-mail does the trick. We communicate without reflecting, and today's funny reply to a mild joke may prove terribly embarrassing when read out of context in five years' time.

More importantly, companies communicate internally on issues of concern. Some of these e-mails may be problematic, and may relate to infringements. Every internal e-mail has the potential of constituting evidence, and the life span of evidence can be years, up to prescription.

Once a legal problem is identified, the company seeks legal advice. In the Anglo-Saxon world, the General Counsel is a trusted advisor, frequently member of the company's board. Communications addressed to him, as well as his advice, are privileged. Not so in many EU countries. Not long ago the European Court of Justice confirmed that the "in-house lawyer" does not have the necessary independence that is required for a legal advisor, and hence his advice is not covered by "legal privilege", i.e. communication with him may be seized or asked for by authorities. This judgement leaves much to say, and the external lawyer may be more dependent on his client than the internal lawyer on his company. Nevertheless, it is a reality that many legal systems in Europe and, most importantly, the European Commission do not recognise the legal privilege of communications from and to in-house lawyers.

Seeking legal advice from the external lawyer is privileged in the EEA – provided, however, that the lawyer is qualified in a Member State of the EEA. As strange as this may seem, legal advice given by an attorney admitted in New York is not covered by the legal privilege.

Not all communications from and to a duly qualified external lawyer are privileged. They have to relate to the defence of the company in the matter concerned. The boundaries are vague and vary from country to country. Sometimes the authorities within a jurisdiction modify their policy without prior warning. Some jurisdictions do not recognise any legal privilege at all.

As regards competition law, access to information is another issue. The European Commission allows leniency applicants to make oral statements, a mechanism developed to shield leniency submissions from US discovery rules. So far this has worked. However, a new frontline has emerged in the last few years. The European Commission as well as most national competition authorities encourage whistleblowing and leniency submissions, but at the same time develop tools to facilitate private damage actions, two conflicting principles.

Worse, private plaintiffs seek to gain access to the authorities' files, including to leniency submissions. At the level of the European Commission, this has led to tension and legal uncertainty. While the procedural rules governing competition investigations do not allow for such access, plaintiffs use another instrument, the Transparency Regulation, that was created years ago to give the European citizens access to the documents in the hands of the European institutions. The Courts have tried to balance this conflict out, but with mixed results. The European Commission has proposed new legislation to solve the problem, and hopefully this legislation will be adopted soon.

A company operating internationally should take these different policies into account when defining its internal communication policy and its legal strategy. Otherwise, it unnecessarily puts itself at risk. This booklet gives some guidance and food for thought, but should not be seen as giving legal advice.

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EUROPEAN UNION

Does legal privilege exist?

There are no statutory provisions establishing legal privilege in the EU. In the absence of this, EU legal privilege was recognised as a fundamental right in 1982 by the European Court of Justice in *AM & S v European Commission* (C-155/79).

Documents protected by EU legal privilege are protected from inspection by the European Commission, notably in the exercise of its powers of investigation in the enforcement of EU competition law.

What is protected by legal privilege?

Any person should be able, without constraints, to consult a lawyer, whose profession entails the giving of independent legal advice to all those in need of it. In order for the communication to be protected by EU legal privilege, the communication must have been made for the purposes and in the interests of the **client's rights of defence**.

- EU legal privilege covers all written communications between an independent lawyer and his/her client after the initiation of a European Commission administrative procedure and which are related to the procedure.
- Pre-existing communications which have a relationship with the subject matter of the investigation by the European Commission are also protected.
- EU legal privilege is not restricted to the actual communication between an independent lawyer and his/her client. Internal notes which reproduce the advice given by an independent lawyer to his/her client are also protected by EU legal privilege (*Hilti Aktiengesellschaft v Commission* T-3/98).
- Furthermore, EU legal privilege protection extends to documents prepared for the purpose of seeking legal advice in the exercise of one's rights of defence. For example, working documents and summaries prepared as a means of gathering information for an independent lawyer will be protected by EU legal privilege. Such preparatory documents will be privileged even if they were not exchanged with a lawyer or created for the purpose of being sent physically to a lawyer. The only requirement is that the documents were created exclusively for the purpose of seeking legal advice from an independent lawyer in the exercise of one's rights of defence.

Is in-house counsel protected by legal privilege?

Communication between a company and its in-house counsel is not protected by EU legal privilege. EU legal privilege applies only to correspondence with an independent lawyer not bound to the client by a relationship of employment.

This was recently confirmed by the Court of Justice in *Akzo Nobel v European Commission* (C-550/07). Communications with in-house counsel are not protected by legal privilege irrespective of in-house counsel's status under national law. The Court of Justice held that an in-house counsel's relationship as an employee of the company by its very nature does not allow him to ignore the commercial strategies pursued by his employer.

Does legal privilege apply to the correspondence of non-EEA qualified lawyers?

No. EU legal privilege applies only to correspondence with independent lawyers registered with a bar of one of the countries of the EEA.

What are the main differences between national legal privilege and EU legal privilege?

The protection of EU legal privilege may differ substantially from legal privilege protection in other jurisdictions. Companies need to be aware of these differences and understand the risks they are exposed to in their jurisdictions of operation. It is therefore of utmost importance to have correct internal procedures dealing with legal privilege and to appreciate the differences between the various legal privilege regimes.

There are commonalities but also significant discrepancies between the scope of legal privilege under the national and EU laws. The scope of EU legal privilege is narrower than legal privilege under some national legislations, for instance:

- EU legal privilege does not protect legal advice emanating from in-house counsel. This is in contrast with legal privilege protection in Belgium, Greece, the Netherlands, Norway, Portugal, England and Wales and others.
- EU legal privilege protects only correspondence made for the purposes and in the interests of the client's rights of defence. Under the laws of England and Wales, the protection of legal privilege covers a wider range of legal advice.
- EU legal privilege protects communication with EEA-qualified lawyers only. In England and Wales the protection covers communication with any lawyer.

Other remarks

What to do when legal privilege is disputed during a dawn raid

The European Commission has the power to conduct dawn raids to examine and copy books and other records as part of its investigation into anti-competitive practices. In the course of a dawn raid, if a document is protected by EU legal privilege, the undertaking should give the European Commission's inspectors a cursory look at the headings of the document to demonstrate that the document is indeed protected by EU legal privilege.

An undertaking claiming EU legal privilege is entitled to refuse to allow the European Commission's inspectors to take even a cursory look at one or more specific documents which the undertaking claims to be covered by EU legal privilege. This is provided that the undertaking considers that such a cursory look is impossible without revealing the content of the documents and that the undertaking gives the European Commission's inspectors appropriate reasons for its view.

Where the protection of EU legal privilege is disputed during a dawn raid by the inspectors of the European Commission's DG COMP, the following procedures are to be followed:

- the disputed document is placed in a sealed envelope;
- the European Commission's inspectors may remove the sealed envelope from the premises;
- if the matter cannot be resolved with the European Commission, the undertaking may ask the Hearing Officer to examine the claims of legal privilege. In order to do so, the Hearing Officer may inspect the document. The Hearing Officer will communicate his preliminary view and take appropriate steps to propose a mutually acceptable decision;
- where no resolution is reached, the Hearing Officer will formulate a reasoned recommendation and deliver it to the European Commission; and
- the European Commission will then examine the matter further. It may the claim. The European Commission will not look at the document before the deadline for appealing the decision to the Court of Justice has passed, or, if appealed, before the proceedings before the Court of Justice are closed.

An undertaking should exercise caution when making claims of EU legal privilege as unwarranted and deceitful claims are prohibited and may be punishable by a fine.

Exchange of information within the European Competition Network

The competition authorities of the European Competition Network have the power to exchange and use information collected for the purpose of applying competition law. National competition authorities may use information exchanged within the European Competition Network in order to enforce their national competition law when it is applied in parallel with EU law and does not lead to a different outcome.

This has implications on the treatment of legal privilege. A national competition authority is able to obtain a document from an authority in another Member State which is subject to more relaxed legal privilege rules. A national competition authority is

therefore able to obtain and use documents even if they were collected under rules which are less protective than its own.

Indeed, as an example, the UK Office of Fair Trading's *Guidelines governing powers of investigation* states that it may use documents emanating from in-house counsel if it has received those documents from a national competition authority of another Member State.

Disclosure of documents and private antitrust damages claims

A related and important matter to consider is the disclosure of documents to third parties, notably private damages claimants. The competition authorities and the courts are increasingly encouraging the private enforcement of competition law. For example, the UK government has unveiled plans to enable consumers and business to group together and sue infringers of competition law in the UK, and has promised to increase funding for the UK Competition Appeal Tribunal. The European Commission is also considering a general framework for allowing "class action" lawsuits to be brought, including in private actions against infringers of competition law.

The European Commission is however seeking to balance the private enforcement of competition law with the protection of certain categories of documents from disclosure in order to maintain its very successful leniency programme. Indeed, the European Commission is currently preparing legislation to harmonise the rules on private litigants' access to case files.

The push for private enforcement of competition law further exposes undertakings to the possibility that their documents may be obtained by third parties and be used against them in civil damages claims for competition law infringements.

The Transparency Regulation (Regulation 1049/2001) grants citizens the right to access documents of the European Parliament, Council and European Commission. Private claimants are using these provisions in an attempt to gain access to the European Commission's competition files.

Under the Transparency Regulation the right to access files may be restricted where disclosure would undermine the protection of public interest or the protection of commercial interests of a natural or legal person. It may also be restricted to protect court proceedings and legal advice or to protect the purpose of inspections, investigations and audits. Access to internal documents may also be restricted where disclosure would undermine the institution's decision-making process.

The European Commission and the European Court of Justice have in general restricted the use of the Transparency Regulation for accessing the European Commission's files of competition proceedings on the basis that doing so would undermine the European Commission's leniency programme. If access to leniency documents were given, undertakings would be reluctant to come forward and expose wrongdoings in fear of their statements being used against them in a civil court.

However, with the recent emphasis on, and encouragement of, private competition law enforcement, courts are increasingly willing to aid private litigants. In a recent judgment, the General Court held that a private damages claimant should be granted access to the European Commission's statement of contents of the administrative file relating to a cartel (*CDC Hydrogene Peroxide v Commission T-437/08*). In another judgment, the General Court annulled the European Commission's refusal to grant a request to access to an entire file, and required the European Commission in that case to undertake a document-by-document analysis of documents on the file (*EnBW v Commission T-344/08*).

The Transparency Regulation is not the only avenue open to private claimants seeking access to the case files of competition proceedings. Private claimants may seek to obtain documents, especially leniency applications, held by national competition authorities. The Court of Justice recently held in *Pfleiderer* that the EU competition rules must be interpreted as not precluding a person who has been adversely affected by an infringement of EU competition law, and is seeking to obtain damages, from being granted access to documents relating to a leniency procedure

involving the perpetrator of that infringement. The Court of Justice left it to the courts of Member States to determine, on the basis of their national law, the conditions under which such access must be permitted or refused (*Pfleiderer v Commission* C-360/09). The exposure companies face is further increased through the exchange of information within the European Competition Network.

In the first application of the *Pfleiderer* judgment by a national court, the Higher Regional Court in Dusseldorf held against disclosing leniency applications of cartel participants. The Local Court affirmed the German Federal Cartel Office's view that leniency applications are subject to particularly strict confidentiality and that private damages claimants should not be granted access to them. The UK High Court has recently granted National Grid access (under a confidentiality order) to certain parts of the confidential version of the European Commission's decision fining manufactures of gas-insulated switchgear, and to one part of a reply to a request for information by the European Commission in that case.

A peculiar situation arises where a document which is not protected by EU legal privilege is obtained by the European Commission or other national competition authority, and is relied on by a private litigant in damages proceedings in a jurisdiction with wider legal privilege protection. This question is as of yet unanswered.

The law on access to documents in competition proceedings, and especially leniency applications, is uncertain at this stage. The European Commission is planning to introduce legislation on private damages actions in the spring of 2013 to clarify and harmonise the law. Companies ought to remain vigilant and understand the complexities and risks of these matters.

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AUSTRALIA

Does legal privilege exist?

In Australia, Legal Privilege is found in common law and in various statutes.

The common law maintains a distinction between two limbs of Legal Privilege. *Advice privilege* refers to the protection of communications between a client and a lawyer for the purposes of the lawyer providing legal advice to the client. *Litigation privilege* refers to the protection of communications between a client and lawyer for the dominant purpose of anticipated or existing legal proceedings.

Sections 118 and 119 of the 'Evidence Act 1995' (Cth) provide that confidential communications created for the 'dominant purpose' of providing legal advice or litigation are protected from disclosure to federal courts.

What is protected by legal privilege?

Communications must be for the 'dominant purpose' of legal advice or in relation to actual or anticipated litigation in order to attract Legal Privilege.

The purpose for which a document is brought into existence is a question of fact that must be determined objectively. Evidence of the intention of the document's maker, or of the person who authorized or procured it, is not necessarily conclusive.

'Dominant' has been held to mean a 'ruling, prevailing or most influential' purpose. A 'dominant purpose' is one that predominates over other purposes. It is the prevailing or paramount purpose. In determining whether the dominant purpose exists, the courts will examine the circumstances of the case objectively, rather than considering the subjective view of the person making the communication.

Typically, legally privileged communications occur between a client and its legal adviser, but can include those between a client and a third-party e.g. consultants. If the dominant purpose test is met, legal professional privilege extends to:

- Notes, memoranda or other documents made by staff of the client, if those documents relate to information sought by the client's legal adviser to enable legal advice to be provided.
- A record or summary of legal advice, even if prepared by a non-lawyer, but not to the client's opinions on, or stemming from the legal advice.
- Drafts, notes and other material brought into existence by the client for the purpose of communication to the lawyer, whether or not they are actually communicated to the lawyer.
- The lawyer's revisions of the client's draft correspondence.

The privilege does not extend to legal advice contained in policy and procedure manuals. Nor can privilege be claimed over communications for use in existing or anticipated legal proceedings before a commission or tribunal.

Is in-house counsel protected by legal privilege?

In Australia, Courts have considered whether in-house lawyers are protected by Legal Privilege by assessing whether they are acting in their capacity as a lawyer or have the requisite independence to provide unfettered advice.

To attract Legal Privilege, communications must be made in a lawyer's capacity as a lawyer, rather than any other capacity.

Communications made by in-house lawyers who act beyond their role as a legal adviser may fall outside the scope of Legal Privilege because they are found to have been made for mixed non-legal and legal purposes rather than a 'dominant purpose'.

A key requirement of acting in the capacity of a lawyer is that the lawyer exercises independent professional judgment. Claims for Legal Privilege have been rejected on the basis that in-house lawyers have not acted at sufficient arms length from their client. For example, doubts have been expressed as to whether Legal Privilege extends to documents produced by in-house lawyers who are subject to the directions of their managers and therefore, might lack the necessary independence. In addition, Legal Privilege has been denied in cases where in-house lawyers have been involved in the commercial decision-making of a transaction for which the client is claiming privilege.

Whether an in-house lawyer has a practicing certificate has also been considered by courts in Australia when deciding whether Legal Privilege should apply to an in-house lawyer's advice. Whilst not having a

practicing certificate is not fatal, the important issue is independence. This reflects the view that a lawyer's primary obligation is to the court, rather than the lawyer's employer and/or client.

Does legal privilege apply to the correspondenceof non-national qualified lawyers?

Legal Privilege is available in relation to legal advice from foreign lawyers provided that the 'dominant purpose' requirement is met.

What are the main differences between nationallegal privilege and EU legal privilege?

For matters relating to European law, legal professional privilege only applies to communications that 'emanate from independent lawyers, that is to say lawyers who are not bound to the client by a relationship of employment'. Thus, in contrast to the more flexible approach in Australia, under EU law in-house lawyers are not covered by Legal Privilege.

Other remarks

There are a number of exceptions to Legal Privilege, even when the dominant purpose test is satisfied. These exceptions apply in circumstances where:

- The privilege has been waived.
- It is in the public interest.
- A statute modifies or removes the privilege where the legislature affords a competing public interest a higher priority.
- The communication is for the purpose of facilitating a fraud or crime.

A client will be deemed to have waived privilege if it acts in a way which is inconsistent with the confidentiality which the privilege is supposed to protect. A waiver may occur either explicitly or implicitly.

As the privilege exists to protect the client, courts will consider whether the client has made any waiver of the privilege, not the legal adviser, subject to considerations of fairness when necessary.

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AUSTRIA

Does legal privilege exist?

Partly.

Legal Privilege exists in the context of European Competition Law but not within the legislation of the Austrian Cartel Act. Therefore, as long as the Federal Competition Authority does not act for the European Commission or for another member state, there is no guarantee that the "privileged" communication is protected.

What is protected by legal privilege?

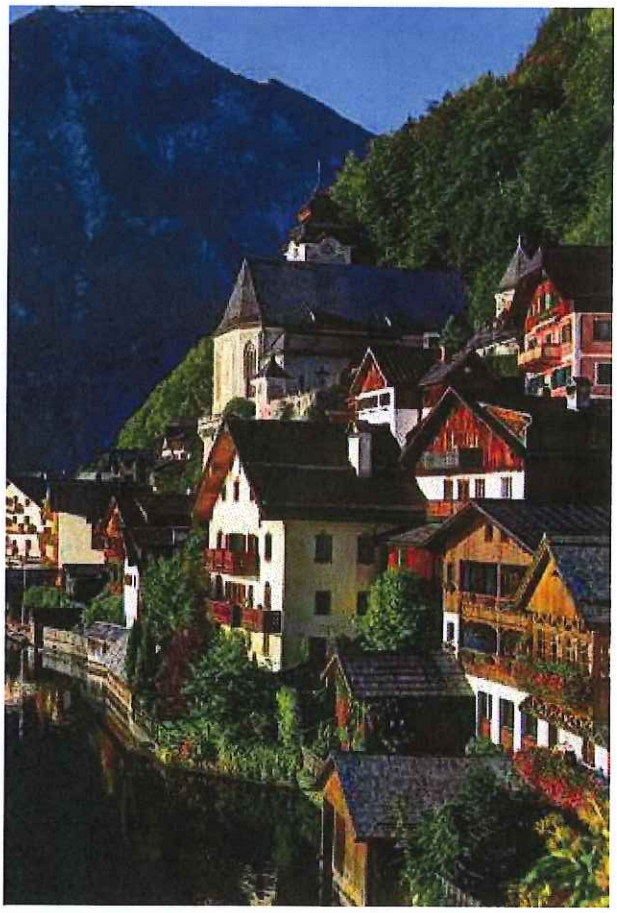
Legal Privilege protects the communications between the attorney and its client (if and when the client agrees to such protection). Legal privilege also grants the right to refuse to testify in court regarding facts related with attorney/client counselling.

Legal Privilege does not cover communications from the attorney to the client when they are found in the client's possession.

Is in-house counsel protected by legal privilege?

The attorney-client privilege is applicable only with respect to independent attorneys registered with the bar (Rechtsanwälte) and extends to personnel assisting these independent attorneys as well.

The attorney-client privilege is not applicable to in-house counsels as they cannot be or remain registered with the Austrian bar. To be able to register or remain registered with the bar, attorneys need to be independent and not under control of the client. These requirements are not met by in-house counsels that are normally integrated in the organization of their client (legal department). In-house counsels usually have various functions, which extend beyond the services normally provided by an attorney, sometimes including management functions.



What are the main differences between national legal privilege and EU legal privilege?

In addition to the reply to the first question, an exception to the attorney client privilege is applied in cases of money-laundering (when there is a suspicion that a certain client is connected with money-laundering activities its attorney is obliged to report such activities to the Austrian Federal Office of Criminal investigation). Such exception is not applicable regarding facts perceived in the preparation of court proceedings.

Other remarks

There are no explicit legal provisions privileging communications between in-house counsels and officers, directors or employees of the company. However, Austrian labour law establishes a general duty of loyalty of the employees towards the employer. This means that all employees of a company (including in-house counsels) are obliged to protect the employer's business interests. It includes the obligation not to disclose relevant information concerning the enterprise towards third persons. Under Art 15 DSG, Austrian Data Protection Act, data, which have been accessible during and by virtue of one's employment, have to be treated as confidential as far as there is no legal reason for the transmission of these data. Communications between in-house counsels on the one hand and officers, directors or employees of the company on the other are subject to this general duty of secrecy if this is in the employer's interest.

These secrecy obligations, however, are not applicable if the employee is called as witness in proceedings which are criminal, administrative or civil. Furthermore, this obligation of secrecy normally only lasts for the duration of the respective employment contract. At a later stage, the employee is only committed to secrecy if a respective secrecy agreement has been entered into.

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BELGIUM

Does legal privilege exist?

Belgium has no separate and independent right to Legal Privilege. However, legal advice is protected from seizure through the following concepts:

Professional secrecy – is a general obligation not to disclose secrets, imposed on all persons that, due to their professional status, have access to such secrets. It is an obligation of public order and deontology, sanctioned by criminal law (art. 458 Criminal Code) and by disciplinary measures.

Confidentiality – is a corollary of professional secrecy, giving the person bound by it the right to refuse to give evidence on matters covered by professional secrecy or to withhold from seizure any document containing information covered by professional secrecy.

Thus, no separate right exists that grants protection to legal advice. It is, however, the necessary consequence of the obligation imposed on lawyers not to disclose information obtained due to their professional capacity.

What is protected by legal privilege?

Since confidentiality is a corollary of the secrecy obligation, its rights are connected to the lawyer and not to the legal advice. It is a right *in personam*. This means that only information communicated to and in possession of the lawyer is protected and that advice or information communicated by the lawyer to his client does not fall within the protected scope. However, in criminal cases, protection has a wider reach, which is linked to the rights of defence of the accused: in this context, also communications by the lawyers to the accused are protected from seizure. Since Belgium does not impose criminal sanctions on violations of competition law, this is not relevant from a competition law perspective.

Art. 458 Criminal Code formulates the secrecy obligation in general terms. This means that any secret is caught by it. The obligation is, however, restricted by allowing lawyers to reveal a secret when a law requires them to do so or when called before court to testify. This does not imply that he can be compelled to do so if he believes that it is his duty not to disclose a secret. Furthermore, exceptions to the obligation can be provided for by law (eg. money laundering).

In contrast, Belgian lawyers' deontology imposes an absolute secrecy obligation. However, at all time, a lawyer may reveal a secret in order to defend himself against an unjustified accusation.

In principle, correspondence between lawyers is protected. However, where it is expressly stated not to be confidential, when it cannot by its nature be confidential, or when the correspondence discloses a concluded agreement between the parties, it cannot enjoy confidentiality.

Is in-house counsel protected by legal privilege?

Yes; the profession of in-house counsel is regulated in Belgium by the law of March 1, 2000, creating the *Institut des Juristes d'entreprise/Instituut voor Bedrijfsjuristen* (hereinafter referred to as the "*Institut/Instituut*").

These in-house counsels are the only ones entitled to bear the title of "*Juriste d'entreprise/Bedrijfsjurist*". In order to become a *Juriste d'entreprise/Bedrijfsjurist*, the candidate must, amongst others, be registered with the *Institut/Instituut*. The Institut/Instituut is an autonomous public institution enjoying legal capacity (*personnalité juridique/rechtspersoonlijkheid*) and created by the abovementioned law.

As required by law, the *Institut/Instituut* issues ethical rules, sets up a disciplinary regime to be approved by Royal decree and exercises effective disciplinary power through specific bodies, namely the *commission de discipline/tuchtcommissie* and the *commission d'appel/beroepscommissie*, both chaired by magistrates appointed by the King. The *Juristes d'entreprise/Bedrijfsjuristen* must abide by these rules and they are sanctioned in case of infringement.

Article 5 of the law of March 1, 2000, as commented by the ethical rules issued by the Institute, provides that all correspondence between a client and a *Juriste d'entreprise/Bedrijfsjurist* containing or seeking legal opinion is confidential. Therefore, if a manager asks his/her *Juriste d'entreprise/Bedrijfsjurist* a legal opinion, both the correspondence seeking and containing the legal opinion will be confidential.

As a difference compared to the *Advocat/Advocaat*, the legal privilege of the *Juriste d'enetreprise* is limited to his/her legal opinion and the document(s) seeking it.

Article 5 of the law of March 1, 2000, does not expressly refer to article 458 of the Criminal Code. Yet, although the matter remains controversial, article 458 of Criminal Code also applies, according to eminent authors to the *Juriste d'entreprise/Bedrijfsjurist* where he/she gives a legal opinion so that any infringement to his/her duty not to reveal what is confidential will give rise to criminal sanctions in the same way as for external lawyers.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

Regarding lawyers: No; since confidentiality is linked to the capacity of a lawyer, it can only be granted to lawyers that fall within the field of application of Belgian law: a lawyer is recognised as such due to subjection to a Belgian Bar. This makes art. 458 Criminal Code and its accompanying right of confidentiality applicable. A foreign lawyer, who is not subject to art. 458 Criminal Code, thus does not enjoy the accompanying right of confidentiality.

Regarding in-house counsel: No; in order to enjoy protection, legal advice needs to be given by in-house counsel recognised as such by the *Institut/Instituut*.

What are the main differences between national legal privilege and EU legal privilege?

European confidentiality protection is, contrary to the Belgian equivalent, not granted to legal advice emanating from in-house counsel.

European confidentiality protection is attached to the actual communication. This means that also documentation in possession of undertakings can enjoy protection.

European confidentiality can only be enjoyed when correspondence relates to a client's right of defence. This means that only communication relating to a procedure enforcing art. 101-102 TFEU can be granted protection. Also communication predating the initiation of such procedure that comes to fall within such context, is granted protection.

Correspondence between a lawyer and a third party, not being a client of his, is not protected by European legal privilege.

Other remarks

Article 5 of Law of March 1, 2000, creating the *Institut des Juristes d'entreprise*, states:

"Opinions given by in-house counsel to the benefit of their employers and within the framework of their activity as legal counsel are confidential."

This implies that legal advice emanating from in-house counsel enjoys a functional protection that is to be judged upon in every single situation. Thus, correspondence with other in-house counsel or with external lawyers can be granted confidentiality, but will not automatically enjoy such protection.

Interestingly, a distinction is to be noticed in the philosophy of the two different forms of protection: while in-house counsel enjoys an actual legal privilege protection, this stands in contrast with protection granted to lawyers: not the advice in itself is protected; rather, the professional secrecy of the lawyer is maintained. No functional approach is thus taken towards this protection.

In addition, stagiers (legal trainees) are covered in the same way as lawyers are.

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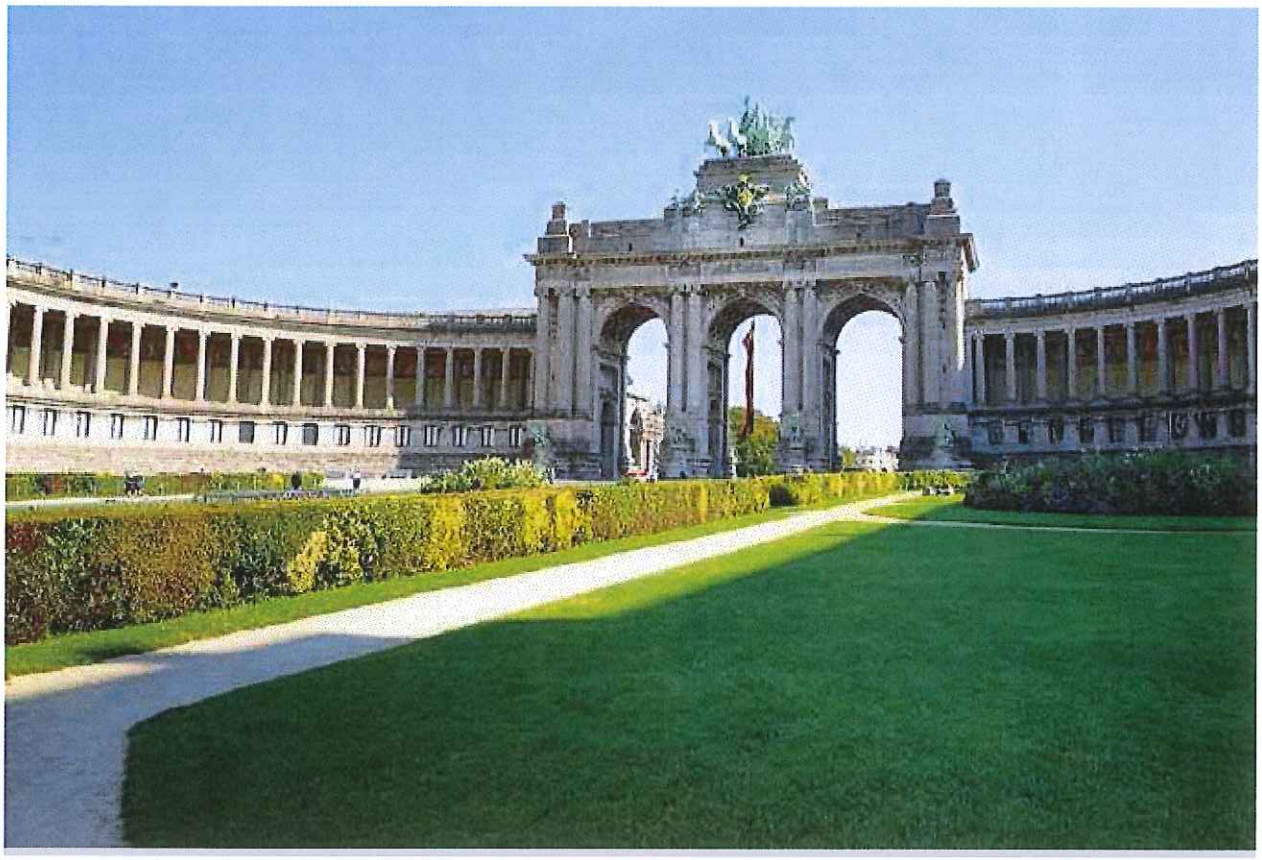


BULGARIA

Does legal privilege exist?

Generally, attorney-client privilege is regulated in Bulgarian legislation by article 33 of the new Law on Advocacy (in force from July 1, 2004), which contains the legal regime of the attorneys. No competition-law-specific regulation with respect to legal privilege (by way of legislative or case-law authority) exists in Bulgaria.

What is protected by legal privilege?

Legal Privilege states that the attorney's files, documentation, electronic documents, computer equipment and other information carriers, as well as the client-attorney correspondence (irrespective of the manner it is maintained, including electronically), are inviolable. They cannot be reviewed, copied, examined or seized and cannot be used as evidence either.

The attorneys may not be summoned to testify (in court) or otherwise interrogated (by investigating authorities) regarding their conversation and correspondence exchanged with the client or another counsel, regarding client's matters or other facts and circumstances that the attorney became acquainted with while representing and assisting the client.

Any oral attorney-client communications/conversations may not be intercepted and recorded. Provided that any recordings have been made, they may not be used as evidence and should be destroyed immediately.

Is the in-house counsel protected by legal privilege?

EU case-law provides that "communications with in-house lawyers, that is, legal advisers bound to their clients by a relationship of employment, are expressly excluded from protection under legal professional privilege." (Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals and Akcros Chemicals v Commission of the European Commission, CFI, September 17,2007*). Those views were recently upheld by the ECJ in its Judgement of 14 September 2010 in Case C-550/07P, *Azko Nobel Chemicals Ltd and Ackros Chemicals Ltd v European Commission*, at para 43 *et seq.*

This tenet has not yet been tried in Bulgarian courts and, thus, no clear resolution at national level exists in this respect. However, it can be reasonably expected that the Bulgarian competition authority and courts will bring this principle to bear to such domestic situations as well.

Pursuant to the Law on Advocacy attorneys are not entitled to be bound to their clients by a relationship of employment. Bulgarian law has no specific legal provision or Court ruling in respect of in-house counsel privilege. In fact, to the extent that the in-house counsel is in an employment relationship with the company (i.e. has been retained on the basis of an employment agreement), it is considered to be a regular employee of a company (and not an "independent" lawyer with its inherent rights). Open remains the question of legal privilege over the advice of counsel who effectively works in-house full-time but on the basis of the so-called "civil law" agreement (services agreement), which happens in practice.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

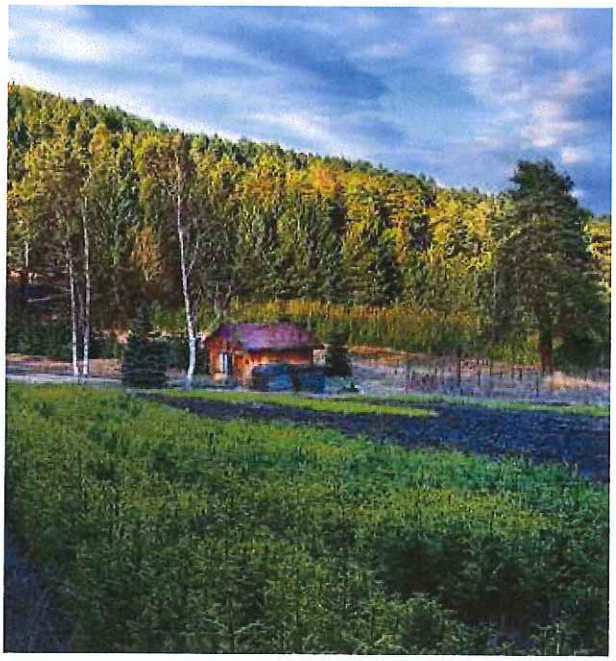
The Bulgarian Law on Advocacy implements Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtain. Article 6 of the Directive reads that "irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State *in respect of all activities he pursues in its territory.*"

The Law on Advocacy provides that a citizen of an EU Member State who qualified as an attorney-at-law in another EU Member State (other than Bulgaria) in accordance with the home Member State's legislation, may practise in Bulgaria under the professional title obtained in his/her home Member State. Such attorneys from other EU Member States enjoy the same rights as Bulgarian attorneys, including legal privilege.

What are the main differences between national legal privilege and EU legal privilege?

The EU Privilege extends to attorneys who are admitted to the bar in one of the EU Member States. According to the settled case-law of the European Courts (Case C-155/79, *AM & S Europe Limited v Commission of the European Communities*, May 18, 1982; Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals and Akcros Chemicals v Commission of the European Commission*, CFI, September 17,2007, Case C-550/07P, *Azko Nobel Chemicals Ltd and Ackros Chemicals Ltd v European Commission*), legal privilege sticks to written communications between lawyer and client made for the purposes and in the interests of the client's rights of defense and emanating from independent lawyers (that is to say, lawyers who are not bound to the client by a relationship of employment are subject to the EU Privilege protection). Such written communications include both (i) all written communications exchanged between the attorney and the client in relation to the subject-matter of the pending proceedings, as well as (ii) internal notes circulated within the client's organization if they are confined to merely reporting the content of the outside counsel's advice.

The Bulgarian Law on Advocacy provides that not only written communications are subject to client-attorney privilege protection, but any attorney's files, documentation, electronic documents, computer equipment and other information carriers, correspondence between client and attorney (irrespective of the manner it is maintained, including electronically), as well as verbal client-attorney communication. No domestic legislative or case-law authority exists as to whether the written communications (including correspondence) need to be exchanged specifically for the purposes of excising the client's right of defence in already pending proceedings in order to benefit from legal privilege. Neither exists authority on the application of legal privilege to internal notes merely reporting the content of the external advice.



Other remarks

The information and correspondence emanating from in-house counsel is not especially protected against scrutiny by authorities in the course of pending proceedings. More specifically, from a competition law perspective, undertakings may not call on protection of business secret with respect of such information/correspondence if they are subject to investigation or have been requested to provide information.

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CHINA

Does legal privilege exist?

The concept of legal privilege does not exist under the laws of the People's Republic of China ("PRC"). PRC laws and regulations do not contain any provisions that exempt lawyers from being forced to disclose information they receive from a client to a third party. There is no attorney work product protection and there is no protection of communications between lawyers and clients on the basis of legal privilege in China. While the PRC Lawyer's Law does contain provisions that require lawyers to keep confidential certain information they receive during the course of their practice, this requirement is not equivalent to the concept of legal privilege or attorney work product protection. The Lawyer's Law provides that:

1. A lawyer must keep confidential information he or she receives from the client or others (who have not agreed to its disclosure) in the course of representing a client; an exception, however, is for information concerning the preparation or the commission of criminal acts (Article 38 of the Lawyer's Law);
2. A lawyer shall keep confidential state secrets and commercial secrets which he or she obtains in the course of representing a client and should not disclose a client's personal secrets (Article 38 of the Lawyer's Law); and
3. The government may not conduct audio surveillance when a lawyer interviews a criminal suspect or defendant (Article 33 of the Lawyer's Law).

However, a PRC lawyer may be forced to disclose information referred to in point 1 and 2 above by (a) PRC governmental authorities, although this is not specifically defined, and (b) also by an order of the court. In relation to the latter, Article 70 of the PRC Civil Procedure Law provides that a lawyer has a duty to testify about a client's private information in court. Again, there is no claim for legal privilege since this concept does not exist in China.

For criminal cases, the PRC's Criminal Procedure Law also contains the general principle concerning a lawyer giving testimony, similar to Article 70 of the Civil Procedure Law. However, a new provision has been added to protect lawyer-client communications in the latest revised version of the Criminal Procedure Law (which came into effect on 1 January 2013). This new Article 46 provides that "*[a] lawyer has the right to keep confidential information of the client obtained during the professional practice. For information that involves any impending or on-going criminal activity which would jeopardize national and public security or cause serious personal safety damage, a lawyer must inform PRC judicial authorities*". This new provision is seen as China taking a step forward to protect lawyer-client confidential communications, although it only applies to criminal cases. How Article 46 will be implemented is yet to be tested in practice. Our understanding is that this new Article 46 is unlikely to afford blanket protection to "lawyer-client communications" and it is different from the concept of "legal privilege" in common law countries.

What is protected by legal privilege?

As there is no concept of legal privilege in China, no one is subject to absolute protection as is the case of legal privilege in common law countries for example. Therefore, if a company is subject to investigation by governmental authorities (for example the People's Prosecutorate or the Public Security Bureau), the authorities can require a person or entity to produce any documents that lawyers have created.

Is in-house counsel protected by legal privilege?

As there is no concept of legal privilege in China, no such protection applies.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

Counselling and/or correspondence originates from a non-national qualified lawyer in China is not protected from disclosure to Chinese authorities by any concept of legal privilege in China since such a concept does not exist under PRC law.

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CYPRUS

DLA Piper Preferred Firm

PAMBORIDIS LLC
ADVOCATES & LEGAL ADVISORS

Does legal privilege exist?

Yes.

What is protected by legal privilege?

All persons that are admitted to the Cyprus Bar are considered to be advocates and are, consequently, regulated by the Advocates' Law (Cap. 2) and the Advocates' Code of Conduct Regulations of 2002 ("the Regulations").

The Regulations provide that, as a general rule, the advocate – client privilege ("Legal Professional Privilege" or "LPP") applies to the dealings and communications of all advocates with their clients. Legal Professional Privilege is both a fundamental right and a duty of the advocate not to disclose any confidential information which has arisen from communications with his client, whether in the context of legal proceedings or at a discovery process. Communications between an advocate and a third person are also considered privileged so long as these take place predominantly in the context of pending or anticipated judicial proceedings/litigation.

If an advocate practices in a firm or partnership, the rules of confidentiality and legal professional privilege extend and apply to all members of the firm or partnership as well. Confidential information arising from another advocate is therefore also regarded as privileged

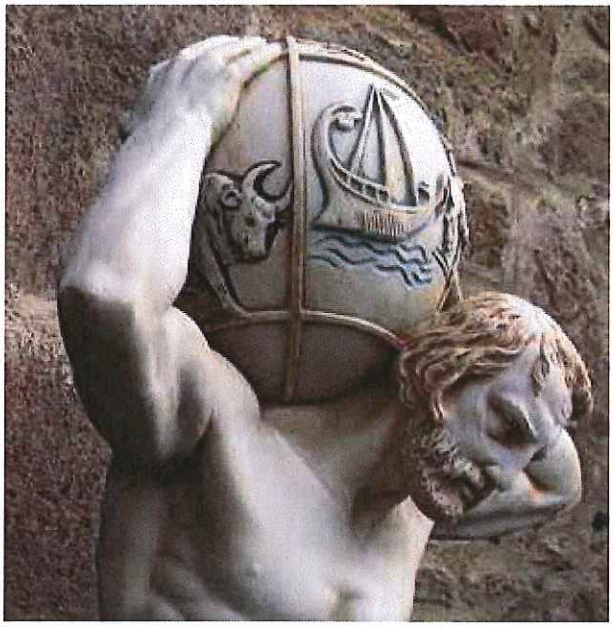
Legal Professional Privilege applies only in relation to an advocate's legal communications with his client and does not extend to any additional role the advocate may take up, e.g. as a trustee, agent, representative etc of his client.

Is in-house counsel protected by legal privilege?

Yes provided that he/she is admitted to the Cyprus Bar.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

The Regulations also apply to foreign advocates allowed or granted a license to practice law by the Cyprus Bar.



Other remarks

The Regulations apply also to trainee lawyers.

The duty to maintain professional secrecy does not have any time limitation. If the client appears as a witness in court he may refuse to answer any question which may tend to lead to a disclosure of information covered by professional privilege.

If a client makes a complaint against an advocate or if the advocate is facing criminal or disciplinary charges then the advocate is entitled to disclose any confidential information with regard to the accusations.

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CZECH REPUBLIC

Does legal privilege exist?

Yes. While it is not expressly set out in any legal regulation, the case law has developed this concept in the area of competition law, based on more general legal principles.

What is protected by legal privilege?

The Czech case law recognizing the concept of legal privilege is extremely underdeveloped. We are actually aware of only one case heard by the authorities where this matter was at stake. namely *Billa – Meinl* case. That case involved the purest form in which legal privilege can be involved, i.e. communication between an undertaking (subject to investigation by the national competition authority) and its external counsel (registered as a Czech attorney-at-law) relating a particular competition matter. The national competition authority took possession of the said documentation in course of a dawn raid, but returned it then and excluded it for the purposes of subsequent fact finding. The Supreme Administrative Court, hearing an administrative action against the decision of the national competition authority, confirmed, basically just as an obiter dictum to its judgement, the existence of the legal privilege in this respect – the Court stated that the legal privilege forms a part of the undertaking's right for legal defence and that the authority having become acquainted with the content of a document covered by that privilege might violate that right.

Based on this fact, it is unfortunately impossible to give more definite details as to scope of protection ensuing from legal privilege in the Czech Republic (as to covered lawyers, types of work products, content and time when a document was prepared).

Apart from that, obviously a general concept of "legal privilege" consisting in right and duty of professional secrecy and confidentiality of attorneys-at-law is recognized in the Czech Republic.

Is in-house counsel protected by legal privilege?

Current Czech case law does not given any response to this – see above. Most likely, the national approach would follow the position of EU law, i.e. the answer would be "no".

Does legal privilege apply to the correspondence of non-national qualified lawyers?

Current Czech case law does not given any response to this – see above. Most likely, the national approach would follow the position of EU law, i.e. the answer would be "no", unless there would be any strong reason for a deviating position (could be the case e.g. if the relevant non-EEA qualified lawyer, advising in a relevant matter, would be registered by the Czech Bar Association as a "foreign attorney").

