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Corporate Counsel

Protecting Client Communications With Foreign Counsel From Discovery in U.S. Litigation



By Jacques Semmelman, Jonathan Walsh & A. Robert Quirk

Foreign companies that assume their communications with their own non-U.S. in-house or outside counsel will automatically be treated as privileged and protected from discovery in U.S. litigation may face a rude shock. In several decisions, U.S. courts have required non-U.S. parties to disclose communications with their non-U.S. in-house counsel and with their unlicensed non-U.S. outside counsel. Companies can mitigate the risk of disclosure by including licensed U.S. counsel in their legal communications whenever there is a plausible risk of future U.S. litigation.

The rationale for refusing to accord privilege protection to communications with foreign in-house counsel or with unlicensed foreign outside counsel varies. In some cases, the court applied U.S. law and held that the attorney-client privilege does not cover communications with counsel who are not members of the foreign country's bar (or an equivalent organization). This was so even though the unlicensed counsel were functioning as lawyers and were permitted to do so under the foreign country's laws. In other cases, U.S. courts applied the law of the foreign country and ruled that the laws of that country did not protect communications with unlicensed counsel. Nor can privilege be bestowed through a contractual choice-of-law provision. In one recent securities fraud case, the court held that contractual choice-of-law provisions did not control which nation's privilege law applied.

In two recent cases, the U.S. District Court for the Southern District of New York ruled that as a matter of U.S. law, the attorney-client privilege does not protect communications with non-U.S. in-house counsel who are not members of the bar of their country. In the first case, *Wultz v. Bank of China*,[1] the court rejected claims of privilege with respect to communications between Bank of China and its unlicensed in-house counsel located in China, even though bar membership is not re-

Partners Jacques Semmelman and Jonathan Walsh, and associate A. Robert Quirk are members of the Litigation Department of Curtis, Mallet-Prevost, Colt & Mosle LLP in New York.

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quired to serve as in-house counsel in China.[2] Bank of China had argued that privilege questions concerning non-U.S. lawyers should be governed by a ''functional'' test. Under such a test, communications with a person who is '' 'competent to render legal advice and is permitted by law to do so' '' would be accorded the protection of the privilege.[3] The court rejected this argument and strictly applied the requirement that a lawyer be ''a member of the bar of a court'' for the privilege to apply.[4] Bank of China was subsequently compelled to disclose documents related to an internal investigation because the investigation had been conducted by the in-house legal team without the oversight of licensed outside counsel.[5]

The issue arose again in *Anwar v. Fairfield Greenwich Ltd.*,[6] an investment fraud case in the Southern District of New York. There, the court again rejected the functionality test, and declined to apply the privilege to communications with an unlicensed in-house counsel in the Netherlands.

Though the issue has not been addressed at the appellate level, the district court decisions demonstrate that communications with unlicensed foreign in-house or outside counsel are at risk of disclosure in the event of U.S. litigation or—even more troubling—in the event of U.S. government investigation.

In a second line of case law, U.S. courts have applied the law of the foreign country to deny privilege protection to communications with in-house counsel. These cases are difficult to generalize because laws concerning in-house attorney-client privilege vary considerably across nations.[7] For example, in one case, the court ordered disclosure of communications with French in-house counsel because they are not permitted to maintain their bar membership, and are explicitly excluded from that country's attorney-client privilege protections.[8] In another case, the court held that Switzerland does not protect communications with in-house counsel, regardless of bar membership.[9] The court there held that the existence of a legally-mandated secrecy obligation, enforceable by sanctions under Swiss employment law, was not equivalent to a privilege and would not provide a basis for preventing disclosure in U.S. litigation.[10] The court acknowledged that under Swiss law, mandatory disclosure of documents would be unlikely, given the lack of broad discovery in Swiss civil litigation; nevertheless, the court held that the lack of an applicable evidentiary privilege under Swiss law left the communications with in-house counsel unprotected from discovery in U.S. litigation.[11]

Not all courts, however, have been so narrow in their analysis of the privilege laws of countries with limited civil discovery procedures. For example, in *Astra Aktiebolag v. Andrx Pharmaceuticals*,[12] the court applied U.S. law rather than Korean law because it concluded that the documents would not have been discoverable in litigation in Korea due to Korea's policy restricting discovery, and that ''principles of comity'' required the court to give deference to that policy. And while the rationale under Korean law would not have been based on privilege but rather on more general discovery restrictions, the court achieved its desired outcome by finding the communications with in-house counsel privileged under U.S. law.

