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INTERNATIONAL BAR ASSOCIATION 2020 ANNUAL CONFERENCE

International Attorney-Client Privilege and Ethics

Speakers



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“Dance like no one is watching...

Email and text like it may one day be
read aloud in a deposition.”

Olivia Nuzzi

Privilege Globally

- Key Differences
 - Professional secrecy/confidentiality vs. privilege.
 - Privilege may belong to the lawyer, not client.
 - Narrower or judge-run discovery.
 - May not protect communications with in-house counsel.
 - Scope of privilege afforded to internal investigations.

IBA Rules on Taking of Evidence

Article 9.2(b) specifically refers to the power of a tribunal to exclude from evidence or production any document on the grounds of "*legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable*" (Article 9.2(b)).

Article 9.3 contains criteria that a tribunal may take into account when considering "*issues of legal impediment or privilege ...insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable*", including any need to protect the confidentiality of a document "*made in connection with and for the purpose of providing or obtaining legal advice*".

Privilege in International Arbitration

- Privilege law differs—particularly with regard to the role of in-house counsel
- Options:
 - Law of the seat?
 - Law where the client is domiciled?
 - Law where the lawyer practices?
 - Law where the advice was rendered?
 - “Level up,” “level down”?

Carlos Rios y Francisco Javier Rios v Chile

ICSID Procedural Order, 2018

Whether emails between legal counsel for companies owned by the Claimants and representatives of bondholders who were not parties to the arbitration were subject to lawyer-client privilege and common interest privilege.

The Tribunal held that:

The concept of lawyer-client privilege has been "*widely accepted in international and comparative law*", and has been applied by international tribunals without reference to rules of domestic law;

In general terms, lawyer-client privilege protects communications that are (i) confidential; (ii) exchanged between a lawyer and their client; and (iii) for the purpose of giving or receiving legal advice;

In relation to common interest privilege, the Tribunal found that in general terms it will only arise in the context of communications covered by lawyer-client privilege that have been shared with third parties.

While accepting the application of the concepts of privilege generally, the Tribunal went on to find that on the facts of this case none of the relevant documents were protected by lawyer-client privilege because they were not for the purpose of giving or receiving legal advice.

Privilege in Common Law Jurisdictions

- U.S.
 - Strong privilege and work product protections serve to counteract its broad discovery rules.
 - U.S. courts generally view privilege issues to be questions of substantive law.
 - But note, U.S. courts view work product as a procedural matter, and the work product law of the forum will apply.
- U.K.
 - Privilege is viewed as a substantive right.
 - U.K. courts treat it as a procedural question and apply the privilege law of the forum in choice of law analysis.

Civil Law Jurisdictions

- Limited document discovery results in more limited privilege and confidentiality protections.
- In civil litigation, each party is generally expected to marshal its own evidence.
- Privilege and confidentiality are doctrines arising from the civil law jurisdictions' concept of professional secrecy, which is itself enshrined in criminal codes and ethical rules.
- Privilege is treated as a matter of procedural law

Privilege in the EU

“[A]n in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee”

Akzo Nobel Chemicals and Akcros Chemicals v. Commission
2007 E.C.R. II-03523 (2010)

Notes on *Akzo*

- The *Akzo* case involved an investigatory procedure commonly used by the EC: dawn raids.
- Limited to investigations by the European Commission. Otherwise, the law of each EU member country will control on privilege.
- Waiver: Communication between an in-house attorney in the U.S. and a corporate executive in Europe disclosed in European court after a dawn raid might not be privileged because the confidentiality will have been breached.

Who is the Client?



- Volkswagen hired Jones Day to conduct internal investigation into the 2015 emissions testing
- Investigation covered activities at VW and at subsidiary, Audi
- Engagement agreement was only between VW and Jones Day
- Munich prosecutors raided Jones Day offices, took documents relating to Audi
- German Federal Constitutional Court held documents were not protected by the ACP because no attorney-client relationship between Jones Day and Audi
- U.S. based Jones Day was held to be unable to lodge a constitutional complaint under the German constitution at all, for being neither a domestic nor an EU legal entity, among other things as it did not demonstrate an effective place of management within Germany or the EU.

Which Country's Law?

- “[A]ny 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.”
- Considerations:
 - Whether communications involved U.S. lawyers.
 - Whether client was U.S. resident attempting to protect a right under U.S. law.
 - Whether relevant proceedings were in the U.S.

Wultz v. Bank of China Ltd., 979 F.Supp.2d 479, 489 (S.D.N.Y. 2013).

Privilege in China

- Civil Procedure Law: Weight of authority indicates that courts and government can compel an attorney to testify concerning confidential client matters.
 - Art. 70 of Civil Procedure Law requires individuals to provide testimony at court's request.
- Criminal Procedure Law: Criminal defense attorneys have right to keep in confidence information learned from the client *during representation*.
- Unclear whether attorney's right to refuse to testify in criminal litigation is also applicable to civil and administrative litigations.
- Chinese law is developing in this area. In practice, it is rare for privileged information to be disclosed in *civil* court proceeding because of limitations on all discovery.