What are the main differences between national legal privilege and EU legal privilege?

Due to highly undeveloped concept of legal privilege in the Czech Republic, the question cannot be answered yet – we need to wait for further development of the national case law in this respect.

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DENMARK

DLA Piper Focus Firm

HORTEN

Does legal privilege exist?

Yes. However there are no explicit provisions on legal privilege under the Danish Competition Act.

What is protected by legal privilege?

Communication (at least with respect to confidential information) in any form between a qualified attorney and his client is generally subject to the attorney-client privilege (Legal Privilege).

The Danish Administration of Justice Act and the Danish Penal Code set out provisions governing attorney-client privilege. The rules apply to all Danish attorneys, whether in-house, self-employed or otherwise engaged, provided that the attorney is qualified as such in Denmark, i.e. has obtained a formal practicing certificate from the Ministry of Justice on the basis of having fulfilled the requirements for this.

The main legal rule on attorneys' duty to give oral evidence in legal proceedings is section 170 of the Danish Administration of Justice Act according to which evidence cannot be demanded from attorneys regarding matters communicated to them in the course of carrying on their profession, if the party who has a right to confidentiality does not agree with that. The court may, however, order attorneys (apart from defence counsel in criminal cases) to give evidence, when the evidence is deemed decisive for the outcome of the case, and the nature of the case and its importance to the party in question or society is considered to justify such evidence being given.

Further, according to section 299 of the Danish Administration of Justice Act a court may – at the request of a party – order a third party, including an attorney, to produce or surrender documents which are at his disposal and which are important to the case, unless this will result in the disclosure of matters, on which he would otherwise be excluded or exempted from giving oral evidence.

Is in-house counsel protected by legal privilege?

There are no explicit legal provisions privileging communications between in-house counsels and officers, directors or employees of the company and there is no case law regarding the question. It is therefore unclear, whether in-house counsel is protected by the legal privilege as contained in section 170 of the Danish Administration of Justice Act.

However, please note that practice under the Danish Competition Act, communication between in-house councils and officers, directors or employees of the company is not covered by the Legal Privilege.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

There are no explicit legal provisions privileging communications between non-national qualified lawyers and Danish Clients and there is to our knowledge no judgments concerning the question. However, there is the assumption that if the attorney is established in the EU, the legal privilege will apply.

Other remarks

Under the Danish Money Laundering Act an attorney, who suspects a client to be involved in money-laundering, is obliged to report such activities to the Public Prosecutor for Serious Economic Crime.

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ENGLAND & WALES

Does legal privilege exist?

Yes, the law of England and Wales recognises two main types of legal professional privilege:

- legal advice privilege
- litigation privilege.

Other types of privilege which are occasionally asserted are joint privilege and common interest privilege.

Legal professional privilege is a substantive legal right (not a procedural rule). It enables a person to refuse to disclose certain documents in a wide range of situations. However, it only applies to protect documents which are confidential. If documents which would otherwise be privileged contain information which is already in the public domain or which has been shared with third parties, privilege will be lost.

The privilege belongs to the client, not the lawyer and does not depend upon the document being in the lawyer's custody. Privileged documents can (and frequently are) held by the client.

Privilege is waived if the relevant material is placed before a court. It is also lost if the material in the document looses confidentiality or if the document came into being for the purpose of furthering a criminal or fraudulent scheme. A lawyer has a duty to protect his client's privilege and cannot waive it without his client's express authority

What is protected by legal privilege?

Litigation Privilege

Litigation privilege affords a wider protection than legal advice privilege since, where it applies, it can protect communications with third parties, as well as those between a lawyer and his client. It applies where adversarial proceedings are *reasonably in prospect* (for instance, where negotiations over a contractual issue are breaking down or one party sends or receives a formal letter before action). Enquiries by regulatory authorities, requests for staff to give witness evidence, third party disclosure orders and other investigative processes will not normally be considered adversarial, although regulatory proceedings in which judicial powers are being exercised are likely to be considered adversarial for these purposes. A good approach to determining whether proceedings are in prospect is to consider whether there is a legal issue to be determined as between the parties to the relevant process.

If adversarial proceedings are reasonably in prospect, a "*dominant purpose*" test will apply to protect as privileged all confidential documents prepared for the *dominant purpose of giving or getting legal advice with regard to that litigation or aiding the conduct of that litigation.* Determining the dominant purpose can be problematic.

Litigation privilege has no retrospective effect. Documents created before adversarial proceedings are reasonably in prospect will not attract litigation privilege (although they may attract legal advice privilege).

Legal Advice Privilege

If no adversarial proceedings are in contemplation, privilege will only attach to documents which constitute confidential *communications between a lawyer and his client made for the purpose of giving or obtaining legal advice* and *documents which evidence such communications*. Each part of this test requires further explanation:

Communications must actually transfer information between a lawyer and his client. A document which stands in its own right or is not addressed and delivered to a lawyer specifically for his advice may not constitute a *communication*. A statement prepared by an employee at the request of his manager to record his recollection of events is unlikely to benefit from legal advice privilege – even if the employee believes that the document will be passed to lawyers for advice – since it is not a *communication* with a lawyer.

Lawyer: includes all members of the legal profession: solicitors, in-house lawyers, barristers and foreign lawyers. Where appropriate provisions for supervision are in operation, it can also include legal executives, paralegals and trainee solicitors. Care must be taken when communicating with an in-house lawyer to place the communication within the correct lawyer/client relationship. An in-house lawyer may need to maintain two such relationships; one with the business, in which he is the "lawyer" and one with external lawyers, in which he (alone or together with others) is the "client".

Client: Not every employee in a company will be the client for the purpose of attracting privilege. The "client" will only comprise those few individuals who are actually charged with obtaining legal advice and who directly communicate with the lawyer, whether external or in-house. This might be an ad hoc committee or group formed to respond to a specific issue or incident. Or it might be members of senior management. Often, however, those with direct knowledge of the facts or matters in issue will not fall within the concept of "client" and particular care will therefore need to be exercised when interviewing or obtaining information such employees.

Documents made for the purpose of giving or obtaining legal advice: privilege only attaches to legal advice, which includes advice as to what should prudently and sensibly be done in the particular situation (including how best to present facts in light of legal advice given). There must first be a *relevant legal context* – an important practical distinction for in-house lawyers to bear in mind, since privilege will not attach to advice they provide which is purely commercial or strategic.

Difficulties arise when determining the status of copy documents and documents which are only privileged in part. Further difficulties can arise if privilege has been impliedly or expressly waived. These issues are beyond the scope of this brief summary. Expert legal advice should be taken.

Is in-house counsel protected by legal privilege?

Yes, except in the context of a competition investigation by the European Commission.

An in-house lawyer must, however, take particular care to ensure that he distinguishes clearly between advice which is legal and that which is commercial in nature, since the latter will not attract legal professional privilege. He must also take care when instructing external lawyers to ensure that he clearly identifies and effectively manages the relevant lawyer/client relationships.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

Yes, where the question of disclosure is governed by the law of England and Wales. Legal professional privilege applies to advice given by all members of the legal profession. It is not necessary for the lawyer to be qualified in England and Wales.

Where the question of disclosure is governed by European law (such as in the context of a competition investigation within the UK by the European Commission), only the advice of a lawyer qualified within the European Economic Area is privileged.

What are the main differences between national legal privilege and EU legal privilege?

The law of England and Wales pertaining to legal professional privilege differs from European law in that:

- legal advice provided by in-house lawyers enjoys the same privilege as legal advice provided by external lawyers;
- the protection of privilege extends to legal advice provided by any lawyer, not just to advice provided by a lawyer qualified to practice within the European Economic Area;
- protection is afforded to a much wider range of legal advice. Under European law, only correspondence made for the purpose and in the interest of the client's right of defence is protected;
- when litigation is reasonably in prospect, communications with third parties can fall within the protection of privilege, depending upon the dominant purpose of those communications.

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ESTONIA

DLA Piper Preferred Firm

LAWIN

Does legal privilege exist?

The Legal Privilege is explicitly enacted in the Bar Association Act. Few specifying provisions have been included in the Taxation Act, Money Laundering and Terrorist Financing Prevention Act and Code of Criminal Procedure. The non-adherence of the confidentiality obligation (part of the Legal Privilege) has been sanctioned in the Penal Code with fines of up to 500 daily rates (rate depends on the daily earnings of the convicted person).

The Legal Privilege in Estonia consists of the following rights and obligations (the **Legal Privilege**):

- All the information mediums related to the attorney providing Legal Services (for definition see 1.2 Scope) enjoy immunity;
- Right to refuse from answering questions in criminal proceedings as a witness regarding the information received in the course of providing the Legal Services;
- Right to refuse from providing information to the Tax and Customs Board, when such information has been received in the course of the providing Legal Services;
- Attorney's right to be guided only by the laws, regulations and decisions of the Bar Association, professional ethics, good moral and conscience;
- Attorney may not be detained, searched or arrested based on the circumstances arising from his/her professional activity;
- The law office cannot be searched based on the circumstances arising from its professional activity;
- Obligation to maintain in secrecy the information received during the provision of Legal Services;
- Obligation to maintain in secrecy the fact of addressing the attorney for Legal Services;
- Obligation to maintain in secrecy the amount of the legal fee paid for Legal Services.

What is protected by legal privilege?

Scope

The scope of Legal Privilege under Estonian law is considerably wide covering the correspondence between the client and the attorney (the member of the Bar Association) in the course of the court proceedings, pre-trial procedure or any other legal procedure, legal counselling and executing any other legal act in the interests of the client (the **Legal Services**). This means that the Legal Privilege applies to all the information revealed in the correspondence between the client and the attorney related to provision of Legal Services and not only to the correspondence related to the right of defence in the courts. All rights and obligations under the Legal Privilege are valid without term. The immunity of the information mediums related to provision of Legal Services also apply to the information mediums in the possession of the client.

Covered Persons

The Legal Privilege is not only the privilege of the attorneys, but it also covers the employees of the law offices and Bar Association and public officials, who have acquired information covered by Legal Privilege in the course of his/her professional activity. Furthermore, the clients of the attorneys are covered as well regarding the immunity of the information mediums. Lawyers, who are not members of the Bar Association (including in-house counsels), enjoy no Legal Privileges.

Restrictions

a) Money laundering

Legal Privilege is not an absolute privilege and there exist few exceptions. For example, the Money Laundering and Terrorist Financing Prevention Act stipulates that attorneys and other legal service providers (also lawyers not being members of the Bar Association) are obliged to inform Financial Intelligence Unit of any information regarding the money laundering or terrorist financing or any suspicion thereon they have acquired

while acting as a client's representative in financial or real estate transactions, at the sale or purchase of the real estate or the company or while administering client's money, securities or other property, opening or administering bank or security accounts, acquiring funds for establishing, operating or managing the company or similar entity or while providing instructions or executing the transaction regarding the establishment, operation or management of the company or any other similar entity.

The attorneys (but not other lawyers) have been released from the informing obligation, when they have received information regarding the possible money laundering or terrorist financing, while representing the client in civil, criminal, administrative or challenge proceedings, including the pre – and post-trial activities (i.e. determining the clients position). Extending the exception only to the attorneys creates lots of problems, as the law also allows other persons with sufficient capabilities to represent the client/accused person in the court proceedings. For example, the investigatory bodies may demand information on money laundering from the non-attorney criminal defence counsel during the proceedings and the latter has no legal ground to refuse. When the counsel refuses to provide information on money laundering or terrorist financing, he/she may be sentenced to prison for up to one year.

b) In criminal proceedings

As a rule, the attorney and the law office cannot be searched based on the circumstances relating to their professional activity. However, the pre-trial judge may approve searching of the attorney or law office, when there exists dominant public interest and the procedural guarantees (i.e. the attorney must always be present, when the law office is being searched) shall be adhered. It is also important to emphasise that the personnel of the investigative body may only review and take away the information mediums specifically related to the grounds of the search and no wide scale search and removing of "random" information mediums is allowed. With the prior approval, the investigative bodies may also apply surveillance on the correspondence between the attorney and the client. Therefore, the immunity of the information mediums and obligation of confidentiality related to the attorney providing Legal Services can be limited in the criminal proceedings with the approval of the court.

However, the approval to apply surveillance, to review and take away the information does not automatically mean that these information mediums can be used as evidence in the criminal procedure. After the personnel of the investigative body has acquired the information mediums about or from attorney, law office or client (by searching or surveillance) and presented them to the judge hearing the matter, the judge shall review the presented information mediums and shall decide whether the relevant information mediums enjoy Legal Privilege or not (Supreme Court decision 3-1-1-22-10). When the judge decides that the relevant information mediums are related to the attorney providing Legal Services, the judge will refuse to accept these mediums as evidence.

c) In competition supervisory proceedings

The Competition Act stipulates that the Competition Board is entitled to inspect the premises of the entrepreneur, including enterprise, area, building, room and transport vehicle without the prior notice or special permit, to establish the breach or possible breach of the Competition Act. The person inspecting the entrepreneur has the right to control the documents relating to the business activity and to make copies and to control the information, databases and electronic information mediums recorded in the computers at the premises or belonging to the entrepreneur. The Competition Act includes no references to the information mediums covered with Legal Privilege. On the contrary, Competition Act stipulates that the Competition Board has the right to issue a precept, when the entrepreneur has failed to present the documents requested by the Competition Board. When the precept has not been complied with the Competition Board may issue fine of up to 6400 EUR. Although, given procedure may be in violation with the Legal Privilege principle, this should be considered as current practice. It should be noted however, that it is not in compliance with the standpoint expressed

by European Court of Justice in the milestone case *Akzo Nobel Chemicals Ltd vs European Commission* (please see below).

d) On confidentiality obligation

Although as a rule, the attorney and other obliged persons, are bound by the obligation without term to keep all the information received in the course of providing Legal Services confidential, there are few exceptions to that rule. Firstly, the client or its legal successor may release obliged person from the confidentiality obligation. Secondly, the obliged person may file to the chair of the administrative court or to the administrative judge so appointed by the chair a reasoned written application for releasing him/her from the confidentiality obligation in order to prevent the first degree crime. However, the judge may refuse to grant approval.

Is in-house counsel protected by legal privilege?

No; the principle of Legal Privilege applies only to the persons stipulated above (Covered Persons). Lawyers not being members of the Bar Association are not included.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

The Bar Association Act stipulates that the attorney, who has the full legal right to act as attorney in another European Union member state and is not the member of Estonian Bar Association must comply, when acting in Estonia, with all the professional and professional ethics requirements set for attorneys being members of the Bar Association. The rights and obligations under Legal Privilege serve as integral part of the professional requirements set for the members of the Bar Association and are therefore applicable also to the European Union member state attorneys.

What are the main differences between national legal privilege and EU legal privilege?

The legal practice of the right of defence in competition supervisory proceedings in Estonia is not in compliance with the standpoint expressed by ECJ in *Orkem vs Commission* and *Akzo Chemicals Ltd vs Commission.* The ECJ has repeatedly stated that the competition authorities must acknowledge the legal privilege and cannot demand the obliged person to present the information mediums evidencing its guilt. In practice the Competition Board shall collect and review all the information mediums located at the premises of the entrepreneur. Although, most likely the judge in misdemeanour and criminal proceedings shall declare such information mediums to be covered with Legal Privilege and shall not accept them as evidence, it is still not in accordance with the standpoint expressed by ECJ in *Akzo Chemicals Ltd vs Commission.* ECJ stated that the exercise of the right of defence is impaired even, when the information mediums shall not be used as evidence, however, the supervisory body has gained through reviewing the information mediums direct or indirect information about the possible sources of evidence. Investigatory bodies in Estonia shall have reviewed the information mediums by the time they submit them to the judge.

Also in criminal proceedings the current legal practice stands with investigatory bodies collecting all the information mediums (from the client, attorney or from the law office), which are related to the purpose of the search despite some information mediums being covered with Legal Privilege. Whether the information medium is covered with legal privilege is determined by the judge hearing the matter, but the investigatory body shall review the documents beforehand. This is not in compliance with the right of defence as fundamental right established by ECJ, however, this practice has been confirmed by the decision of the Supreme Court. Such approach could be in direct violation with art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which releases accused person from the obligation to convict himself and art 8, which protects the secrecy of the correspondence.

The range of information mediums protected by Legal Privilege is wider than in EU (please see above);

The immunity under EU Legal Privilege means that the documents covered with Legal Privilege cannot be reviewed prior to final determination by the court, whether the documents are covered by the Legal Privilege

and enjoy immunity or not. Under Estonian Legal Privilege, the entitled persons review the documents and then submit the documents to the judge for determination, whether the documents are covered with Legal Privilege or not.

Other remarks

When the client (entrepreneur) has refused to submit documents to the Competition Board and the Competition Board has imposed a fine on the entrepreneur, the latter is entitled to file a claim to the administrative court to challenge the fine. In the administrative proceedings the administrative court is subjected to the same rules as the civil court in the matters of acceptable evidence. The civil court may not accept and may not collect evidence, which have been collected or have been requested to be collected in violation with the fundamental rights. According to ECJ the right of defence is a fundamental right. It remains unclear, what should the administrative court do next; whether it should state, based on the forbidden evidence argument, that the fine cannot be imposed as these documents cannot be used as evidence in administrative proceedings or should it disregard the claim and state that the right of the Competition Board is a special right, which initially prevails the Legal Privilege, and that the entrepreneur should hand over the documents knowing that these documents cannot be used as evidence in administrative, misdemeanour or criminal proceedings.

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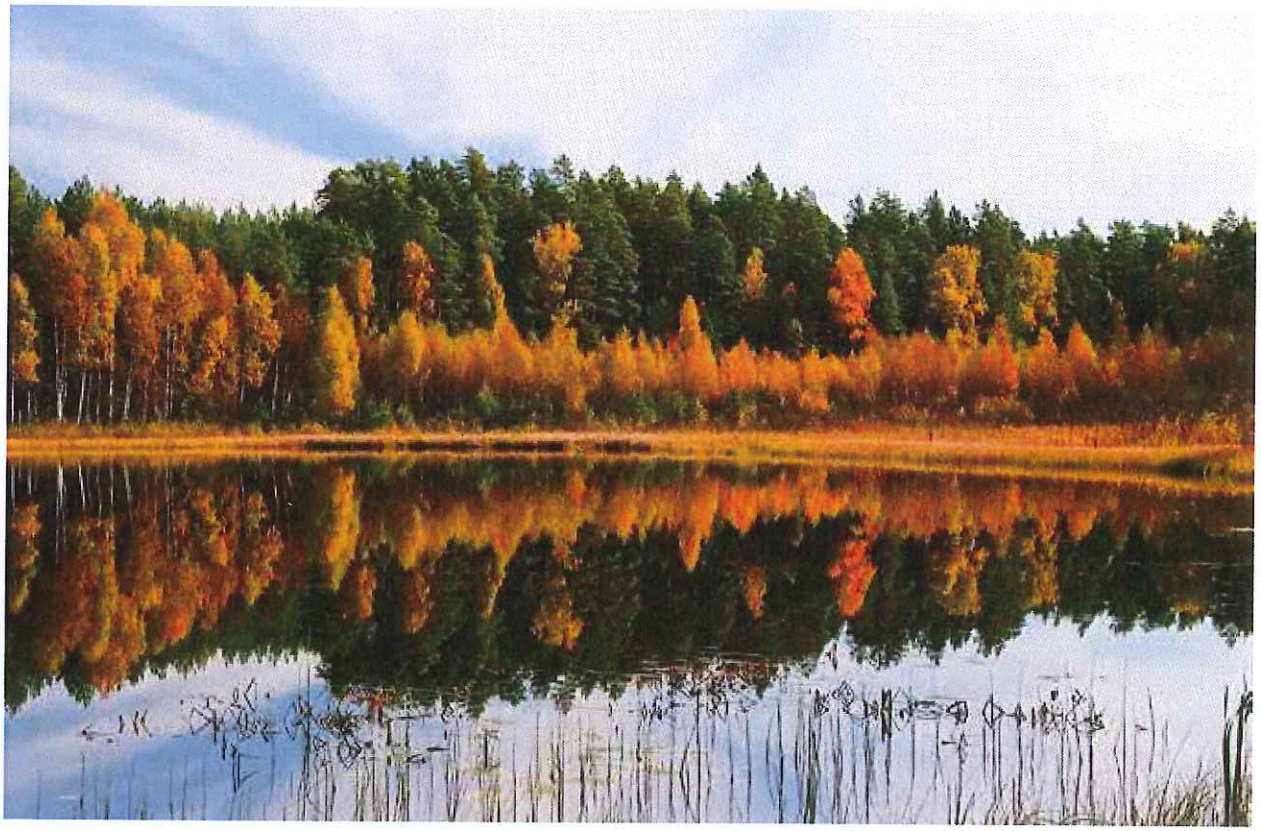

FINLAND

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BORENIUS
ATTORNEYS AT LAW

Does legal privilege exist?

Yes, the concept corresponds with the practice of the EU.

Legal Privilege is presented in the Act on Advocates section 5c, which states that an advocate or his assistant shall not, without due permission, disclose the secrets of an individual, family or business or professional secrets which have come to his knowledge in the course of his professional activities. The obligation to follow this confidentiality is expressed in subsection 2: Breach of the obligation of confidentiality provided for under paragraph 1 above shall be punishable in accordance with chapter 38, section 1 or 2, of the Penal Code, unless the law otherwise provides for more severe punishment for the act.

A similar provision is found in the Code of Judicial Procedure chapter 15, section 17: An attorney, a counsel or an assistant thereof may not without permission disclose a private or family secret entrusted to him or her by a client, nor similar confidential information received by him or her in the course of his or her duties.

According to the Code of Judicial Procedure chapter 17, section 23(1)(4), an attorney or a counsel is not allowed to testify in respect of what the client has entrusted to him or her for the pursuit of the case. The testimony can be allowed with the client's consent. According to subsection 3, other persons can, except for the counsel of the defendant, be ordered to testify in the case if the public prosecutor has brought a charge for an offence punishable by imprisonment of six years or more.

What is protected by legal privilege?

In Finland, the Legal Privilege of an attorney is not bound to his membership with the Finnish Bar Association, but to his status as a legal advisor. According to the provisions mentioned above, Legal Privilege covers advocates, attorneys, counsels and their assistants. The coverage has also been interpreted to cover a wider circle of people: legal aid counsels have been equated with attorneys, and the expression "an advocate and his assistant" covers the whole staff of the lawyer's office. It has been commonly acknowledged that the secrecy obligation which can be derived from the attorney's profession also includes the staff of his office; the fulfillment of an assignment requires often the assistance of other lawyers and legal staff.

The question on Legal Privilege often arises in relation to legal proceedings, where the possibility to use different documents as evidence is put to a test. The scope of the documents which are covered by this confidentiality is not explicitly mentioned at the level of law in Finland, but the principle expressed in the EU case law has been considered to be valid also at the national level. The correspondence between a legal advisor and a client is considered to be confidential if the material is relevant to the client's right of defence and the legal advisor is independent, i.e. not an employee to the client. Legal Privilege covers the entire correspondence between an independent lawyer and a client in relation to a specific case, i.e. all the material after an authority has begun the proceedings, but also all the material prior to the case, if a direct relation to the case can be presented. The documents' relevance to the case must also be stressed: not all material that the client considers as secret is protected by Legal Privilege, e.g. documents containing business or trade secrets.

There are exceptions to the main rule of Legal Privilege. Firstly, the confidentiality can be passed if the client, whose interests are protected, gives an express consent. Secondly, the Penal Code chapter 15 section 10 expresses a duty to disclose serious threats against an individual or the society. The duty also covers lawyers, except for cases where there exists a confidentiality based on an assignment. Thirdly, a state of necessity, e.g. a lawyer's need to defend himself against accusations, entitles an infringement of Legal Privilege. A fourth exception applies only to advocates, who shall give essential information on the completion of his professional duties to the organs of the Finnish Bar Association in cases of disciplinary measures. Other exceptional situations can be justified by law, e.g. money laundering regulation.

Is in-house counsel protected by legal privilege?

According to the relevant EU case-law, an in-house counsel is not protected by Legal Privilege, and this is also the standpoint in Finland. Legal Privilege is based on the attorney's independence in relation to the client; an in-house lawyer cannot be considered to be separate from his employer. It is more difficult for an in-house lawyer to solve eventual conflicts objectively, and he is often bound to the employer's strategies, business principles and goals.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

Legal Privilege is not bound to the nationality of the legal advisor.

What are the main differences between national legal privilege and EU legal privilege?

In Finland the scope of persons covered by Legal Privilege is more extensive than the advocate in person, see above. The EU Court of Justice has in its case law defined Legal Privilege mainly in relation to the role of advocates.

Other remarks

The prohibition to testify is expressed in the aforementioned section 23, chapter 17 of the Code of Judicial Procedure. The purpose of the prohibition is to protect the confidentiality in the client-attorney relationship. The prohibition means that although the Code imposes a common duty to testify, the role of legal advisor repeals this obligation and imposes an opposing obligation not to testify about matters related to the case. The Finnish Supreme Court has stated in its ruling 2003:119 that the lawyers' secrecy obligation is more wide-ranging than the prohibition to testify and that a legal advisor can be obliged to testify about issues that otherwise would be covered by confidentiality.

In the field of criminal law, the Finnish Supreme Court has stated that Legal Privilege covers only information relevant to an assignment. In the case 2003:117, a legal advisor was obliged to disclose information which he had found out about his client while discussing another case. He had not taken the second assignment, and the information was not covered by the first assignment's Legal Privilege.

In the field of competition law, the new Finnish Competition Act entered into force as of 1 November 2011. In the preparatory work of the Act, a separate section has been created to express Legal Privilege. The section refers to investigations performed by the FCA, during which the entrepreneur is not obliged to supply the FCA with documents which contain privileged correspondence between a legal advisor and a client. According to the preparatory work, the section is of informative nature, because the principle of the protection of independent legal advice is already considered as the state of law.

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FRANCE

Does legal privilege exist?

France does not grant a separate and independent right to Legal Privilege. However, legal advice is protected through professional secrecy.

Professional secrecy is a general obligation not to disclose secrets, imposed on all persons that, due to their professional status, have access to such secrets. It is an obligation of public order and deontology, sanctioned by criminal law (art. 226-13 Criminal Code) and by disciplinary measures.

French Bar Association provides the principles of the professional rules of conduct (cf. Article 2 of the "Règlement intérieur national" referred to herein after as the "RIN").

What is protected by legal privilege?

In effect a lawyer shall not disclose the information that he acquired while representing a client or even the information he passed onto a client when advising him.

The professional secrecy of the lawyer is an obligation of public order. It is general, absolute and unlimited.

More precisely, pursuant to Article 2 of the RIN, French legal privilege is applicable in all matters, both in case of consulting or litigation, whatever the support, either material or immaterial (paper, fax, email, etc.):

- legal opinions addressed by the lawyer to its clients;
- correspondences between the lawyer and its clients, and between lawyers except those identified as official;
- meeting notes, and, in general, all the elements of the files, all information and confidences made to the lawyer at the occasion of its profession;
- clients' names and the lawyer's diary;
- fees payments;
- information required by the statutory auditor.

The violation of such conduct would represent a professional misconduct according to the professional rules established by the French Bar and the French Criminal Code.

However, this hard and fast rule applies within the following restrictions:

- the lawyer assisting the civil part, who does not have to respect the secret of the instruction, is allowed, in order to support its demand of stay of execution, to produce elements belonging to a criminal procedure where they are necessary for the defence of its client;
- the legal privilege could not be opposed at the occasion of investigations of alleged criminal offences involving the lawyer; (the Cour de Cassation authorised the copying of the law firm's complete hard drive (14/11/2001, 01-85965)).
- the legal privilege could be disclosed for the purpose of the lawyer's own defence.

Pursuant to Article 3 of the RIN, all correspondences between lawyers are confidential (including letters, faxes, emails…).

Is in-house counsel protected by legal privilege?

Contrary to common law which provides that in-house lawyers (juristes d'entreprise) enjoy the same status as private practitioners (avocats), French law still considers these two professions as totally separate.

Under French law, in-house counsel is obliged to respect professional secrecy regarding the information qualified as «business secrets» they receive within the framework of their position with the company. Professional secrecy also applies to legal opinions they render to their «client», i.e. the company. A breach of this obligation is deemed a criminal offense (Article 226-13 of the French criminal Code).

Because only lawyers are subject to the Code of Conduct of the French Bar, the legal privilege principles are not extended to communications between in-house counsel and employees, officers or directors of a company that aim at obtaining legal opinions on subjects related to their work.

In fact, a French investigation on Competition law issues can use internal company memos produced by the in-house lawyers against the company. Furthermore in-house

lawyers (unlike external lawyers) are obliged to testify if called or to provide evidences regarding the company they work for.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

No, as there is no rule specifying the status of the correspondences exchanged between French and foreign lawyers.

In such a case, it is thus recommended that they determine whether they will respect confidentiality or not prior to any negotiation.

In addition, the Code of professional ethics of European lawyers specifies that correspondences between EU lawyers would be considered as confidential at the sole condition that it is mentioned on it "without prejudice".

Other remarks

Legal advice of major importance shall then be provided by external legal counsel in order to assure the full extent of the legal privilege principles and lawyers professional secrecy.

The French OFT's agents seize the whole hard drive and the whole e-mail box even if they contain documents covered by the legal privilege. Could the OFT's agents find a less intrusive way to guarantee the effectiveness of legal privilege and the affairs' confidentiality?

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GERMANY

Does legal privilege exist?

In Germany, communication between the attorney and the client is protected by several seizure prohibitions based on the following principles:

Effective right of defence – is protected by Article 6(3) of the European Convention on Human Rights as well as Article 2 (1) in connection with Article 20 (3) of the German Constitution (*Grundgesetz* – GG). It protects correspondence and private notes from being seized if they relate to the client's defence, regardless whether they are in the attorney's or the client's possession.

Right to refuse testimony – is the right of certain persons to refuse testimony. According to section 53 (1) no. 2 of the Code of Criminal Procedure (*Strafprozessordnung* – StPO), a counsel has the right to refuse testimony as to matters he is entrusted with in his capacity as defence counsel, same applies to attorneys according to section 53 (1) no. 3 StPO. In connection to this, section 97 (1) no. 1 StPO provides that correspondence between the defendant and the persons entitled to refuse testimony shall not be seized. According to section 97 (2) StPO this prohibition does, generally, only apply if the person in question is in the possession of the respective documents. The legal privilege has been only recently extended to cover attorneys in case of investigations. This legal change was brought by a recent amendment of section 160 a StPO. After revision of section 160 a StPO by 1 February 2011, client-related information is now thoroughly protected against investigation measures. Pursuant to the new legal situation, investigations shall no longer be conducted against attorneys in order to attain information that would be covered by the attorney's right to refuse testimony. Attorneys may still be searched outside the scope of the right to refuse testimony after a weighing of the interests.

What is protected by legal privilege?

As regards the effective right to defence and the seizure prohibition based on the right to refuse testimony, the correspondence which shall not be seized must relate to the client's defence ("**defence correspondence**").

I. The prerequisites are the following: Investigation proceedings must be initiated, the suspected person (*i.e.* the client) must be aware of those proceedings and the correspondence must be prepared and/or exchanged within the scope of an existing mandate with regard to the respective proceedings. Otherwise, the correspondence will not be considered as defence correspondence. As regards correspondence which has been prepared and/or exchanged before the initiation of the respective proceedings, there is, under German law, no seizure prohibition even if the correspondence has a relationship to the subject-matter of the procedure. Despite some scholars arguing in favour of a seizure-prohibition expansion, relevant court practice, so far, has not shown relevant new tendencies.

II. Correspondence relating to legal advice, e.g. a legal opinion, is protected from being seized if its purpose is the client's defence, only. Memos shall not be seized if they are made in relation to the respective accusation and within an existing mandate. In case there is no existing and specific mandate that relates to the client's defence, seizure of such correspondence is, according to the regional court of Bonn, not prohibited even if it contains comments or legal opinions on potential summary proceedings. Thus, general advice by external lawyers in the possession of the client is, potentially, subject to seizure.

III. As regards the seizure prohibition based on the right to refuse testimony, section 97 (2) StPO provides that the person who is entitled to refuse testimony must be in the possession of the correspondence in question. According to the legal practice, section 148 StPO has to be taken into account if the entitled person is the defence counsel. It provides that the suspected person is permitted to correspond with his defence counsel. In view of this provision, seizure of correspondence is, in deviation from section 97 (2) StPO, even prohibited if the respective correspondence is in the client's possession, as long as it concerns the client's defence. It is also prohibited to seize documents which are in the possession of the client and recognisably prepared by the client for the purpose of defence. Advice by external lawyers, however, just as other documents, is protected if it is in the possession of the lawyer, only.

IV. The seizure prohibition does not apply if the attorney is suspected of having participated in the infringement.

Is in-house counsel protected by legal privilege?

In case in-house counsel is in possession of the documents/correspondence in question, the abovementioned seizure prohibitions only apply if the in-house counsel actually acts as an attorney, *i.e.* if correspondence is concerned which the attorney has prepared for attorney-related services for third parties. In so far as the in-house counsel acts for the undertaking he is employed by, he does not act as an attorney within the meaning of section 53 StPO. An attorney within the meaning of section 53 StPO must have the position of an organ of justice which is independent and not bound to the client. Thus, in order to enjoy the legal privilege, the in-house counsel must be entitled to act independently from the undertaking without being bound to instructions. For practical reasons this means that the in-house lawyer is treated comparably as under EU law.

Does legal privilege apply to the correspondence of non-domestic qualified lawyers?

Legal Privilege applies to lawyers being enrolled in the bar. As a result of this enrolment the lawyer is subject to the professional ethical obligations, *e.g.* confidentiality.

According to section 4 of the Federal Attorney Regulation (*Bundesrechtsanwaltsordnung* – BRAO) the enrolment requires the applicant to be qualified to exercise the function of a judge according to the German Judiciary Act (*Deutsches Richtergesetz* – DRiG) or to fulfil the incorporation requirements of the Law on the activity of European lawyers in Germany (*Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland* – EuRAG) or to have passed the qualification test as to this law. Additionally, at least attorneys from other EU-member states and also Switzerland are covered by the legal privilege of sections 53 and 97 StPO, provided that all other criteria are met. Other foreign lawyers, generally, do not qualify for Legal Privilege.

What are the main differences between national legal privilege and EU legal privilege?

German Legal Privilege is narrower than EU Legal Privilege as "normal" legal correspondence with no specific relationship to an existing defence mandate is not subject to privilege.

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GREECE

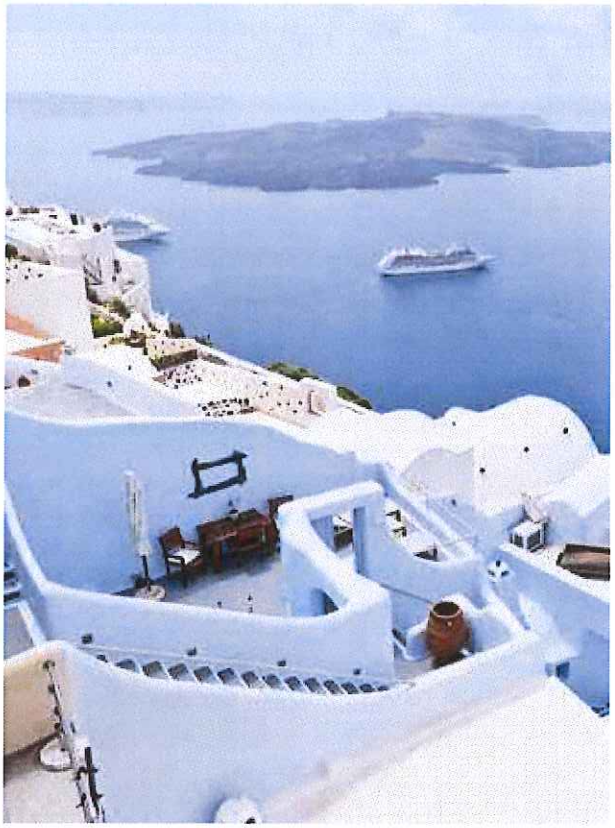
Does legal privilege exist?

Legal Privilege is recognized and protected by Greek legislation. Mainly the Attorneys Code of Conduct, the law regulating the legal profession, and also the Code of Civil Procedure, the Code of Criminal Procedure and the Criminal Code, are the sources that contain specific provisions, granting protection from disclosure of privileged communication between attorney and client.

What is protected by legal privilege?

All data (verbal, written, electronic etc.) obtained in the course of legal practice is treated by the law as privileged – unless such data is in the public record – even after the termination of the attorney client relationship, and cannot be used even for the purposes of judicial proceedings.

Greek law (L. 3691/2008) provides an important exception from legal privilege in case of "Money Laundering". Attorneys while acting as a client's representative in financial or real estate transactions, or while administering client's money, opening or administering bank or security accounts, acquiring funds for establishing, operating or managing the company or similar entity, if they acquire information regarding money laundering or terrorist financing, they are obliged to inform the Authorities. The same obligation applies to counselling a client while being aware that his purposes and activities would violate anti-money laundering rules. Attorneys are forbidden to notify a client of any investigation being conducted against him. The violation of these two main obligations attracts both disciplinary and criminal sanctions against the attorney. However, attorneys are not obliged to inform the Authorities of any information received regarding money laundering and terrorist financing, while representing the client in civil, criminal or administrative proceedings, including the pre – and post-trial activities. The law has not been tested in practice and remains to be seen how the Courts will interpret such strict provisions.



Is in-house counsel protected by legal privilege?

Until today there is no specific legislation on the matter. The Attorneys Code of Conduct does not distinguish between in-house counsel and independent attorneys. They are all subject to the local Bar and fall under the same ethical and disciplinary rules.

Due to the fact that in everyday practice in-house counsel are "not bound to the client by a relationship of employment", it is accepted that they are also protected by legal privilege. It should be noted that in Greece attorneys are not considered to be "employees". Even as in-house counsel they remain legal professionals providing legal services against "remuneration" even if such remuneration is monthly and of a fixes amount.

However, in case where "exclusive employment" exists and in-house counsels in the exercise of their duties participate in administrative decisions or exercise administrative duties, they are not covered by the legal privilege, when their particular function does not constitute provision of legal services (ECJ 155/1979/18.05.1982). Generally speaking each case is being decided ad hoc and the practice tends to award privilege rather than to deny it.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

The Attorneys Code of Conduct does not differentiate between Greek and EU nationals (who can practice law in Greece under permit of the local Bar association, P.D. 130/23.05.2000) as to the application of Legal Privilege. Third country nationals cannot qualify as lawyers in Greece with the exception of Greek expatriates following special permit by the Ministry of Justice and respective Bar Association.

Given that standard EU jurisprudence shall be respected, communications, other than correspondence, between a Greek (or EU) in-house legal counsel and lawyers outside EU (third countries) are not covered by legal privilege.

Similarly to EU practice, in case of doubt a copy of the relevant document should be placed in a separate envelope, which may not be used by the investigators until the resolution of the dispute as to its status.

What are the main differences between national legal privilege and EU legal privilege?

The EU Legal Privilege applies only to written communications between attorneys and clients for the purpose of exercising the clients' rights of defense. The EU Legal Privilege may extend to internal written communications (preparatory documents) written by in-house counsel as long as they are prepared exclusively for the purpose of seeking advice from an independent attorney in the exercise of the right of defense.

Under Greek legislation qualified attorneys providing legal service as in-house legal counsel are also protected by Legal Privilege.

Other remarks

According to the Attorney Code of Conduct attorneys can not be called as witnesses regarding a case they were involved with, unless they have permission by the BoD of the local Bar Association.

Under the provisions of the Code of Civil Procedure attorneys can reveal before a Court confidential or privileged information received from their clients only if they have the clients' permission to do so.

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HONG KONG

Does Legal Privilege exist in your jurisdiction?

Yes. In Hong Kong, legal privilege is a substantive right available under statute (Basic Law) and common law. Hong Kong's legal system is based on the English common law. The justification for legal privilege is the public policy interest in the need to facilitate the administration of justice by encouraging and enabling a client to consult his lawyer fully and frankly, and in complete confidence, safe in the knowledge that what he tells his lawyer will never be revealed to a third party without his consent.

Two main classes of documents and communications are protected on this ground, namely

(a) those that are privileged whether or not litigation was contemplated or pending (*legal advice privilege*), and

(b) those that are only privileged if litigation was contemplated or pending when they were made or came into existence (*litigation privilege*).

There is also common interest legal privilege. This is privilege in aid of anticipated litigation in which several persons have a common interest although all such persons have not been made parties to the action. They may share privileged information without waiving their right to assert lawyer-client privilege.

Common to these types of privileges is that these privileges cannot be claimed unless the relevant communication or document is confidential. Therefore, documents which are in the public domain are not privileged. Moreover, Legal privilege is lost once the relevant communication ceases to be confidential. For example, if a client forwards an email from his solicitor to an accountant, the email loses confidentiality and will no longer be considered privileged.

Legal privilege is in all cases the privilege of the client and not of the lawyer and may only be waived expressly or impliedly by the client. Privilege is considered waived if the relevant document or communication is included in the depositions filed in the course of a court action or in the transcripts of other notes of court proceedings.

Legal privilege does not extend to cases where the document came into existence as a step in a criminal or illegal proceeding. However, to bring a case within this exception there must be a definite charge of fraud or illegality or a prima facie case must be made out.

What is the scope of Legal Privilege?

Legal Advice Privilege

Letters and other communications passing between a party and his lawyer are privileged from production if they are, and sworn to be (i) confidential and (ii) written to or by the lawyer in his professional capacity and (iii) for the purpose of getting legal advice or assistance for the client.

This privilege applies to communications between a lawyer and his client only. It does not provide protection for communications with an independent third party. However, the privilege does extend to information that the lawyer receives in a professional capacity from a third party and which he conveys to his client.

In addition to confidentiality, a document or communication must also be made for the purpose of getting legal advice before legal advice privilege can be applied.

The purpose of getting legal advice has been construed broadly. Where information is passed between a lawyer and his client as part of a process aimed at keeping both informed, so that advice may be sought and given, privilege will attach. Moreover, legal advice is not confined to telling the client the law, it may include advice about what should prudently and sensibly be done in the relevant legal context.

Where the client appoints employees to communicate with his lawyer, those employees are the client for the purpose of legal advice privilege. Information provided to the lawyer by any other employee of the client will be regarded as information provided by an independent third party.

Where legal privilege applies to lawyer-client communications, internally circulated documents or parts of documents revealing such communications are also privileged.