While the court in *Astra* stretched as far as it could to attain its desired result, that is not how the majority of courts have addressed the issue. Generally, U.S. courts have found communications with foreign in-house counsel to be privileged only when presented with proof of the existence of a specific legal privilege governing in-house counsel under the law of the relevant jurisdiction. The absence of such proof has led to recent denials of privilege claims by courts applying the laws of France,[13] India,[14] the Netherlands,[15] China,[16] and Russia.[17]

U.S. Courts Do Not Defer to Contractual Choice-of-Law Provisions With Respect to Privilege Issues

A choice-of-law provision in the contract that underlies the litigation does not necessarily control which jurisdiction's privilege law applies. In determining which law to apply to an international privilege dispute, U.S. courts generally apply the ''touch base'' test articulated in *Golden Trade, S.r.L. v. Lee Apparel Co.*[18] Under this test, ''any communications touching base with the United States will be governed by the federal discovery rules while any communications related to matters solely involving [a foreign country] will be governed by the applicable foreign statute.''[19] When choosing among foreign statutes, the court will seek to apply the law of the jurisdiction with ''the most direct and compelling interest in whether [attorney-client] communications are to be publicly disclosed.''[20]

U.S. courts have disregarded contractual choice-of-law provisions in favor of the ''touch base'' test. In *Vel-*

[1] *Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479 (S.D.N.Y. 2013).
[2] *Wultz*, 979 F. Supp. 2d at 491.
[3] *Wultz*, 979 F. Supp. 2d at 494 (quoting *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442, 444 (D. Del. 1982)).
[4] *Id.* at 494.
[5] *Wultz v. Bank of China Ltd.*, No. 11 Civ. 1266, 2015 BL 17294 (S.D.N.Y. order issued Jan. 21, 2015).
[6] 982 F. Supp. 2d 260, 265, 29 Law. Man. Prof. Conduct 430 (S.D.N.Y. 2013).
[7] *See* Case C-550/07, *Akzo Nobel Chems. Ltd. & Akcros Chems. Ltd. v. European Comm'n*, 2010 E.C.R. I-08301, I-8388, 26 Law. Man. Prof. Conduct 584 (Sept. 14, 2010) (noting a lack of consensus among E.U. member states regarding privilege as applied to in-house counsel).
[8] *Malletier v. Dooney & Bourke, Inc.*, No. 04 Civ. 5316, 2006 BL 129404 at *18 (S.D.N.Y. Nov. 29, 2006).
[9] *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69, 76 (S.D.N.Y. 2006).
[10] *Id.* at 77.
[11] *Id.* at 78.
[12] 208 F.R.D. 92 (S.D.N.Y. 2002).
[13] *Malletier*, 2006 BL 129404.
[14] *Shire v. Cadila Healthcare Ltd.*, No. 10-581, 2012 BL 275793 (D. Del. Oct. 19, 2012).
[15] *Veleron Holding, B.V. v. BNP Paribas SA*, No. 12-CV-5966, 2014 BL 233660 (S.D.N.Y. Aug. 22, 2014); *Anwar v. Fairfield Greenwich Ltd.*, No. 09 Civ. 118, 2013 BL 369503, at *2, 29 Law. Man. Prof. Conduct 430 (S.D.N.Y. July 8, 2013).
[16] *Wultz*, 979 F. Supp. 2d at 493.
[17] *Veleron*, 2014 BL 233660 at *6.
[18] *See, e.g.*, *Wultz*, 979 F. Supp. 2d at 486; *Astra*, 208 F.R.D. at 98.
[19] *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 520 (S.D.N.Y. 1992).
[20] *Id.* at 521.

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eron Holding, B.V. v. BNP Paribas S.A.,[21] a securities fraud case in the Southern District of New York, an investment agreement was expressly governed by Canadian law, and a second agreement was expressly governed by British law. The plaintiff's attorneys, some of whom were in-house, others of whom were unlicensed outside counsel, were based in Russia and the Netherlands.[22] The court looked to the interests of the *forums*, not the parties, in determining whether communications should be protected from disclosure.[23] Noting that ''the only connection the United Kingdom and Canada have to the communications at issue is through choice of law clauses in the relevant contracts,'' the court ruled that the interests of Russia and the Netherlands in ''the uniform application of attorney-client privilege law for Russian and Dutch attorneys and for communications that occur in their respective countries'' outweighed the interests of the U.K. and Canada.[24] Because Russian privilege law does not protect communications with in-house counsel or unlicensed lawyers, and Dutch law does not recognize attorney-client privilege for communications with unlicensed lawyers, the court rejected Veleron's privilege claims.[25]

According Protection to Communications With Unlicensed Foreign Counsel

To help ensure that a communication with foreign counsel will be protected by the attorney-client privilege during U.S. litigation, the communication should include at least one attorney who is unequivocally within the privilege. This can be accomplished by involving licensed U.S. counsel in all legal discussions. The presence of U.S. counsel would strengthen an argument that U.S. privilege law should apply under the ''touch base'' test, and that the communication should be protected from disclosure in U.S. litigation.

[21] *Veleron*, 2014 BL 233660 at *5.
[22] *Id.* at *5.
[23] *Id.*
[24] *Id.*
[25] *Id.* at *6.