Wultz v. Bank of China Ltd.

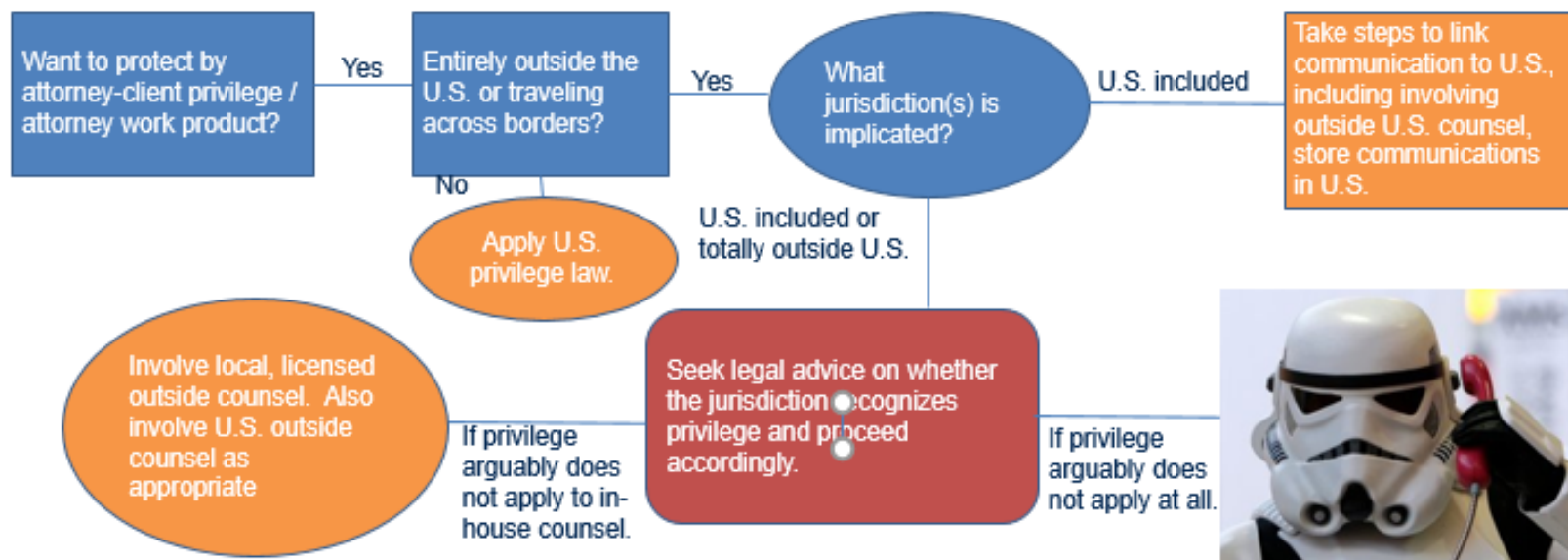
- Internal investigation conducted by in-house counsel of bank in China
- Held not privileged in SDNY civil suit:
 - Court held Chinese law applied
 - China does not recognize attorney-client privilege
 - Even if U.S. law applied, privilege would not attach because in-house lawyers in China are not licensed attorneys

Applying United States Law

“To the extent BOC has claimed privilege over communications from, to and among members of legal or other departments who are not licensed attorneys, the attorney-client privilege does not apply.”

Wultz v. Bank of China Ltd., 979 F.Supp.2d 479, 489 (S.D.N.Y. 2013).

How to Think About Communications



Business Counsel v. Litigator Counsel

- Need to get deal done v. need to protect self in case of future litigation.
- If lawyer is giving legal advice, ensure that is clear (as opposed to business advice).
- Keep number of people involved in sensitive aspects of deals as small as possible.
- WebEx and other tools allow screen sharing and for multiple parties to view and edit a document.
- Use zoom / phone.

Internal Investigation

- Plan for the least protective law to apply.
- At the outset, assess what privilege law may apply and plan accordingly.
- In investigations, assume interview memos and other fact-gathering work product will not be protected.
- Do not email, save versions, or otherwise create copies of the document until it is final.
- Use technology: WebEx and other tools allow screen sharing and for multiple parties to view and edit a document.
- Use zoom / phone.

Additional Tips

- Use local, licensed outside counsel for sensitive matters.
- Clearly mark privileged files and file separately to avoid confusion in dawn raid.
- Warn in-house counsel against summarizing/annotating outside counsel communications.
- Circulate sensitive materials among a small group. Warn against sharing more broadly.
- Minimize written communications to EU-based in-house counsel on matters historically the subject of Commission investigations.
- Include choice of law in contracts and specify preferred privilege rules.
- Use licensed in-house counsel and ensure in-house counsel don't mix legal and business in communications.

Witness Communication

- Civil law systems generally prohibit pre-testimonial communication.
- Common law systems generally permit pre-testimonial communication.