Litigation Privilege

Litigation privilege is wider than legal advice privilege. It not only covers communications between a lawyer and his client, but also covers the communications between (i) a lawyer and his non-professional agent, (ii) a lawyer and a third party, or (iii) the client and his agent or third party, provided that:

(a) they came into existence after *litigation* is commenced or contemplated, and

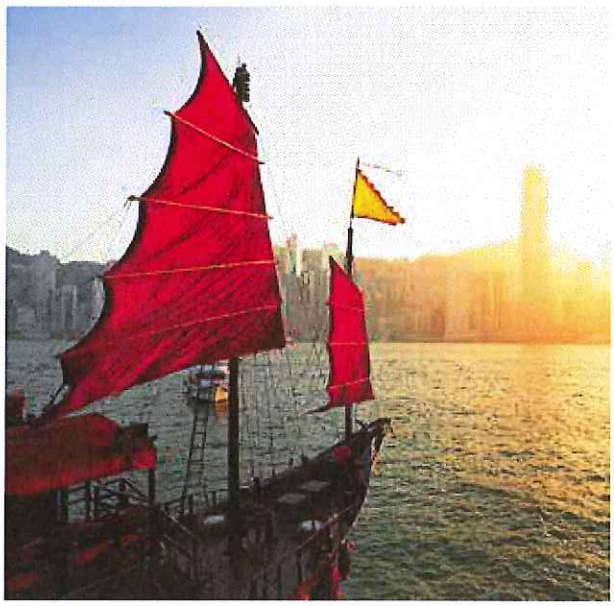
(b) for the *dominant purpose* of giving or obtaining legal advice, obtaining or collecting evidence or obtaining information which may lead to the obtaining of such evidence:

These two requirements must be satisfied before litigation privilege can be applied.

Litigation refers to proceedings in court and tribunals, arbitration, disciplinary proceedings and any other adversarial proceedings. It must be "adversarial" as opposed to investigative or inquisitorial. Hence, where a proceeding is merely fact-gathering or where a tribunal is an administrative one, it is unlikely that litigation privilege can be claimed.

The application of the "dominant purpose" test can be problematic (i) if the relevant communication came into existence for more than one purpose, and (ii) in deciding at what stage it can fairly be said any such purpose is obtaining advice in anticipated litigation. In analysing the dominant purpose, it is important to turn to the facts of the particular case. Hong Kong courts have in the past examined "purpose" from an objective standpoint, examining all the relevant evidence, including reference to the intention of the actual composer of the relevant document (or the person under whose direction it is made) at the time when the document is brought into existence.

If a document or communication has not come into existence for the purposes of the litigation, but is already in existence before the litigation is contemplated or commenced, litigation privilege does not apply even if it was obtained by the client or his lawyer for the purposes of the litigation. Hence, a pre-existing document not entitled to privilege does not become privileged merely because it is handed to a lawyer for the purposes of litigation.



Is correspondence with in-house counsel protected by Legal Privilege?

Yes. The definition of "professional lawyer" for the purpose of legal professional privilege includes all members of the legal profession: solicitors, barristers, in-house lawyers and foreign lawyers.

Communications between the in-house lawyer and the management and employees of the same company are therefore prima facie entitled to enjoy legal advice privilege and/or litigation privilege in a similar way to those of private lawyers.

Privilege however cannot be sufficiently established based on the mere fact that a party to a communication is a lawyer. The lawyer must be acting in a professional capacity as a lawyer. Therefore, if an in-house lawyer is consulted about anything other than the law, or where legal advice had been given on a social rather than professional basis, privilege will not be attached to such advice.

Moreover, an in-house lawyer should take particular caution if, apart from being a legal adviser, he holds other positions within the company (such as an executive or operational role). If he is consulted in his capacity as a business adviser about commercial issues, privilege will not apply.

Does Legal Privilege apply to correspondence with non-national qualified lawyers?

Yes. Solicitor-client privilege exists between a foreign lawyer and his client to the same extent as the privilege exists between a Hong Kong lawyer and his client. The approach to determining the question of legal privilege is the same as adopted for communications with Hong Kong lawyers.

Please include any remarks not covered elsewhere and which you believe add value to the reader.

Hong Kong law incorporates the concept of partial waiver of legal privilege. If a privileged document is disclosed for a limited purpose only (e.g. for investigation by a regulator such as the Securities and Futures Commission), it does not follow that privilege is waived generally. The privilege is waived for that particular purpose only.

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HUNGARY

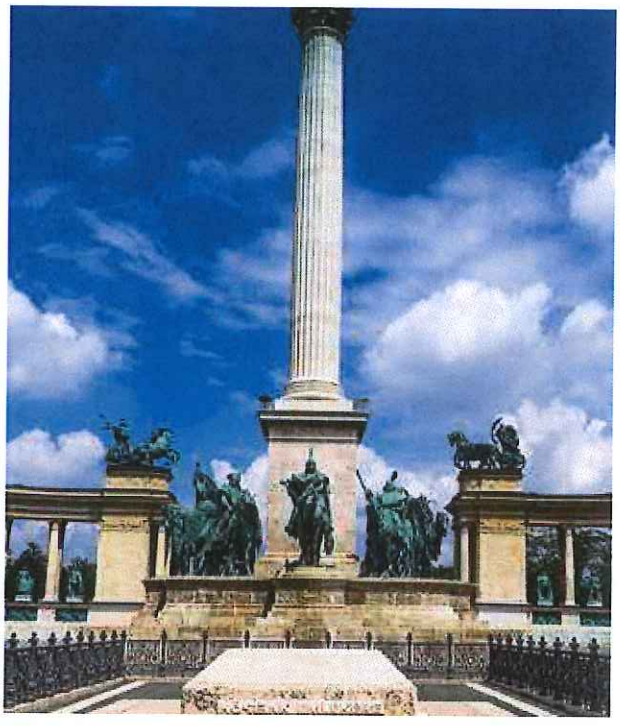
Does legal privilege exist?

Hungary has no separate and independent right to Legal Privilege. However, legal advice is protected from seizure through the following concepts:

Professional secrecy – is a general obligation on attorneys not to disclose secrets without the consent of their client. It is an obligation sanctioned by disciplinary measures.

Confidentiality – is a corollary of professional secrecy, giving the person bound by it the right to refuse to give evidence on matters covered by professional secrecy or to withhold from seizure any document containing information covered by professional secrecy.

Thus, no separate right exists that grants protection to legal advice. It is, however, the necessary consequence of the obligation imposed on lawyers not to disclose information obtained due to their professional capacity.



What is protected by legal privilege?

Since confidentiality is a corollary of the secrecy obligation, its rights are connected to the lawyer and not to the legal advice. It is a right *in personam*. This means that only information communicated to and in possession of the lawyer is protected and that advice or information communicated by the lawyer to his client does not fall within the protected scope (save for certain specific information e.g. in the field of competition law). However, in criminal cases, protection has a wider reach, which is linked to the rights of defence of the accused: the attorney cannot be heard in respect of any confidential information – not even in the case if the attorney got consent from its client to disclose the confidentiality obligation.

Is in-house counsel protected by legal privilege?

No explicit provisions of the decree regulating the operation of in-house counsels in an employment relationship grant Legal Privilege to the information possessed by in-house counsels and the lack of protection is explicitly provided for in competition matters.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

Regarding lawyers: No; since confidentiality is linked to the capacity of a lawyer, it can only be granted to lawyers that fall within the field of application of Hungarian law: a lawyer is recognised as such due to subjection to the Hungarian Bar.

Regarding in-house counsel: No; since no protection is granted to national in-house counsels either.

What are the main differences between national legal privilege and EU legal privilege?

European confidentiality protection is, like the Hungarian equivalent, not granted to legal advice emanating from in-house counsel.

European confidentiality protection is attached to the actual communication. This means that also documentation in possession of undertakings can enjoy protection.

European confidentiality can only be enjoyed when correspondence relates to a client's right of defence. This means that only communication relating to a procedure enforcing art. 101-102 TFEU can be granted protection. Also communication predating the initiation of such procedure that comes to fall within such context, is granted protection.

Correspondence between a lawyer and a third party, not being a client of his, is not protected.

Other remarks

Legal trainees are covered in the same way as attorneys are.

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INDONESIA

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Does Legal Privilege exist in your jurisdiction?

Legal professional privilege does exist in Indonesia under Law No. 18/2003 on Advocates (**"Advocates Law"**). In addition to the Advocates Law, the code of ethics for Indonesian Advocates (**"Code of Ethics"**) which was issued prior to the enactment of the Advocates Law also regulates legal professional privilege.

What is the scope of Legal Privilege?

The following provisions of the Advocates Law set out the conditions protected by the legal professional privilege.

Article 14

Advocates shall be free to give their opinions or statements in defending the cases they are responsible for in compliance with the code of ethics and the laws.

Article 15

Advocates shall be free to perform their profession to defend the cases they are responsible for in compliance with the code of ethics and the laws.

Article 16

Advocates cannot be the targets of either civil or criminal suits, in performing their professional duties in good faith for the purpose of defending their clients in the courts of law.

Article 17

In performing their profession, Advocates are entitled to obtain information, data and other documents, either from the government institutions or other parties in order to defend their clients as per prevailing laws.

Article 19

a. *Advocates must keep confidential anything known or acquired from their clients as a result of their professional relationships, unless it is stipulated otherwise in the laws.*

b. *Advocates are entitled to the confidentiality of their relationship with the clients, including protection of the files and documents from seizure or inspection and protection against the tapping of their electronic communications.*

However, protection may be waived under applicable laws, such as:

Corruption Law

Article 36 of Law No. 31/1999 on the Eradication of The Criminal Act of Corruption (**"Corruption Law"**) states that, *"The obligation to give testimony as referred to in Article 35 also applies to those who by profession, dignity or position, keep secrets, except for religious officers who keep secrets in accordance with their religions".*

It is still arguable whether advocates who are in their professional capacity representing a client suspected of corruption, can be forced to give testimony under this article. It is generally thought that Article 36 would not apply to lawyers who are acting in their professional capacity by representing suspects accused of corruption.

Telecommunication Law

Article 42 Paragraph 2 of Law No. 36/1999 on Telecommunications (**"Telecommunications Law"**) states that:

With respect to the criminal justice court process, telecommunications service providers may record information they send or receive and may present the necessary information, if there is:

a. *a written request from the Attorney General and/ or the Republic of Indonesia's Chief of Police with respect to a certain criminal act;*

b. *a request from the investigator in charge of a particular criminal action that conforms to the prevailing legislation.*

From Article 42 of the Telecommunication Law, it may be interpreted that Article 19 (2) of the Advocates Law may be waived if the police or district attorney believes that the communication (e.g. telephone conversation) between an advocate and his/her client may be used as evidence during an investigation to support the allegation.

Is correspondence with in-house counsel protected by Legal Privilege?

No, the legal privilege under the Advocates Law and the Code of Ethics only applies to the Indonesian qualified advocates who are appointed as external counsel of a company. In-house counsel are deemed to be employees.

Does Legal Privilege apply to correspondence with non-national qualified lawyers?

No, but under the Advocates Law, non-national qualified lawyers (i.e. foreign advocates) must also comply with the Code of Ethics.

Please include any remarks not covered elsewhere and which you believe add value to the reader.

The legal profession is relatively new in Indonesia and there are very few regulations or statutes, etc which regulate it or which provide it with protection.

We are not aware of any tests, guidance or regulation on legal professional privilege other than under the Advocates Law or the Code of Ethics. One issue in the Code of Ethics which may be used as guidance to see under what circumstances legal professional privilege apply is that letters stamped as "Sans Prejudice" sent by an Advocate to his/her colleague cannot be used as evidence before the courts. In practice, this type of letter also cannot be used as evidence during investigations by the police or district attorney. Therefore, the advocate may refuse to provide documents or letters stamped "Sans Prejudice" if asked by the police or district attorney.

Given these facts, it remains to be seen how the legal professional privilege applies in Indonesia. Since there is still no further guidance or regulation on the Advocates Law, the interpretation and the applicability of legal professional privilege may depend on the relevant judge's opinion as to when legal professional privilege should apply. As Indonesia does not have a system of precedent (*stare decisis*) as exists in many common law jurisdictions, the judgment of any one court does not have to be followed by other courts, even if the facts are similar.

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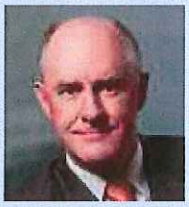

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IRELAND

DLA Piper Focus Firm

MASON HAYES & CURRAN

Does legal privilege exist?

Yes.

Legal Professional Privilege is a rule of evidence providing for a privilege that can be asserted by a client – and must be asserted by a lawyer (unless otherwise instructed by his client [who 'owns' the privilege]) – whereby disclosure of certain confidential communications, whether written or oral, can lawfully be refused if the communication comes within one or other limb of the Legal Professional Privilege rule.

What is protected by legal privilege?

Legal Professional Privilege covers two types of confidential communication, and thus has two limbs. The two types of privilege are known as "legal advice privilege" and "litigation privilege."

Legal Advice Privilege covers confidential communications between client and professional legal adviser, made either to establish-, or in the course of, a professional legal relationship, for the purpose of seeking or giving legal advice. (Note that no litigation or any prospect of litigation is required for legal advice privilege to apply.)

Litigation Privilege covers confidential communications between

(a) a client and a professional legal adviser; or

(b) a client and a third party other than a legal adviser; or

(c) a lawyer and a third party other than the client,

the dominant purpose of which is preparation for reasonably apprehended or pending litigation.

Claims to privilege are most usually made in the context of court proceedings, when either refusing to give oral evidence of a privileged communication, or refusing to produce a privileged communication comprising of a document, by way of discovery. When a privilege claim is accepted, the oral evidence cannot be required, or, as the case may be, the document need not be produced.

The final arbiter of whether any claim to privilege over any communication is properly and validly made is the court dealing with the proceedings in which the claim is made.

Is in-house counsel protected by legal privilege?

The rule of legal professional privilege extends to communications to and from professionally qualified and practicing lawyers (not academics, for example), and so extends in the normal case to such communications involving solicitors in private practice, such solicitors' employees acting on their behalf, barristers and employed ("in-house") lawyers (be they solicitors or barristers).

The only exception to privilege extending to cover confidential communications between in-house lawyers and their employer clients is that provided for in the specific context dealt with by the European Court of Justice in the *Akzo Nobel* decision (cartel investigations carried out by the European Commission).

Does legal privilege apply to the correspondence of non-national qualified lawyers?

Yes.

What are the main differences between national legal privilege and EU legal privilege?

I am not aware of any other main differences, but further or other differences may exist.

Other remarks

It is important to be precise in applying the ingredients of the legal professional privilege rule. For example, in all cases, it is necessary that the communication at issue be confidential. Also, in the advice privilege limb, it is necessary that the communication concern the giving or seeking of legal advice (not other types of advice, and not something falling short of legal advice – often distinguished as 'legal assistance'). The latter is

particularly important in the in-house context, where communications can easily become entangled with other, non-legal, matters. In the litigation privilege limb, it is important to observe that the dominant (or preferably the sole) purpose of the confidential communication must be preparation for reasonably apprehended or pending litigation (beware, therefore, of mixed or other purposes).

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ITALY

Does legal privilege exist?

The Legal Privilege does not exist in the Italian framework. According to the Italian Code of Conduct communications between lawyers are protected. However, please note that this breaching is a violation of an ethical rule.

What is protected by legal privilege?

All documents can be seized under Italian rules. The only exceptions to the above is provided by article 103 of the Italian Procedural Criminal Code ("IPCC") which strictly relates to the defense counsel formally appointed in a criminal proceeding and provides for that the public prosecutor cannot carry out inspections and/or searches in the defense counsel's premises (unless the defense counsel himself is indicted). Under this provision, at the lawyer's premises the public prosecutor cannot seize any documents which concern the defence's strategy, the defence's investigations and any correspondence between the lawyer and his client (defendant); also wiretapping the conversations between the lawyer and his client is forbidden. In case the public prosecutor violates this provision, the results of his investigations cannot be used during the criminal trial.

Is in-house counsel protected by legal privilege?

The in – house counsel category does not exist. They are levelled to the other employees.

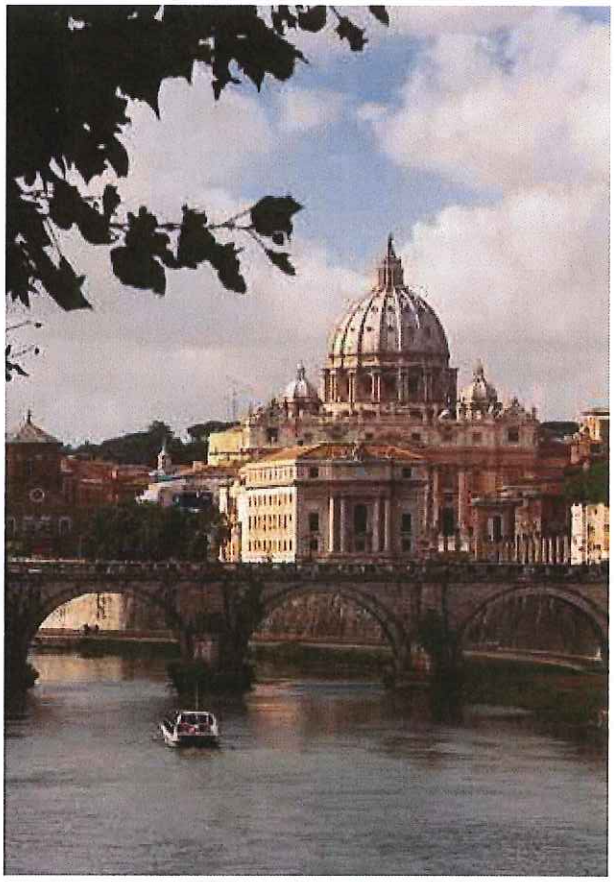
1) Lawyers to go in house have to resign from the bar.
2) In house legal council are not necessarily lawyers (and even if it happens more seldom they may not even have a degree in law).

Does legal privilege apply to the correspondence of non-national qualified lawyers?

No.

What are the main differences between national legal privilege and EU legal privilege?

There are no main differences.



Other remarks

Even if (see e.g. C.d.S. No. 4016 of June 24 2010) principles of the case law established by the European Court should be applied also to domestic cases, the Italian Competition Authority is used to seizing documents also covered by the legal privilege according to EU principles.

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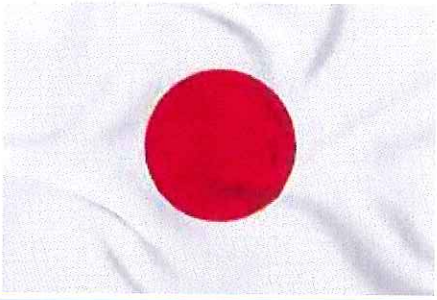
JAPAN



Does legal privilege exist?

Japan has no separate and independent right to Legal Privilege. However, legal advice is protected through the following concepts:

Confidentiality – is a basic right and obligation of an attorney's professional responsibility, and necessary to meet the attorney's fiduciary obligations to his/her client. It is stipulated in the Attorney Act (Article 23) that an attorney or a former attorney shall have the right and obligation to maintain the confidentiality of any facts which he/she may have learned in the course of performing his/her duties ("Confidentiality Obligation"). Under the Code of Attorney Ethics created by the Japan Federation of Bar Associations ("JFBA"), if an attorney discloses client information to others or violates the attorney's Confidentiality Obligation the attorney could be disciplined by the bar association.

Refusal rights – are corollary to the Confidentiality Obligation. Attorneys are entitled to refuse court orders that would require the disclosure of client information or the attempt to seize documents or materials in the attorney's possession that are confidential. In addition, an attorney may refuse to testify regarding matters covered by the attorney's Confidentiality Obligation in both civil and criminal cases. These rights are guaranteed under the Civil Procedure Act (Articles 197 and 224.4) and the Criminal Procedure Act (Articles 105 and 149). It should be noted that although these rights may be asserted by the attorney, if confidentiality is waived by the client or the person who has the right to keep such information confidential, the attorney may no longer assert these rights. It is important to note that even if the client or person who has the right to keep such information confidential discloses the confidential information to a third party, the attorney's refusal rights may remain in place if the client or person who has the right to keep such information confidential does not intend to permit the information to be publicised and the information is disclosed as confidential information and only to a limited number of people.

Unlawful Disclosure of Confidential Information – an attorney and other professionals who receive confidential information have an obligation not to disclose another person's confidential information which the professional has come to be known in the course of the professional's work. This obligation is imposed on the professional based on their status and the relationship of trust they form with clients. A violation of this obligation is a crime under Japan's Penal Code and could result in imprisonment for up to 6 months or a fine up to JPY100,000 (Article 134 of the Penal Code).

What is protected by legal privilege?

The scope of the Confidentiality Obligation is not clearly delineated but it is limited to confidential information which the attorney has come to know in the course of their work with clients. The obligation is not limited to only secret information which the client believes will not be disclosed but includes any confidential information that a reasonable person would expect to be held in confidence. It should also be noted that the obligation continues after a case is completed or if a case is transferred to another attorney, regardless of whether the client has paid the attorney for the attorney's work. It should also be noted that the Confidentiality Obligation may extend beyond the client to cover information about third parties if that information is learned during an attorney's representation of a client.

The Confidentiality Obligation may cease to exist in the following situations:

(i) when the client permits the attorney to disclose the confidential information;

(ii) when the client clearly intends to commit a crime and the danger of the client carrying out this intent is high; or

(iii) when the attorney faces accusations regarding the matter in which the information was learned and disclosure is necessary to protect the attorney from claims or damages.

Is in-house counsel protected by legal privilege?

In-house counsel has similar rights and obligations with respect to confidential information that private attorneys have.

In-house counsels are subject to the same obligations and have the same rights not to divulge confidential information regarding their employers (provided the in-house counsel is a licensed attorney). Pursuant to the Code of Attorney's Ethics, in-house counsel is expected to perform their duties as freely and independently as possible within their enterprises or organizations (Article 50). If in-house counsel comes to know information regarding some unlawful conduct the in-house counsel should take an appropriate action within the enterprise or organization i.e. to report the issue to his/her superior, however the in-house counsel is not required to disclose confidential information outside of his/her enterprise or organization under the Code (Article 51).

Does legal privilege apply to the correspondence of non-national qualified lawyers?

The Confidentiality Obligation applies to a foreign qualified lawyer registered as a Foreign Lawyer (*Gaikokuhou-Jimu-Bengoshi*) under the Foreign Lawyers Act (Article 50.1) (Article 50.1 stipulates that the provisions Article 23 to 30 of the Attorney Act shall applied to a registered Foreign Lawyer.) Similar to the treatment of Japanese lawyers, if a foreign qualified lawyer violates the Confidentiality Obligation, he/she could be disbarred by the JFBA (Articles 51 and 52) and such violation is subject to imprisonment of up to 6 months or a fine of up to JPY100,000 (Article 67).

What are the main differences between national legal privilege and EU legal privilege?

- The confidentiality obligations and rights apply to in-house counsel in Japan.
- The confidentiality obligations and rights in Japan apply to information in the attorney's possession, not necessarily information created by the attorney but no longer in the attorneys' possession. Thus, if documents created by an attorney are held by a third party, including the client, the documents will not be subject to the Confidentiality Obligation.

Other remarks

In Japan, there is a Legal Apprentice (*Shihou-Shuushuu-Sei*) program which is a national legal training system, for attorneys, judges and prosecutors who have passed the bar exam. All legal apprentices study legal practices for 1 year under the supervision of experienced judges, prosecutors and attorneys. Under the Rules regarding Legal Apprentices formulated by the Supreme Court (Article 3), legal apprentices are also obliged to hold in confidence information that they have come to know while acting as an apprentice.

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LATVIA

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KĻAVIŅŠ & SLAIDIŅŠ | LAWIN
Attorneys at Law

Does legal privilege exist?

In Latvia Legal Privilege legal framework applies to the professional activities of the Sworn Attorneys who are members of the Latvian Sworn Attorneys Collegium (hereinafter referred to as "Sworn Attorneys"). The Latvian Advocacy Law states that Sworn Attorneys shall be independent in their professional activities and it is prohibited to request any explanations on information obtained in providing of the legal assistance even if the legal relations with the client have been terminated. The same provision is included in the Code of Ethics of the Sworn Attorneys (hereinafter referred to as "Code of Ethics") and the Criminal Procedure Law concerning the criminal proceedings.

The afore noted laws cover the requirements related to the protection of the confidentiality of the Sworn Attorney provided by:

- Basic Principles on the Role of Lawyers adopted by the United Nation in 14 December 1990,
- Council of Europe Recommendation No (2000)21 of 25 October 2000 on the Freedom of Exercise of the Profession of Lawyer,
- Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers adopted by the Council of Bars and Law Societies of Europe.

The Law on the Prevention of Laundering the Proceeds from Criminal Activity (Money Laundering) and of Terrorist Financing (hereinafter referred to as "Law on Prevention of Money Laundering and of Terrorist Financing") that implements Directives 2005/60/EC and 2006/70/EC of the European Parliament and of the Council limits the scope of confidentiality of the Sworn Attorneys in providing of the legal assistance by imposing an obligation to inform a competent state authority on each suspicious and unusual transaction if such is identified.

Confidentiality of the legal assistance provided by the lawyers that are not members of the Latvian Sworn Attorneys Collegium (hereinafter referred to as "lawyers") may be protected by the provision of the Commercial Law on regulation of a "trade secret". However this option applies only to the legal relations with business entities (companies) and only to the extent that such business entity (company) has determined. Upon the request of the competent government authority according to the Law on Prevention of Money Laundering and Terrorist Financing and the Criminal Law the information under the status of "trade secret" shall be disclosed.

What is protected by legal privilege?

Article 67 of the Latvian Advocacy Law prohibits the Sworn Attorneys from disclosing any secret of the client not only while providing the legal assistance, but also after termination of the legal relations. Moreover, the Sworn Attorneys are obliged to ensure compliance with such requirement not only in their activities, but in the work of their employees as well.

The similar provision is included in Article 1.3 of the Code of Ethics stating that the Sworn Attorneys cannot disclose the information obtained while providing legal assistance even if the legal relations with the client are terminated. In addition Article 2.1 of the Code of Ethics states that the Sworn Attorneys are prohibited to perform such operations that may damage the benefits of the client.

According to Article 6 of the Latvian Advocacy Law and Article 122 of the Criminal Procedure Law the government authorities are prohibited from performance of the following actions in the criminal proceedings where the Sworn Attorneys defend the client:

- request information and explanations from the Sworn Attorneys including interrogation as witnesses on the information obtained in providing legal assistance;
- control any correspondence and any document, which the Sworn Attorneys have received or drafted upon providing the legal assistance, examine or seize, as well as to search in order to find and seize such correspondence and documents;

- control the information systems and means of communication, including electronic, used by the Sworn Attorneys in providing the legal assistance, delete information from information systems and interfere with operation thereof.

It follows that the effective laws and regulations are generally determined to protect confidentiality of the legal assistance of the Sworn Attorneys in Latvia. However, the Sworn Attorneys are obliged to notify the government authorities on particular cases that may be detrimental to public interests such as:

- any suspicious and unusual transaction (according to Article 3 of the Law on Prevention of Money Laundering and Terrorist Financing), and
- if there is verified information on preparation or commitment of a crime.

As it was noted in response above, in certain cases the lawyers who are not members of the Latvian Sworn Attorneys Collegium may rely on the provision of the Commercial Law containing regulation of "trade secret". Thus, according to Article 19 of the Commercial Law a business entity (company) may assign status of "trade secret" to information of economic, technical or scientific nature, which is recorded in writing or by other means or is not recorded and complies with the following features:

- information is related to the company;
- information is not available to the third persons;
- information possesses actual or potential financial or non-financial value;
- the company has performed appropriate measures to prevent disclosure of such information.

If the above noted requirements apply to the information obtained in providing legal assistance such information might be considered to be "trade secret". The business entity (company) is entitled to claim reimbursement of damages in case of disclosure of the "trade secret". However, the status of "trade secret" does not release the lawyer from the obligation to notify government authorities upon identification of the case any suspicious and unusual transaction according to the Law on the Prevention Money Laundering and Terrorist Financing and preparation of the crime complying with the requirements of the Criminal Law. Upon the request of the competent government authority the information under the status of "trade secret" shall be disclosed according to the aforesaid law.

Is in-house counsel protected by legal privilege?

Presently there is no specific legal framework for activities of an in-house counsel in Latvia.

The in-house counsel may provide the legal assistance as a Sworn Attorney upon a cooperation agreement with a company. In this case his professional activities fall within general protection of the Legal Privilege provided in Latvian Advocacy Law, Law on Criminal Procedure and the Code of Ethics in the scope described in responses to the question 1.2 above.

According to the Advocacy Law the Sworn Attorney relying on the protection of the Legal Privilege shall provide a legal assistance independently and cannot enter in the employment relations with the client. This complies with the opinion of ECJ in case C-550/07P, Akzo Nobel Chemicals, Akcros Chemicals Ltd vs European Commission (hereinafter referred to as *Akzo* case), and case 155/79, AM&S vs European Commission (hereinafter referred to as *AM&S* case), providing that the correspondence between the client and the Attorney is privileged if:

- the correspondence relates to the clients' right to defense;
- relates to the written correspondence between the client and the Attorneys whose relations are not bound by the employment agreement.

Another option for a Sworn Attorney to operate as in-house counsel is to terminate the professional activity in the status of a Sworn Attorney and to provide the legal assistance as a lawyer upon an employment contract. If the in-house counsel is operation as a lawyer the confidentiality of the legal assistance could cover

the regulation on the "trade secret" according to the Commercial Law. The information under the status of "trade secret" shall be disclosed upon the request of the competent state authority in compliance with the Law on the Prevention Money Laundering and Terrorist Financing, Criminal Procedure Law and Criminal Law.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

An Attorney from another EU Member State may provide a legal assistance in Latvia only after registration with the Latvian Council of Sworn Advocates and upon receipt of a permit to perform professional activity. Afterwards the Attorney may participate in criminal court proceedings only in cooperation with the Latvian Sworn Attorney. If the Latvian Council of Sworn Advocates recognizes professional qualification of the Attorney from another EU Member State as correspondent to practice independently (upon passing an examination on the knowledge of Latvian language and Latvian legislation), such Attorney has the same rights and obligations as the Latvian Sworn Attorneys. Thus, the legal framework on Legal Privilege applies only to the Attorneys from another EU Member State who have obtained the aforesaid recognition of the Latvian Council of Sworn Advocates.

Other foreign non-national qualified lawyers may rely on the provisions of the Commercial Law that regulates the "trade secret".

What are the main differences between national legal privilege and EU legal privilege?

The national regulation of the Legal Privilege generally complies with the regulation of the Legal Privilege of EU according to the following:

(1) The Latvian Advocacy Law, Criminal Procedure Law and the Code of Ethics cover the requirements related to the protection of the confidentiality of the Sworn Attorney provided by:

- Basic Principles on the Role of Lawyers adopted by the United Nation in 14 December 1990,

- Council of Europe Recommendation No. (2000)21 of 25 October 2000 of the Freedom of Exercise of the Profession of Lawyer,
- Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers adopted by the Council of Bars and Law Societies of Europe.

(2) The criteria of application of the Legal Privilege provided in ECJ *AM&S* and *Akzo* cases (the application of the Legal Privilege to the correspondence that relates to the clients' right to defense and is between the client and the Attorneys

whose relations are not bound by the employment agreement) is reflected in the Latvian Advocacy Law, Criminal Procedure Law and the Code of Ethics.

(3) The requirement to notify the competent governmental authorities on unusual and suspicious transactions provided in Directives 2005/60/EC and 2006/70/EC are implemented in the Law on Prevention of Money Laundering and Terrorist Financing;

(4) The practice of the government authorities and the provisions of the Law on Prevention of Money Laundering and Terrorist Financing complies with the ECJ judgment in case C-305/05 of 26 June 2007 providing that the obligation of information and cooperation with the competent government authorities do not infringe the right to a fair trade.

Legal framework of the Legal Privilege in Latvia applies to professional activities of the Sworn Attorneys who are members of the Latvian Sworn Attorneys Collegium and EU Attorneys whose professional qualification is recognized by the Latvian Council of Sworn Attorneys and does not cover confidentiality of legal assistance by lawyers who do not belong to the Latvian Sworn Attorneys Collegium.

Other remarks

The regulations of the Legal Privilege on professional activities of the Sworn Attorneys apply to the professional activity of the Assistants of the Sworn Attorneys as well.

The confidentiality could be limited by an obligation to notify competent authorities according to the Criminal Law and Law on Prevention of Money Laundering and Terrorism Financing in cases explained below.

According to Article 315 of the Criminal Law the Sworn Attorney is obliged to notify government authorities on preparation of a crime in case if there is true information precluding any doubts that the crime could be committed. The Criminal Law establishes criminal liability for failure to notify on preparation of a crime, and such liability may involve imprisonment for up to 4 years or detention, forced labour, or a fine in the amount of 60 minimum monthly salaries (one minimum monthly salary in Latvia is 200 LVL that is approximately 284.46 EUR). The duty of the Sworn Attorney is to discourage the client from committing such crime.

The obligation of the Sworn Attorney to inform the government authorities on any suspicious and unusual transaction (provided by the Law on the Prevention of Money Laundering and Terrorist Financing) mainly applies to the transactions dealing with immovable property and finances. This obligation does not cover the cases when the Sworn Attorney defend or represent a client in relation to such transaction in out-of-court criminal proceeding, court proceedings or when they provide legal advice on initiation of the court proceedings or evading thereof. The Law on the Prevention of Money Laundering and Terrorist Financing prohibits from informing the client about such notification of the government authority on suspicious and unusual transaction. This prohibition is aimed at preventing elimination of evidence. However, it may possibly jeopardize possibilities of the Sworn Attorney to discourage the client from entering into such transaction.

In addition the Latvian Advocacy Law provides that the unlawful operation of the Sworn Attorney that facilitates the commitment of the crime is not considered to be a legal assistance. Therefore the Legal Privilege protection is not applicable in this case.

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LITHUANIA

DLA Piper Preferred Firm

LAWIN

Does legal privilege exist?

In Lithuania, a legal privilege is understood as a duty of an advocate to preserve a professional secret as well as a set of general rules of substantive law (legal prohibitions), which ensure that such duty can be effectively fulfilled. The definition of the advocate's professional secret is broadly defined and covers any information that is obtained by the advocate when conducting his or her professional activities; cases when information shall not be deemed to be professional secret can be provided for by the law (e.g. money laundering prevention).

What is protected by legal privilege?

The laws of Lithuania set the following legal prohibitions pertinent to the protection of advocate's professional secret:

- it shall be prohibited to summon an advocate as a witness or to give explanations as to the circumstances which came to his knowledge in the pursuit of his professional activities;
- it shall be prohibited to examine, inspect or take the advocate's practice documents or files containing information related to his professional activities, examine postal items, wiretap telephone conversations, control any other information transmitted over telecommunications networks and other communications or actions, except for the cases when the advocate is suspected or accused of a criminal act (the latter exception covers only the documents related to the allegations or charges made against the advocate);
- it shall be prohibited to familiarise, overtly or covertly, with the information comprising the advocate's professional secret and use it as evidence.

The law specifies that the advocate's professional secret shall encompass the fact of consulting the advocate, the terms of the contract with the client, the information and data provided by the client, the nature of consultation and the information collected by the advocate by order of the client. While there is a general position that the definition of the professional secret covers communication to as well as from the client, there has been no jurisprudence confirming this position. It also does not answer the question whether it covers the information and data exchanged between advocates. Therefore, currently the laws of Lithuania and jurisprudence do not provide a comprehensive concept of professional secret.

The legal prohibitions mentioned above only apply in respect to and the duty to preserve the professional secret is only imposed upon regulated legal professional who is authorized to pursue its professional activities under the professional title of "advokatas" (in English: "advocate"), i.e. member of the Lithuanian Bar. Therefore, no other person is protected by the legal privilege in Lithuania.

Is in-house counsel protected by legal privilege?

No. Only advocates, who are being members of the Lithuanian Bar, are protected by the legal privilege. Other legal professionals, including in-house counsels, are not covered by the laws of legal privilege in Lithuania. In practice, however, there are cases when an advocate is being exclusively engaged by a company for the provision of legal services exclusively to that company (without becoming its employee). Though it poses a question of the independence of such advocate, under current laws of Lithuania, such advocate would be covered by the laws of legal privilege. Please also note that employees (e.g. in-house counsels), who provide legal services to their employers, are subject to a general obligation of confidentiality in their capacity as employees.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

No. Only advocates, who are being members of the Lithuanian Bar, are protected by the legal privilege under the current laws of Lithuania. The possibility to claim such protection by EU legal professionals, who are practicing in Lithuania, remains unclear.

What are the main differences between national legal privilege and EU legal privilege?

The main difference is that the European Union legal privilege can only be enjoyed when correspondence relates to a client's right of defence, while no such distinction exists under the laws of Lithuania.

It is also not entirely clear whether Lithuanian legal privilege covers client's internal communications made for the purposes of seeking legal advice or reporting such within the client's organization in the same way as European Union legal privilege does.

Other remarks

In Lithuania, advocate's assistant (future advocate) is covered in the same way as advocate is. However, the capacity of the advocate's assistant is limited (e.g. he/she is not allowed to act at the appeal stage of any court proceeding; he/she is not allowed to act as a representative of a defendant in criminal case, etc.).

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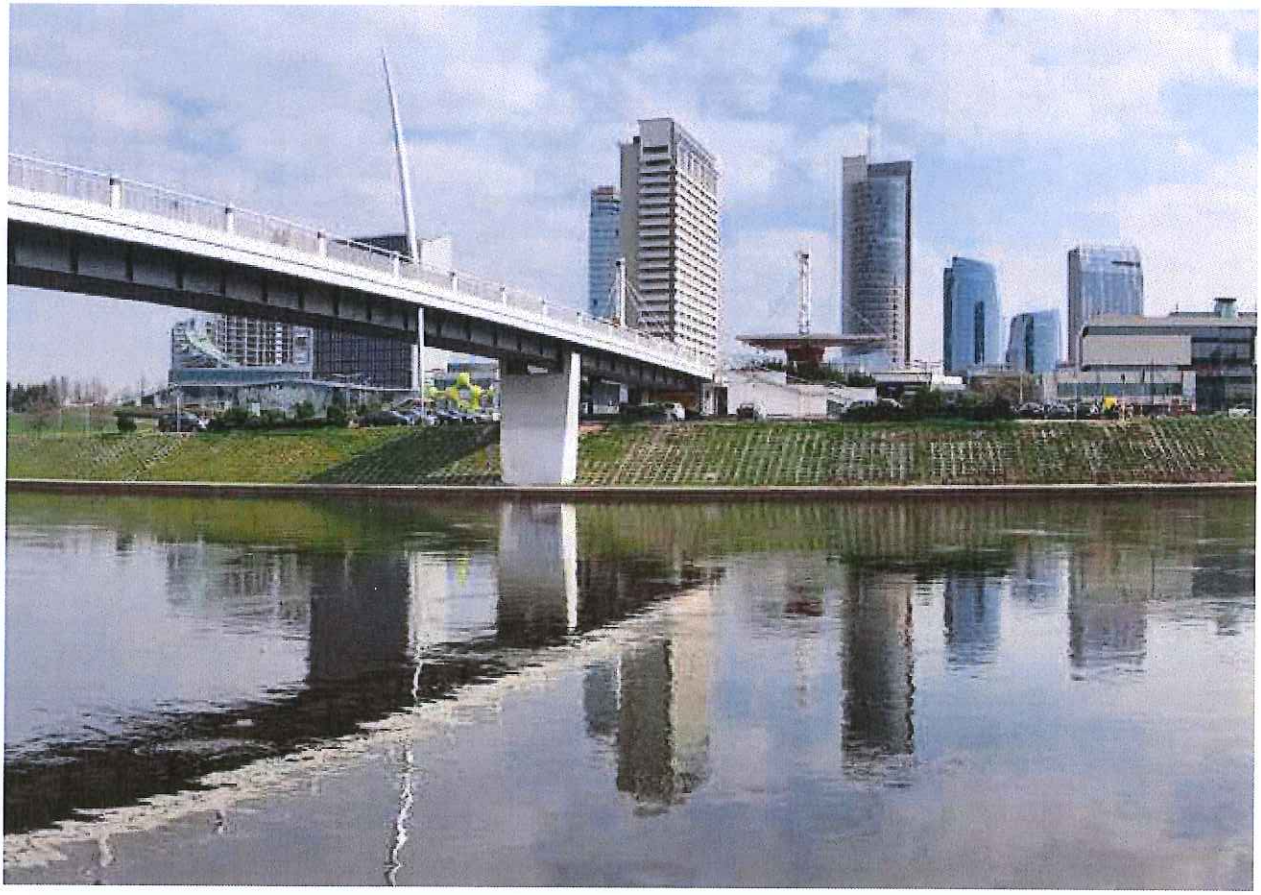


MALTA

DLA Piper Preferred Firm

MAMO TCV ADVOCATES

Does legal privilege exist?

Yes.

The term "Legal Privilege" is not defined in Maltese law.

There is a general obligation not to disclose secrets, imposed on all persons who, due to their professional status, become the depositary of any secret confided in them. A breach of professional secrecy is a crime that is punishable by heavy penalties (art.257 of the Criminal Code). This obligation is elaborated upon in the Professional Secrecy Act. Lawyers are specifically mentioned. Apart from this, a lawyer has an ethical duty to keep the affairs of clients confidential.

The corollary of this is confidentiality. A number of professions, and lawyers in particular, may not be compelled to disclose information on matters covered by professional secrecy.

Particular instances or effects of legal privilege are stated in various provisions of law.

This "privilege of silence" referable to lawyers, "inviolable" within its scope, is also recognised by case-law (Grech vs Mifsud, Civ.Ct 1st Hall, 1916)

What is protected by legal privilege?

(a) The obligation of professional secrecy imposed by art 257 of the Criminal Code, and its corollary of confidentiality, are wide.

The definition of "secret" in the Professional Secrecy Act is framed widely and includes anything that is described as secret by the person giving it, or that should be considered as secret in view of circumstances, including the profession of the person receiving the information, that is in the possession of the professional person.

(b) There are limits.

The wording of art 257 of the Criminal Code and the Professional Secrecy Act refer to information given to the professional, and in his possession.

(c) There are exceptions.

In exceptional cases, a person normally bound by professional secrecy may be compelled by an express provision of law to disclose the secret information. (art 257 of the Criminal Code and the Professional Secrecy Act) Such cases include the obligation of the professional person to report knowledge or suspicion of money laundering or of funding of terrorism to the regulatory authority, or to provide information to it.

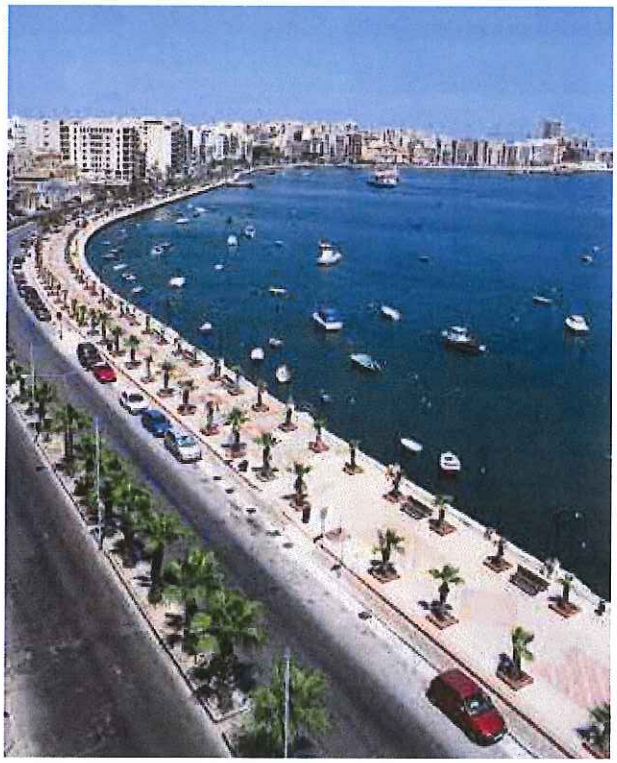
(d) There are fewer exceptions in the case of lawyers.

