

Insights

CAN YOU CLAIM LEGAL ADVICE PRIVILEGE FOR YOUR COMMUNICATION WITH FOREIGN IN-HOUSE LAWYERS IN AN ENGLISH LITIGATION OR ENGLISH-SEATED ARBITRATION?

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SUMMARY

A recent English judgment discussed whether communications with an in-house counsel or with external foreign lawyers are protected by legal advice privilege, including whether the type and seniority of qualification of the foreign lawyers makes any difference.

Introduction

For many businesses, the in-house legal department probably is the first point of contact when legal issues arise. Such in-house corporate counsel dedicate all of their time and skills to your business, and understand the business the best, and therefore are able to provide best-tailored and on-point advice and solutions. Members of such corporate legal teams often come from various foreign jurisdictions, and some might not be qualified lawyers in the local jurisdiction in question in a particular matter.

Additionally, for international business and cross-border transactions, it is common to instruct foreign lawyers for aspects of various business and transactions.

Foreign qualified lawyers, both internally and externally, are a common and sometimes indispensable part of running a business.

A natural and not-unreasonable expectation (at least for lawyers trained in a common law setting) will be that all communications with both in-house and foreign lawyers are protected and shielded by the cloak of legal advice privilege against any scrutiny by outsiders. However, is that really the case?

A recent English judgment *PJSC Tatneft v Bogolyubov and others* [2020] EWHC 2437 (Comm) (the “**Judgment**”) handed down by the Commercial Court in London (the “**Court**”) on 11 September 2020

has discussed and examined critically this important issue.

The Court confirmed that legal advice privilege does extend to communications with foreign lawyers, both in-house and in independent practice. The Court further held that it will not enquire into the extent of qualification or regulation of foreign lawyers in assessing whether legal advice privilege applies.

Legal advice privilege – the basics

Under English law, legal advice privilege protects confidential communications between “lawyers” and their clients for the purposes of giving or seeking legal advice. Such legal advice privilege acts as a shield to oppose the production of documents in litigation / arbitration under the common law system.

The involvement of a “lawyer” is essential in establishing a claim to legal advice privilege. It has been established for many years that under English law, for legal advice privilege purposes, a “lawyer” includes solicitors and barristers admitted locally, as well as foreign lawyers.

However, before the Judgment, it was not entirely clear as to what qualification standard a foreign lawyer must satisfy (e.g. admission to a local legal regulatory body) so that their advice to the client will be covered by legal advice privilege. The Judgment has clarified this.

Brief facts

The dispute arose as part of ongoing litigation between a Russian state-owned oil giant PJSC Tatneft (the “**Claimant**”) and four high net-worth Ukrainian businessmen (together, the “**Defendants**”) regarding an alleged fraud scheme.

During the process of disclosure of relevant documents, the Claimant claimed legal advice privilege over certain communications and documents passing between (a) the Claimant’s employees/officers and (b) members of its internal legal department in Russia.

The second Defendant made a standalone application on whether legal advice privilege validly may be claimed by the Claimant, in respect of members of the Claimant’s legal department who were qualified Russian advisors but who did not hold the Russian “advocate” status. The second Defendant submitted that such members are not “appropriately qualified” under Russian laws because: (a) an “advocate” is admitted to the Russian legal bar and there is a register of advocates maintained by the Ministry of Justice of the Russian Federation, and (b) the Russian legal concept of “advocates secrecy” only protects communications between a client and an “advocate”. The communications between a client and a lawyer who is not an “advocate” will only be covered by a lesser Russian legal concept of “commercial secrecy”, under which disclosure will be compelled when officially requested by an authorised state body, which includes judicial authorities.

The Court rejected the second Defendant's attack upon the Claimant's claim for legal advice privilege in respect of the communications with the lawyers who did not hold the status of "advocate". The three main strands of the Court's reasoning were as follows.

(1) Rationale for legal advice privilege

The Court acknowledged that there is a strong public interest in protecting legal advice privilege. It is necessary that a client can obtain legal assistance from a lawyer, safe in the assurance that these communications will be kept confidential. The extension of legal advice privilege to foreign lawyers is consistent with the public interest rationale.

(2) Standard of qualification of a foreign lawyer

The Court held that the determining factor on whether legal advice privilege can be extended to foreign legal advisors is the "function" of the relationship and not the "status" of the particular lawyer. As long as a foreign lawyer acts in the capacity or function of a lawyer, the Court will not investigate how and why the foreign lawyer is qualified, recognised or regulated in their home jurisdiction.

Further, the Court pointed out the following problematic consequences if legal advice privilege is restricted to lawyers who are "appropriately qualified" in foreign jurisdictions:

- (a) Investigation: the court will need to examine particular national standards or regulations to determine whether a legal advisor is regulated or registered properly, so as to ensure that their advice to a client attracts legal advice privilege;
- (b) Issues of comity: the court may be obliged to express views on the qualifications and regulation of foreign lawyers – which for obvious reasons would not be useful or welcome; and
- (c) Unfairness and inconvenience: the consequence of such a restriction would be the exclusion of all in-house foreign lawyers and non-"advocates" in Russia from being able to provide a client with legal advice privilege.

(3) Foreign lawyers versus foreign in-house lawyers

The Court saw no reason to distinguish between foreign independent lawyers and foreign in-house lawyers, except that the latter represent one client only. As a matter of both logic and principle, legal advice privilege should apply equally to communications with both types of foreign lawyers.

Key takeaways

You can now be assured that, in the case of English litigation or England-seated arbitration (and this extension probably will be viewed with favour and applied by extension in other common law jurisdictions), legal advice privilege protects your communications with your foreign lawyers, whether internal or external. The court will not scrutinise the type or sufficiency of the local

qualifications of your foreign lawyers, as long as they are acting in the capacity or function of a legal advisor.

We consider the Judgment to be a welcome clarification which, on one hand, upholds the fundamental right to confidential legal advice; and on the other hand, enables clients to provide candid information to foreign lawyers with absolute openness, for the purposes of seeking effective and comprehensive legal advice and effective and comprehensive conduct of litigation and arbitration.

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