Witness Communication

In Guernsey...

- Witness “coaching” is prohibited.
 - No mock questions or preparation based on facts of the case.
- Witness “familiarization” is permitted.
 - Courtroom format and procedures.
 - Tips for effective testimony.
 - Mock cross exams based on unrelated issues and content.

Discovery

- Treatment of inadvertent disclosures.
- Preservation and ensuring client compliance.
- Production process.

Conflicts of Interest

- Most jurisdictions are more permissive than U.S. conflicts rules.
- Informal, custom-based, lax enforcement.
- Often no imputation of conflicts.

Confidentiality

- May only cover information communicated by the client or learned from other sources.
- Doesn't always cover in-house counsel.
- Applicability of crime-fraud exception.
- Could cover communications with opposing counsel.

Other Examples

- Ex parte communications may be appropriate in some countries.
- Contingent fees are banned in many European countries.
- Payment of fact witnesses.

Questions?

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Rachael Kent is a partner and vice chair of the International Arbitration Practice Group at WilmerHale, based in Washington, DC. She joined the firm in 1998.

Ms. Kent has more than 15 years of experience representing clients in a wide variety of commercial and investment disputes in arbitration proceedings seated in common law and civil law jurisdictions worldwide. Her experience includes ad hoc and institutional arbitrations under the rules of the ICC, LCIA, HKIAC, ICDR, WIPO, ICSID, UNCITRAL and others. She has recently represented parties in disputes in the energy, mining, aerospace, defense, pharmaceutical, construction, insurance, telecommunications, technology and retail sectors, among others.

Ms. Kent has taught International Commercial Arbitration at the Georgetown University Law Center and the Duke University School of Law. She also frequently speaks and writes on topics related to international arbitration.

N. Mahmood Ahmad



Mahmood Ahmad is currently senior counsel at Johnson Controls, where he oversees and helps to manage a global portfolio of complex litigation and legal support for procurement. Mahmood is a graduate of the University of Virginia School of Law, where he served on the Editorial Board of the law review. Following law school, Mahmood spent nearly a decade at Williams & Connolly, where his practice was focused on complex commercial litigation. He also served as a law clerk on the United States Court of Appeals for the Fourth Circuit.

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Ana Reyes Co-Chairs the firm's International Disputes practice group and is a member of its Executive Committee. She focuses her practice on complex litigation and international arbitration. She has handled matters involving foreign governments, foreign officials, multi-national corporations, and international organizations, representing clients throughout the world. Along with her admissions to Bars of the United States, Ana is listed on the Roll of Solicitors in England and Wales.

Ana has devoted a substantial portion of her practice to pro bono work, representing refugee organizations and refugees seeking asylum in the United States. The United Nations High Commissioner for Refugees has retained Ana for representation in numerous appellate matters and commissioned her to draft a comprehensive report on asylum law in the United States. In 2017, Ana was named as the D.C. Women's Bar Association's Woman Lawyer of the Year in recognition of her international litigation practice and for her efforts in representing the rights of those seeking asylum in the United States.

Ana is a Clinical Visiting Lecturer at Yale Law School, where she co-teaches Advocacy in International Arbitration. She has also served as an Adjunct Professor of Law at Georgetown Law School, where she co-taught a course in the use of experts in federal courts.

Ana was born in Montevideo, Uruguay, and grew up in Louisville, Kentucky. She received her B.A., *summa cum laude*, from Transylvania University in 1996. She received her J.D., *magna cum laude*, from Harvard Law School in 2000, where she was an editor of the *Harvard Law Review*. In 2014, Ana also received a Master's in International Public Policy, *with distinction*, from the Johns Hopkins University, School of Advanced International Studies.

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Jon Landy, Co-Chair of the firm's International Disputes practice, focuses his practice on international and domestic arbitrations. He has experience before many of the world's leading arbitral institutions in matters that have spanned a range of jurisdictional law and subject matter, including an increasing emphasis in recent years on patent-licensing disputes. Jon's experience in these matters involves a range of industries—pharmaceuticals, medical devices, semiconductors, and mobile telephony—and spans a wide array of factual, legal, and expert areas.

He is an experienced litigator outside of the international arbitration context, including in trial and appellate courts throughout the United States, in both bench and jury trials, and in civil, commercial, and criminal matters.

Jon also has extensive experience representing law firms in legal malpractice matters, financial services institutions and multinational corporations in commercial litigation and government investigations, and labor unions in government investigations and civil litigation.

Jon graduated from Dartmouth College, *magna cum laude*, in 1995, and in 1998 from the Yale Law School, where he was senior editor of the *Yale Law Journal*. Before joining the firm in 1999, Jon was a law clerk to Judge Louis F. Oberdorfer of the U.S. District Court for the District of Columbia.

Jon is Clinical Visiting Lecturer at Yale Law School, where he teaches Advocacy in International Arbitration. Jon is a member of the advisory board of the Celiac Disease Program at the Children's National Health System in Washington, D.C.

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