Even in the exceptional cases, the lawyer may not divulge information that is received or obtained in the course of ascertaining the legal position of his client. (Prevention of Money Laundering Act, Prevention of Money Laundering and Funding of Terrorism regulations)

(e) It is expressly stated in the Code of Organisation and Civil Procedure, the Criminal Code that in civil and criminal proceedings, the lawyer cannot be compelled to divulge information that he has received from the client in professional confidence. There are other specific statutory references to the duty of professional secrecy and the protection of confidentiality of communications between a lawyer and his client.

Is in-house counsel protected by legal privilege?

Yes. In dealing with legal privilege the law does not distinguish between independent and in-house counsel. In view also of the strong culture of legal professional secrecy, it is thought that the same obligation of professional secrecy, and the same confidentiality, must apply also to in-house counsel. The code of ethics applicable to the legal profession, in dealing with professional secrecy, does not distinguish between lawyers in private practice, and lawyers in employment.



Does legal privilege apply to the correspondence of non-national qualified lawyers?

The formulation of the general duty of professional secrecy in art. 257 of the Civil Code, as elaborated on in the Professional Secrecy Act, (and its corollary of confidentiality) is wide enough to include non-national qualified lawyers.

However, it is thought that the enhanced confidentiality referred to above in item (d) would not apply to non-national qualified lawyers, because the legal provisions dealing with this enhanced confidentiality appear to refer to lawyers holding a warrant to appear before the Maltese courts.

What are the main differences between national legal privilege and EU legal privilege?

National legal privilege extends also to unwritten information.

National legal privilege is not limited to communications that are made for the purpose of the client's rights of defence, unless there is a specific statutory provision that requires disclosure to a public authority, in which case, the legal privilege will be thus limited.

National legal privilege does not extend to documents that are prepared by the client for the purpose of obtaining legal advice but that are not communicated to the lawyer.

Other remarks

Although the concept of legal privilege is long-standing and very strong, there are various scenarios that are not specifically dealt with by statute, nor clarified by case-law.

It is not clear whether or to what extent communication by the lawyer to his client is protected. There is a strong view that such communication is also protected as confidential since it would appear to be a necessary aspect of the confidentiality that the law is protecting.

It is thought that national legal privilege will not normally extend to a communication by a client to a lawyer that is in the possession of the client, except in criminal proceedings if the communication is in connection with the giving of advice by the lawyer.

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MEXICO

Does Legal Privilege exist in your jurisdiction?

Yes.

Pursuant to the Federal District Professions Law (it is a local – not federal – law; all the states of Mexico have a similar regulation), all professionals (not only attorneys) have a professional secrecy obligation of those matters entrusted to them.

Notwithstanding the foregoing, by means of a court order, any person may be compelled to disclose information related to civil, criminal or antitrust procedures and documentation may be seized; *provided, however*, that such person is not listed as exempt (lawyers are exempted) in the criminal and civil codes (there is no exemption in antitrust matters).

What is the scope of Legal Privilege?

Attorneys are not obliged to declare as witnesses or submit documentation or information in their possession related to a client regarding civil and criminal procedures opened against him (not for antitrust procedures).

Is correspondence with in-house counsel protected by Legal Privilege?

Yes, the same rationale applies for in-house counsel.

Does Legal Privilege apply to correspondence with non-national qualified lawyers?

No, under Mexican law non-national lawyers are not considered professional, thus Legal Privilege does not apply to them.

Please include any remarks not covered elsewhere and which you believe add value to the reader.

There is a court precedent pursuant to which it has been established that persons with privileged information may only disclose it in civil or criminal procedures with the consent of the client.

Another court precedent establishes that the authorization made by litigation counsel to third parties to review the file of a procedure does not constitute a violation to the professional secret obligation.

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NETHERLANDS

Does legal privilege exist?

Yes. The Netherlands Competition Authority (*Nederlandse Mededingingsautoriteit* or *NMa*) exercises supervisory and investigative powers under the Competition Act (*Mededingingswet* or *Mw*) and the General Administrative Law Act (*Algemene wet bestuursrecht* or *Awb*). Section 5:20 of the General Administrative Law Act stipulates that everyone must extend cooperation to a supervisory authority. Paragraph 2 of this section subsequently grants a right of non-disclosure to, for example, attorneys. Insofar as supervisory powers concern third parties, attorneys have the right to refuse to cooperate. Section 51 of the Competition Act supplements this attorney-client privilege by stating that the NMa may not request to inspect "*documents relating to the application of competition rules exchanged between an undertaking and an advocate admitted to the Bar*".

What is protected by legal privilege?

Section 51 of the Competition Act is based on the *AM&S*[1] judgment rendered by the European Court of Justice ("ECJ"), which held that it follows from the principle of confidentiality between an attorney and an undertaking that correspondence and advice from an attorney to his client belong to the category of protected documents insofar as these concern the subject of a verification investigation. Hardcopy or digital information exchanged between an undertaking and a client fall under legal privilege. In practice, legal privilege applies to almost all attorney-client correspondence. For the purposes of interpreting this privilege, the NMa follows the *AKZO* case law[2] and on some points its interpretation goes a bit further to the advantage of undertakings:

This correspondence includes:

- Internal documents prepared for the sole purpose of seeking legal advice from an attorney;
- Any advice given by the attorney himself;
- Internal reports and summaries of an attorney's advice.

Is in-house counsel protected by legal privilege?

Under section 5:20 of the General Administrative Law Act, in-house counsels who are admitted to the Dutch bar as "salaried lawyers", also referred to as "Cohen lawyers", may also invoke their attorney-client privilege in respect of supervisory authorities. Documents exchanged between an undertaking and a Cohen lawyer are also protected by legal privilege, provided that it is clear from the documents that the in-house counsel acted in his capacity as an attorney. Legal privilege does not apply to communications with in-house counsels who are not also attorneys. The broader protection applies only to the application of national powers. The only situation in which legal privilege does not apply is when the NMa assists officials of the European Commission ("Commission") with verifications (the searching of premises) conducted by these officials. In line with the *Akzo* judgment, Cohen lawyers do not enjoy attorney-client privilege in the event of such dawn raids and undertakings cannot invoke legal privilege.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

Yes. Section 51 of the Competition Act does make a distinction based on where the attorney in question is based. Correspondence with attorneys based outside the EU is also protected under Dutch legal privilege. This constitutes an expansion of an attorney's duty of confidentiality, also under disciplinary and criminal law. In this respect, the Dutch legal privilege provision explicitly deviates from ECJ case law.

What are the main differences between national legal privilege and EU legal privilege?

Contrary to national legal privilege, in-house counsels do not enjoy legal privilege at a European level. This means that national competition law offers more extensive protection of the confidentiality of correspondence between an attorney and his clients, because the correspondence of in-house counsels is also protected.

[1] ECJ 18 May 1982, case 155/79, AM&S Europe Limited/Commission of the European Communities.

[2] ECJ 14 September 2010, case C-550/07P, Akzo Nobel Chemicals & Akcros Chemicals/Commission.

European legal privilege limits its protection to attorneys who are based in a Member State. Dutch legal privilege does not make a distinction based on where an attorney is based.

The NMa's manner of protecting legal privilege differs from that of the Commission. If a legal privilege claim is dismissed, the Commission issues a decision. An administrative law proceeding then follows. After this proceeding has been finalised, the Commission will be afforded the opportunity to inspect these documents. In the case of the NMa, a "Legal Privilege Officer" examines the documents and determines whether they fall under legal privilege. This officer notifies the undertakings of his opinion. Following this, a judicial review can be conducted in the form of civil law interim relief proceedings.

Other remarks

As soon as the supervisory officials have a reasonable suspicion that a certain undertaking or an association of undertakings has committed an offence, the obligation to extend cooperation within the meaning of section 5:30 of the General Administrative Law Act will no longer apply in the sense that there will no longer be an obligation to give a statement regarding the matter. This right to remain silent applies from the moment a situation involves a "criminal charge" within the meaning of article 6 of the European Convention on Human Rights and article 14(3) of the International Covenant on Civil and Political Rights. This right to remain silent under criminal law applies to both verbal and written statements given by an undertaking or a association of undertakings. Employees **as well as former employees** of an undertaking who are required to give a statement upon the NMa's demand may invoke the undertaking's right to remain silent. This applies to both consulting an attorney prior to a hearing, and the right to have an attorney present during a hearing.

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NEW ZEALAND

Does Legal Privilege exist in your jurisdiction?

Yes, New Zealand law recognises two particular kinds of legal privilege in relation to proceedings. The two kinds are commonly known as 'solicitor/client privilege' and 'litigation privilege'. Both kinds of privilege are recognised in both civil and criminal proceedings. Other types of privilege are also recognised.

Disclosure in civil matters

Any person who has either solicitor/client privilege or litigation privilege in a communication or information has the right to refuse to disclose that communication or information or any opinion formed on the basis of it in any proceeding. The person who holds the privilege can also require any other person who also has the information or communication to not disclose it (as long as that person did not receive the communication or information in a way that amounted to a waiver of privilege). In addition, a Judge can order that evidence of a communication, information, opinion or document in which a person has a privilege must not be given in a proceeding. The person who has the privilege or any other interested party can seek such an order from a Judge.

A party's discovery obligations in civil matters include identifying those documents in which privilege is claimed. However, those documents do not have to be disclosed for inspection by other parties. The High Court Rules provide a regime for challenging a claim of privilege.

The rules which apply in civil matters also apply to competition law cases.

Disclosure in criminal matters

In criminal matters, both the prosecuting party and the defendant are required to disclose certain information but not that which is privileged. However, under the Criminal Disclosures Act 2008, a Judge may disallow a claim of privilege by the prosecuting party if it is necessary for the defendant to present an effective defence.

As with civil proceedings, in criminal proceedings, a Judge can order that evidence of a communication, information, opinion or document in which a person has a privilege must not be given in a proceeding. The person who has the privilege or any other interested party can seek such an order from a Judge.

Investigations by a competition authority

Both solicitor/client privilege and litigation privilege are also recognised by the common law in areas that are not "proceedings". This includes investigations by, for example, the New Zealand Commerce Commission. Where the Commerce Commission compels production of documents, those documents are protected by solicitor/client privilege (and litigation privilege, if any) and do not have to be provided.

What is the scope of Legal Privilege?

Both types of privilege protect a wide variety of interaction including oral communications and documents.

Solicitor/client privilege

Solicitor/client privilege protects communications between a client and his or her legal adviser where the communication is intended to be confidential and is made for the purposes of seeking or giving legal advice. Where such a communication is made or received by the agent of either party it will also be protected by this privilege.

Litigation privilege

Litigation privilege is wider than solicitor/client privilege. It protects information and communications made for the dominant purpose of preparing for a proceeding or an apprehended proceeding. Litigation privilege protects communications made between the party and any other person, and the party's legal adviser and any other person. It also protects information compiled or prepared by the party or the party's legal adviser or by any other person at the party's request or the legal adviser's request.

In both cases the privilege is owned by the client. However, privilege is relatively easily lost by express or implied waiver. To ensure privileged information remains that way, it must be dealt with in a way that is consistent with a claim to it being confidential.

Privilege does not extend to communications made or received for a dishonest purpose or to assist a person to commit an offence.

Is correspondence with in-house counsel protected by Legal Privilege?

Both solicitor/client privilege and litigation privilege will apply correspondence with in-house counsel provided he or she holds a current practising certificate and all other requirements for the privilege to apply are met.

Correspondence between in-house counsel and external legal providers will also be covered by solicitor/client privilege and litigation privilege where the usual requirements are met.

Does Legal Privilege apply to correspondence with non-national qualified lawyers?

Yes, solicitor/client privilege and litigation privilege both extend to overseas practitioners if they are either a person who is a barrister or solicitor in Australia or a person who is entitled to undertake the work of a lawyer (ie somebody with a current practising certificate, or equivalent) in any one of a number of specified countries. Those countries currently number 87 and include all current EU member states, The People's Republic of China, Chinese Taipei, Hong Kong, Japan, Singapore and the Republic of Korea, amongst others.

Please include any remarks not covered elsewhere and which you believe add value to the reader.

In addition to solicitor/client privilege and litigation privilege, New Zealand law has specific provisions which govern the privilege in communications which form part of settlement negotiations. A party to a dispute or a mediator of a dispute has a privilege in respect of any communications or documents prepared that were intended to be confidential and made in connection with an attempt to settle or mediate the dispute. This privilege does not extend to the terms of a settlement or 'without prejudice save as to costs' offers if required at a later costs hearing in a proceeding.

The New Zealand Law Commission is required to review the Evidence Act every five years. A new review was launched on 27 April 2012. As at July 2012, there has been no indication that any of the privilege provisions will be a focus of the review.

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NORWAY

Does legal privilege exist?

Yes, based on a long-term practice and sections 119, 204 and 205 of the Criminal Procedure Act as well as section 22-5 of the Civil Procedure Act.

What is protected by legal privilege?

The attorney-client privilege applies to both qualified attorneys and junior lawyers, as well as those persons who assist the attorney in his or her work. In order to be considered privileged, the information must be given to the attorney in his capacity as an attorney, *i.e.* in connection with obtaining legal advice. The attorney-client privilege does not apply to information an attorney receives when acting in another capacity, for instance as a member of a company's Board of Directors. Further, the privilege does not apply to legal documents that are in the hands of a third party.

Is in-house counsel protected by legal privilege?

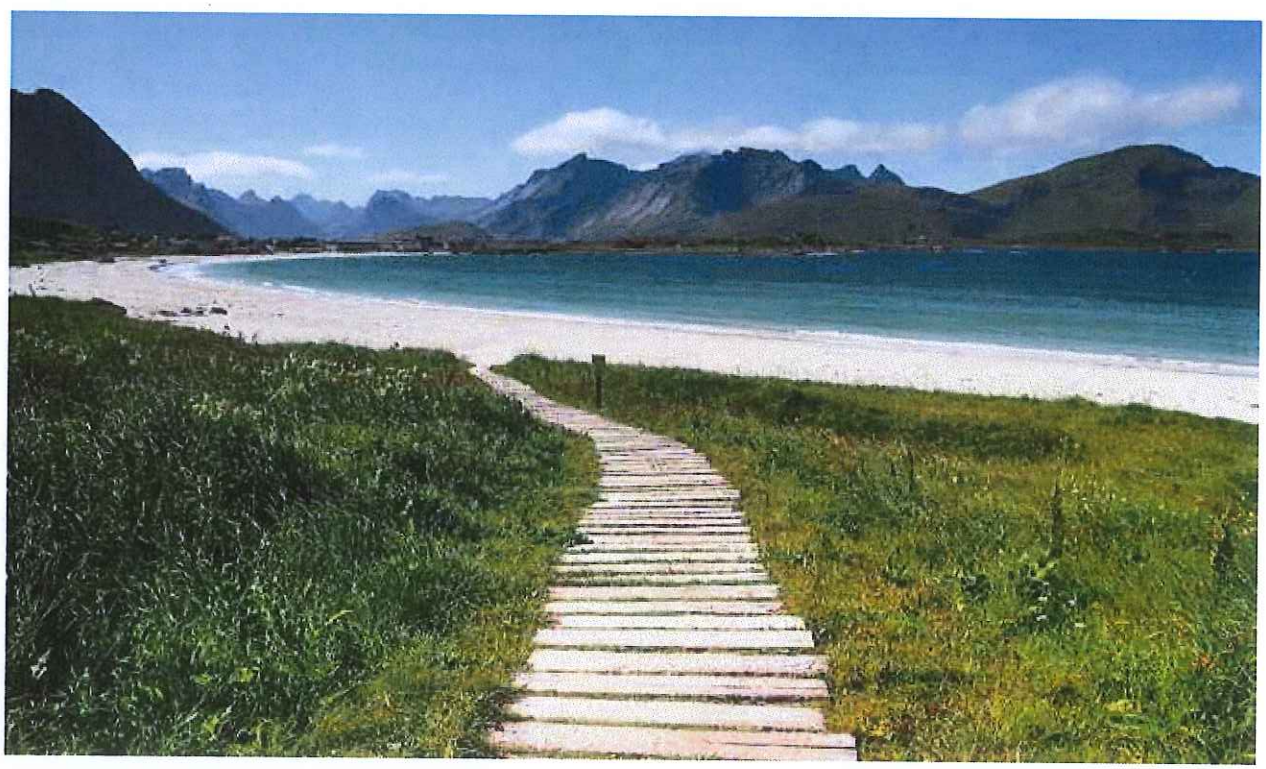
Yes, the attorney-client privilege also applies to in-house attorneys, although there are some caveats, *cf.* below.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

Attorney-client information is regarded as privileged regardless of the attorney's nationality. In a case where an in-house counsel of an US-corporation had prepared certain strategy documents in connection with a dispute, it was held that sections containing legal considerations and assessments of litigation risk were to be considered as privileged information, *cf.* decision by the Appeals Selection Committee of the Supreme Court 22 December 2000.

What are the main differences between national legal privilege and EU legal privilege?

Under Norwegian national law, in-house counsels are protected by legal privilege as described above. Under EEA/EU-law, however, information given to in-house counsels are not protected by legal privilege. The result of this is, for instance, that if a dawn-raid is undertaken by the EFTA Surveillance Authority (ESA), which falls within the scope of EEA/EU-law, the in-house counsel at the company in question cannot invoke legal privilege.



Lawyers need to be aware of this difference, and have to be certain of what kind of decision and which regulatory agency he or she is facing.

Other remarks

If an attorney is sued by a client for alleged malpractice, the attorney is free to disclose privileged information to the extent that this disclosure is necessary for his or her defense. However, information received under a specific confidentiality agreement cannot be divulged.

There has been a debate between the National Authority for Investigation at Prosecution of Economic and Environmental Crime (Økokrim) and the Norwegian Bar Association on the legal privilege of attorney-client information. Økokrim has been arguing that the privilege is an obstacle to their work against white collar crime, and has been asking for new regulations which involve limiting the attorney-client privilege. The Norwegian Bar Association is clear on the importance of trust and confidentiality in the attorney-client relationship and that the attorney-client privilege is a fundamental part of this.

Over the last few years, there have been a few cases regarding the legal privilege of attorney-client information. In December 2010 the Supreme Court concluded that information about money transfers as part of the attorney's legal practice, and client identity in a specific attorney assignment, is privileged information. In a subsequent High Court case in 2011, the Supreme Court's 2010 precedent was re-confirmed.

In these cases it was emphasized that if the scope of legal privilege is an obstacle against white collar crime, it is a task for the legislative authority to make the necessary amendments.

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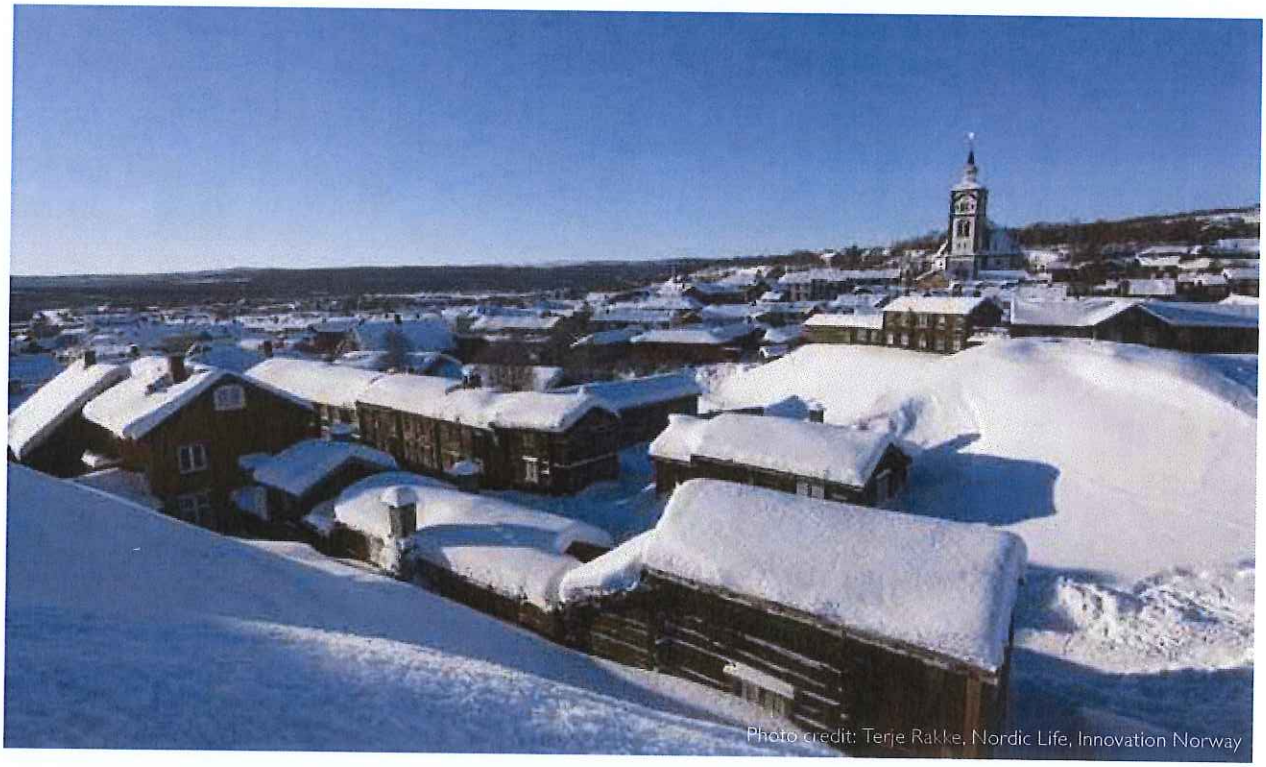

Photo credit: Terje Rakke, Nordic Life, Innovation Norway

POLAND

Does legal privilege exist?

There are two groups of lawyers i.e. advocates and attorneys-at-law which are specified under Polish law. Difference between profession of advocates and attorney-at-law are insignificant. The discrepancy is that solely advocates are entitled to appear before the court in criminal cases acting on behalf of accused party. Both professions are bound by Polish law, internal regulation of the bar etc. (hereinafter jointly "**attorneys**").

The concept of legal privilege does not exit under the Polish law. However, attorneys are obliged to keep confidential all information which they became aware of in the course of providing legal services. In accordance with Polish law, attorneys are bound by the professional secrecy of attorneys, which means that they should keep all information concerning legal service confidential.

What is protected by legal privilege?

The scope of the protection of the client is narrower under Polish law than the concept of EU legal privilege. The professional secrecy of attorneys concerns the knowledge and documentation possessed by the particular attorney rather than specific documentation marked with confidentiality clause. Exceptionally, professional secrecy is excluded if the obtained information refers to money laundering and terrorist activities regulated under a separate statute.

Is in-house counsel protected by legal privilege?

There is no separate law concerning in-house lawyers. Therefore, the above-mentioned comments apply to in-house lawyers provided that in-house lawyers are qualified attorneys. (If the in-house lawyer is not an attorney i.e. he is not admitted to the bar, the professional secrecy rule does not apply to him.)

Does legal privilege apply to the correspondence of non-national qualified lawyers?

Generally, the above-mentioned rules will be applicable to non-national qualified lawyers (which obtained professional title in the member state of European Union or third country) in the event that qualified lawyers will provide service in the territory of Poland. The Polish law specifies the scope and limitation of the legal service provided by foreign qualified lawyers in the territory of Poland. However, general rules applicable to the attorneys will be applicable to foreign qualified lawyers, including the professional secrecy rule.

What are the main differences between national legal privilege and EU legal privilege?

We have determined the following main discrepancies:

1. European legal privilege covers communication between the client and the lawyer, including correspondence and written legal opinion. On the other hand, Polish professional secrecy of attorneys is related to the particular lawyer which is obliged to keep all information obtained from the client confidential. As a result it does not protect from disclosing documents which may contain relevant information related to providing legal services, for example during the criminal investigation concerning the search on the client's premises, dawn raid etc.
2. European legal privilege is not granted to in-house lawyers. In Poland the same scope of the professional secrecy rule is applicable regardless of the fact whether the attorney is in-house lawyer or not.

Other remarks

Legal trainees for attorneys who are admitted to the bar for traineeship programme are bound by the professional secrecy rule respectively.

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PORTUGAL

DLA Piper Focus Firm

Does legal privilege exist?

Legal Privilege in Portugal is provided by the Portuguese Bar Association Statutes enacted by Law nº. 15/2005 of January 26 ("Statutes"), which regulates the rights, conduct and code of ethics of Portuguese Lawyers.

Article 87 of the above mentioned Statutes determines that Lawyers can not disclose any secret information, data or relevant facts obtained due to their professional status.

Furthermore, § 2 of this provision states that this professional secrecy duty is always applicable, regardless if the lawyer does or does not represent the client on and out of court, if he/she receives a fee or practices pro bono. Also, if incorporated in a law firm, this duty is extended to every lawyer of the firm.

Therefore, any breach of professional secrecy can give rise to disciplinary, civil and criminal liability of the infringer, subject to different penalties:

- **Disciplinary liability** – the penalties range from the mere admonishment to the disbarment of the infringer;
- **Civil liability** – this conduct falls under the category of tort and may determine a compensation for damages;
- **Criminal liability** – Article 195 of the Portuguese Criminal Code establishes that whoever discloses someone else's secrets, without their consent, having acknowledged it due to their profession or office is punished with a penalty up to 1 year of imprisonment or a fine up to 240 days.

What is protected by legal privilege?

i. Legal privilege covers a broad spectrum of information and documents. In fact, article 87 of the Statutes determines that every fact and/or supporting document (in any format) disclosed to a lawyer by a client, its associated parties, co-defendants, counterparties and others are of confidential nature, unless its disclosure is expressly authorized by the concerned party and, in most cases, by the Bar Association. In addition, Portuguese Lawyers have the right/obligation to withhold from seizure any document containing information covered by professional secrecy.

ii. Legal privilege does not include:
   - notorious facts;
   - facts known by the public;
   - facts previously proven in court;
   - facts described in public documents/deeds;
   - facts alleged in the client's benefit and on his defence.

iii. Legal privilege is extended to lawyer's staff, co-counsels, trainees, substitutes, successors and also third party experts.

iv. It should be noted that Legal privilege is not an absolute right in Portugal, and the concept is still disputed among judges and Lawyers. It flows from Article 135 of the Portuguese Criminal Procedural Code that criminal courts can order the disclosure of certain facts and or documents subject to Legal privilege, whenever the same are deemed essential to provide evidence in trial and there are no other alternative evidences. However, such court decisions can only be adopted when the interest at stake is deemed higher than Legal privilege. In these cases, Lawyers can appeal from the court decision and refer the matter to the Bar Association. To the extent that Article 135 of the Portuguese Criminal Procedural Code may be inconsistent with Article 87 of the Statutes, Lawyers can only abide by the Court decision if duly authorized by the Bar Association, and even in such cases they still can object to disclose the confidential information to which they have access.

v. Lawyers can formally request the Bar Association to authorize the disclosure of confidential information whenever such disclosure is deemed necessary to safeguard their own legitimate interests, rights and dignity or of their clients and representatives.

Is in-house counsel protected by legal privilege?

Yes. Pursuant to Article 68 of the Statutes, and opinion No. 14/PP/2008-G of the General Council of the Portuguese Bar Association, in-house counsels have the same rights and are bound by the same duties as independent Lawyers, notably on what concerns Legal privilege and professional secrecy duties.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

Yes. The Portuguese Bar Association allows for the registration of certain foreign accredited Lawyers to enable their practice in Portugal, whether on a permanent or occasional basis. Hence, foreign Lawyers are subject to the same guidelines and code of conduct as Portuguese Lawyers, namely on what concerns Legal privilege and professional secrecy as provided by Article 24 of the Bar Regulation No. 232/2007 for the registration of Lawyers and Trainees.

Regarding communications exchanged between Lawyers, the same are covered by Legal privilege. However, it should be clearly stated to the recipients that the information is strictly confidential, in which case it can neither be disclosed nor serve as evidence in court (Article 108, §1 and 2 of the Statutes).

What are the main differences between national legal privilege and EU legal privilege?

- European confidentiality protection is, contrary to the Portuguese equivalent, not granted to legal advice emanating from in-house counsel. This is particularly noticeable in matters of Competition Law. Contrary to the European trend and as recently confirmed in the ECJ Judgment on Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission case, whereby it was reaffirmed that in-house counsels are not protected by legal privilege and that they may be subject to antitrust investigations and that their communications and documents may be seized and serve as evidence in court, this is not the Portuguese courts' understanding. In fact, Lisbon's Commercial Court passed a judgment in 2009 stating that the National Competition Authority (Autoridade da Concorrência) can neither seize nor present as evidence in court in-house counsels' communications or documents as these are, in fact, protected by legal privilege.
- European confidentiality can only be enjoyed when correspondence relates to a client's right of defence. This means that only communication relating to a procedure enforcing art. 101-102 TFEU can be granted protection. Also communication predating the initiation of such procedure that comes to fall within such context is granted protection. In Portugal there is no such limitation and all confidential information, as described above, is protected from seizure.

Other remarks

The recently enacted Money Laundry Regulation provides for certain duties of lawyers when accepting new clients, notably to complete details concerning the clients identity, ultimate ownership in case of legal persons and origins of values/moneys. Whenever a lawyer has strong suspicions concerning the origin or legitimacy of his client and values/moneys involved, such Lawyer has the duty to report it to the Portuguese Bar Association who, on its turn and if it the issue is deemed potentially unlawful, has the duty to report it to the Public Prosecutors. However,

Portuguese Lawyers have been limiting this duty to confidential information not pertaining directly to their clients but to third parties involved, and the general understanding and interpretation of Article 87 of the Statutes has been prevailing. Thus, to the best of our knowledge, nothing was yet reported.

In addition to the above, and as a complementary information, it should be noted that lawyers can be prosecuted in case they assist their clients in perpetrating any unlawful actions

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ROMANIA

Does Legal Privilege exist?

Yes.

Prior to the amendment of the Competition Law No. 21/1996 ("**Competition Law**") by Government Emergency Ordinance 75/2010, entered into force on 5 August 2010, one could only rely on general provisions in the legislation which regulated a corollary notion – professional secrecy (confidentiality), as follows:

(i) the Law on the profession of lawyer;

(ii) the Regulations of the profession of lawyer;

(iii) the Law on the profession of in-house counsel (Romanian, "*Consilier Juridic*");

(iv) the Regulations of the profession of in-house counsel;

(v) the Criminal Code.

For instance, according to the Law on the profession of lawyer, the lawyer is obliged to keep the professional secrecy with regard to any aspect of the matter which was confided to him/her, except for the cases expressly provided by the law (e.g. Law no. 656/2002 on Money Laundering provides that under certain circumstances, if they have the suspicion that a coming operation is made in order to launder money or to finance terrorism, lawyers have the obligation to inform the National Office for Preventing and Combating Money Laundering).

Therefore, although our national legislation did not expressly regulate a client's right to legal privilege, it did regulate an obligation for the lawyer/in-house counsel to keep the professional secrecy with regard to any aspect of the matter which was confided to them.

Following the amendment of the Competition Law by Government Emergency Ordinance 75/2010, entered into force on 5 August 2010, legal privilege is now expressly regulated. The legal framework is represented by Art. 36 paragraphs (8) through (11) of the Competition Law.

In our answer below, we will refer to the legal privilege within the specific meaning of the Competition Law and not to the general obligation of lawyers/in-house counsels to keep the professional secrecy with regard to any aspect of the matter which was confided to them.

What is the scope of Legal Privilege?

Legal privilege covers the following type of correspondence:

- Communications between the investigated undertaking or association of undertakings and its lawyer exchanged for the exclusive purpose of exercising the undertaking's right of defense, respectively before or after the opening of the administrative procedure based on the Competition Law, subject to such communication being related to the object of the procedure. They cannot be seized or used as evidence during the procedures exercised by the Competition Council.
- The preparatory documents drafted by the investigated undertaking or association of undertakings for the exclusive purpose of exercising the right of defense. They cannot be seized or used as evidence.

As per the procedure, to the extent the undertaking does not prove the privileged nature of the communication, the competition inspectors will seal the document in two copies and take it with them, together with the rest of the documents gathered during the dawn raid.

The president of the Competition Council will then urgently decide, on the basis of the evidence and arguments put forth by the investigated undertaking, whether the document will be deemed privileged or not. Should the president of the Competition Council decide to reject the privileged nature of the communication, the undertaking can challenge this decision before the Bucharest Court of Appeal within 15 days of the decision being communicated to the undertaking.

The decision of the Bucharest Court of Appeal can be further challenged before the High Court of Cassation and Justice, within 5 days of communication.

De-sealing can only take place after the expiry of the time period in which the decision of the president of the Competition Council can be challenged, or, if challenged, after the court decision becomes final and irrevocable.

Is the in-house counsel protected by Legal Privilege?

No.

As opposed to lawyers, in-house counsels are not considered to be practicing a liberal profession. The aforementioned legal provisions appear not to cover the situation of in-house lawyers. Nevertheless, in-house counsels are also obliged to keep the professional secrecy.

Does Legal Privilege apply to non-national qualified lawyers counselling/correspondence?

Yes, the Competition Law makes no distinction between national lawyers and non-national lawyers.

Other Remarks

Mutatis mutandis, all the considerations made with respect to lawyers, shall also apply for trainee lawyers (Romanian, "*Avocaţi Stagiari*").

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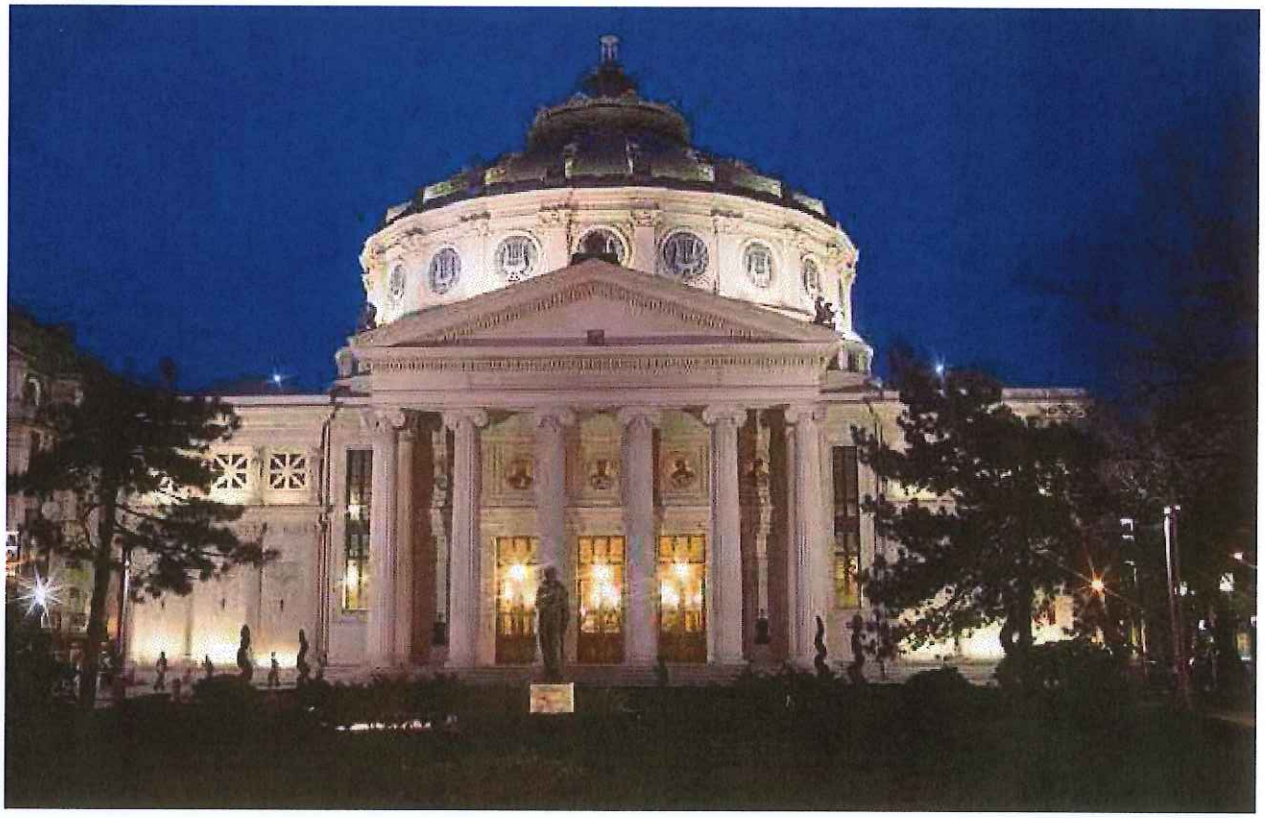

RUSSIA

Does Legal Privilege exist in Russia?

Russian law does not in general recognise the concept of Legal Privilege. However, the concept of Legal Privilege is expressed in some ways.

In Russia the most similar concept is advocate secrecy. An advocate secret is any information connected with an advocate providing legal services to his/her client. This information is protected by law; there is no need to enter into a special agreement (confidential agreement).

Under Russian law not every lawyer is considered an advocate. To gain the status of an advocate a candidate must meet the special requirements set out in the federal law and pass a special exam.

If a lawyer does not have the status of an advocate, the information he/she receives from his/her clients can be protected through a regime of commercial secrecy. This regime differs from the concept of Legal Privilege. It is a specific concept for protecting confidential information.

A commercial secret is information of any character (production, technical, economic, organisational, etc., including the results of intellectual activity in the scientific and technical area, as well as information on the methods for performing professional activity) which has an actual or a potential commercial value because it is unknown to third parties. A regime of commercial secrecy shall be deemed to have been established if the holder of commercially secret information has adopted a set of measures listed in the federal law to protect the confidentiality of the information.

A commercial secret can be protected in two ways:

- Information received from a client can be protected from being disclosed to third parties by a confidentiality agreement between the client and the lawyer.
- If a lawyer is an employee (including employees in law firms) he/she has to maintain the confidentiality of the commercially secret information which he/she obtained during the performance of his/her employment (including information received from clients).

What is the scope of Legal Privilege? (What correspondences does it cover? Who does it cover? What are the conditions? Etc)

Advocate secrecy – information considered as an advocate secret cannot be requested to be provided to any state bodies. Advocates cannot be questioned as a witness regarding circumstances that became known to them while rendering legal services to their clients.

Correspondence between advocates is protected by the advocate secrecy regulations. Special investigative activities can be performed in respect of advocates only under special rulings.

The advocate secrecy is unlimited in time and can be waived only by the client. There are certain exceptions to this rule stated in the law.

Commercial secrecy – The most important difference from advocate secrecy is that a commercial secret is protected from third parties until it is officially requested by an authorised state body (investigating agencies, agencies in charge of a pre-trial inquest, judicial authorities, antimonopoly bodies). The regime of commercial secrecy cannot be applied to certain data specifically listed in the law (for example, constituent documents, documents confirming entries the relevant state registers etc).

Lawyer to lawyer relationships – advocate secrecy does not apply to lawyer to lawyer communications (to the extent the lawyers are not advocates). Correspondence between legal consultants can be protected by means of a confidentiality agreement as a commercial secret. However upon a request of an authorised state body, this information must be provided.

Is the in-house counsel protected by Legal Privilege?

No. However in-house counsels cannot disclose to third parties, except authorised state bodies, commercial secrets which they obtained during the performance of their employment. Authorised state bodies have a right to seize documents or question an in-house counsel in

connection with the special inspection of the company, criminal prosecution of the head of the company or other employees and other cases.

There is a general human and constitutional right for the secrecy of correspondence, telephone calls etc. (article 23 of the Russian Constitution). This right can be limited if the information is officially requested by authorised state bodies. However this applies only to private correspondence and not to official/business correspondence.

Does Legal Privilege apply to non-national qualified lawyers

Foreign advocates: no. Under Russian law foreign advocates can advise on issues of such foreign law on the territory of the Russian Federation. Foreign advocates are prohibited from providing legal assistance on the territory of the Russian Federation on issues relating to state secrets of the Russian Federation. Only Russian-qualified advocates are protected by advocate secrecy.

If a foreign lawyer is an employee under an employment agreement governed by the Russian Labour Code such lawyer has to comply with Russian rules related to commercial secrecy.

Are there other main differences between EU Privilege and your National Legal Privilege law?

No. The general concept is the same. The only difference is that in the EU Legal Privilege applies to all qualified lawyers, while in Russia it extends only on a limited range of lawyers – ie advocates.

Please include any remarks not covered elsewhere. (Trainee lawyers, unclear scenarios)

In Russia advocate assistants and trainee advocates (future advocates) have to obey rules on advocate secrecy as advocates. The law is not however explicit as to whether they are fully protected by the advocate secrecy regime.

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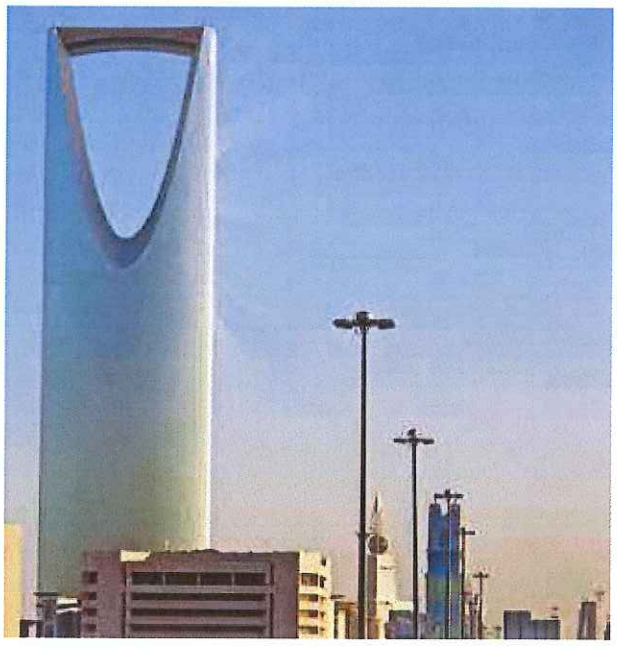
SAUDI ARABIA

Does Legal Privilege exist in your jurisdiction?

In the Kingdom of Saudi Arabia where the primary source of Law is Islamic Law *Shari'a*. In addition to Sharia, the law in Saudi Arabia is derived from secular legislation passed by the government. Further, the KSA government, from time to time, issues rules and regulations with the objective of supplementing Islamic Law when the need arises. Yet, the Legal Profession Law in Saudi Arabia doesn't have provisions concerned with the Legal Privilege. While the attorney-client privilege is interpreted in the KSA under Islamic Law.

As the fundamental law or the constitution of Saudi Arabia is the Islamic Law *Shari'a*. The Sharia in this respect does not refer to lawyers but refers to one who has been given a power of attorney ("**Wakalah/ Power of Attorney**"). Powers of attorney are special enabling documents granted by Saudi Arabian persons or entities for use in Saudi Arabia that must be made before the competent Notary Public or other official having competence in order to be effective. It arises rights and obligations in various aspects, civilian, criminal and antitrust/competition enforcement. Enduring The Power of Attorney ("**POA**") The attorney must take into account any instructions from the donor in the POA, The attorney has an absolute duty to act in the best interest of the donor at all times. An attorney who acts improperly can be held personally and criminally liable for losses, The attorney must keep and preserve accurate records and accounts for all dealings and transactions when exercising his powers. Failure to do so is an offence. The attorney does not have any right to his/her inheritance before the donor's death. The attorney(s) cannot be paid for work done on behalf of the donor, except out of pocket expenses directly connected to carrying out his duties. The attorney(s) cannot pay himself a wage for duties performed under the POA but may claim travelling expenses incurred in the performance of his duties.



What is the scope of Legal Privilege?

Legal professional privilege protects all communications between a professional legal adviser and his clients from being disclosed without the permission of the client. The privilege is that of the client and not that of the lawyer. The purpose behind this legal principle is to protect an individual's ability to access the justice system by encouraging complete disclosure to legal advisers without the fear that any disclosure of those communications may prejudice the client in the future. When an attorney is not acting primarily as an attorney but, for instance, as a business advisor, member of the Board of Directors or in another non-legal role, then the privilege generally does not apply. The privilege protects the confidential communication, and not the underlying information. For instance, if a client has previously disclosed confidential information to a third party who is not an attorney, and then gives the same information to an attorney, the attorney–client privilege will still protect the communication to the attorney, but will not protect the communication with the third party. The privilege may be waived if the confidential communications are disclosed to third parties. Other limits to the privilege may apply depending on the situation being adjudicated. The Legal Profession law, article 11 mentions that a lawyer shall practice the profession in accordance with the *Shari'a* and laws in force. He shall refrain from any act that compromises the dignity of the profession and

shall comply with the relevant rules and instructions. According to article 12 of The Legal Profession law, a lawyer shall not refer to personal matters concerning his client's adversary or representative, and shall refrain from any offensive language or accusation in connection with the content of his written or oral argument. As well as a lawyer shall not disclose any confidential information which has been communicated to him or of which he has become aware in the course of practicing his profession even after expiration of his power of attorney, unless such non-disclosure constitute a violation of *Shari'a* requirement. Similarly, he shall not, without a legitimate cause, decline to represent his client before the case has been concluded, as mentioned in article 23.

Is correspondence with in-house counsel protected by Legal Privilege?

Most of the in-house counsel who's practicing in Saudi Arabia associating with Saudi nationals or practicing as in – house foreign Legal consultants, accordingly The Legal Profession law would not include the in-house counsels who are considered to be providing their services on an employment provisions and subject to the Saudi Labor Law which is not including any provisions relating to privileges. It should be noted that most in-house counsel in the KSA are non-National, and they would accordingly be subject to the professional obligations of their home countries.

Does Legal Privilege apply to correspondence with non-national qualified lawyer

The non – national Lawyers are practicing as in-house counsels who are considered under the Saudi law as employees and subject to the relevant provisions of the Saudi Labor Law. However, a non-Saudi shall be entitled to practice law subject to the terms of agreements concluded between the Kingdom and other countries.

Please include any remarks not covered elsewhere and which you believe add value to the reader.

The ongoing development of the judicial system in Saudi Arabia, since several new regulations governing the judiciary facilities which aims to create special courts to allow advocacy attorneys to advocating in to have the chance rather than Advocating in *Shari'a* public courts to avoid any issues relating to conflict of jurisdiction. In 2007, HRH King Abdullah issued royal decrees with the aim of reforming the judiciary and creating a new court system. The reforms have yet to be implemented in full but, once they are, will include the creation of a Supreme Court and the transfer of the Board of Grievances' commercial and criminal jurisdictions to a restructured general court system. New specialist first instance courts will be established comprising general, criminal, personal status, commercial and labor courts. The *Shari'a* courts will therefore lose their general jurisdiction to hear all cases and the work load of the government's administrative tribunals will be transferred to the new courts. Another important change is the establishment of appeal courts for each region in Saudi Arabia.

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SOUTH AFRICA

Does Legal Privilege exist in your jurisdiction?

Yes, Legal Privilege does exist in South Africa and is governed to a large extent by Common Law principles.

What is the scope of Legal Privilege?

Legal Privilege covers communication between a client and its legal advisor which:

1. is made in confidence;
2. is for the purpose of obtaining legal advice or in the process or in contemplation of litigation; and
3. is not obtained for the purpose of committing a crime or fraud.

All correspondence which satisfies these requirements is privileged.

Privilege also extends to communication between third parties and legal advisors if the communication was in confidence for the primary purpose of informing the advisor at the time when litigation was pending or contemplated.

Legal Privilege does not extend to communication between a party and a doctor, a clergyman, an accountant, a journalist, a banker (except to the very limited extent provided for in s236 (4) of the Criminal Procedure Act 51 of 1977), an insurer, or any person who is not a legal advisor.

Legal Privilege would also cover communication by an agent, if that communication was made at a time when litigation was pending, or was contemplated and that such communication was brought to the attention of the legal advisor with the sole aim of procuring advice.

Is correspondence with in-house counsel protected by Legal Privilege?

Yes provided that the general requirements for Legal Privilege have been met.

Does Legal Privilege apply to correspondence with non-national qualified lawyers?

Yes, provided that the general requirements for Legal Privilege have been met. Whether the person was acting in the capacity of legal advisor will be determined on a case-by-case basis.

Please include any remarks not covered elsewhere and which you believe add value to the reader.

The South African law on Legal Privilege is based largely on the English law of Legal Privilege.

To the extent that the English law of Legal Privilege differs from EU Privilege, it is highly likely that the South African Law on Legal Privilege will differ in similar respects. Legal Privilege is that of the client and not that of the legal advisor. Accordingly only the client may waive such privilege.

Communication between clients and candidate attorneys (trainee lawyers) will be covered by Legal Privilege, provided again that the general requirements for Legal Privilege are met.

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SOUTH KOREA

Does Legal Privilege exist in your jurisdiction?

Korea has no separate and independent legal privilege belonging to the client. However, the confidentiality of communications between the attorney and the client is substantively protected pursuant to the Civil Procedure Act and the Criminal Procedure Act. Also, an attorney may be subject to punishment in case of his or her failure to maintain client confidences pursuant to Article 317 of the Korean Criminal Act. As document production is limited in Korean civil proceedings (with no pre-trial discovery), there has been no practical need to develop the concept of legal privilege under Korean law.

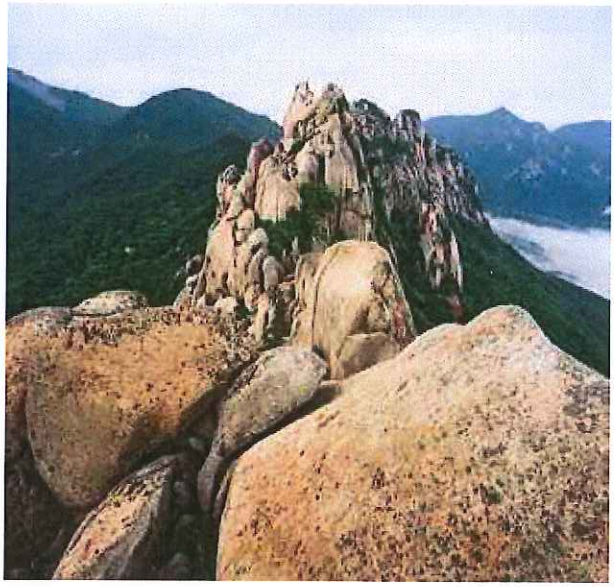
What is the scope of Legal Privilege?

Pursuant to Article 315 of the Civil Procedure Act and Article 149 of the Criminal Procedure Act, an attorney is allowed to refuse to testify as to-client confidence. The privilege to refuse testimony in a civil suit does not apply, however, where the client grants permission to the attorney to disclose the information. Likewise, such protection in criminal litigation does not apply where the client consents to the seizure or a compelling public interest is at stake.

Pursuant to Article 112 of the Criminal Procedure Act, an attorney is permitted to refuse a seizure order in case the information sought to be seized contains secrets entrusted by a client. However, this protection may be overridden where the client consents to the seizure or a compelling public interest is at stake.

Also, an attorney may refuse to produce documents which contain privileged information in the civil litigation.

Accordingly, the protections mentioned above can only be relied upon after civil or criminal legal proceedings are initiated.



Is correspondence with in-house counsel protected by Legal Privilege?

The prevalent view is that the protection mentioned herein as to the correspondence with outside counsel should be applied to the correspondence with in-house counsel. However, some legal professionals claim that those in-house counsel who are not Korean-licensed are not afforded the same protection as Korean-licensed in-house counsel.

Does Legal Privilege apply to correspondence with non-national qualified lawyers?

At present, it is not clear. As the legal market is opening up for non-national qualified lawyers, there is a possibility that Korean legislature enact a statute which explicitly extends the same protection permitted to the correspondence with Korean-licensed lawyer to those non-national qualified lawyers who have registered with the Korean Bar Association.

Please include any remarks not covered elsewhere and which you believe add value to the reader.

On May 18, 2012, the Korean Supreme Court handed down its first judgment regarding the attorney-client privilege in a criminal case. Obviously, this case is of great importance as the Supreme Court for the first time made it explicit that there are no clear statutory grounds to recognize the concept of broad attorney-client privilege under Korean law relating to attorney's advice obtained during day-to-day business (not directly related to the criminal case at issue). However, the court ultimately ruled that the attorney's written advice, which was unrelated to the criminal case, was inadmissible in that case because the attorney invoked its right to refuse to testify. Thus, although the Supreme Court did not go as far as acknowledging the concept of broad attorney-client privilege recognized in common law jurisdictions, it expressly ruled that attorney's day-to-day advice may not be admitted as evidence in a criminal case if the attorney refuses to testify at the court about such advice.

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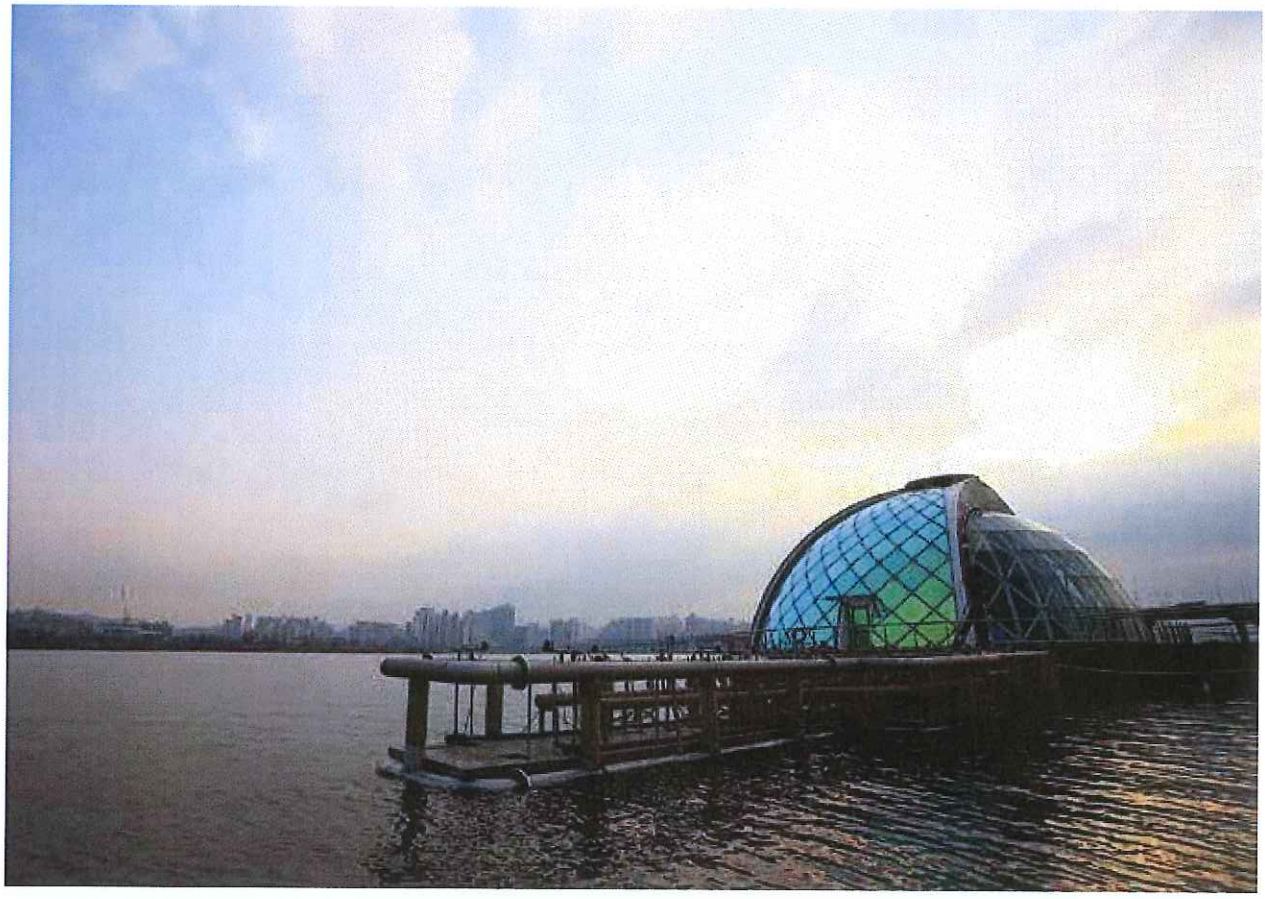

SLOVAK REPUBLIC

Does legal privilege exist?

In Slovakia, the right to Legal Privilege is not explicitly stipulated in the laws of the Slovak Republic. In general, right to legal protection is stipulated in Article 47 of the Slovak Constitution (Act No. 460/1992 Coll.).

The Act No. 586/2003 Coll. on Advocates, as amended, stipulates that the advocate shall not reveal any information relating to the client's representation and shall treat such information as strictly confidential. It should be noted that a violation of professional privilege is not a criminal offence and is considered as being professional misconduct accordingly leading to possible disciplinary sanctions. A duty of confidentiality of the advocates applies to all matters related to the performance of his/her function unless otherwise stipulated by the relevant legal regulations.

According to the Act No. 300/2005 Coll. Criminal Code, as amended, it is a criminal offence if someone breaches the secret provided in closed letter or other documents transferred via post, electronic communications or computers. It is also a criminal offence to breach the secret of document or other written document, audio record, record of image or other record, computer data or other document maintained in privacy in a way that it will be disclosed or accessed by third person or otherwise used causing so serious damages on a person's rights.

According to the Act No. 513/1991 Coll. Commercial Code, as amended, trade secrets are protected; in particular, everyone is entitled for trade secrets protection, and should one interfere into it, the person suffering trade secrets protection does have legal means for the protection of his trade secrets.

As regards the execution of inspections in by the Slovak Competition Authority, pursuant to Act No. 136/2001 Coll. on Protection of Competition, as amended, the Authority is entitled to request from natural and legal persons information and documents concerning an undertaking, as well as other information and documents necessary to the Authority's activities. These persons are required to provide such information and documents to the Office without delay, unless this is contrary to special legislation (e.g. banking, tax legislation).

What is protected by legal privilege?

The express privilege of confidentiality is provided by the Slovak law only in respect to the attorney-client relationship. This covers the right of the client for the protection of the information the client provided to the advocate in course of legal representation and the obligation of the advocate to maintain confidentiality on the obtained information. This obligation of the advocate does not apply in cases where the legal regulations impose on him/her to prevent a criminal offence.

An advocate cannot be compelled to produce documents in court proceedings. The advocate can produce such materials only in case when he/she is released from the obligation of confidentiality by his/her client or a client's successor. In course of civil proceedings, the Act No. 99/1963 Coll. on Civil Proceedings, as amended, guarantees during evidence in civil proceedings the obligation to maintain confidentiality.

In course of a criminal proceeding any secret information, trade secret, bank, tax, insurance or telecommunications secret shall be protected. The data which is subject to such secret can be only provided before the criminal proceedings or in the preparatory proceeding on request of a prosecutor or the judge. In this respect, also communications between the advocates and clients shall be protected from seizure out of an investigation.

Is in-house counsel protected by legal privilege?

Since the in-house counsel is deemed to be an employee, his obligation to maintain confidentiality stems from the general obligation of the employee to maintain confidentiality on information which he obtained during the performance of his/her employment. The obligations set for the advocates do not apply to in-house counsels.

Thus, contrary to the advocate, the in-house counsel is obliged to maintain confidentiality on information which he obtained during the performance of his/her employment whereas the advocate is obliged to maintain confidentiality on all information he obtained in relation to the performance of his function of an advocate.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

The obligation to maintain confidentiality stipulated in the Act No. 586/2003 Coll. on Advocates, as amended, shall also apply to the so called registered European lawyer (European lawyer is a national of any EU Member State or a national of any other signatory of the EEA Treaty, who is authorised to pursue his professional activities and provide legal services as a sole practitioner under his home professional title). A registered European lawyer may provide legal services in the Slovak Republic under the terms and conditions laid down in this Act and he/she is obliged to fulfill the duties and obligations arising for lawyers under this Act, under separate legal rules and the Slovak Bar's internal rules (his/her duty to comply with the laws and legal rules applicable in his home Member State shall not be affected).

As regards the in-house counsel, the obligation to maintain confidentiality will apply to a foreign in-house counsel provided he/she will be employed in Slovak Republic and Slovak labour law regulations will apply to him/her.

What are the main differences between national legal privilege and EU legal privilege?

In Slovakia the legal privilege is not expressly recognised in the Slovak regulations. There is unfortunately no case law in this respect, therefore it is difficult to foresee the standpoint of the Slovak courts in this respect.

According to our information however, the Slovak Competition Authority tends to proceed in line with the European case law, thus its procedure in course of investigations shall be similar to the procedure of the European Commission in course of investigations.

Other remarks

As regards the legal privilege in course of competition law investigations, the Slovak Competition Authority seeks to adapt the procedures developed by the case-law of the European Court of Justice and in order to enforce the legal privilege, the undertaking shall prove to the Authority that respective document

(i) related to the subject of the investigation and

(ii) that document/correspondence relates to the communication between the undertaking and his advocate.

For this purpose the employees of the Authority conducting the investigations do have the right to look into the document in order to indentify to whom is this document destined to but they have no right to investigate the content of such document.

Provided the undertaking will not allow the Authority employees to look into the document, he will have to provide to the Authority sufficient evidence that indeed these documents present documents relating to the communication with the advocate

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SLOVENIA

Does legal privilege exist?

Yes, it is expressly provided in the Slovene Prevention of the Restriction of Competition Act (*Zakon o preprečevanju omejevanja konkurence*).

The Attorneys Act (*Zakon o odvetništvu*) and the Civil Procedure Act (*Zakon o pravdnem postopku*) set the general confidentiality obligation of attorneys towards clients and the possibility for exemption from testifying in court.

What is protected by legal privilege?

In an investigation proceeding under the Prevention of the Restriction of Competition Act all letters, notifications, or other means of communication between a company against which an investigation is conducted and its attorney are excluded (referred to as "privileged communication").

Is in-house counsel protected by legal privilege?

This is not explicitly regulated by statutory provisions. However, since the protection under the Prevention of the Restriction of Competition Act refers only to communication with attorneys, this would indicate that in-house counsels are not protected. Attorney (*odvetnik*) is namely a special term indicating a lawyer who has been admitted as attorney (after passing the bar exam) and is practicing as such, independently representing clients.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

The law does not specify any restrictions for application of the legal privilege in case of foreign qualified lawyers. But the law does expressly refer to the term *odvetnik* (attorney), which could be seen as a special term as used under Slovene law or as a more general legal term, which could also cover foreign such professionals. It could be argued that legal privilege would apply to the attorneys from EU-member states that fulfill the criteria for exercising attorney profession in Slovenia (including under a foreign title) as provided in the Attorneys Act. If analogy with the right to practice attorney profession is drawn, then also attorneys from other countries could be viewed as included in a general term attorney under the condition of actual mutuality.

What are the main differences between national legal privilege and EU legal privilege?

There are no significant differences.

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SPAIN

Does legal privilege exist?

Yes. Documents and communications exchanged between attorney-client are protected under Spanish law by the general rule of professional confidentiality/ secrecy (article 542.3 of the Judiciary Law, and article 32 of the General Regulation of the Legal Profession, the "GRLP"). Besides these provisions, it is important to highlight that in Spain there is no express regulation on "privileged" documents or communications. Typically, only advice concerning defence on legal proceedings will be privileged (i.e., documents prepared to analyse a potential acquisition may not be privileged).

Notwithstanding the above, the antitrust case-law has stated that the only evidence that is subject of being protected by the legal privilege is the one related to communications/documents exchanged with external lawyers. In that order, advices from in-house counsel are not privileged.

As a sample of the recent case-law, we can mention the following cases related to dawn raids carried out by the National Competition Commission ("NCC"). In many of these resolutions, the NCC has established that the legal privilege only covers external lawyers communications/documents: Judgements of the Supreme Court of 27 April 2012 and 9 July 2012, Judgments of the National Court of 7 February 2012 and 2 July 2012; Resolution NCC, Case SNC/0007/10 EXTRACO, of 6 May 2010; Resolution NCC, Appeal Case 0011/09 COLGATE PALMOLIVE, of 4 May 2009; Resolution NCC, Appeal Case R/0010/08 TRANSITARIOS 3, of 3 February 2009; Resolution NDC, Appeal Case R/0009/08 TRANSITARIOS 2, of 3 February 2009; Resolution NCC, Appeal Case R/0008/08 TRANSITARIOS 1, of 3 February 2009; Resolution NCC, Appeal Case R/0006/08 STANPA, of 3 October 2008, Judgment of the National Court of 30 September 2009; Resolution NCC, Appeal Case R/0005/08 L'OREAL, of 3 October 2008; Resolution NCC, Appeal Case R/0004/08 CP SPAIN, of 3 October 2008; and Resolution NCC, Case SNC/02/08 CASER-2, of 24 February 2008.

What is protected by Legal Privilege

The general rule is that any spoken or written communications, documents or correspondence exchanged between an external lawyer and his/her client, opposing parties and other attorneys within the context of an attorney-client relationship must be kept confidential. Any breach of this duty could lead to the attorney being held criminally liable and to sanctions being imposed by the Bar Association, as well as by any other potential authority related to the matter (for instance, the NCC). However, in addition to this duty, the attorney is also afforded the privilege to maintain such confidentiality.

Additionally, any internal document that merely reproduces an advice provided for an external lawyer shall be covered by the Legal Privilege, as it may be inferred from the recent case-law issued by the NCC (see for instance the Resolution NCC, Appeal Case 0011/09 COLGATE PALMOLIVE, of 4 May 2009). In this regard, it is important to highlight that when a *dawn raid* inspection is carried out, the raided company must explain and demonstrate to the NCC the reasons that justify the consideration of this type of information (i.e. reproducing an external legal advise) as a document protected by the Legal Privilege (see the Judgement of the Supreme Court of 27 April 2012).

Is in-house counsel protected by Legal Privilege?

As previously stated, in-house counsel is not protected by the Legal Privilege.

Does Legal Privilege apply to the correspondence of non-national qualified lawyers?

There are no specific rules on that regard. However, in line with the Akzo Nobel Judgment (Cases T-125/03 and T-253/03 Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd v. Commission, judgement of 17 September of 2007) we consider that Legal Privilege may be applicable to non-national qualified lawyers, as long as they are not in-house lawyers.

What are the main differences between EU Privilege and National Legal Privilege?

There are no significant differences.

Other remarks

As previously mentioned, it is important to highlight that during *dawn raid* inspections the raided company shall prove to the NCC that certain documents gathered during the inspections are/may be covered by the Legal Privilege. In this line, it is important to obtain specialist legal advice from experienced lawyers, who know exactly how to deal with the inspectors.

Notwithstanding the above, recent case-law has narrowed the scope of the NCC powers for the performance of a *dawn raid* to the information/documentation specifically related to the objective of the inspection. As a result of that, any kind of information/documentation whose content is not related or is beyond the objective of the inspection, shall not be gathered by the NCC.

In this line, to be covered with the Legal Privilege it would be advisable that companies shall follow the following tips:

Before a dawn raid: (i) mark documents which are (or may be) protected by Legal Privilege; (ii) keep such documents separately; (iii) avoid internal memoranda; (iv) reduce written and e-mail communication to a minimum; (v) develop and audit compliance programs in close cooperation with external counsel.

During a dawn raid: (i) object immediately any request to inspect privileged communication; (ii) provide explanation and evidence to the NCC demonstrating that such communication/information is privileged.

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SWEDEN

DLA Piper Group Member

DLA NORDIC

Does legal privilege exist?

Yes.

What is protected by legal privilege?

Correspondence between lawyers and undertakings is privileged material which the Competition Authority cannot take, whether pursuant to a request or through a dawn raid inspection.

Under Swedish law, the correspondence protected as privileged material covers such facts and information that lawyers or their associates can refuse to give testimony about in a court of law. If such information is in their possession or in the possession of a person protected by professional secrecy, e.g. an employee of undertaking under investigation, the material is privileged and cannot be seized by the Competition Authority.

Is in-house counsel protected by legal privilege?

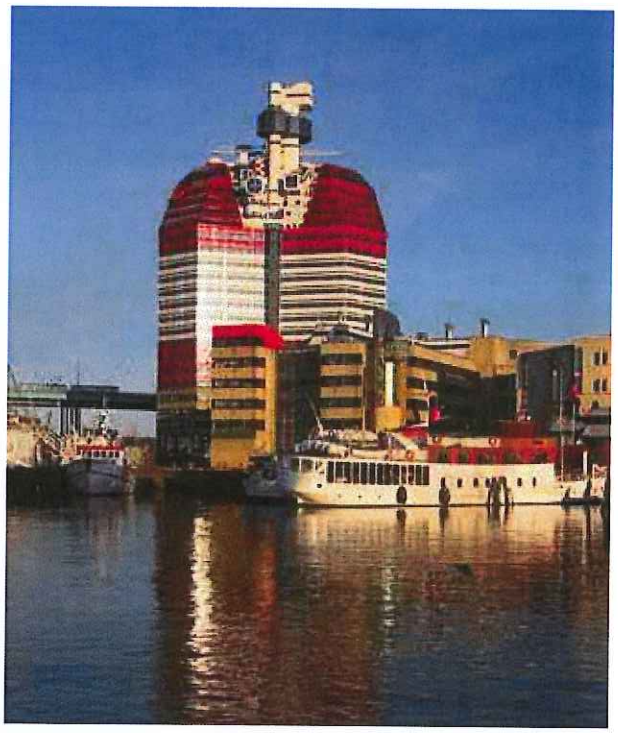
No, not generally. Communications between in-house counsel and officers, directors, and employees of the companies they serve are not protected from disclosure by attorney-client privilege according to Swedish law.

Does legal privilege apply to the correspondence of non-national qualified lawyers?

This is not clear.

What are the main differences between national legal privilege and EU legal privilege?

Interestingly, the preparatory work is somewhat contradictory on this point. On the one hand, it states that the application of these rules should correspond to the similar rules under EU law. On the other hand, it states that only correspondence between the client and the lawyer concerning the case at hand is privileged. It seems—especially after the Akzo Nobel case where the court stated that working documents or summaries prepared by the client, in particular as a means of gathering information which will be useful, or essential,



to that lawyer for an understanding of the context, nature and scope of the facts for which his assistance is sought are privileged—that more information is protected by privilege under EU law than only the information regarding the case under investigation by the Competition Authority. Therefore, an undertaking as well as a lawyer present should insist and see to it that the EU standard for privileged material is applied in dawn raids performed under chapter 2, section 1 of the Act.

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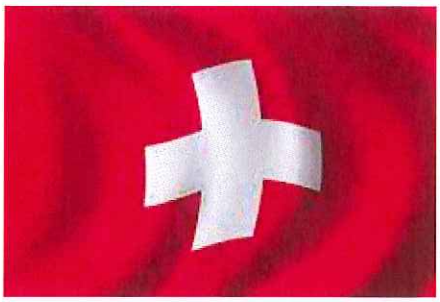
SWITZERLAND



PRAGER DREIFUSS

RECHTSANWÄLTE
ATTORNEYS AT LAW

Does Legal Privilege exist in the Member state

Yes, legal privilege exists based on provisions of procedural law (see below) and the Swiss Penal Code (article 321). Professional rules are further set out in the Federal Act on Attorneys (Bundesgesetz über die Freizügigkeit von Anwältinnen und Anwälten, BGFA, SR 935.61).

Article 321 of the Swiss Criminal Code reads as follows: "[…], attorneys, […] who reveal a secret which they were entrusted with by virtue of their profession, or from which they have taken notice during the exercise thereof, shall, upon motion, be punished with imprisonment up to three years or pecuniary penalty." (unofficial translation). The aforementioned provision is subject to exceptions (e.g. release) and duty of disclosure vis-à-vis authorities (see below, Section 1.2, Criminal Procedure).

The relevant provision in the BGFA reads as follows: "Attorneys are subject to professional secrecy without time limit and must keep confidential from all persons anything which they were entrusted with by virtue of their profession from a client. A release does not oblige them to surrender anything they were entrusted." (article 13(1) BGFA, unofficial translation).

What is the scope of Legal Privilege? What does it cover?

External Counsel

Lawyer-client privilege only extends to lawyers registered in the cantonal lawyers register. In-house counsel do not benefit from this type of privilege and cannot legally hold back company documents which are in their custody. Correspondence relating to, and prepared in the course of, a specific mandate to or from external professional counsel is protected by privilege, irrespective of its location.

Civil Procedure (Federal Code on Civil Procedure – CCP)

As a general rule, parties to civil proceedings are under a duty to cooperate with the court with respect to the taking of evidence and establishing the facts of the case, and are therefore required, upon successful request by the opponent, to produce documents to the (Swiss) court (article 160 CCP); a party refusing to cooperate without justification cannot be sanctioned but may bear the consequences of adverse consideration of the evidence (article 164 CCP). Correspondence relating to and prepared in the course of a specific mandate to or from external professional counsel is protected by privilege, irrespective of its location (article 160(1)(b) CCP; article 166(1)(b) CCP).

Parties and witnesses of a civil trial do not need to testify and are entitled to withhold documents if they can invoke a statutory privilege (e.g., attorney-client confidentiality) or have a particularly close personal relationship to a party (e.g., being directly related or married). The rules of civil procedure also govern which documents may be withheld and who can withhold them.

Controversy exists to the extent companies with registered office in Switzerland or Swiss subsidiaries of foreign companies may be subject to pre-trial discovery in foreign proceedings. It is important to note in this respect that an obligation to surrender evidence located in Switzerland to foreign authorities or parties may constitute a violation of article 271 (prohibited acts for a foreign state) and article 273 (economic intelligence service) of the Swiss Criminal Code or other special statutory provisions (e.g. banking regulation, data protection regulation).

Switzerland is a party to The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

Criminal Procedure (Federal Code on Criminal Procedure – CCrimP)

A defendant (including legal entities) cannot be held to incriminate himself (article 113 CCrimP). The applicable rules on criminal procedure specify who may also decline giving testimony. Attorneys may be held to testify provided that they are subject to a statutory duty of disclosure or have been released by the client or the competent supervisory authority of their obligation of professional secrecy (article 171 CCrimP). However, even if an attorney has been released of its obligation of

professional secrecy, the attorney may still rely on article 13(1) BGFA and refuse to testify. Communication between defence attorney and client made in connection with the defence must not be seized by the authorities (article 264(1)(a) CCrimP).

The CCrimP protects communication between counsel and defendant relating to defendant's defence in the proceedings irrespective of their location. Such documents may not be seized by the prosecuting authorities.

With regard to foreign proceedings, see also above, Civil Procedure.

Competition Law

Parties to agreements, undertakings with market power, undertakings concerned in relation to concentrations and affected third parties shall provide the competition authorities with all the information required for their investigations and produce the necessary documents (article 40 of the Federal Cartel Act).

Defence communication is protected irrespective of its location and the time at which it was created and for this reason must not be seized by the competition authorities (article 264 CCrimP). Documents located at the searched

premises which contain legal advice from external counsel that is *not* related to the client's defence, are not privileged from seizure. In-house counsel may be subject to testifying, unless they can invoke a right to refuse giving testimony pursuant to the rules set forth in the Federal Act on Federal Civil Procedure (not to be confused with the above mentioned CCP).

Searches ("dawn raids") based on Swiss competition legislation are governed by the Federal Administrative Criminal Act (Bundesgesetz über das Verwaltungsstrafrecht, VStrR, SR. 313.0). Defendants subject to searches of their premises may immediately object to the search of books and business documents. Upon such objection, the concerned books and documents will be sealed and may not be used in the investigation until a decision on the admissibility of the search and the confiscated books and documents has been rendered by the Board of Appeal of the Federal Criminal Court (cf. article 50(3) VStrR).

With regard to foreign proceedings, see also above, Civil Procedure.

Is the in-house counsel protected by Legal Privilege?

Attorney-client privilege only extends to attorneys' registered in the attorneys register. Lawyers employed by a company whose business does not involve offering legal services cannot register with the attorneys register as they do not qualify as being independent, a requirement for entry into the register. Therefore, in-house counsel do not benefit from this type of privilege and cannot legally hold back company documents which are in their custody.

A proposal by the Federal Government to enact legislation on the matter of legal privilege of in-house counsel failed in public consultations and hence was not sent to Parliament for consideration.

Does Legal Privilege apply to non-national qualified lawyers counselling/correspondence?

Attorneys not qualified in Switzerland but carrying out business in Switzerland pursuant to the BGFA are subject to the professional rules contained in the BGFA and are therefore subject to article 321 of the Swiss Criminal Code. Documents located at their premises are protected by legal privilege.

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THAILAND

Does Legal Privilege exist in your jurisdiction?

In accordance with Section 92 of the Civil Procedure Code and Section 231 of the Criminal Procedure Code, provided that the information relates to legal professional advice or representation, privilege will be available to prevent the disclosure by a lawyer of any confidential document or fact that was entrusted or imparted by a party or witness to the lawyer in his capacity as a lawyer. Note that the lawyer-client privilege is not absolute and that the Thai courts can order disclosure under these Sections. The privilege itself it a right of the client who may waive this right.

Whilst the above provisions apply in respect of civil court proceedings and criminal proceedings, it is arguable that the privilege provisions extend to regulatory and other proceedings. In some circumstances regulators have powers to demand evidence in relation to criminal and regulatory proceedings.

What is the scope of Legal Privilege?

The scope of legal privilege only extends to information that is related to legal professional advice or representation and the privilege attaches to communications which include or refer to documents or facts provided in confidence to a lawyer for this purpose. Procedure Chapter 3, Clause 11 of the Lawyers Council Regulations on Lawyer Conduct B.E. 2529 (A.D. 1986) provides that "*a lawyer shall not disclose confidential information of the client that comes into his knowledge in the course of performing his duties as a lawyer, except where the client's consent has been obtained or it is made under the Court's order*". Any documents or communications falling outside of this category are not privileged. Whilst there are no specific provisions under Thai law which govern when legal privilege commences, the generally accepted principle is that it starts at the time of the first communication.

A document is defined as any paper or other material used for expressing information, by way of printing, photography or other means. The scope also extends to documents which are relevant to the legal proceedings in Thailand yet created abroad.

Note however that scope of privilege only applies to 'Lawyers'. Section 4 of the Lawyers Act defines a "lawyer" *as "a person who has been registered as a lawyer and a license therefore has been issued to him by the Lawyers Council of Thailand"*. This has implications in respect of documents or communications with non-national qualified lawyers (see below).

Is correspondence with in-house counsel protected by Legal Privilege?

Yes. In Thailand the rules of privilege and confidentiality apply to all Lawyers as defined above irrespective of whether they are in-house or a lawyer in private practice.

Does Legal Privilege apply to correspondence with non-national qualified lawyers?

A non-national qualified lawyer (who has not obtained a lawyer's licence in Thailand) shall not be recognised as a "*lawyer*" according to the Section 4 definition contained within the Lawyers Act and therefore confidentiality obligations under Thai law do not extend to them.

Non-national qualified lawyers are often referred to as Legal Consultants. In the event that a Legal Consultant violates client confidentiality, they may be liable for a wrongful act under the Civil and Commercial Code or may be held criminally liable for defamation according to Sections 323 and 326 of the Penal Code.

Legal Consultants may also be bound by the legal ethics of the law society/association in the country upon which they are registered to practice law and they may also be answerable for any confidentiality violations committed abroad in accordance with their own jurisdiction,

Please include any remarks not covered elsewhere and which you believe add value to the reader.

There is a lack of clear statutory guidance in respect of disclose and, at times, the approach taken by the Thai courts is governed by custom. This leaves the system open to being unclear and inconsistent.

The lack of confidentiality obligations on non-national qualified lawyers is also a concern for a client in Thailand. If a non-national qualified lawyer breaches confidentiality, they may be liable for defamation. However in the event that the client has not been defamed as a result of the disclosure of information, there is little recourse against the non-national qualified lawyer.

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TURKEY

Does Legal Privilege exist in your jurisdiction?

Yes. However there is no specific provision regarding legal privilege under Turkish Law. In this absence, the Attorneys Act and the Turkish Code of Criminal Procedures provide some guidance as to protection of client's confidential information. In this respect, Article 36 of the Attorneys Act provides a general obligation of confidentiality. Similarly, Article 130 of the Turkish Code of Criminal Procedures provides protection for documentation relating to a client as it sets forth strict requirements for obtaining a search warrant for a lawyer's office.

According to the Attorneys Act, an attorney is prohibited from disclosing the information that he/she receives or the matters which he/she becomes aware of because of their duty of representation or their duty in the Union of Turkish Bar Associations and bodies of the relevant bar.

Breach of this obligation by the attorney may result in criminal liability and related sanctions pursuant to the Article 239 of the Turkish Criminal Code.

What is the scope of Legal Privilege?

The obligation of the attorney to respect the client's right to privilege is only towards the client, as there is no such obligation of the attorney towards third persons.

The information that the attorney must keep confidential is only the information that the attorney happens to learn about the client as a result of his/her attorneyship.

The attorney must respect the client's right to legal privilege even in circumstances against the relatives and heirs of the client, other attorneys, courts and administrative bodies.

The issue of legal privilege is mostly faced by the Turkish Competition Authority during investigations on anti-competitive activities. In such cases, due to the lack of specific legislation pertaining to legal privilege, the above-mentioned articles are taken into consideration while case law of Court of Justice of European Union has a significant impact on administrative practices and Turkish Competition Authorities decisions.

It may be derived from this practice that in order for an exchange/correspondence to be considered to be within the scope of legal privilege, the following conditions should be satisfied:

- the exchanged document or correspondence should be produced with the purpose of client's right of defense,
- the exchanged document or correspondence should be exchanged between an independent lawyer and his/her client,
- the lawyer should claim legal privilege in the course of an inspection and object to the confiscation of such document or correspondence.

Is correspondence with in-house counsel protected by Legal Privilege?

In order to fall within scope of the aforesaid provisions, the lawyer must be independent from his client. Therefore, exchanges/correspondence between in-house lawyers and their clients are not considered to be covered by legal privilege.

Does Legal Privilege apply to correspondence with non-national qualified lawyers?

The provisions which provide guidance as to legal privilege do not make a distinction in this respect. However, attorneys not qualified in Turkey but carrying out business in Turkey pursuant to the Attorneys Act are subject to the professional rules contained in the Attorneys Act. Thus we consider that legal privilege may be applicable to non-national qualified lawyers as long as they are not in-house lawyers.

Please include any remarks not covered elsewhere and which you believe add value to the reader.

The Attorneys Act stipulates disciplinary sanctions for lawyers who act in breach of this provision.

Pursuant to the Article 130 of the Turkish Code of Criminal Procedures, in the course of the enforcement of the search warrant, the lawyer is entitled not to permit the confiscation of a document in respect of client-lawyer relationship. In this case, the document claimed to be covered by a client-lawyer relationship should be placed in a sealed envelope and the Court will decide if the said document should be considered to be protected by the client-lawyer relationship. In the event that the Court considers the document to be protected, it is returned to the lawyer. In other words, the legal privilege right should be claimed directly by the lawyer.

Finally the legal privilege is not subject to a time limitation. As far as the information is related to the right of defense of the client, it is protected by the legal privilege.

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UNITED STATES OF AMERICA

Does Legal Privilege exist in your jurisdiction?

Yes. Legal privilege in the United States is embodied in rules of professional conduct for lawyers (lawyer-client confidentiality), and rules of evidence and procedure applicable in the courts (the attorney-client privilege and the work product doctrine).

While the American Bar Association has promulgated the Model Rules of Professional Conduct (the "Model Rules"), each of the 50 states in the United States has jurisdiction over the lawyers practicing in that state and may have adopted rules with slight variations from the Model Rules. In addition, while there are Federal Rules of Evidence and Federal Rules of Civil Procedure applicable in federal courts throughout the United States, each state has its own rules of evidence and procedure which may vary from their federal counterparts. This summary is based upon the Model Rules and the Federal Rules of Evidence and Civil Procedure, except with respect to the discussion of legal privilege as it applies to non-national lawyers set forth below.

Ethical duties in the United States relating to attorney-client privilege and lawyer-client confidentiality have their roots in early English law. Their concepts are now embodied in Model Rule 1.6. Under the Federal Rules of Evidence, Rule 501, federal common law governs the attorney-client privilege and the work product doctrine unless the U.S. Constitution, federal statutes, or court rules provide otherwise. Legal privilege applies to civil matters, criminal matters, and antitrust enforcement.

What is the scope of Legal Privilege?

The following three areas of law embody the scope of legal privilege.

Rule of Confidentiality

Under Rule 1.6 of the Model Rules of Professional Conduct, confidentiality is a fundamental principle in the relationship between a lawyer and client whereby, in the absence of client consent or other applicable exceptions (described below), the lawyer may not reveal information relating to

client representation. Confidentiality may apply whether or not the source of the information was the client. Therefore, communication with representatives of the client, or between the attorney and persons retained by him or her, may also be protected by the privilege. For example, if a lawyer engages a consultant or expert to assist in preparation for litigation on behalf of a client, the communication of the consultant to the lawyer can also be privileged. This rule is meant to establish a relationship of trust between the lawyer and the client; it encourages the client to seek legal assistance and to communicate fully and frankly.

Under Rule 1.0(e), in order for the client to give informed consent to waive the privilege, the lawyer must communicate adequate information to the client about the material risks of and reasonable alternatives to waiving confidentiality. Unless confidential information otherwise becomes general knowledge, it remains confidential throughout the entirety of representation and thereafter.

Rule 1.6(b) enumerates exceptions to the rule of confidentiality, which are more likely to arise in criminal matters and in antitrust enforcement. A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer believes necessary to:

- prevent reasonably certain death or substantial bodily harm;
- prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- prevent, mitigate, or rectify substantial injury to financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's presentation of the client; or
- comply with other law or a court order.

Attorney-Client Privilege

The attorney-client privilege is an evidentiary rule that protects confidential communication between clients and their lawyers made in furtherance of obtaining legal services. It applies specifically to judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The attorney-client privilege is distinguishable from the rule of confidentiality because it only applies to confidential communication between the lawyer and the client, and not all confidential information provided by the client. Communication between lawyers and clients is often marked "lawyer-client" privilege to readily distinguish such communication, although such labeling is not mandatory for the privilege to be applicable.

Some courts have found that the attorney-client privilege may be lost if the attorney or the client discloses privileged communication, even if disclosure was inadvertent.

Work Product Doctrine

The work product doctrine protects material that an attorney has prepared for litigation from discovery by opposing counsel. There are two types of work products – opinion work product, and ordinary work product. Opinion work product includes an attorney's mental impressions, attorney notes, and documents reflecting strategies. Ordinary work product includes factual information separate and apart from legal analysis, such as transcripts of witness interviews, reports of non-testifying experts, and financial records from the client.

Is correspondence with in-house counsel protected by Legal Privilege?

Yes. Courts have taken two approaches to legal privilege between in-house counsel and corporate employees. Some courts have adopted the "control group test", which limits

privilege to communication between in-house counsel and corporate employees who have authority to control or participate in the corporation's legal affairs. Under this approach, communication from individuals outside of the control group is not protected. Other courts have adopted the "subject matter test," which limits privilege to communication from corporate employees for the specific purpose of securing legal advice for the corporation. Communication with in-house counsel that relates to business as opposed to legal advice will likely not be protected by legal privilege.

In the seminal case of *Upjohn v. United States*, the U.S. Supreme Court found that, for purposes of federal law, communication was privileged when it was for the specific purpose of securing legal advice for the corporation and was within the scope of the communicating employee's corporate duties. 449 U.S. 383, 394 (1981). In *Upjohn*, communication from lower level employees to general counsel in the form of a confidential questionnaire to learn the extent of any illegal payments was considered to be privileged information.

Some corporations choose to waive the attorney-client privilege when they are under pressure from the government to do so during a criminal investigation. This has been the topic of much debate, and the U.S. Department of Justice has altered its policies to reduce the pressure on corporations to waive the privilege.

Does Legal Privilege apply to correspondence with non-national qualified lawyers?

Perhaps Under such circumstances, U.S. courts apply a choice-of-law analysis to determine whether domestic or foreign law governs the question of legal privilege. Otherwise, the court will apply the relevant foreign privilege law. Federal and state courts take different approaches to the choice-of-law analysis.

In federal courts, under Section 501 of the Federal Rules of Evidence, federal common law governs the attorney-client privilege to give courts the flexibility to develop rules governing privilege on a case-by-case basis. If the federal court finds that domestic law should apply, then the U.S. concept of the attorney-client privilege protects correspondence with non-national qualified lawyers. Most federal courts apply the "touch base" approach when determining whether correspondence with non-national qualified lawyers is privileged. Under this fact-specific analysis, "any communications touching base with the United States will be governed by the federal discovery rules," including the attorney-client privilege. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1169 (D.S.C. 1974). The Southern District of New York recently applied the "touch base" approach in a trademark infringement case, and found that even communication between a U.S. client and a non-national agent of a non-national lawyer were privileged under U.S. law. *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58 (S.D.N.Y. Sept. 23, 2010).

At the state court level, courts tend to follow one of two approaches when determining whether correspondence with non-national qualified lawyers is privileged. A minority of the states (including Nevada, Connecticut and Virginia) apply the "territorial approach" under which courts apply the privilege laws of the forum state. On the other hand, most states (including California, Delaware, Florida, Illinois, Maryland, New York, and Texas) apply the "most significant relationship" test, under which courts apply the privilege laws of the jurisdiction that has the "most significant relationship" with the communication, unless admission would be contrary to public policy. Accordingly, if the "most significant relationship" with the communication is determined to be a foreign jurisdiction, and if such jurisdiction would not protect such communication (e.g., because the lawyer was an in-house counsel), the law of the foreign jurisdiction will govern.

A few states that apply the "most significant relationship" test, including California, Delaware, Florida, and Texas, have broadly defined "lawyer" to include all licensed lawyers so that legal privilege extends to correspondence with non-national qualified lawyers. In these states, if the state court finds that its own jurisdiction has the "most significant relationship" with the communication in question, it is clear that the attorney-client privilege

applies no matter the nationality of the licensed lawyer. In other states, if the court determines that its own laws apply, either based upon the "territorial approach" or the "most significant relationship" test, the determination to protect correspondence with a non-national lawyer will depend on that individual state's laws and the results may vary.

Please include any remarks not covered elsewhere and which you believe add value to the reader (recent developments, unclear scenarios, etc.).

The attorney-client privilege also protects communication with prospective clients and former clients. Under Rule 1.18, communication between a lawyer and a prospective client who does not retain the lawyer's services remains privileged. In these situations, lawyers should limit the information obtained during a preliminary interview to the information necessary to screen for conflicts. Under Rule 1.9, communication between a lawyer and a former client – arguably even one who is deceased – also remains privileged. The question of whether the privilege should survive a client's death is a debatable one. One the one hand, disclosure will not place the client in jeopardy; on the other hand, disclosure may call into question the former client's character.

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Annex 23

Privileged.

Linklaters

Privilege review 2009

Index

A review of legal professional privilege across 20 jurisdictions

Preface to 3rd Edition
Since Linklaters' review of legal professional privilege was first published in May 2005 there have been many changes in the application of privilege, with new rules and clarification of existing principles in several jurisdictions across Europe and elsewhere. We have therefore taken the opportunity to revise and update our guide, which continues to provide a quick reference tool to practice across the globe.

Preface to 1st Edition
This publication is a quick reference guide on privilege for busy in-house counsel. For 20 jurisdictions, including the EU, it provides at-a-glance answers to five basic questions:

> Is the concept of disclosure of documents recognised?
> Is a right to privilege recognised? If so, what types of document may be privileged?
> Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?
> What law determines whether privilege applies to a document or communication?
> Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Legal professional privilege exists in most jurisdictions but its scope and application varies widely. In some jurisdictions privilege will prevent the disclosure of a large number of communications passing between a lawyer and his or her client. In others privilege is barely recognised at all. In particular, the position of in-house lawyers varies considerably between jurisdictions.

As both litigation and regulatory investigations become increasingly international, these differences (and their potential consequences) present a significant risk for companies and their legal advisers. Increasingly regulators are indicating impatience with privilege, which makes it all the more important to understand where the true boundaries lie.

In-house counsel advising companies operating in multiple jurisdictions are particularly exposed. Negotiating a path through competing and frequently contradictory laws on privilege can throw up very unexpected results: advice that is privileged in one country may not be protected in others.

The review is intended to highlight issues rather than to provide comprehensive advice. If you have any particular questions about privilege, please do not hesitate to contact the Linklaters LLP lawyers with whom you work.

Patrick Robinson, partner

In this review, "disclosure" (also known as "discovery") means the process by which:
> documents are provided to the other side in the course of litigation, arbitration or other dispute resolution procedure, in accordance with rules of court or non-judicial procedure as appropriate; and
> documents which have to be provided in the course of statutory and other regulatory investigations or enquiries.

Law stated as at 2009

Belgium

Is the concept of disclosure of documents recognised in this jurisdiction?

No. There is no formal process of disclosure. However, parties must produce their own bundle of exhibits on which they rely. These will be served on the other side and at court. There is a procedure for disclosure of specified documents, but the criteria for such an application to the court are stringent.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Pursuant to Article 458 of the Criminal Code 1867, persons entrusted with a duty of confidence by status or by profession (such as lawyers, doctors and pharmacists) cannot reveal confidential information, except where they are called to give evidence in legal proceedings or where the law requires them to disclose the information in question. This concept is referred to as "professional confidentiality". The Professional Conduct Rules of the Bar forbid a lawyer from testifying to facts that were revealed to him during the course of the exercise of his profession. However, a lawyer may reveal confidential information if it is necessary for his own defence in a criminal or civil case.

As a general rule, correspondence between a lawyer and his client is confidential by nature. Neither the client nor the lawyer may release the lawyer from this obligation as the principle derives from public policy. Correspondence between Belgian lawyers is confidential in principle and cannot be used in evidence. However, some correspondence between lawyers will be classified as official and can be produced in court. The Professional Conduct Rules of the Bar determine how the distinction should be made. Conflicts are resolved by the Head of the Bar.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

To a certain extent, the concept has been recognised since the introduction on 1 March 2000 of the Law on the Establishment of an Institute for In-house Counsel. Opinions rendered by in-house counsel for the benefit of his employer and in the course of his employment as legal counsel are privileged. However, as any reference to Article 458 of the Criminal Code was left out of the text of the Law of 1 March 2000, it seems that in-house counsel are not subject to that provision. The extent of the privilege is therefore unclear. During preparatory discussions, this was justified as follows: "the amendment has as its purpose the limitation of the scope of the application of professional secrecy solely to the legal opinions that the in-house counsel renders for his company".

There are several conditions which must be fulfilled before opinions given by in-house counsel may be deemed privileged. The advice must be legal in nature, and not commercial or operational. Only opinions from in-house counsel acting in his capacity as counsel are privileged. Furthermore, only advice given to the employer (as opposed to third parties) is privileged. However, the advice will lose its privileged status if it is treated non-confidentially by its author and its addressee. For example, legal opinions circulated to a large number of people may lose their privileged status.

What law determines whether privilege applies to a document or communication?

Belgian law applies - in particular, the following provisions: (i) Article 458 of the Criminal Code; (ii) Article 444 of the Judicial Code; (iii) Article 5 of the Law of 1 March 2000 on the Establishment of an Institute for In-house Counsel; (iv) The Professional Conduct Rules of the Bar; and (v) the principles governing the rights of defence.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Documents covered by professional confidentiality (e.g. letters received and sent by the lawyer, notes, memoranda and invoices) cannot be seized or used in evidence. The Public Prosecutor and other official authorities generally respect this principle. The extent to which in-house lawyer privilege is respected varies from one authority to the other.

Brazil

Is the concept of disclosure of documents recognised in this jurisdiction?

There is no obligation on a party to list or disclose documents but parties will generally produce those documents they consider support their own case. Documents are filed at court but not served on the other side.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

All documents relating to the relationship between client and attorney are privileged under federal law, including documents held at the client's premises. This is called in Brazil "professional secrecy". Professional secrecy must be respected by all investigative bodies, including the courts. The Ethical Code of the Brazilian Bar establishes that there will be no breach of professional secrecy if otherwise protected documents are disclosed by an attorney acting in defence of his own life, honour or the Nation. Article 25 of the Ethical Code includes, among these, the situation where the attorney feels threatened by the client him/herself.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

The law applies to both in-house and "external" lawyers and does not treat the confidential communications of such professionals in different ways. If the communication is related to a lawyer/client relationship, it will be privileged.

What law determines whether privilege applies to a document or communication?

Federal law regulates when privilege applies.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Yes, privilege must be applied by all investigative bodies. This extends to privileged communications held at the client's premises which cannot be seized by such bodies.

The European Union/ECJ

Is the concept of disclosure of documents recognised in this jurisdiction?

Parties to proceedings before the European Court of Justice ("ECJ") disclose the documents on which they wish to rely. However, the European Commission has powers to demand disclosure of documents in the course of certain investigations, such as alleged breach of competition rules.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Neither Articles 81 and 82 of the EC Treaty, nor any of the regulations implementing them, contain any provisions in relation to legal privilege. The principles governing such privilege have largely been developed through the case law of the ECJ. The AM&S case (1982) established the principle that Regulation 17 (setting out the rules implementing articles 81 and 82) must be interpreted as protecting the confidentiality of written communications between lawyer and client. (Regulation 17 has now been replaced by Regulation 1/2003, the Modernisation Regulation, but the position remains the same). This principle is subject to two conditions: (i) the communications must be made for the purpose and in the interests of the client's right of defence; and (ii) the communications must emanate from independent lawyers established within the European Union ("EU") (i.e. the privilege of in-house and non-EU qualified lawyers is not respected).

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

Advice from and communications with in-house lawyers are explicitly excluded from the ambit of the AM&S decision, although in the subsequent Hilti case, the Court of First Instance ("CFI") held that notes internal to the undertaking reporting the content of advice received from independent external lawyers are covered by the principle of confidentiality laid down in AM&S. On 17 September 2007, in a landmark judgment in the case of the EC Commission v Akzo Nobel and Akcros Chemicals (Joined cases T-125/03 and T-253/03), the CFI confirmed that legal professional privilege does not extend to communications with in-house lawyers. It is very disappointing that after 25 years the privilege of inhouse lawyers has not been recognised.

In this case the companies had challenged a Commission decision to seize and retain allegedly privileged documents during a dawn raid. In its final judgment the CFI confirmed that only documents prepared exclusively for the purpose of seeking external legal advice in the exercise of rights of defence are privileged. Internal company documents will only be privileged if it is unambiguously clear that they were drawn up exclusively for the purpose of seeking external legal advice in the exercise of the company's rights of defence. This will apply even if they have not been exchanged with an external lawyer nor created for the purpose of being physically sent to an external lawyer, but the mere fact that a document has been discussedwith a lawyer will not be sufficient to give it such protection.

What law determines whether privilege applies to a document or communication?

European law.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Yes. However, as outlined above, the doctrine is not respected in the cases of in-house or non-EU qualified lawyers.

In the context of a European Commission dawn raid, communications between companies and their inhouse counsel will not attract legal privilege and, if relevant to the investigation, must be surrendered to the Commission. However, the CFI in the Akzo case clarified the procedure for dealing with privileged documents during a dawn raid:

> The company is entitled to refuse to allow Commission officials even a cursory look at documents which it claims are privileged, if it would be impossible to do so without revealing the documents' contents. The company must give the officials appropriate reasons for its view.
> If the Commission believes that the documents are not privileged, it may place copies of the documents in a sealed envelope and retain them (without reviewing them) until the dispute is resolved.
> The Commission is not permitted to read such documents until it has adopted a decision giving the company the opportunity to challenge the rejection of privilege before the CFI. To do so prior to the resolution of the dispute could cause irreparable harm to the company.

This makes it particularly important that all privileged documents (including e-mails) are headed "Privileged and Confidential".

France

Is the concept of disclosure of documents recognised in this jurisdiction?

There is no process in French civil procedure that is equivalent to documentary discovery or disclosure. There is no obligation for a party to list or produce documents under its control which are relevant to the dispute.

Parties to civil proceedings in France will generally only produce the documents that they consider support their respective cases. This will occur at the same time as the parties exchange formal pleadings setting out their positions on the facts, evidence and the applicable principles of law.

It is possible for a party to civil proceedings in France to apply to the court for an order obliging either a party to the proceedings or a third party to produce documents. An application for a production order in relation to documents can be resisted on the basis that the relevant party or third party has a legitimate reason (*motif légitime*), such as:

(i) that the documents are protected by some form of legally recognised confidentiality obligation; or
(ii) that they cannot be produced due to a situation that qualifies as "force majeure".

Before civil proceedings are commenced investigation measures, such as an order to a third party to produce documents, may also be granted at the request of any interested party by way of a motion or by summary proceedings. The measure must be justified by a legitimate need to preserve or establish evidence for a future legal action and must have a limited scope.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

The relationship between a lawyer (avocat, admitted to the local Bar) and his client is protected by the general professional confidentiality obligations set out in the New Criminal Code, article 226-13, which prohibit a professional who is subject to a confidentiality obligation from divulging information obtained by him from his client. The client is not, however, bound by this confidentiality obligation.

In addition, article 66-5 of the Law of 31 December 1971 on the status of lawyers provides that any written communications addressed by a lawyer to his client (correspondence, meeting notes and generally all documents forming part of the client's file), and between a lawyer and his adversaries, in relation to a matter handled on behalf of a client are protected by professional confidentiality, unless expressly indicated to the contrary. A client cannot release his lawyer from his obligation to keep all of these documents confidential. However, as indicated, the client is not himself bound by this confidentiality obligation.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

No. This concept is not recognised in France. *Avocat* status may not be retained by in-house lawyers and they may not represent their employers in proceedings where representation is compulsory.

There are currently discussions underway in relation to a merger of lawyers with in-house lawyers, which would extend the duty of professional confidentiality to the latter. An official report dated March 2009, commonly referred to as the *Rapport Darrois*, (named after the lawyer presiding over the Commission appointed by President Nicolas Sarkozy to make recommendations on the reform of the legal profession), has recommended the extension of the duty of professional confidentiality to in-house lawyers.

What law determines whether privilege applies to a document or communication?

French law will determine whether a communication is privileged. However, where the correspondence is between lawyers from different EU states, they will have to agree at the outset of their relationship how they will treat correspondence between themselves.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

In civil and commercial matters, the doctrine of privilege is binding and respected by everybody. Regulatory bodies (e.g. competition and financial authorities) cannot order the production of, nor rely upon, documents protected by professional confidentiality while investigating and carrying out checks.

In criminal, customs and tax matters the position is slightly different. In theory, documents protected by professional confidentiality cannot be seized during searches conducted by the investigating magistrate. Nor can they be removed by regulatory and certain public bodies (competition and financial authorities, customs and tax) when they undertake court-authorised house searches. Such searches are only permitted when they are intended to collect evidence of a criminal offence or certain customs and tax offences.

France (cont.)

This prohibition of seizure extends to lawyer-client communications held at the client's premises.

However, the Code of Criminal Procedure sets out one exception to the rules on professional confidentiality in relation to lawyers: documents are no longer protected by professional confidentiality when they are seized as evidence of a lawyer's commission of a criminal offence or certain customs and tax offences. In that circumstance, the search may only be carried out by a judge, and the president of the Bar Association or his delegate must be present during the search.

The Criminal Chamber of the Supreme Court (Cour de Cassation) seems to have abandoned its distinction between documents relating to the exercise of defence rights and documents relating to the drafting and negotiating activities of a lawyer: in accordance with the provisions of article 66-5 of the law of 31 December 1971, the Criminal Chamber now considers that all documents are protected by professional confidentiality and cannot be seized except as evidence of a lawyer's commission of an offence.

Germany

Is the concept of disclosure of documents recognised in this jurisdiction?

There is no doctrine of pre-trial disclosure in Germany. One party may not inspect the files of the other party nor those of the other party's lawyers. There is no duty to disclose documents to the other side, other than those upon which a party intends to rely. Only very limited means of obtaining disclosure from the court exist (e.g. section 142 of the Civil Procedure Code).

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

The relationship between a lawyer and his client is protected by a number of professional confidentiality regulations. In the absence of the consent of his client, a lawyer is prohibited from divulging any confidential information or documents obtained in the course of his professional activities. This obligation to preserve confidentiality provided by section 203(1) of the Criminal Code is mirrored by the right of the lawyer to refuse to divulge such information pursuant to sections 383 and 142(2) of the Civil Procedure Code, and section 53 of the Criminal Procedure code.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

The status of in-house lawyers in Germany is complex and there is very little case law on the matter. Lawyers admitted to the Bar (known as *Rechtsanwälte*) may act as in-house counsel, in which case they are known as *Syndicusanwälte*. Although they will retain some rights gained from being a member of the Bar, in many other respects they are treated as normal employees of the company. It has been held recently, by the District Courts of Berlin and Bonn, that legal advice from in-house lawyers to their employers is not protected from disclosure. Furthermore, following a ruling of the Federal Court of Germany (BGH) that in-house counsel do not act as lawyers vis-à-vis their employers, it seems unlikely that the BGH would recognise legal privilege as regards communications with in-house counsel. Where confidentiality and privilege are of particular importance, it is advisable to instruct external independent Rechtsanwälte.

What law determines whether privilege applies to a document or communication?

German law (including German private international law) will apply.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Section 97 of the Criminal Procedure Code protects documents and communications which have been entrusted to a lawyer in his professional capacity and which remain in his possession. Section 148 of the Criminal Procedure Code protects correspondence between a lawyer and his client regarding the defence of a prosecution for a criminal or regulatory offence. However, any lawyer-client communications not falling within the ambit of section 148 which are located at the client's premises could be seized by regulatory and other investigative bodies.

Hong Kong

Is the concept of disclosure of documents recognised in this jurisdiction?

Yes. Disclosure is made by each party of those documents in their possession, custody or control which relate to the matters in question in the action. The powers of the court were recently extended to provide the court with power to limit the scope of disclosure. It remains to be seen how this power will be exercised.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Legal professional privilege is recognised in the same way in Hong Kong as it was in the UK prior to the Three Rivers judgments. Therefore, communications between lawyer and client will be privileged where the information passed relates not only to advising the client with regard to the law, but advising also as to what should prudently and sensibly be done in a particular legal context.

Although the Hong Kong courts are not bound to follow English decisions, the decision of the House of Lords in Three Rivers may be persuasive and may be applied in Hong Kong.

"Document" will include everything on which evidence or information is recorded.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

An in-house lawyer's communications will be privileged as long as he is exercising professional skill as a lawyer. Where he communicates with a party in an executive or general managerial capacity, the communication will not be privileged.

What law determines whether privilege applies to a document or communication?

Hong Kong law will apply.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Yes. Express provision is made for the preservation of privilege in respect of legal advice in various regulatory statutes. Where a lawyer-client communication is held at a client's premises it will generally be privileged from production to such regulatory and investigative bodies. However, under section 13 of the Prevention of Bribery Ordinance, the Commissioner for the ICAC may authorise an investigatory officer to seize all relevant accounts, books and documents relating to the matter under investigation. Section 15 of the same ordinance excludes documents in the possession of a legal adviser from this requirement but documents held at a client's premises may not fall within this category.

Italy

Is the concept of disclosure of documents recognised in this jurisdiction?

No. There is no formal process of disclosure. The parties must produce their own bundle of exhibits on which they rely, which will be served on the other side and at court. In civil proceedings, any party can apply for a court order that the other party or a third party disclose any documents which contain relevant evidence of any important facts. Any such application must clearly identify:

(i) the document, production of which is requested; and

(ii) the person in possession of such document (article 210 of the Italian Code of Civil Procedure: article 94 Disp. Att.).

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

There are certain circumstances in which Italian law recognises a right of privilege from disclosure:

(i) lawyers cannot be obliged to give evidence of any information acquired by reason of their profession ("*professional confidentiality rule*") (article 200 of the Code of Criminal Procedure);

(ii) Lawyers cannot be obliged to disclose documents (including data, information and data-processing programs), which are in their possession as a result of their professional activities, provided that they declare in writing that the documents, data, information or data-processing programs are covered by professional confidentiality (article 256 of the Code of Criminal Procedure);

(iii) conversations and communications by a lawyer, including conversations and communications with his clients, are privileged from disclosure (article 103, paragraph 5 of the Code of Criminal Procedure);

(iv) correspondence between a lawyer and his client is privileged from disclosure provided that it clearly states on its face that it is "*corrispondenza per ragioni di giustizia*" ("correspondence for judicial reasons") and where there are insufficient grounds to believe that such correspondence represents a *Corpus Delicti* (article 103, paragraph 6 of the Code of Criminal Procedure); and

(v) documents relating to the defence held by any lawyer are privileged from disclosure unless they evidence a *Corpus Delicti* (article 103, paragraph 2 of the Code of Criminal Procedure).

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

Under Italian law, legal privilege will apply to in-house counsel, provided that the counsel is a lawyer duly registered with the Bar Association and appointed by the defendant to act in the proceedings. However, as inhouse lawyers are normally employees of a company and, as such, cannot be registered with the Bar Association, legal privilege does not usually apply to them. Certain major Italian corporations (mainly state-owned companies and public entities) have their own in-house lawyers registered in a special section of the Bar List. However, their standing in court is strictly limited. They are not normally authorised to act in criminal matters to which the company may be a party, but will be limited to matters such as debt collection. It is therefore highly disputable whether legal privilege would apply to them.

What law determines whether privilege applies to a document or communication?

Italian law applies, in particular articles 103, 200, 235, 256 and 271 of the Code of Criminal Procedure, and the Professional Conduct Rules of the Bar.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Yes, it is normally respected and applied. Before carrying out any seizure of documents which could represent a *Corpus Delicti* in a lawyer's office, the competent authority must inform the Bar Association in order to allow its president to assist and verify the propriety of the seizure. Documents and information acquired in contravention of the right to legal privilege cannot be admitted in evidence by the Court (article 103, paragraph 7, and article 271 of the Code of Criminal Procedure). Where lawyer-client communications are held at the premises of the client and are not *Corpus Delicti*, they cannot be seized by the authorities so long as the document in question indicates:

(i) the full name of the client;

(ii) the full name of the lawyer;

(iii) the professional title of the lawyer;

(iv) the signature of the sender; and

(v) the details of the proceedings to which the correspondence refers. The document must also be marked "*corrispondenza per ragioni di giustizia*".

Japan

Is the concept of disclosure of documents recognised in this jurisdiction?

There is no concept of disclosure equivalent to that of the UK or US in Japan. Parties to civil cases will generally only produce documents on which they rely as evidence in their respective cases. However, a party may apply to the court for an order that the holder of specific documents (including the other party) disclose the documents.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Japan does not have any specific doctrine of legal professional privilege akin to the client-attorney privilege or the US work product doctrine. However, pursuant to Article 23 of the Lawyers' Law (Law No. 205 of 1949), lawyers are subject to a confidentiality obligation which prohibits them from disclosing confidential information obtained in the course of the exercise of their professional activities. Therefore, Japanese law stipulates the following rules. (These rules do not apply to lawyers if their clients consent to such disclosure.):

(i) In a civil case, even if a party to the case applies to the court for an order that a lawyer disclose a specific document possessed by that lawyer, when the document includes such confidential information, the lawyer may refuse the disclosure and the court may not order the lawyer to disclose it (Article 220 of the Code of Civil Procedure of Japan, Law No. 109 of 1996, as amended). In this context, the term "document" is defined in Article 231 of the Code of Civil Procedure as including anything in or on which information may be recorded, including tapes, photographs, electronic documents and emails.
(ii) In a criminal case, a lawyer may refuse the seizure of articles containing confidential information subject to the lawyers' confidential obligation mentioned above (Article 105 of the Code of Criminal Procedure of Japan, Law No. 131 of 1948, as amended).
(iii) In both civil and criminal cases, a lawyer may refuse to give testimony in court on the facts which are subject to the lawyer's confidentiality obligation.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

Japanese law does not recognise the difference between in-house and external lawyers. The rules set out above apply equally to in-house lawyers.

What law determines whether privilege applies to a document or communication?

The Code of Civil Procedure or the Code of Criminal Procedure will apply to cases proceeding in Japan.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

There are no concrete rules on this. However, pursuant to the lawyer's confidentiality obligation mentioned above, in practice, it is not common for these bodies to seek the disclosure of lawyer-client communications including his/her client's confidential information possessed by the lawyer. No prohibition has been recognised on such bodies seizing lawyer-client communications held at the client's premises.

Luxembourg

Is the concept of disclosure of documents recognised in this jurisdiction?

A party is obliged to disclose the documents on which it wants to rely and therefore which support its case. The other party may apply to the court for an order that additional documents may be disclosed. Such an order will only be granted if the document sought proves to be in the possession of the party – or even a third party – and if it is necessary to determine the case.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

A right to legal privilege is expressly recognised in the Criminal Code, in the Law of 8 August 1991 on the legal profession (the "Law"), and in the new Luxembourg Bar Association Regulation ("New LBAR") of 12 September 2007. Article 35 of the Law provides that a lawyer is subject to a duty of professional confidentiality in accordance with article 458 of the Criminal Code. He must keep confidential all aspects of the case, and must not communicate or publish any information regarding the case under consideration.

According to article 7.1.1 of the New LBAR, the lawyer is subject to a duty of professional confidentiality. Article 7.1.7 of the LBAR adds that the duty is general and unlimited in time, except as otherwise provided by law. A lawyer, like any person subject to a duty of legal confidentiality, can be a witness in court and disclose confidential information but, according to case law, he can never be obliged to do so.

The duty to maintain confidentiality is subject to certain exceptions provided by law. However, it does extend to any information that the lawyer has obtained as a result of his being instructed on a matter, from the client or third party, whether the information concerns the client or a third party. Article 7.1.2 of the LBAR provides that the duty of confidentiality includes, in particular, information received by a lawyer from his client concerning the client or a third party as a result of his being instructed on a matter. All types of documents and communications between the lawyer and his client are protected against disclosure, including tapes, photographs, electronic documents, emails and so on.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

The concept of in-house lawyer privilege is not recognised as such in Luxembourg. Lawyers employed by companies, the state or local authorities may not be members of the Bar as it is considered they lack the required degree of independence from their employer.

However, lawyers working within the financial or insurance sectors are under a duty to keep confidential all information obtained by them in the course of their professional activities, pursuant to the Law of 5 April 1993 on the financial sector and to the Law of 6 December 1991 on the insurance sector.

What law determines whether privilege applies to a document or communication?

Luxembourg law applies, and more particularly:

(i) article 35 of the Law of 8 August 1991 on the legal profession;
(ii) article 458 of the Criminal Code; and
(iii) the new LBAR Regulations.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

In civil and/or administrative matters, regulatory bodies such as the *Commissariat aux Assurances or the Commission de Surveillance du Secteur Financier* have to respect professional confidentiality in their investigations.

Under article 15 of the modified Law relating to competition dated 17 May 2004, the *Conseil de la Concurrence* (Competition Council) may only seize documents pursuant to a court order. When an investigative judge authorises a search of a law firm, documents may only be removed if the Chairman of the Bar Council or his representative is present. Where lawyer-client communications are held at the client's premises, there is nothing in the law that prevents investigative or regulatory bodies from seizing them. However, upon request, these bodies are required to return the seized documents to the client should they appear to be privileged. However, to the best of our knowledge, the issue of to what extent regulatory and/or investigative bodies effectively respect the doctrine of privilege has not yet been addressed by Luxembourg courts.

The Netherlands

Is the concept of disclosure of documents recognised in this jurisdiction?

Dutch law does not provide for a general duty to disclose comparable to the English or American discovery rules. Parties will generally only disclose those documents which assist their case and on which they wish to rely. However, the Dutch law of procedure does contain a limited number of specific regulations which allow the court to order the disclosure of specific documents. Such an order may be disregarded by the parties concerned, but the court may then draw any conclusion it deems appropriate from the fact that the parties have refused to disclose the requested documents. In addition, the court may, upon application by a party or ex officio, also order the disclosure of documents upon payment of a fine for every day the ordered party fails to comply with the order. See in particular:

(i) article 22 Rv (the general rule);
(ii) article 162 Rv;
(iii) article 843a Rv; and
(iv) article 843b Rv. ("Rv" refers to the *Wet-boek of Burgerlijke Rechtsvordering* (Dutch Act on Procedure in Civil Matters).

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Pursuant to article 843a sub 3 Rv and article 165 sub 2b Rv, persons entrusted with a duty of confidence by status or by profession (such as priests, doctors, lawyers and notaries) cannot be forced to reveal confidential information. This right to legal privilege only relates to information revealed to these persons in their professional capacity. The Professional Conduct Rules of the Bar forbid a lawyer (advocaat) from testifying to facts that were revealed to him by his client in the course of the exercise of his profession. A client can give his lawyer permission to use specific confidential information in court. Information about the client revealed to the lawyer by third parties is not subject to legal privilege, except where it has been revealed to him within a separate client relationship. Correspondence between Dutch lawyers relating to negotiations is confidential in nature and cannot be used in court, except where the client's interests require this. However, in such a case, prior consent of the other party or the President of the local Bar is required.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

Although discussions to extend the principle of privilege to in-house lawyers have taken place, the concept remains unrecognised in Dutch law. In principle, in-house lawyers who are also admitted to the Bar have a right to legal privilege as described above. However, there is still some controversy surrounding the question of whether in-house lawyers who are also members of the Bar should have the full benefit of lawyer privilege, particularly as it can be difficult to distinguish between activities an in-house lawyer undertakes as an '*advocaat*' (privileged) and those he undertakes in another capacity (not privileged).

What law determines whether privilege applies to a document or communication?

Dutch law will apply, in particular the following provisions:

(i) article 22 Rv which provides that the court can order parties to reveal specific documents. Parties may refuse to do so, but the court may then draw any conclusion it deems appropriate from the fact that the parties refuse to disclose the required documents;
(ii) articles 98 and 218 of the Act on Criminal Procedure which allow persons entrusted with a duty of confidence by status or by profession (such as priests, doctors, lawyers and notaries) to refuse to give evidence; and
(iii) the Professional Conduct Rules of the Bar. These rules acknowledge that a lawyer may be prosecuted under section 272 of the Penal Code if he breaches his duty to maintain professional privilege.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Documents covered by professional confidentiality and held in lawyers' offices cannot be seized or used in evidence. Regulatory and other investigative bodies in general respect this principle. This prohibition also applies to lawyer-client communications held at the client's premises.

People's Republic of China

Is the concept of disclosure of documents recognised in this jurisdiction?

The parties have no obligation to disclose documents to the other side in litigation. However, if they think it is necessary, they may apply to the court to arrange for the exchange of evidence. If the case is sufficiently complicated, the court shall arrange this itself (Article 37 of the Supreme People's Court's Certain Provisions Regarding Evidence in Civil Litigation).

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

The concept of legal privilege is not recognised in China.

Pursuant to the PRC Lawyers Law as amended in 2007, a lawyer must keep confidential State and trade secrets of his clients which he acquires during his professional practice. If so requested by a client, a lawyer's confidentiality obligations shall extend to information relating to the client or other related persons which the lawyer learns as a result of his professional practice. However, a lawyer's confidentiality obligations do not extend to facts and information relating to impending or ongoing criminal acts of clients or other individuals which may damage State or public security, or cause other severe damage to personal safety or property (Article 38). Whilst it is not expressly stated under the law, the preferred view is that a lawyer's confidentiality obligations to his clients will also exempt him from disclosing confidential information in court proceedings or pursuant to requests from a government authority.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

There is no concept of in-house lawyer privilege recognised under the PRC Law.

What law determines whether privilege applies to a document or communication?

Not applicable.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

No. The doctrine is not applied by the regulatory and other investigative bodies.

Poland

Is the concept of disclosure of documents recognised in this jurisdiction?

There is no obligation on parties to litigation to disclose any documents other than those on which they intend to rely. However, the court may ask the parties to disclose documents proving facts that are essential for the court to decide on the merits. The parties may refuse to comply with the court's request on the same grounds on which they could refuse to testify before the court.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

In Poland, there are two separate bodies representing the legal profession, each with its own independent governing body and regulations: advocates (*adwokaci*), and legal advisers (*radcowie prawni*). The main difference between the two is that, on the whole, only advocates can represent clients in criminal proceedings. Both may act, with minor exceptions, in civil cases.

Both the Advocates Law 1982 and the Legal Advisers Law 1982, as amended, provide that advocates and legal advisers are obliged to keep confidential all material obtained in connection with giving legal advice. This obligation extends to all support staff working with a given advocate/legal adviser. All facts and information connected with rendering legal assistance are subject to protection; the format of the information is irrelevant.

There are certain exceptions to privilege concerning money laundering cases and certain limitations contained in particular in the Polish Civil Procedure Code and the Polish Criminal Procedure Code.

According to articles 180 and 226 of the Criminal Procedure Code, a court may release an advocate/legal adviser from his confidentiality obligation where a fact cannot be discovered by way of any other evidence and it is necessary for the proper administration of justice.

According to the Civil Procedure Code, an advocate/legal adviser may refuse to answer questions if the answer may significantly breach the professional confidentiality code. It is therefore the advocate/legal adviser who decides which information is significant in character and which is not.

Contrary to the exceptions existing in the Polish Civil Procedure Code and the Polish Criminal Procedure Code, the Polish Code on Administrative Proceedings does not contain any limitations on professional confidentiality.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

Legal advisers, but not advocates, are allowed to work under a contract of employment and are the lawyers who will be employed in-house. However, in other respects, Polish law does not distinguish between external and internal lawyers. In particular, it does not differentiate between their obligations with respect to confidentiality – the rules on the treatment of confidential information are the same.

What law determines whether privilege applies to a document or communication?

Polish law applies to keep relevant communications confidential irrespective of the place in which the communication occurred.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

The rules relating to the doctrine of privilege are respected and applied by the courts and regulatory and other investigative bodies in Poland.

However, there is nothing in law to prevent such bodies seizing lawyer-client communications held at a client's premises.

Portugal

Is the concept of disclosure of documents recognised in this jurisdiction?

In certain circumstances, prospective parties may obtain disclosure of documents essential to their case from other intended parties or third parties before commencement of proceedings.

In any event, disclosure must be made of documents that a party intends to use to support its own case, to enable its opponent to prepare its defence.

However, the court may ask the parties (or a third party) to disclose documents or other evidence to support the facts alleged. The information to be disclosed is limited to the scope of the factual dispute.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Confidentiality must be maintained in respect of facts of which a lawyer (*advogado*, and a member of the Portuguese Bar) gains knowledge during the course and as a result of the exercise of his legal profession, pursuant to article 87 of the Portuguese Bar Association Professional Conduct Rules.

It is not that a document is privileged in itself, but that lawyers in Portugal are under a duty not to disclose confidential information.

It does not matter what form the information takes – as long as the information itself is privileged, the "document" will be.

However, a lawyer in Portugal may waive his duty of confidentiality in so far as it is absolutely necessary to preserve the lawyer's or the client's reputation, legal rights and legitimate interests and provided prior authorisation from the relevant entities of the Bar Association is obtained.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

Yes, in-house lawyers are bound by the duty of confidentiality in the same way.

Advogados may be employed by a business, advise employers and represent them in court. Public employees and those employed by the state may not practise law and have to suspend their membership of the Bar in such circumstances.

Under new provisions in the Bar Association's Professional Conduct Rules, an in-house lawyer's contract of employment must be reviewed by the Portuguese Bar to ensure its conformity with the conduct rules.

What law determines whether privilege applies to a document or communication?

Privilege, as set out by Portuguese law, applies to all lawyers registered in the Portuguese Bar Association in the exercise of their profession, both in Portugal and abroad. Likewise, the aforementioned rules also apply to European Union lawyers who exercise their profession in Portuguese territory, as long as they are members of a foreign Bar Association (articles 2.2 and 199 of the Bar Association Professional Conduct Rules).

Foreign lawyers exercising their profession in foreign territories are not bound by Portuguese law provisions. However, if a document is produced by a foreign lawyer at the request of a Portuguese lawyer, Portuguese provisions will be applicable.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Usually, yes. However, where a judge wishes a lawyer to testify in proceedings, the Portuguese Bar Association has the right to make prior representations (article 135 of the Criminal Procedure Code).

Regarding criminal and other investigations carried out by regulatory authorities, the investigative bodies always require judicial authorisation before searching premises and seizing documents.

When the search is carried out in a lawyer's office, it must be led by the judge and the presence of a Portuguese Bar Association member is always required. They may interview lawyers and request disclosure of information or documents relevant to the inquiry.

Where lawyer-client communications are held at a client's premises, such bodies are unable to seize documents protected by privilege.

Russia

Is the concept of disclosure of documents recognised in this jurisdiction?

No. However, if the court requires a party to disclose certain documents, it is obliged to do so.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Yes, but there are differences between Russian advocates who are qualified to represent clients in court, and lawyers, who can be anyone who has completed a law degree. Russian legislation recognises as privileged any information/communication between an advocate, although not a lawyer, and his client, if it is produced in the course of the provision of legal assistance by the advocate to the client. An advocate may not disclose confidential client information. In addition, he cannot appear as a witness in court proceedings, nor be questioned on the information he has gained in the course of carrying out his professional duties as an attorney-at-law. In contrast, a lawyer must disclose any information requested by an authorised regulatory or investigative state body. All types of documentary material are covered.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

This concept is not recognised in Russia. If requested by the court, an in-house counsel has to disclose the requested information.

What law determines whether privilege applies to a document or communication?

The federal law of the Russian Federation.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Communications protected by advocate privilege remain protected. However, as noted, a lawyer will have to comply with a request to provide information from an authorised regulatory or investigative state body.

Singapore

Is the concept of disclosure of documents recognised in this jurisdiction?

Yes. Subject to privilege (see below), parties are obliged by appropriate order of the court to disclose documents which are or have been in their possession, custody or power, and upon which they rely or, where appropriate, lead to a train of enquiry that may do so, and in addition documents which could:

(i) adversely affect their own case;
(ii) adversely affect another party's case; or
(iii) support another party's case.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Legal professional privilege (known as solicitor-client privilege) exists under the Evidence Act (Cap.97) (the "Act") sections 128(1) and 131, and also the common law to the extent that it is not inconsistent with the Act. Common law provides that all letters and other communications passing between a party and its solicitor are privileged from production if they are confidential and written to or by the solicitor in his professional capacity, for the purpose of getting legal advice or assistance for the client. Under section 128(1) of the Act, an advocate or solicitor (that is, a lawyer admitted to the Singapore Bar to practise law in Singapore) may not disclose, without his client's consent, any communication made by or on behalf of the client to the advocate or solicitor in the course of and for the purpose of his employment as advocate or solicitor, the contents of any document obtained during the course of his employment, or advice given to the client in the course of and for the purpose of his employment.

Generally, communications for the purpose of obtaining business advice, or for any other purpose, are not privileged. Under section 131 of the Act, the client has a right to refuse to answer questions concerning confidential communications between him and his legal professional advisers unless he agrees to appear as a witness in court, in which case he may be compelled to disclose any such communications as may appear to the court to be necessary in order to explain any evidence he has given.

"Document" includes any means by which letters, figures or marks may be used to record a matter. It has therefore been held to be broad enough to encompass information on a hard disk drive or recording device.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

Statutory law probably includes in-house lawyers in the category of "legal professional advisor" in section 131 of the Act. The wording of section 128, however, is narrower, referring specifically to "solicitors and advocates", which does not include in-house counsel Commentators suggest that a purposive approach should be taken and in-house lawyers included in this section also. In any event, common law appears to recognise the concept of in-house lawyer privilege, similar to that under UK law.

What law determines whether privilege applies to a document or communication?

Insofar as proceedings before Singapore courts are concerned, the applicable law would be the Singapore Law of Evidence, applying as part of the applicable law of the forum, governing procedure.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Yes, legal professional privilege would be recognised or given effect to by regulatory and other investigative bodies in Singapore. For instance, assistance with a criminal investigation should not lead to a loss of legal professional privilege in a subsequent civil action. Various Singapore statutes take account of the solicitor-client privilege by allowing advocates and solicitors to refrain from disclosing privileged information in certain circumstances, including the regulation of securities and futures. Appropriate documents will be privileged regardless of whether they are held at the client's premises or the lawyer's.

Spain

Is the concept of disclosure of documents recognised in this jurisdiction?

No. However, the court will require that a party provides evidence of its case. Disclosure will therefore be made of the documents that a party intends to use to support its own case, so that an opponent is able to prepare its defence.

A party can ask a judge to order that the opposing party, or even a third party, produce a document in its possession. The document must be of considerable importance to the case and the requesting party will have to be able to identify the document in question to a fairly precise degree.

Notwithstanding the above, the Spanish courts have recently shown a greater willingness to accede to requests for specific disclosure. This shift is probably due to the influence of the common law. However, such orders have been granted only in exceptional circumstances and remain contrary to common practice.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Lawyers (*abogados*, for whom membership of the Bar is obligatory) are obliged by Article 542 of the *Ley Organica del Poder Judicial* to keep confidential all facts and matters which they come to know through the conduct of their professional obligations. This is reinforced by the Spanish Professional Conduct Code (November 2002) and General Statute for Spanish Lawyers 658/2001, which impose on a lawyer a duty not to disclose facts and documents of which he has come into possession as a result of his professional activities. Professional confidentiality is a principal right and duty of lawyers. The client is the beneficiary of this duty. Privilege may attach to all information that the client has provided to the lawyer, and all information in the lawyer's possession due to the conduct of his professional activities. It does not matter in what format the information is recorded.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

Many lawyers are employed in-house and advise their employers in legal matters. If the lawyer is registered with a *Colegio de Abogados* he has the same rights and duties as any other *abogado*.

Spanish law imposes the same obligation of maintaining professional secrecy on both internal and external lawyers.

What law determines whether privilege applies to a document or communication?

Privilege is determined by the law that governs the relationship between the lawyer and the client. However, all lawyers registered in Spain must observe, in their activities both inside and outside Spain, the duty to maintain professional confidentiality.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Legal provisions on privilege have to be respected by regulatory and other investigative bodies in their conduct, insofar as they constitute current legislation. These bodies may only seize documents if they have a court order authorising them to do so or the party under investigation consents. Court orders are based on legal depositions authorising the disclosure of information protected by professional confidentiality obligations in these cases.

In addition, the Spanish anti-trust authorities have begun looking to the position under EC law in antitrust investigations, in which communications from internal lawyers are not protected from disclosure. So far this development has been restricted to anti-trust investigations, and remains at odds with the position with regard to in-house legal communications which are otherwise protected under Spanish law.

In recent years there have been a number of legislative developments which erode the right to confidentiality in the fields of tax and financial matters, such as money laundering and competition investigations.

Sweden

Is the concept of disclosure of documents recognised in this jurisdiction?

There is no concept of disclosure of documents in Swedish law equivalent to that in the UK. There is no general obligation for a party to produce all documents under its control relevant to the dispute. During the preparation for trial, however, each party shall submit all documents they wish to present as evidence.

Furthermore, a party shall, upon request of the opposing party, indicate what additional items of written evidence it is holding. Also, the court can, upon request, order a party (as well as non-party holders of documents) to produce specified documents, or groups of documents, which they hold that are believed to be of importance evidentially.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Yes, although it is limited and depends on the identity of the lawyer. The scarcity of case law and legislative commentary makes it difficult to reach firm conclusions. Swedish *advokats* (that is, members of the Swedish Bar Association) and their assistants have a right to legal privilege which protects all confidential information gained by them in the provision of legal services generally, as well as any related knowledge of the advokat/assistant. Legal privilege available to non-advocate trial lawyers is limited to protecting only confidential client communications entrusted to the lawyer for the purposes of the litigation. Any medium in which information is recorded may be privileged. It applies to relevant documents that are with the client's advokat / assistant or his non-advocate trial lawyer and, in some situations, with the client himself.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

No. *Advokats* may only be employed by a law firm and on entering into employment an *advokat* will have to relinquish his membership of the Bar Association. Therefore in-house lawyers will not qualify for the privilege afforded to *advokats*. If in-house counsel act as trial representatives, they may to some extent be protected by the more limited legal privilege for non-advocate trial lawyers with regard to communications made in the furtherance of litigation.

What law determines whether privilege applies to a document or communication?

The Swedish rules on legal privilege are procedural and are likely to be applied by Swedish courts, irrespective of where the communication took place.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Yes, in general it is. There are instances, however, of Swedish tax authorities demanding confidential (and possibly privileged) information from *advokats*, including client names and details of work done for the client, when determining the taxes payable by the advokat.

Thailand

Is the concept of disclosure of documents recognised in this jurisdiction?

In civil proceedings there is no general discovery process. Any party to proceedings intending to rely upon any document as evidence in support of its allegations or contentions must deliver a copy to the court and to the opposing party. In criminal and certain regulatory proceedings, the police and regulators have wide powers to demand production of evidence.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Yes. Under the Civil Procedure Code section 92 and the Criminal Procedure Code section 231, privilege will be available to prevent the disclosure by a lawyer of any confidential document or fact that was entrusted or imparted by a party or witness to the lawyer in his capacity as a lawyer. The privilege belongs to the client or witness, who may give permission for the disclosure. For privilege to apply, the information must relate to legal professional advice or representation. The privilege attaches to communications which include or refer to documents or facts provided in confidence to the lawyer for this purpose. Communications between lawyer and client which do not fall into this category are not privileged. The relevant law does not so state, but is in practice generally applied to permit a party to proceedings to refuse to disclose advice or other confidential communications from his lawyer in connection with such proceedings.

Note also that, under the Penal Code, disclosure of confidential information by a lawyer may be an offence.

"Document" is defined as any paper or other material used for expressing information, by way of printing, photography or other means.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

No different treatment is accorded whether or not the lawyer is "in-house".

What law determines whether privilege applies to a document or communication?

There is no law that governs when a privileged relationship starts. Consequently, it is generally held to commence at the time of the first communication. Questions of privilege and the admissibility of evidence are procedural/evidential matters and if raised in a Thai court, would be governed by Thai law under the relevant Civil or Criminal Procedural Code. Thai law will apply in these circumstances to any documents in Thailand, including those created abroad.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

The express provisions on privilege only apply in court proceedings or criminal investigations. However, while the law is unclear and practice is inconsistent, arguably the provisions on privilege also apply in relation to regulatory or other proceedings, by analogy. Further, under the Civil Procedure Code section 92, and Criminal Procedure Code section 231, regulatory and other investigative bodies are prevented from seizing lawyer client communications from the client's premises.

UK

Is the concept of disclosure of documents recognised in this jurisdiction?

Yes. A party to litigation must disclose, broadly, those documents on which he relies and those that adversely affect his own case, adversely affect another party's case, or support another party's case (Civil Procedure Rules ("CPR") rule 31.6).

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Yes. Documents that are protected by legal privilege are not disclosable to an opposing party in court litigation. Legal privilege comprises two principal types:

(i) Legal advice privilege - this applies to confidential communications, written and oral, between a lawyer and his client that come into existence for the purpose of giving or receiving legal advice in a relevant legal context, that is, relating to the client's rights, liabilities, obligations and remedies under private or public law. The "client" is narrowly defined for these purposes. Communications between the lawyer and the client's employees, or third parties, are not covered by this privilege.

(ii) Litigation privilege – this arises once litigation is in reasonable prospect (that is, pending, existing or reasonably contemplated). Communications and documents, including preparatory briefs, that come into existence at the request of a lawyer or at the request of a client with the intent to pass them on to the lawyer (including those generated by third parties, e.g. witnesses and experts) will be privileged from disclosure, provided that they are made with the dominant purpose of use in, or obtaining evidence for, or giving or receiving legal advice in connection with the litigation.

A "document" includes anything on or in which information is recorded.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

Yes. In-house lawyers are treated in the same way as outside counsel. Privilege will be granted to internal communications made by the lawyer when acting in a legal capacity and if the communication was created for the purposes of obtaining or giving legal advice, or made with a view to litigation.

What law determines whether privilege applies to a document or communication?

The law of England and Wales will apply to determine whether a document is privileged. Parties to litigation must disclose documents relevant to the case (within the meaning of CPR 31.6) which are within their control. CPR 31.8 states that a party has "control" of a document if he has or had physical possession of it, has or had a right to physical possession of it, or has or had a right to inspect or copy it, no matter where the document is located. Privilege impacts on the obligation to disclose that document.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Yes, for example in the context of competition law. Section 30 of the Competition Act 1998 provides that persons will not be required, under any provision of Part I of the Competition Act, to produce or disclose privileged communications as defined therein.

The Financial Services and Markets Act 2000 (FSMA) recognises a limited form of privilege in the context of a regulatory investigation, which applies where documents are required by the FSA. A regulated firm is entitled, under s.413 FSMA, to withhold production of a "protected item", unless that item is held with the intention of furthering a criminal purpose. The definition of protected item essentially follows the tests for legal professional privilege and legal advice privilege at common law, although there are some differences in scope. There may also be circumstances during a regulatory investigation in which common law privilege will apply.

A regulated firm or individual can, under English law, disclose a copy of a privileged document to the FSA without waiving privilege in it against the rest of the world. Such a limited waiver of privilege is not, however, recognised by regulators in other jurisdictions. Caution must therefore be exercised when handing over such documents where there is a risk that copies of these may be sought by other international bodies.

USA

Is the concept of disclosure of documents recognised in this jurisdiction?

Disclosure (discovery) does take place, but it is principally up to the parties to request disclosure of documents from the opposing party, as the mandatory disclosure requirements under the federal rules are quite limited and the states in the main have no such rules. Parties may assert applicable privileges to prevent disclosure of confidential documents. A failure to do so may result in a total waiver of privilege, since the concept of "limited waiver" is generally not recognised in the U.S. If a confidential communication protected by the attorney-client privilege is voluntarily disclosed, the privilege is waived both as to the communication disclosed and all other communications concerning the same subject matter. Unless the disclosure does not substantially increase a potential adversary's ability to obtain the information, such as where material is provided to a party with whom there is a common interest, work product protection will be waived if disclosure is made to third parties. While some U.S. courts limit work product waiver to the actual items disclosed, other courts may find the entire subject matter of disclosed material waived, depending on the specific facts of the case and the policies underlying the work product doctrine.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

U.S. jurisdictions recognise several legal privileges, with two being the most common: the attorney-client privilege and the work product doctrine. The attorney-client privilege protects confidential communications between an attorney and his or her client which are made (i) in the course of legal representation and (ii) for the purpose of rendering legal advice to the client by the attorney. It protects only the communication and not the underlying facts. A client cannot shield documents from discovery simply by sending them to his or her lawyer. The work product doctrine protects documents and tangible things prepared in anticipation of litigation by an attorney or an attorney's agent. It does not provide absolute protection. However, it will prevent disclosure of an attorney's mental impressions, conclusions, opinions or legal theories with respect to actual or reasonably anticipated litigation. The attorney-client privilege protects "communications", which may be either oral or written.

The work product doctrine protects "documents and tangible things". According to one leading treatise, this term has no preset limitations, and has been interpreted to include such items as letters, interview notes, interview transcripts, surveillance tapes and studies. Other applicable privileges in the U.S. are the common interest privilege and privilege against self-incrimination. This is not an exhaustive list.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

In-house counsel is generally treated in the same manner as outside counsel. However, communications made by and to in-house counsel acting in a business advisory role are not protected.

What law determines whether privilege applies to a document or communication?

The federal common law on privilege generally applies in federal court proceedings except with respect to an element of a claim or defence governed by state law, in which case the law of privilege of a particular state may apply. When there is a conflict between U.S. and foreign law privilege, the court will look at factors such as where the allegedly privileged relationship arose, and where the relationship was centred at the time of the communication or creation of the document.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

In theory yes, but in practice, often not. Though privilege is technically available during regulatory investigations, there is an evolving trend of "encouraging" waiver in exchange for reduced penalties and other concessions. For example, the Securities and Exchange Commission and Department of Justice do not explicitly require waiver, but both have publicly stated that they will consider whether an entity under investigation has waived its legal privileges when making their decisions regarding the amount and type of penalties they will impose, and will, in some circumstances, directly request such a waiver. Partially in response to criticism of these developments, the Department of Justice has recently issued specific guidance regarding the circumstances under which it will consider an entity's waiver of privilege in deciding whether to indict an entity under criminal investigation, and the procedures that must accompany a waiver request. While a client retains the right to refuse production on the basis of privilege, because of the evolving "culture" of waiver a company under investigation should normally consult with counsel experienced with handling U.S. regulatory investigations before aggressively asserting its legal privileges in responding to a U.S. regulator's requests.

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Annex 24

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Disclosure and privilege in Asia Pacific

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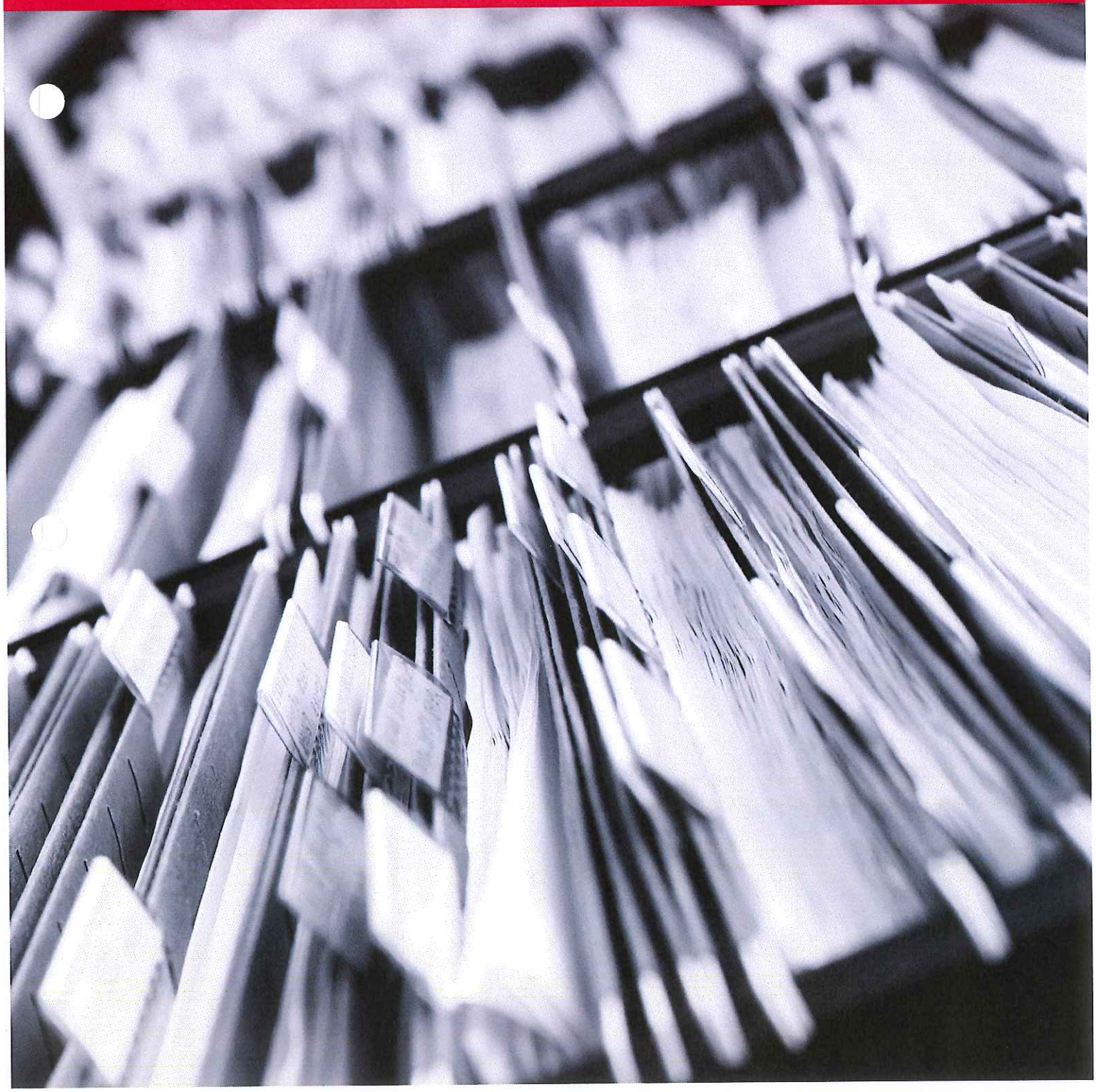

Disclosure and privilege in Asia Pacific

A NORTON ROSE GROUP GUIDE

Norton Rose Group

Norton Rose Group is a leading international legal practice. We offer a full business law service from our offices across Europe, the Middle East and Asia Pacific.

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With over 700 lawyers in our 13 Asia Pacific offices, we are one of the best resourced international legal practices in the region.

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Preface

The issues raised by disclosure obligations and legal privilege are of paramount importance both for international and national companies operating within the Asia Pacific region. The complexity and inconsistencies between one jurisdiction and another can create many pitfalls for the unwary. On the other hand, tactical advantages can be gained by choosing the appropriate jurisdiction by reference to disclosure requirements and the recognition afforded to legal privilege.

Some jurisdictions require mutual disclosure in judicial proceedings but recognise the concept of legal privilege as an exception to that system. Other jurisdictions do not require mutual disclosure and instead, operate a limited system of specific disclosure to the court. Consequently, such systems may give less recognition to the concept of legal privilege.

Most common law based jurisdictions regard legal privilege as a substantive right, whereas, civil law jurisdictions merely regard it as a procedural matter. These differing approaches can present serious problems for international disputes. A party to an arbitration may feel particularly aggrieved at having to disclose what would otherwise be privileged communications in its national courts.

Not all jurisdictions recognise that in-house lawyers are entitled to claim legal privilege either in judicial or regulatory proceedings. In general, only common law based jurisdictions extend the privilege to in-house lawyers and even some of those jurisdictions will require in-house counsel to demonstrate a degree of independence in order to obtain protection.

Other jurisdictions only afford the protection of legal privilege to domestically qualified lawyers in private practice and to documents within the actual possession of a lawyer.

The disclosure of otherwise privileged documents in one jurisdiction, whether in judicial or regulatory proceedings, may result in the waiver of legal privilege in another. Waiver of privilege in one document may result in waiver of privilege in connected or other contextual documents.

In some, but again not all, jurisdictions it may be possible to claim legal privilege in respect of documents generated in corporate compliance inquiries or arising from regulatory investigations. In other jurisdictions, the findings of such inquiries or investigations may have to be disclosed.

Often in order to reach a settlement with prosecution or regulatory authorities, otherwise privileged documents may have to be disclosed. That exercise may then expose individual officers to prosecution or civil proceedings leading in turn to serious and invidious conflicts of interest for those officers.

This guide is intended to provide an overview, within an Asia Pacific context, of disclosure obligations both in judicial and regulatory proceedings, the concept and applicability of legal privilege and the protection afforded to settlement negotiations. For comparative reasons, given the mix of common and civil law jurisdictions within the region, we have also included commentaries based on France and England and Wales.

Acknowledgements

The chapters on Australia, China, Hong Kong, Singapore, Thailand, England and Wales and France have been provided by Norton Rose Group. We gratefully acknowledge the assistance of other law firms who have contributed to the chapters on the remaining jurisdictions. These firms are identified at the start of each chapter and further details are given at the end of the guide.

Contents

Questions

We have compiled the following questions for practitioners in different jurisdictions to secure consistent and comparative responses.

1 **Is there a duty to disclose documentary records in judicial and regulatory proceedings and if so, what is the extent of that disclosure duty?**

2 **Can disclosure be ordered against third parties and if so, in what circumstances?**

3 **Can disclosed documents be used in other proceedings and jurisdictions?**

4 **What are the sanctions for failing to give adequate disclosure?**

5 **Is there a concept of legal privilege and if so, how does it apply?**

6 **Who can claim legal privilege?**

7 **How can legal privilege be lost?**

8 **To what extent may in-house counsel and foreign lawyers claim legal privilege?**

9 **Can legal privilege be maintained in regulatory investigations or proceedings?**

10 **Is there a concept of privilege against self-incrimination and if so, how is it applied?**

11 **Can documents or communications generated in the course of settlement negotiations be used as evidence in judicial proceedings?**

Australia

Contributed by Norton Rose Group

1 Is there a duty to disclose documentary records in judicial and regulatory proceedings and if so, what is the extent of that disclosure duty?

Yes. Parties are generally under a mutual and ongoing obligation to disclose the existence of documents, which have been or are within their control and which they either seek to rely on or adversely affect or support their cases. As with other jurisdictions, the courts are encouraging parties to give more efficient and focused disclosure.

2 Can disclosure be ordered against third parties and if so, in what circumstances?

Both the Federal Court Rules and Supreme Court Rules in the various jurisdictions provide for preliminary discovery and discovery from non-parties. The rules relating to preliminary and non-party discovery establish procedures, in appropriate cases, to enable a person to identify a proper party, or, to enable an informed decision to be made on whether to commence proceedings, or, to obtain disclosure of relevant documents from a third party.[1]

3 Can disclosed documents be used in other proceedings and jurisdictions?

Parties to and witnesses in proceedings give an implied or procedural undertaking not to disclose or use the document, or information obtained from the document, for any purpose other than in relation to the litigation in which it is disclosed.[2] A party may be released from the undertaking only with leave of the court or when a document has been received into evidence in open court.[3] Breach of the undertaking may constitute contempt of court. Ignorance of the implied undertaking is not a defence to proceedings for contempt.[4]

4 What are the sanctions for failing to give adequate disclosure?

Failure to comply with discovery obligations will result in disclosure and costs orders. A failure to comply may also cause an inability to tender an undisclosed document at trial or adduce evidence of its contents. In extreme cases, failure to disclose may result in the dismissal of a party's claim or defence or prosecution for contempt of court.

1 Dover Fisheries Pty Ltd v. Bottrill Research Pty Ltd (1995) AIPC, 91-158.

2 Harman v. Secretary of State for the Home Dept: sub nom Home Office v. Harman [1982] 1 All ER 532; [1982] 2 WLR 338; [1983] 1 AC 280.

3 Hamersley Iron Pty Ltd v. Lovell (1998) 19 WAR 316.

4 Watkins v. A J Wright (Electrical) Ltd [1996] 3 All ER, 41, considered in Hearne v. Street (2008) 248 ALR 609.

5 Is there a concept of legal privilege and if so, how does it apply?

Legal professional privilege is a substantive right preventing, in the absence of statutory authority, a client from being forced to disclose certain documents. Confidential communications between a client and the client's legal adviser are privileged, whether oral or in the form of written or other material, if made for the dominant purpose of submission to the legal adviser for advice or for use in existing or anticipated litigation. The justification being that legal privilege exists to serve the public interest in the administration of justice by encouraging frank disclosure by clients to their lawyers.[5]

The uniform evidence legislation, which applies to proceedings in the Federal Court and the Courts of the Australian Capital Territory, New South Wales and Tasmania and, from 1 January 2010, Victoria, generally governs "client legal privilege" as it applies to the "adducing of evidence", that is, evidence led in court. In New South Wales (and Victoria from 1 January 2010), the legislation also governs client legal privilege as it applies to pre-trial procedures, such as discovery. The common law continues to apply in circumstances where the uniform evidence legislation does not apply. Under the uniform evidence legislation, evidence is not to be adduced if it would result in disclosure of advice privilege[6] or litigation privilege.[7]

At both common law and under the uniform evidence legislation, documents or other material not created for, but merely delivered to, the legal adviser for such purposes are not privileged.

6 Who can claim legal privilege?

The privilege belongs to the client and, accordingly, privileged communications should not be revealed without the client's consent. Under the uniform evidence legislation, "client" is defined to include an employee or agent of the client, and "lawyer" is defined to include an employee or agent of the lawyer. Partial legal privilege may be claimed in respect of documents that contain both privileged and non-privileged material. It is established practice to "mask", seal up or redact part of a discovered document on the grounds that the part is privileged.[8]

7 How can legal privilege be lost?

Legal professional privilege depends on confidentiality. If confidentiality is lost then privilege cannot be maintained. Privilege may be either expressly or impliedly waived by the client. Privilege will be expressly waived when there is intentional disclosure of protected materials.[9] The test of implied waiver is one of "inconsistency". It is the inconsistency between the conduct of the client and the maintenance of the confidentiality which effects a waiver of privilege.[10]

5 Waterford v. The Commonwealth [1987] HCA 25; (1987) 163 CLR 54.

6 S.118 Evidence Act.

7 S.119 Evidence Act.

8 Young J, Discovery: Privileged material – redacted documents (2008) 82 ALJ 243.

9 ACCC v. Lux [2003] FCA 89.

10 Mann v. Carnell (1999) 201 CLR 1 at 28.

Where a party to judicial proceedings has mistakenly failed to claim privilege over a document in a list of documents, the court will generally permit the solicitors to amend the list of documents at any time before inspection. Once inspection has occurred, the general rule is that privilege is waived.[11] Disclosure of one favourable privileged document will generally require disclosure of other contextual privileged documents. For example, waiver of legal advice will generally lead to waiver of legal instructions and information. When instructing expert witnesses particular care should be taken not to include privileged material, as once an expert report is filed in the proceeding, the privilege will be lost over that material and all other material on which the expert relied in the preparation of their report. Privilege cannot be claimed where advice is sought or given for the purpose of facilitating a crime or fraud.

8 To what extent may in-house counsel and foreign lawyers claim legal privilege?

At common law, communications to and from in-house or corporate counsel or a salaried lawyer (who is admitted to practice) for the purpose of giving advice or in contemplation of litigation, are privileged, provided that the lawyer is acting independently and in his or her capacity as a lawyer.[12] The common law position is reflected in the uniform evidence legislation which defines "client" to include "an employer (not being a lawyer) of a lawyer".

Communications generated in another capacity (perhaps of an executive nature) will not sustain a claim for client legal privilege.[13] Legal professional privilege is only conferred on communications that satisfy the dominant purpose test and are made between the in-house or corporate counsel and his/her employer or other employees of the company, when the in-house counsel is acting solely in his/her capacity as a lawyer. The Courts have adopted an approach that a degree of independence is required in order for privilege to apply to in-house counsel.[14]

Accordingly, in-house or corporate counsel should take care to:

- separate legal advice from non-legal communications
- separate Board and other minutes which contain mixed references to company and legal matters and
- sign legal advice in the capacity of the company's solicitor (not in a dual capacity).

Australian courts have recognised that legal professional privilege may also apply in respect of legal services provided by foreign lawyers.[15] Generally, the approach to determining

11 Guinness Peat Properties Ltd v. Fitzroy Robinson Partnership [1987] 1 WLR 1027.

12 Attorney-General (NT) v. Kearney & Northern Land Council (1985) 156 CLR 500.

13 Alfred Crompton Amusement Machines v. Customs & Excise Commissioners (No. 2) [1972] 2 QB 102.

14 Rich v. Harrington 2007 FCA 1987.

15 Ritz Hotel Ltd v. Charles of the Ritz Ltd [No 4] (1987) 14 NSWLR 100 and see also Kennedy v. Wallace [2004] FCAFC 337 and Grofam Pty Ltd v Australia and New Zealand Banking Group Ltd (1993) 45 FCR 445.

the question of privilege is the same as that adopted for communications with Australian lawyers, at least in circumstances where privilege would attach to the communication in the jurisdiction of the foreign lawyer. There is, however, some uncertainty as to whether privilege can apply in circumstances where, under the legal system governing the foreign lawyer, or the legal system where the legal advice was given, the communication would not be privileged.

9 Can legal privilege be maintained in regulatory investigations or proceedings?

Legal professional privilege can generally be maintained in regulatory investigations unless unequivocally abolished by statutory provisions.[16] Certain provisions such as the Trade Practices Act 1974 ("TPA"), Australian Securities and Investments Commission Act 2001 ("ASIC Act") and the Taxation Administration Act 1953 expressly deal with professional privilege and have been the subject of judicial consideration.[17] Other than legal professional privilege, regulators, revenue and competition authorities have significant powers to require companies or individuals to provide them with documents and information. These powers will often be invoked where documents and information have not been voluntarily produced.

10 Is there a concept of privilege against self-incrimination and if so, how is it applied?

Yes. This privilege exempts a person from being compelled to produce documents or provide information which might incriminate him or her in any potential or current criminal proceedings in Australia. The privilege may be claimed when refusing to produce documents or information whether at trial or before trial. The privilege against self-incrimination does not extend to corporations.

The privilege of non-disclosure on the grounds of self incrimination is overridden by some statutes. Relevantly, s. 155 of the TPA provides that a person is not excused from furnishing information or producing documents to the Australian Competition and Consumer Commission ("the ACCC") in response to a notice requiring that person to do so, on the ground that the information may tend to incriminate the person. Similarly, s. 68(1) of the ASIC Act provides that it is not a reasonable excuse to refuse to provide information, sign a record or produce a book, in response to a requirement to do so, relying upon that privilege.

It has also been held that where a person is required to furnish information or answer a question to the Australian Taxation Office under the Taxation Administration Act 1953 (Cth) or the Income Tax Assessment Act 1936 (Cth), that person will not be entitled to refuse to furnish that information or answer the question on the grounds that to do so might tend to incriminate them.[18]

16 Baker v. Campbell (1983) 153 CLR 52.

17 Daniels Corporation International Pty Ltd v. Australian Competition and Consumer Commission (2002) 213 CLR 543.

18 Stergis & Ors v. Federal Commissioner of Taxation & Anor 89 ATC 4442.

11 Can documents or communications generated in the course of settlement negotiations be used as evidence in judicial proceedings?

Documents recording settlement negotiations, often described as "without prejudice" communications are generally not admissible in evidence. It is not essential that litigation should actually have commenced for the privilege to be available, but litigation must be either pending or anticipated.[19] The privilege is a joint privilege between the parties participating in the settlement negotiations.

The communication must, however, be made genuinely for the purpose of negotiating a settlement of a dispute. The statement in respect of which privilege is claimed must have some bearing on negotiations for a settlement.[20] The presence of the term "without prejudice" on the communication does not, of itself, confer the privilege. To determine whether a communication is "without prejudice", it is necessary to examine the dispute or negotiation and the true nature of the communication. It is not essential that a settlement actually be reached for the privilege to be available.

The uniform evidence legislation also deals with the admissibility of documents recording settlement negotiations. The legislation provides that evidence is not to be adduced of a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute. Evidence is not to be adduced of a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

If a settlement is reached, evidence of the negotiations may be given to enforce the settlement agreement, and production may be sought in subsequent proceedings in relation to the compromise or settlement.

There are a number of other exceptions to the rule, including the consent of the parties in the dispute to the evidence being adduced, or if the communication or document is relevant to determining liability for costs, or if the document was prepared in the furtherance of a commission of a fraud or an offence.

19 Gregory v. Phillip Morris Ltd (1988) 80 ALR 455.

20 Field v. Commissioner for Railways (NSW) (1957) 99 CLR 285.

China

Contributed by Norton Rose Group

1 Is there a duty to disclose documentary records in judicial proceedings? If so, what is the extent of that disclosure duty?

China has no discovery procedure involving mutual disclosure of documents. Instead, parties are only required to submit evidence that assists their case.

However, the court, acting in its inquisitional role may question the parties, order the production of documents and procure the inspection of premises. If evidence of infringement is found, the court may order that the information be removed for consideration during a court hearing.

There is no specific legal duty to preserve documents. However, documents should not be intentionally concealed or tampered with.

2 Can disclosure be ordered against third parties and if so, in what circumstances?

Yes, for instance, orders can be made for the preservation of maritime evidence.

3 Can disclosed documents be used in other proceedings and jurisdictions?

No, except if it is necessary to protect national security, as explained below.

4 What are the sanctions for failing to give adequate disclosure?

Article 45(3) of the PRC Lawyer's Law (promulgated in 1996 and first amended in 2001) (the Lawyer's Law) provided that if a lawyer concealed important facts, or threatened or solicited others to conceal important facts from a court, his bar licence could be revoked. In addition, depending on the type of information that is concealed, the lawyer could face criminal liability. However, this provision has ceased to be applicable since the Lawyers' Law was amended again in 2007 (the new amendments took effect on 1 June 2008).

5 Is there a concept of legal privilege and if so, how does it apply?

This concept does not exist under the PRC law. In other words, confidential communications between an attorney and a client are not privileged or protected.

Article 33 of the 1996 Lawyer's Law required lawyers to preserve the confidentiality of any of the clients' trade secrets of which they became aware during their practice, and their clients' privacy. Furthermore, this article stated that lawyers should protect all state secrets they discovered during their practice.

The latest version of Lawyer's Law (effect from June 2008) (the Amended Lawyer's Law) increased the protection afforded to lawyer-client confidential communications. Article 38 of the Amended Lawyer's Law reiterates Article 33 of the 1996 Lawyer's Law, outlined above – and in addition, imposed on a lawyer a duty to keep information confidential if so requested by the client, except for information or facts regarding any crime being committed or in contemplation by his client which severely impairs national or public security, and/or falls into any other class of crime causing serious personal injury or property damage.

Despite the foregoing, a general disclosure obligation has been set out in the PRC Criminal Procedure Law (Article 48) and the PRC Civil Procedures Law (Article 65), where "any individual aware of the details of the case is obligated to give testimony". As the conflict between the Amended Lawyer's Law and the Criminal/Civil Procedure Law has not yet been resolved, uncertainty exists as to whether PRC lawyers might still be required to testify in court on a specific fact that might fall within Article 38 of the Amended Lawyer's Law.

Each of the Amended Lawyers' Law, the Criminal Procedure Law and the Civil Procedure Law falls into the "laws" promulgated by the Standing Committee of the PRC National People's Congress. In accordance with the PRC Law of Legislation, if there is any conflict on a specific matter in two pieces of legislation promulgated by the same authority, the latest legislation should prevail. If this general principle is respected by the court in criminal or civil proceedings, a lawyer should be entitled to refuse to testify in the court in accordance with the rules of the Amended Lawyers' Law, as summarised above.

Nevertheless, courts in practice often decide that confidential communications between lawyers and their clients are not exempt from the requirement under PRC Criminal Procedure Law, and direct that all parties with relevant information should disclose that information as evidence. Since there is no unified guidance in judicial practice to resolve this issue, practices in different localities within China often vary.

6 Who can claim legal privilege?

Subject to the explanation provided above, the client may claim confidentiality of communication with its lawyer.

7 How can legal privilege be lost?

If confidential information relates to existing or future criminal activity, a PRC lawyer has an obligation to disclose this information to the PRC authorities. Moreover, if a client's activities would jeopardise national and public security, or could cause someone serious personal injury or property damage, then a lawyer should notify the authorities.

8 To what extent may in-house counsel and foreign lawyers claim legal privilege?

Under PRC Civil Procedure Law, all parties are required to provide information to the court if required by the court during the court's investigative proceedings. Confidential communications between attorneys and clients are not exempt from this requirement. Generally speaking, international conflict of law principles establish that a court with jurisdiction over a case should determine the applicable procedure. Therefore, in the PRC, foreign lawyers are required to comply with the Civil Procedure Law and the Amended Lawyer's Law, and should testify in the PRC's courts about the evidence of which they have knowledge if so directed by the court.

Furthermore, Article 3 of the Administrative Rules for the Representative Offices of Foreign Law Firms provides that foreign law firms and their lawyers must follow the PRC's laws, rules, and regulations. Under PRC law, the rights and obligations of foreign attorneys working in the PRC are the same as the rights and obligations of the PRC's lawyers.

In China, an in-house counsel is considered as an employee of an enterprise and not a lawyer. There are no clear PRC laws or regulations setting up statutory confidentiality obligations upon them.

9 Can legal privilege be maintained in regulatory investigations or proceedings?

The PRC Law on Administrative Penalties protects state secrets, trade secrets or personal privacy by not holding public hearings of cases leading to administrative penalties to be imposed on individuals or entities. How to deal with the confidentiality obligations of lawyers in such regulatory proceedings is unclear under PRC Law.

10 Is there a concept of privilege against self-incrimination and if so, how is it applied?

No the PRC does not recognise the concept of privilege against self-incrimination

11 Can documents or communications generated in the course of settlement negotiations be used as evidence in judicial proceedings?

China has no concept of "without prejudice" privilege equivalent to that of the UK or USA. The production of documents and the preservation of confidentiality for such documents are subject to mutual agreement between the parties but is always subject to the overriding power of the court to require the production of evidence of settlement negotiations in the course of judicial investigative proceedings as explained in Question 1 above.

Hong Kong

Contributed by Norton Rose Group

1 Is there a duty to disclose documentary records in judicial and regulatory proceedings and if so, what is the extent of that disclosure duty?

In judicial proceedings, the discovery process is governed by Order 24 of the Rules of the High Court of Hong Kong (Cap 4A) (RHC). Each litigation party has a mutual and ongoing duty to disclose all the relevant documents that he has or has had in his possession, custody or power relating to matters in question in the proceedings and whether or not prejudicial to their case. Documents will include electronic and data records. Following the implementation of the Civil Justice Reform (CJR) which came into effect on 2 April 2009, the courts have the power to make orders limiting discovery in appropriate cases.

Discovery orders can also be made by various regulatory bodies, against both companies and individuals. For example, the Securities and Futures Commission has the power to request the production of certain documents or records to assist with its investigations.[21]

2 Can disclosure be ordered against third parties and if so, in what circumstances?

Prior to the implementation of the CJR, orders for pre-action discovery and discovery against third parties were generally limited to personal injury or death claims. The CJR has broadened the ambit of disclosure against third parties to extend to all types of cases.[22] Applications for pre-action discovery can now be brought by any person who is likely to be a party to subsequent proceedings against a likely opponent who is likely to have or have had in his possession documents directly relevant to an issue in that claim.[23]

Regulatory bodies also have the power to require assistance from third parties. For example, the SFC may require not only a company, but also "any other person"[24] to produce any record or document if it appears to the SFC that there are circumstances suggesting that the business of a corporation has been conducted in a fraudulent or oppressive way.[25] In SFC investigations, the SFC may require third parties to produce any record or document containing information relevant to its investigation.[26]

21 S.183 Securities and Futures Ordinance (Cap. 571).

22 O24r7A RHC.

23 O24r3 RHC.

24 Section 179(1)(v) Securities and Futures Ordinance (Cap. 571).

25 Section 179(1)(a) Ibid.

26 Pursuant to section 183(1) Ibid, the SFC may require any "person whom the investigator has reasonable cause to believe has in his possession any record or document which contains, or is likely to contain, information relevant to an investigation...or whom the investigator has reasonable cause to believe otherwise has such information in his possession" to produce any record or document.

3 Can disclosed documents be used in other proceedings and jurisdictions?

Documents disclosed in Hong Kong judicial or regulatory proceedings should not generally be disclosed in any other collateral or foreign proceedings unless they have become public documents, or with the permission of the court or the parties involved.

4 What are the sanctions for failure to give adequate disclosure?

Where inadequate disclosure is provided by one party to judicial proceedings, the other party can seek an order from the court requiring that party to issue an affidavit verifying the accuracy of his list of documents. Alternatively, if the party knows of specific documents in the other party's possession which have not been disclosed, an application for specific discovery can be made. If a party disobeys a court order, that party's actions may amount to contempt of court and may lead to other serious consequences, including dismissal of a party's claim or judgment in default being entered against him.

Under regulatory proceedings, there may be criminal repercussions if a person, without reasonable excuse, fails to produce any record or document when required to do so. For example, any person who fails to provide information as required under the SFO commits an offence and is liable to a fine and to imprisonment for up to one year.[27]

5 Is there a concept of legal privilege and so, how does it apply?

In Hong Kong, legal professional privilege (LPP) is a substantive right available under both statute and the common law which gives a person the right to refuse to testify about a particular matter or to withhold a document where such disclosure pertains to confidential communications between that person and his or her lawyer. The essence of LPP is to afford a person the freedom to engage in an uninhibited dialogue with his or her lawyer so as to receive the best possible legal advice. Whilst a privileged communication may be either oral, documentary, or a combination of each, issues relating to privilege generally tend to arise in the context of the discovery of documents.

Hong Kong is a rather unique jurisdiction in that the right to LPP is entrenched as a constitutional one under the Hong Kong Basic Law.[28] Article 35 states that "Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies".

27 Section 184 ibid.

28 The constitutional document of the Hong Kong Special Administrative Region of the People's Republic of China.

Given that no ordinance may contravene the Basic Law,[29] it has become unnecessary to specifically provide for a right to legal representation and the preservation of legal privilege in individual ordinances. However, this right is implicit in all legislation in Hong Kong by virtue of Article 35 of the Basic Law.[30] It is also expressly reserved in some legislation eg, SFO.

Under the common law, Hong Kong courts have adopted the English approach and classify LPP as either "Legal Advice Privilege" or "Litigation Privilege".[31] Legal Advice Privilege is confined to confidential communications between a lawyer and a client the dominant purpose of which is to seek and obtain legal advice. The advice may be in relation to legal rights and obligations or may be in connection with current or contemplated litigation. Recent authorities have extended the application of legal advice privilege to general advice that is given prudently and sensibly in the relevant legal context.[32] This may include presentational advice as well as advice in relation to regulatory matters. However it will not apply to situations lacking a relevant legal context, for example where advice is provided by a lawyer to a client in relation to business or administrative matters.

Litigation privilege applies to lawyer-client communications or to communications between lawyers and third parties that have come into existence for the sole or dominant purpose of obtaining legal advice in relation to litigation that has either commenced or is in contemplation at the time of the advice.[33] Whilst litigation privilege does not generally extend to advice obtained in the context of investigative or inquisitorial proceedings,[34] it may extend to such proceedings where the dominant purpose test is satisfied.[35] For example, in Hong Kong, the privilege has been held to apply in respect of transcripts obtained by liquidators in inquisitorial proceedings, the dominant purpose of which was to place these documents before their lawyers in order to obtain legal advice in connection with litigation that was in active contemplation and therefore a real prospect at the time.[36]

6 Who can claim legal privilege?

The client can claim privilege in respect of communications with its legal advisors, and may also waive the same. In the case of individuals, it is easy to identify the client. However, this is more complex in the case of large corporations, such as banks, where there may be numerous employees in contact with its legal advisors.

29 Article 11.

30 See for example, Annotated Ordinances of Hong Kong: Securities and Futures Ordinance (Cap 571) at 183.05.

31 Three Rivers District Council v. Governor and Company of Bank of England (No. 5) [2003] EWCA Civ 474.

32 Three Rivers District Council v. Governor and Company of Bank of England (No. 6) [2004] HL 474 Citing Balabel v. Air India [1998] 1 Ch 317.

33 Waugh v. British Railways Board [1980] AC 521 (following Grant v. Downs (1976) 135 CLR 674).

34 Three Rivers District Council v. Governor and Company of Bank of England (No. 5) [2003] EWCA Civ 474.

35 Akai v. Holdings v. Ernst & Young [2009] 2 HKC 245.

36 Akai v. Holdings v. Ernst & Young [2009] 2 HKC 245.

In relation to legal advice privilege, the leading English authority,[37] the House of Lords decision in Three Rivers (No. 5), defines the client in very narrow terms as comprising only those employees directly responsible for providing instructions to the company's lawyers and receiving advice. All other employees, including former employees with relevant knowledge, are to be considered as third parties, to which legal privilege would not extend. This decision generated considerable controversy and a number of commonwealth jurisdictions have now adopted broader constructions of who may constitute the client by extending privilege to third party communications prepared for the client or principal in order to enable them to obtain legal advice.[38]

In Hong Kong, the Court of Final Appeal in the recent case of Akai Holdings Ltd v. Ernst & Young (FACV 28 of 2008) upheld legal professional privilege as a constitutional right. In relation to legal advice privilege, the court referred to the Three Rivers (No. 5) decision, which remains highly persuasive in Hong Kong. The court found that the relevant communications were protected by litigation privilege and as such it was unnecessary, on the facts, to consider the ambit of legal advice privilege. However the court signalled that if the issue arose in any future case, it should be approached in a manner appropriate to a fundamental right. It therefore remains to be seen whether the Hong Kong courts will adopt a wider approach to the definition of "the client" with a greater focus on the function of the third party, as opposed to its relationship with the client.

7 How can legal privilege be lost?

Privilege may be lost either expressly or by implication. The main means through which privilege is lost are (a) express waiver or agreement; (b) loss of confidentiality; (c) conduct such as by bringing a document into the public domain; and (d) accidental disclosure.[39] Waiver of part of a document generally applies to the entire document. It should also be noted that public policy may occasionally override privilege.[40]

8 To what extent may in-house counsel and foreign lawyers claim legal privilege?

Communications between in-house counsel and employees may qualify for LPP but only in situations where the advice is confined to legal advice or is given in relation to current or contemplated litigation. Where the in-house lawyer is acting in multiple capacities, for example as in-house counsel as well as in an executive function, LPP may not apply.[41]

37 Three Rivers District Council v. Governor and Company of Bank of England (No. 5) [2003] EWCA Civ 474.

38 Pratt Holdings Pty Ltd v. Commissionery Taxation [2004] 136 FCR 357.

39 Note that pursuant to English & American Insurance Co Ltd v. Herbert Smith & Co ([1987] The Times, 21 January), privilege can still be claimed where the privileged documents were disclosed inadvertently.

40 Rockfeller & Co Inc v. Secretary for Justice & Anor [2000] 3 HKFC 4.

41 Three Rivers 6 at 474.

9 Can legal privilege be maintained in regulatory investigations or proceedings?

Legal privilege is often expressly maintained under regulatory statutes. However, some statutes, such as the Prevention of Bribery Ordinance and Money Laundering Ordinance may override privilege or only recognise privilege as subsisting in documents held at a legal representative's offices.

10 Is there a concept of privilege against self-incrimination and if so, how is it applied?

In Hong Kong, the privilege against self-incrimination is both a common law right and a constitutional one. Under the common law, a person or corporate body is entitled to withhold information if its disclosure would reasonably likely result in criminal sanctions against them.[42] This privilege has been elevated to constitutional status by virtue of the Hong Kong Bill of Rights[43] and has also been extended to apply to one's spouse.[44] In an important decision by the Court of Final Appeal[45] it was held that the Insider Dealing Tribunal's direct use of the questions and answers obtained compulsorily, during investigation, violated the Bill of Rights, which protects the privilege against self-incrimination and the right to silence.

However there are a number of statutory restrictions imposed on the privilege against self-incrimination. For example, in relation to investigations conducted by the Securities and Futures Commission, the person under investigation is compelled to attend and answer questions in an investigation, even if such answers are likely to incriminate that person.[46] However, any self-incriminating answers provided will generally be inadmissible as evidence for criminal proceedings, with the exception of perjury.[47]

Similarly, under the Theft Ordinance, a person would be required to answer any questions and to comply with any orders made in proceedings relating to the recovery or administration of any property, for the execution of any trust or for an account of any property, irrespective of whether such disclosure would incriminate that person or their spouse. However, any such statements given would be inadmissible in evidence for criminal proceedings against the maker of the statement or their spouse.[48]

42 Salt & Light Development Inc and Anor v. SJTU Sunway Software Industry Ltd [2006] 2 HKC 440, 454-5.

43 Article 11(2)(g).

44 S.65 Evidence Ordinance.

45 Koon Wing Yee v. Insider Dealing Tribunal (FACV No. 19 of 2007).

46 S.183 and 184 Securities and Futures Ordinance.

47 S.187 Securities and Futures Ordinance.

48 S.33 Theft Ordinance.

Privilege against self-incrimination has been impliedly abrogated in the context of proceedings instituted under the Companies Ordinance where a person is summoned under suspicion of possessing property belonging to a company in liquidation, or where a person is deemed capable of providing information pertaining to the affairs of that company.[49] The argument is that those sections of the Companies Ordinance relating to court-supervised examinations in liquidations[50] would be rendered useless if the privilege against self-incrimination were to apply. It has been suggested[51] that it would be for a criminal court to subsequently rule on whether involuntary admissions made by examinees would be admissible or not in criminal proceedings as part of the court's overriding duty to ensure a fair trial.[52]

It has been suggested that the privilege against self-incrimination is impliedly abrogated in the context of proceedings instituted under the Companies Ordinance where a person is summoned under suspicion of possessing property belonging to a company in liquidation, or where a person is deemed capable of providing information pertaining to the affairs of that company.[53] The argument is that those sections of the Companies Ordinance[54] would be rendered useless if the privilege against self-incrimination were to apply.

11 Can documents or communications generated in the course of settlement negotiations be used as evidence in judicial proceedings?

"Without Prejudice" privilege applies to communications between parties which are genuinely aimed at settlement, and such communications are generally inadmissible without the consent of both parties. The mere fact that a communication concerns a dispute between the parties will not be sufficient to confer privilege. Furthermore, this privilege will not apply in circumstances where, for example, it is clear that the exclusion of the evidence in question would act as a cloak for perjury.

Where a document has been inadvertently disclosed to one's opponents in civil proceedings, it becomes a matter of admissibility, not privilege.[55] Where one party comes into possession of a confidential document belonging to the other party by way of improper or fraudulent means, an injunction will, in most cases, be granted by the Court to restrain the use of

49 Re Weihong Petroleum Company Limited [2002] 1 HKLRD 541 per Kwan J citing Mann LJ's judgment in Bishopsgate Investment Management Limited v. Maxwell [1993] Ch 1, as confirmed by Yuen JA of the Court of Appeal in David John Kennedy v. Kelly Cheng & Robert Yip [2006] 4 HKLRD 58 at para. 75: "[t]he most oppressive aspect...of a private examination is the abrogation of the privilege against self-incrimination".

50 Section 221 Companies Ordinance (Cap. 32).

51 David John Kennedy v. Kelly Cheng & Robert Yip (FACV 30/2008), per Bokhary PJ of the Court of Final Appeal at para. 39. The Court of Final Appeal rejected that leave of the court was required to disclose the s221 private examination transcripts to the police.

52 The Court of Final Appeal in David John Kennedy v. Kelly Cheng & Robert Yip (FACV 30/2008) confirmed that the right to a fair trial is guaranteed by Articles 39 and 87 of the Basic Law.

53 Re Weihong Petroleum Company Limited [2002] 1 HKLRD 541) per Kwan J citing Mann LJ's judgment in Bishopsgate Investment Management Limited v. Maxwell [1993] Ch 1.

54 S.221, Companies Ordinance.

55 Black & Decker Inc v. Flymo Ltd [1991] 1 WLR 753 at 755.

the document.[56] Where a party has come into possession of confidential documents as a result of accidental or inadvertent disclosure, authorities suggest that an injunction would ordinarily be granted in circumstances where the documents had not yet been read out in Court.[57] However recent authorities indicate that injunctive relief would generally only be available where the recipient of the inadvertently disclosed documents realised (or should have realised) that an obvious mistake had occurred.[58] In deciding whether to grant injunctive relief, the Court will conduct a balancing exercise to reach a conclusion that is fair and equitable having regard to all of the circumstances of the case.[59]

56 Video Exchange Ltd [1982] 2 All ER 241; High Wealth International Ltd v. China United Holdings Ltd (unreported, 2000; HCA 456/2000).

57 Goddard v. Nationwide Building Society [1986] 3 WLR 734, CA; American Insurance Company Ltd v. Herbert Smith [1988] FSR 232, CA, (Eng).

58 Guiness Peat Properties Ltd v. Fitzroy Robinson Partnership [1987] 1 WLR 1027, CA (Eng); American Insurance Co Ltd v. Herbert Smith (above); ISTIL Group Inc v. Zahoor [2003] 2 All ER 252.

59 Webster v. James Chapman (a firm) [1989] 3 All ER 939.

Indonesia

Contributed by Brigitta I. Rahayoe & Partners (associate office of Norton Rose Group)

1 Is there a duty to disclose documentary records in judicial and regulatory proceedings and if so, what is the extent of that disclosure duty?

Under the Indonesian Civil Code, disclosure is only required within the framework to prove a certain right or action or to deny such right or action.

2 Can disclosure be ordered against third parties and if so, in what circumstances?

Normally it cannot. In a few circumstances, there is a requirement under the Company Law that upon the request of a shareholder, the directors of a company may be required by the court to disclose the financial information of that company.

3 Can disclosed documents be used in other proceedings and jurisdictions?

No. A party who obtains a document from another party as a result of discovery may not disclose or use the document, or information obtained from the document, for any purpose other than in relation to the litigation in which it is disclosed.

4 What are the sanctions for failing to give adequate disclosure?

There is no particular sanction to be imposed on a party in the event that a party fails to give adequate disclosure but the court may draw adverse inferences on account of that failure.

5 Is there a concept of legal privilege and if so, how does it apply?

Under the Advocate Law, advocates and lawyers must keep the secrecy of any information received in the course of a professional retainer, unless any law requires otherwise. Furthermore, the Advocate Law provides that advocates and lawyers are entitled to protect the secrecy of clients' documentary information from any investigation.

6 Who can claim legal privilege?

Privilege can only be claimed by lawyers who are registered and admitted as advocates by the Indonesian advocate association in accordance with the Advocate Law.

7 How can legal privilege be lost?

The Advocate Law provides that the advocates and client's secrecy can be exempted in the event that another law requires otherwise.

8 To what extent may in-house counsel and foreign lawyers claim legal privilege?

In-house counsel and foreign lawyers can claim legal privilege in Indonesia provided that they are registered and admitted as advocates by the Indonesian advocate association.

9 Can legal privilege be maintained in regulatory investigations or proceedings?

Yes. Advocates may refuse to disclose information so long as the document contains client's confidential information.

10 Is there a concept of privilege against self-incrimination and if so, how is it applied?

The Indonesian Civil Code and the Indonesian Criminal Procedure Law provide that a witness may refuse to testify in a civil or criminal court on the matters that could be self-incriminating or incriminate close relatives of the witness, guardian of the witness or a person under the guardianship of the witness if disclosed.

11 Can documents or communications generated in the course of settlement negotiations be used as evidence in judicial proceedings?

There is no concept of "without prejudice" privilege equivalent to that of the UK or USA in Indonesia. The production of documents containing such communication would be subject to the Judge's opinion on whether the parties can use such evidence of settlement negotiations in court proceedings.

Japan

Contributed by Atsumi & Partners

1 Is there a duty to disclose documentary records in judicial and regulatory proceedings and if so, what is the extent of that disclosure duty?

Yes. Although there is no concept of mutual disclosure of documents equivalent to that of the UK or USA, generally documents which are relied on as evidence on a case are produced.

In a civil case, if a party wishes a specific document to be produced by the holder of the document (including a third party), an application for a court order must be made to the court for the submission of the document[61] and the court may make such order only to the extent that the court considers it necessary to disclose pursuant to the Civil Procedure Code[62] and will do so if the court finds that an order to submit the document is justified based on certain criteria.

One of the determinants of whether or not a petition for an order to submit a document is justified comes down to whether or not there is any obligation to submit the document in question. The obligation to submit a document is upheld when: "(i) a party personally possesses the document that he/she has cited in the suit; (ii) the party who offers evidence is able to make a request to the holder of the document for the delivery or inspection of the document; (iii) the document has been prepared in the interest of the party who offers evidence or with regard to the legal relationships between the party who offers evidence and the holder of the document" and (iv) in principle this is also upheld with respect to other documents as well, but with the exception of certain documents which include self-incriminating documents, secret public interest documents, privileged or confidential documents, documents exclusively prepared for the use of the holder and documents concerning minors.[63]

2 Can disclosure be ordered against third parties and if so, in what circumstances?

Yes. As stated above, a party may apply to the court for an order to cause a third party to submit a specific document.[64] The court will only make an order if it finds grounds for the order and is satisfied as to the necessity of disclosure. When a party makes the application, the party is required to clarify (a) the description of the document, (b) the purport of the document, (c) the holder of the document, (d) the facts to be proven by the document and (e) the grounds for the obligation to submit the document.[65] In the event the document

61 The term "document" includes any information which may be recorded, including tapes, photographs, electronic documents and emails (Article 231 of the Code of Civil Procedure of Japan, Law No. 109 of 1996, as amended (the "Civil Procedure Code")).

62 Article 181 of the Civil Procedure Code.

63 Article 220 and Article 223, Paragraph 2 of the Civil Procedure Code.

64 Article 219 of the Civil Procedure Code.

65 Article 221 of the Civil Procedure Code.

contains any part which is found to be unnecessary to be examined or which cannot be found to be subject to disclosure, the court will exclude such part from the scope of disclosure.[66]

3 Can disclosed documents be used in other proceedings and jurisdictions?

No. A party who obtains a document from another party as a result of discovery may not disclose or use the document, or information obtained from the document, for any purpose other than in relation to the litigation in which it is disclosed.

4 What are the sanctions for failing to give adequate disclosure?

There is no particular sanction to be imposed on a party who fails to give adequate disclosure. However, as a consequence of such failure, the court may draw adverse inferences.[67]

If a third party does not comply with a disclosure order, the court may impose a non-penal fine of not more than 200,000 yen.[68] An immediate appeal may be filed against such an order.[69]

5 Is there a concept of legal privilege and if so, how does it apply?

There are several laws under which attorney-client communication may be protected. Both current or former lawyers admitted in Japan ("Bengoshi") and foreign law lawyers registered in Japan ("Gaikokuho Jimu Bengoshi") are subject to a legal duty of confidentiality which prohibits them from disclosing a client's confidential information obtained during the course of their professional duties unless they receive consent from their client to disclose such information.[70]

Furthermore, in a civil case, Bengoshi and Gaikokuho Jimu Bengoshi may rely on the Civil Procedure Code and refuse disclosure of documents containing client's confidential information to a civil court.[71]

66 Article 223 of the Civil Procedure Code.

67 Article 224 of the Civil Procedure Code.

68 Article 225, Paragraph 1 of the Civil Procedure Code.

69 Article 225, Paragraph 2 of the Civil Procedure Code.

70 Article 23 of the Lawyers' Law and Article 50, Paragraph 1 of Special Measures Law concerning the Handling of Legal Business by Foreign Lawyers (Law No. 66 of 1986, as amended).

71 Article 220, Item 4(c) and Article 197, Paragraph 1 Item 2 of the Civil Procedure Code.

In a criminal case, Bengoshi and Gaikokuho Jimu Bengoshi may also refuse the seizure of articles which contain confidential information of a third party if they kept or held them because they are entrusted to do so during the course of their business.[72]

Furthermore, in both criminal and civil cases, Bengoshi and Gaikokuho Jimu Bengoshi may refuse to give testimony in court on facts which are subject to the duty of confidentiality.[73]

6 Who can claim legal privilege?

The above protections are available not only to Bengoshi and Gaikokuho Jimu Bengoshi, but also to other professions, such as doctors, dentists, birthing assistants, patent attorneys, notaries and persons engaged in a religious occupation[74] as the protections are to assist those profession's statutory duty of confidentiality.

7 How can legal privilege be lost?

In a civil case, the abovementioned exceptions to the obligation to submit documents, the right of refusal to testify, and other such legal privilege is lost when "the duty of secrecy is exempted".[75] Professions are accorded legal privilege because of their duties of secrecy but that duty may be discharged with the consent of the client.

8 To what extent may in-house counsel and foreign lawyers claim legal privilege?

Bengoshi and Gaikokuho Jimu Bengoshi, whether or not they are in-house counsel, have the right and duty to maintain the secrecy of any facts which they came to know in the course of their business unless otherwise provided for by any law.[76] To that extent, they may refuse to disclose a client's confidential information.

9 Can legal privilege be maintained in regulatory investigations or proceedings?

Yes. Although there is no doctrine of legal privilege equivalent to that of the UK or US, in Japan, a lawyer's duty of confidentiality overrides the duty of disclosure in regulatory investigations and proceedings. On that basis, Bengoshi and Gaikokuho Jimu Bengoshi may refuse to disclose information so long as the document contains a client's confidential information.

72 Article 105 of the Code of Criminal Procedure (Law No. 131 of 1948, as amended) (the "Criminal Procedure Code").

73 Article 149 of the Criminal Procedure Code, and Article 197, Paragraph 1 Item 2 of the Civil Procedure Code.

74 Article 105 and Article 149 of the Criminal Procedure Code, and Article 197 Paragraph 1 (ii) and Article 220 Item 4 (c) of the Civil Procedure Code.

75 Article 197, Paragraph 1 Item 2 and Article 220, Item 4(c) of the Civil Procedure Code.

76 Article 23 of Lawyer's Law and Article 50, Paragraph 1 of Special Measures Law concerning the Handling of Legal Business by Foreign Lawyers (Law No. 66 of 1986, as amended).

10 Is there a concept of privilege against self-incrimination and if so, how is it applied?

Both the Civil Procedure Code and the Criminal Procedure Code provide that a witness may refuse to testify in a civil or criminal court on the matters that could be self-incriminating or incriminate close relatives of the witness, guardian of the witness or a person under the guardianship of the witness if disclosed.[77] A witness may also refuse to testify in a civil court when the testimony relates to matters that would be harmful to the honour of the witness, close relatives, guardian of the witness or a person under the guardianship of the witness if disclosed.[78] Production of documents to a civil court may also be refused if it could be self-incriminating or would be harmful to the honour of the holder, or could incriminate, or would be harmful to the honour of the holder's close relatives, guardian of the witness or a person under the guardianship of the witness.[79]

11 Can documents or communications generated in the course of settlement negotiations be used as evidence in judicial proceedings?

There is no concept of "without prejudice" privilege equivalent to that of the UK or US. In Japan the production of documents containing such communication would be subject to the "necessity" requirement ie, whether or not the court considers it necessary to disclose such document, and the "confidentiality" requirement.[80]

77 Article 196 of the Civil Procedure Code and Articles 146 and 147 of the Criminal Procedure Code.

78 Article 196 of the Civil Procedure Code.

79 Article 220, Item 4(a) of the Civil Procedure Code.

80 Article 181, Paragragh 1, Article 220, Item 4(c) and Article 223, Paragraph 1 of the Civil Procedure Code and Article 23 of the Lawyers' Law.

Singapore

Contributed by Norton Rose Group

1 Is there a duty to disclose documentary records in judicial and regulatory proceedings and if so, what is the extent of that disclosure duty?

Yes. In judicial proceedings, the basic rule is that each party has a mutual and ongoing duty to disclose all the relevant documents in his possession, custody or power on which he relies or will rely; or which could affect his own case, adversely affect another party's case or support another party's case.[81]

In regulatory proceedings, the extent of disclosure required is determined by the rules applicable to the particular regulatory proceedings and the powers of the regulatory body can be quite wide. For instance, the Monetary Authority of Singapore has extensive powers to obtain documents for the purposes of carrying out investigations.[82]

2 Can disclosure be ordered against third parties and if so, in what circumstances?

Yes. Once proceedings have commenced, it may be obtained against a third party if he has documents in his possession that are relevant to the matter in question.[83] The Singaporean courts also have the power to order pre-action discovery against third parties in appropriate cases.[84]

3 Can disclosed documents be used in other proceedings and jurisdictions?

No. In general, documents disclosed in Singapore in relation to judicial and regulatory proceedings should not be disclosed in any other collateral or foreign proceedings unless they have become public documents or with the permission of the court or regulatory body (where appropriate) or the parties involved.

4 What are the sanctions for failing to give adequate disclosure?

Failure to give adequate discovery may lead to applications by the opposing party for the defaulting party to provide specific discovery of documents that were not provided. If a party fails to comply with a court order requiring discovery, that could amount to contempt of court if other conditions are met. However making contempt orders for non-disclosure is very rare. Instead, a serious failure to comply with orders for discovery will provide grounds for the other party to strike out the action or defence.

81 Order 24, Rule 1 of Rules of Court (ROC).

82 Securities and Futures Act Pt IX Div 3.

83 Order 24, Rule 6(2) ROC.

84 Order 24, Rule 6(5) ROC; paragraph 12 of the First Schedule to the Supreme Court of Judicature Act.

5 Is there a concept of legal privilege and, if so, how does it apply?

Yes. Documents which are subject to legal profession privilege[85] are not required to be disclosed. There are two types of legal professional privilege recognised, namely legal advice privilege and litigation privilege.

Legal advice privilege is concerned with protecting confidential communication with a client and a lawyer, the dominant purpose of which is to seek and obtain legal advice. Recently, the Singapore Court of Appeal[86] has extended legal advice privilege to include third party communications; however the communication concerned must be for the dominant purpose of enabling the client to obtain legal advice lest the scope of the privilege be overly wide. In doing so, Singapore departed from the more conservative English position where communications to and from a third party are not protected by legal advice privilege unless the third party is a "conduit" (and nothing more) for communication.[87]

Litigation privilege, on the other hand, is concerned with protecting information and materials created and collected for the dominant purpose of litigation.[88] Unlike legal advice privilege, third party communications have long enjoyed litigation privilege.

6 Who can claim legal privilege?

The privilege belongs to the client and not the solicitor.[89] In the context of a corporation, as a corporation can only act through its employees, communications made by employees who are authorised to do so (either expressly or impliedly) would be protected by legal advice privilege.[90]

7 How can legal privilege be lost?

The privilege will be lost if it is waived, either explicitly or impliedly. It will not be lost by accidental disclosure.[91]

85 S.128(1) and 131 of Evidence Act.

86 Skandinaviska Enskilda Banklen AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd [2007] 2 SLR(R) 367.

87 Three Rivers DC v. Governor & Bank of England (No. 5) [2003] QB 1556.

88 Skandinaviska Enskilda Banklen AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd [2007] 2 SLR(R) 367.

89 Singapore Civil Procedure 2003, para 24/3/29.

90 S.128 of the Evidence Act; Skandinaviska Enskilda Banklen AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd [2007] 2 SLR(R) 367.

91 Singapore Civil Procedure 2003, para 24/3/29.

8 To what extent may in-house counsel and foreign lawyers claim legal privilege?

Communications by in-house counsel are privileged provided they relate to legal rather than administrative matters.[92] S. 131 of the Evidence Act refers to legal advisers generally, and does not limit its scope to Singaporean advocates and solicitors, so the privilege should extend to foreign lawyers.[93]

9 Can legal privilege be maintained in regulatory investigations or proceedings?

Strictly speaking, the relevant sections of the Evidence Act[94] and the Rules of Court only apply to judicial proceedings. Some statutes specifically preserve the right to legal advice privilege in some contexts,[95] but this may not be the case in all situations. However, in practice, where clients are represented by counsel in regulatory investigations and proceedings, it is unusual for investigators or regulators to ask for legal advice provided to clients.

10 Is there a concept of privilege against self-incrimination and, if so, how is it applied?

In Singapore, there is a right to silence but this right is heavily qualified. For example, in the Criminal Procedure Code (Chapter 68) , a suspect is required to disclose any facts that he intends to use in his self-defence when making his statement to the police. A failure to do so may result in adverse inferences being drawn against the accused in a trial. The Securities and Futures Act ("SFA") provides that a person is not excused from disclosing information to the Monetary Authority of Singapore on the grounds of self-incrimination. Such statements may be used in civil but not criminal proceedings. The SFA also provides that disclosure of privileged information should not expose individuals to criminal or civil proceedings.[96]

92 Singapore Civil Procedure 2003, para 24/3/11.

93 S.131 of Evidence Act.

94 S.2 of Evidence Act.

95 For example, S.39(4) of Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A).

96 S.145 of the SFA.

11 Can documents or communications generated in the course of settlement negotiations be used as evidence in judicial proceedings?

No. Documents which form part of "without prejudice" settlement communications[97] are not required to be disclosed unless required to establish the existence of a compromise or to construe the terms of the compromise.[98] "without prejudice" means without prejudice to the maker of the statement. The privilege, which is rooted in the public policy of keeping litigation to a minimum, protects the party making a statement in the course of settlement negotiations against the disclosure of that statement, which may be regarded as an admission, thereby encouraging him to settle the dispute without fear.

97 S.23 of Evidence Act.

98 Quek Kheng Leong Nicky & Anor v. Teo Beng Ngoh [2009] SGCA 33.

Thailand

Contributed by Norton Rose Group

1 Is there a duty to disclose documentary records in judicial and regulatory proceedings and if so, what is the extent of that disclosure duty?

Any party intending to rely on any document as evidence in support of his allegations or contentions must deliver a copy of that document to the court and to the opposing party. In addition, the court or regulatory authority may order parties to disclose all documents in their possession, custody or power that relate to the matters in question in the action. Documents that are subject to legal professional privilege or litigation privilege are not required to be disclosed.

2 Can disclosure be ordered against third parties and if so, in what circumstances?

Yes. An order of the court or the regulatory authority may be obtained against a third party if he has documents in his possession that are relevant to the matter in question.

3 Can disclosed documents be used in other proceedings and jurisdictions?

No. However, documents disclosed in a regulatory proceeding may be used by the relevant regulatory body in further court proceedings in relation to the same matter.

4 What are the sanctions for failing to give adequate disclosure?

A person who fails to comply with an order of the court or the regulatory authority may be subject to various penalties, including imprisonment, a fine or both.

5 Is there a concept of legal privilege and if so, how does it apply?

Yes. Information imparted for the purposes of obtaining legal professional advice or representation is privileged.[99] Communications between lawyer and client that do not fall into those categories are not privileged. Unauthorised disclosure may attract a criminal sanction.

6 Who can claim legal privilege?

Legal privilege under the Civil Procedure Code refers only to the lawyer. However, a former Supreme Court justice is of the view that in practice the provision should also apply to the client.

99 S.92 Civil Procedure Code and S.231 Criminal Procedure Code.

7 How can legal privilege be lost?

By voluntary disclosure.

8 To what extent may in-house counsel and foreign lawyers claim legal privilege?

The provision is not expressly restricted to external lawyers or Thai lawyers and ought, where it is properly claimed, to extend to cover in-house counsel and foreign lawyers.

9 Can legal privilege be maintained in regulatory investigations or proceedings?

Yes.[100]

10 Is there a concept of privilege against self-incrimination and if so, how is it applied?

Yes. There is a concept of privilege against self-incrimination, but only in criminal cases.

11 Can documents or communications generated in the course of settlement negotiations be used as evidence in judicial proceedings?

There is no concept of "without prejudice" communications and discussions under Thai law and consequently, no specific restriction against documents or communications generated in the course of settlement negotiation being used as evidence in judicial proceeding. Whether or not such documents will be admissible in judicial proceeding would depend on the method that such documents are obtained.

Under the criminal procedure code, any evidence obtained through any inducement, promise, threat, deception or other unlawful means are inadmissible in criminal proceedings, not civil proceedings. However, the weight assigned to any evidence obtained through any inducement, promise, threat, deception or other unlawful means in civil proceedings is at the discretion of the court.

100 S.92 Civil Procedure Code and S.231 Criminal Procedure Code.

England and Wales (common law)

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1 Is there a duty to disclose documentary records in judicial and regulatory proceedings and if so, what is the extent of that disclosure duty?

In judicial proceedings a litigation party must give standard disclosure, by carrying out a reasonable search for and making available for inspection, those documents, which were or are within its control and on which it seeks to rely, or, which adversely affect or support any other party's case. The disclosure duty is mutual and ongoing. Applications may also be made for specific disclosure of documents.

Unsurprisingly, electronic disclosure is now the major source of any disclosure exercise.[101] Accordingly, effective document retention policies are essential and in order to comply properly with disclosure obligations, legal representatives and clients must have a working level knowledge of the sources and nature of electronic documents and in particular, how to preserve and harvest electronic documents. Because of the logistical complexity and cost consequences parties are now under a duty to co-operate on electronic disclosure issues.

In regulatory proceedings, regulators, revenue and competition authorities have significant powers to require companies or individuals to provide them with information. These powers will often be invoked where information has not been voluntarily released. However, statutory safeguards exist to preserve legal professional privilege, self incrimination and further third party disclosure.

2 Can disclosure be ordered against third parties and if so, in what circumstances?

A wide jurisdiction exists to order disclosure of documents or information against third parties which may enable a party to identify, either for legitimate or judicial proceedings, the existence, nature, extent and perpetrators of wrongdoing, traceable assets, the source of published information and to evaluate a prima facie case. There are important restrictions. An order should not be made against a likely witness, unless it would prevent substantive proceedings from being commenced or pursued. It must also be in the interests of justice having regard to the existence of alternative remedies, proportionality and the balance of convenience.

101 Digicel (St Lucia) Ltd v. C & W PLC 2008 EWHC 2522.

3 Can disclosed documents be used in other proceedings and jurisdictions?

Generally a disclosed document may only be used for the purpose of the proceedings except where:

- The document has been read in open court or has been referred to in public
- The court gives permission
- With the consent of the parties.

In exercising its discretion the court will seek to balance the competing interests of requiring full disclosure against private individual rights.[102] Care should be taken to obtain an undertaking not to use documents that are disclosed pursuant to a pre-claim protocol, for any purpose other than the contemplated proceedings.

4 What are the sanctions for failure to give adequate disclosure?

In judicial proceedings, a party will not be entitled to rely on an undisclosed document, unless, there are extenuating circumstances and even where there are, on meeting the costs consequences. Where a disclosure statement has been falsely signed a party or its legal representative may be held in contempt of court. This jurisdiction is rarely invoked but cannot be ignored.[103] Where a client refuses to co-operate in giving disclosure a legal representative may have no other option but to cease acting. The court may also compel a party to recover forensically deleted data.

If disclosure has not been given or documents have been deliberately destroyed to avoid meeting the disclosure obligation, a party may be entitled to have the opposing claim struck out. In extreme cases, a party may also commit a criminal offence of obstructing or perverting the course of justice.

Failing to provide regulatory authorities with requested information, or providing false or misleading information can lead to the imposition of fines and/or imprisonment.

5 Is there a concept of legal privilege and if so, how does it apply?

Legal privilege is a substantive right[104] preventing, in the absence of statutory authority, a client from being forced to disclose documents. It is based on a public policy rule that communications which involve either the provision of legal advice (legal advice privilege) or legal services in connection with contemplated litigation (litigation privilege) are strictly confidential and should not be revealed without the client's consent so as to engender complete confidence in legal representation. If confidentiality is lost, privilege cannot be maintained.

102 McBride v. The Body Shop International 2007 EWHC 1658.

103 LTE Scientific v. Thomas 2005 EWHC 7.

104 R (Morgan Grenfell & Co Ltd) v. Special Commissioners of Income Tax [2003] 1 AC 563.

The privilege extends not only to discrete legal advice but to legally based advice as to future conduct and also to information provided by the client, provided that in each case, it is sought and given within the "relevant legal context".[105]

It is important to appreciate that in contrast to litigation privilege, legal advice privilege may not extend to legal matters that are handled by non-lawyers such as accountants. This is of particular importance in the field of tax law advice.[106] It is also important to appreciate that in order to obtain legal advice privilege the dominant purpose must be the obtaining of advice and assistance in relation to legal rights and obligations.[107] The privilege exists as between lawyer and client whereas litigation privilege may extend to a third party. The privilege may only extend to employees of a company instructing lawyers so that other communications from employees may not be protected.

6 Who can claim legal privilege?

The privilege belongs to the client and can be claimed by the client in respect of all members of the legal profession, properly supervised non-members and even to non-lawyers provided that the client reasonably believed that person to be a member of the legal profession.[108] It is important to bear in mind that in the event of an insolvency or a state or regulatory intervention, the liquidator or manager will have access to privileged material for the purpose of assessing the conduct of officers.

In corporate matters uncertainty surrounds who may constitute a client, for instance whether it is limited only to those employees instructing legal advisors or to employees who provide information to legal advisors.[109]

Partial legal privilege may be claimed in respect of documents that contain privileged and non-privileged matter.[110]

7 How can legal privilege be lost?

Legal privilege depends on confidentiality. If confidentiality is lost then privilege cannot be maintained.

Legal privilege can only be waived by the client. A major risk to maintaining legal privilege is collateral waiver. Disclosure of one favourable privileged document will generally require disclosure of other contextual privileged documents. For instance, waiver of legal advice

105 Three Rivers No. 6.

106 R (on the application of Prudential Plc and another) v. Special Commissioner of Income Tax and another [2009] EWHC 2494 (Admin).

107 Three Rivers District Council v. Governor and Company of Bank of England (No. 6) 2004 UKHL 48.

108 Dadourian Group International Inc and Ors v. Paul Francis Simms and Ors [2008] EWHC 1784.

109 Three Rivers DC v. The Governor & Co of BOE No. 5 2003 EWCA 474 cf Upjohn.

110 GE Capital v. Bankers Trust 1995 1 WLR 172.

will generally lead to waive of legal instructions and information. However, it may be possible to retrieve privilege if no reliance is placed on the favourable document and it has not been produced in judicial proceedings.

Waiver can be a major concern in regulatory investigations, particularly where a client may want to assist an investigation but still maintain legal privilege. If otherwise privileged documents are released, then privilege should be expressly reserved and an undertaking obtained that the contents of the documents will be kept confidential.

When instructing expert witnesses particular care should be taken not to include privileged material.

Privilege cannot be claimed where advice is sought or given for the purpose of facilitating a crime or fraud or is sufficiently iniquitous to be contrary to public policy.

8 To what extent may in-house counsel and foreign lawyers claim legal privilege?

Legal privilege extends to in-house counsel but only when acting in a legal capacity. Where the role of in-house counsel is mixed with an executive function, the position is not straightforward. Legal advice privilege may attach to legal advice given to the Board but lost where it is mixed with management and compliance advice.[111] Accordingly, care should be taken to separate the advice and to take separate Board Minutes which contain mixed references to company and legal matters. In the course of a privilege claim arising out of an EU cartel investigation[112] the Advocate General noted that the protection afforded to in house counsel by legal privilege was a phenomenon restricted to the common law area, albeit one which included the USA.[113]

9 Can legal privilege be maintained in regulatory investigations or proceedings?

Legal privilege can be maintained in most domestic regulatory investigations and some statutes expressly provide that privilege is not affected.[114] However, a claim that communications with in house lawyers are privileged, arising from an EU cartel investigation, is soon to be determined by the European Court of Justice.[115] The Advocate General has advised the Court to reject that claim on the grounds that in house counsel are not, for the purposes of legal assistance, sufficiently independent and that the trend of EU legal systems has not been to extend privilege to in house counsel. In her opinion, the Advocate General noted that out of the 27 member states, the UK, Ireland and the Netherlands were

111 Three Rivers DC v. The Governor & Co of BOE No. 6 2004 HL 474.

112 Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. EC Case C-550/07 P.

113 Upjohn v. United States 449 US 383 (1981).

114 Paragraph 23, Schedule 36, Finance Act 2008) (Schedule 36).

115 Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. EC Case C-550/07 P.

the only jurisdictions to extend legal privilege to in-house counsel and that European Union legislation had signalled greater opposition than support to extending legal professional privilege to enrolled in house lawyers.

What is not straightforward is the extent to which privilege may be maintained in respect of voluntarily disclosed documents for the purpose of assisting a regulatory investigation. It is also important to note that privilege protection can be overridden by EC directives. For instance, in competition investigations the European Commission will only recognise communications with EEA qualified external legal advisers as privileged.

10 Is there a concept of privilege against self-incrimination and if so, how is it applied?

Yes. The privilege against self-incrimination exempts a person from being compelled to produce documents or provide information which might incriminate him in any potential or current criminal proceedings in England and Wales. The privilege may be claimed when refusing to produce documents or information, whether at trial or before trial.

The privilege does not provide a defence in civil proceedings nor excuse the failure to file a defence but there may be important statutory exceptions. For instance in the UK, s.13 of the Fraud Act 2006 provides that a person will not be excused from answering a question put to him in proceedings relating to "property" or complying with an order "made in proceedings relating to property" on the ground that doing so may incriminate him or his spouse of an offence under the Fraud Act 2006. This has been widely construed and has to a large extent limited the operation of the privilege subject to the safeguard that any statement or admission made by a person in answering such a question or complying with such an order will not be admissible in evidence in respect of an offence under the Act or a related offence.[116]

The court has a discretion to consider the risk of self-incrimination in respect of foreign criminal proceedings. In a recent decision the Court expressed concern that the privilege was being turned into a "fraudster's refuge".[117]

11 Can documents or communications generated in the course of settlement negotiations be used as evidence in judicial proceedings?

Documents recording settlement negotiations of actual, or pending litigation are, subject to a number of exceptions,[118] inadmissible as evidence. The rule is based on public policy grounds that parties should not be prejudiced by seeking to compromise disputes.[119] The term "without prejudice" is often used to highlight expressly the existence of the rule and provided there are substantive settlement negotiations, the term will afford protection against disclosure, unless the opposing party can show a good reason for not doing so.

116 Kensington v. Republic of Congo [2007] EWCA Civ 1128.

117 JSC BTA Bank v. Ablyazov & Others [2009] EWCA Civ 1125.

118 Unilever v. Proctor and Gamble Company [1999] EWCA Civ 3027.

119 Ofolue v. Bossert 2009 UKHL 16.

France (civil law)

Contributed by Norton Rose Group

1 Is there a duty to disclose documentary records in judicial and regulatory proceedings and if so, what is the extent of that disclosure duty?

There is no discovery process in French civil procedure similar to what exists in common law jurisdictions. In practice, parties to proceedings in France produce only the evidence considered necessary to support the case (or that is in their possession). There is, however, an obligation to produce that evidence which is relied upon in the pleadings.

It is possible, however, in a civil action on the merits to seek an injunction to force the production of evidence provided such evidence is sufficiently identified and relevant to the resolution of the issues of the case.[120]

In so-called oral proceedings, ie, mainly before the Commercial Court and in certain types of cases before the Court of Appeals, the court may require a party on its own motion to produce evidence.

2 Can disclosure be ordered against third parties and if so, in what circumstances?

Disclosure can be ordered against third parties via a motion presented to the court provided the evidence is sufficiently identified and relevant.[121]

French law also allows any "interested person" to seek an order from a judge to order the production of evidence from any third party, before any legal action on the merits has been launched, when there is a "legitimate motive" to maintain or establish the proof of facts upon which the issue of a proceeding may depend on.

The evidence sought must also be sufficiently identified and demonstrated to be relevant to the resolution of the issue of the case.[122]

3 Can disclosed documents be used in other proceedings and jurisdictions?

Documents obtained by a party in a proceeding may be used by said party in any other proceeding and/or other jurisdiction.

120 Articles 11 and 138 and following of the French Code of civil procedure.

121 Articles 11 and 138 and following of the French Code of civil procedure.

122 Articles 11 and 145 of the French Code of civil procedure.

4 What are the sanctions for failing to give adequate disclosure?

Assuming that an injunction to produce was ordered, the recalcitrant party may be ordered to pay a civil fine (astreinte)[123] which usually accrues as a function of the delay past the deadline provided for in the order.

If the injunction to produce has been issued against a third party, the latter may incur a liability for having failed to produce where the requesting party can demonstrate that such failure was prejudicial (in an objective quantifiable manner).[124]

5 Is there a concept of legal privilege and if so, how does it apply?

The relationship between an attorney and his client is protected by confidentiality obligations, which prohibits attorneys from disclosing information he has obtained from his principal.[125]

As such, correspondence between a lawyer and its client is protected although the client is free to disclose such correspondence.

Save an express indication to the contrary and provided that such correspondence does not refer to any information covered by the legal privilege, correspondence between counsel and opposing counsel in relation to the matter is protected by professional attorney privilege, ie, is confidential, as is the attorney's work product.[126]

It should be noted that when a meeting is held between the principals with their counsel present, the debates are automatically covered by the professional attorney privilege, although the privilege only applies to the attorneys. The principals remain free to disclose such confidential information and/or documents obtained during such meeting unless a confidentiality agreement has been signed.

6 Who can claim legal privilege?

Being a public policy rule, both clients and attorneys can claim legal privilege.

123 Articles 11 and 139 of the French Code of civil procedure; Article 10 and of the French civil Code.

124 Articles 10 and 1382 of the French civil Code.

125 Article 2 of the Règlement Intérieur National (French ethical rules); Article 4 of the Décret n° 2005-790 July 12, 2005; Article 226-13 of the French criminal Code.

126 Article 3 of the Règlement Intérieur National (French ethical rules); Article 5 of the Décret n° 2005-790 July 12, 2005; Article 11 of the French Code of criminal procedure.

7 How can legal privilege be lost?

The legal privilege is "general, absolute and unlimited in time". Therefore, the legal privilege does not expire by the death of the client and cannot be released from the attorney either by its principal or a tribunal.

The legal privilege can only be lost in very limited situations, such as when an attorney has participated in or committed a criminal offence or such correspondence may relate to money laundering activities of the client. Even in such a case, only limited violations of the legal privilege are authorised.

8 To what extent may in-house counsel and foreign lawyers claim legal privilege?

As a professional rule, legal privilege only applies to attorneys admitted to a French Bar, and is automatic (ie, a specific mention of confidentiality need not appear on the concerned correspondence). It is therefore not applicable to in-house counsel, nor can it be claimed in relation to correspondence between attorneys from Bars of different countries, unless, there is an express and specific indication that the correspondence is confidential.

In should be noted in this regard that where European and Swiss attorneys are acting in France, they can also claim legal privilege.[127]

9 Can legal privilege be maintained in regulatory investigations or proceedings?

Antitrust authorities, tax authorities and criminal authorities have significant powers to require companies or individuals to provide information in relation to investigations or proceedings, even – to a certain extent – information covered by the legal privilege. As mentioned above, in the course of an EU cartel investigation, a claim that communications with in house counsel were privileged was rejected by the Advocate General on the grounds that as employees they lack the requisite independence of external counsel[128] and that those jurisdictions which extend privilege to in-house lawyers, namely the UK, Ireland and the Netherlands are more the exceptions than the norm.[129]

127 Articles 202 and subsequents of Decree n° 91-1197, November 27, 1991 ; D. n° 2004 – 1123, October 14, 2004.

128 Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd (supra).

129 "104 Accordingly, I take the view that the legal position in the now 27 Member States of the European Union, even some 28 years after AM & S, has not developed in such a way as would require – today or in the foreseeable future – the case-law at European Union level to be changed so as to recognise enrolled in house lawyers as benefiting from legal professional privilege."

10 Is there a concept of privilege against self-incrimination and if so, how is it applied?

Although the European Convention on Human Rights does not contain any express provision on the "right to remain silent and to not contribute to its own incrimination", such privilege against self-incrimination has been implied by the European Court of Human Rights from the general right to an equitable proceeding, which belongs to each party.[130]

But while the privilege against self-incrimination can be invoked in tax, antitrust and criminal proceedings, it is not applicable in civil/commercial procedures.

11 Can documents or communications generated in the course of settlement negotiations be used as evidence in judicial proceedings?

As a consequence of the legal privilege, documents or information exchanged between attorneys in the course of settlement negotiations (as in any other circumstances) are confidential and cannot, therefore, be produced in judicial proceedings by an attorney.

As a consequence, such information and/or documents can only be disclosed in a judicial proceeding (i) if the negotiation process did not involve attorneys or (ii) if such elements are not produced by an attorney.

130 The European Court of Human Rights deducted this privilege from Article 6-2 of the European Convention of Human Rights – presumption of innocence – and on Article 14 § 3-g of the International Covenant on Civil and Political Rights: see CEDH Funke v. France February 25, 1993 and CEDH Saunders v. the UK December 17, 1996.

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