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Attorney-Client Privilege in the Global Economy

By Jeremy H. Temkin
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The practice of law is increasingly global, involving more cross-border transactions giving rise to civil litigation and governmental investigations in multiple jurisdictions. This is especially significant in tax matters where multinational companies structure transactions to minimize their worldwide tax obligations. As a result, lawyers involved in planning cross-border transactions and those litigating subsequent disputes need to be cognizant of what privileges apply in all relevant jurisdictions and take steps to ensure that communications will be protected in each jurisdiction.

Privileges Applicable in the United States

In *United States v. United Shoe Machinery*, Judge Charles Wyzanski of the District of Massachusetts articulated the commonly used standard for defining the attorney-client privilege.

"The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." 89 F. Supp. 357, 358–59 (D. Mass. 1950).

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The *United Shoe Machinery* test makes clear that the attorney-client privilege only protects communications aimed at obtaining legal advice. Courts have split on the extent to which the attorney-client privilege applies to advice relating to the preparation of tax returns, and the Supreme Court recently declined to clarify the issue. *See* Jeremy H. Temkin, "Privilege Analysis Following Dismissal of 'In re Grand Jury'", New York Law Journal (May 18, 2023).

In addition to the attorney-client privilege, materials prepared in anticipation of litigation are protected

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by the attorney's work product doctrine. *Hickman v. Taylor*, 329 U.S. 495, 508–14 (1947); Fed. R. Civ. P. 26(b)(3)(A). In the Second Circuit and most other jurisdictions, the party asserting that materials are entitled to work product protection must show that they were "prepared or obtained *because of* the prospect of litigation," and not in the ordinary course of business. *United States v. Adlman,* 134 F.3d 1194, 1202 (2d Cir. 1998).

The work product doctrine can be broader than the attorney-client privilege because it applies to agents of attorneys such as investigators, *United States v. Nobles*, 422 U.S. 225, 238–39 (1975), and will typically only be deemed waived when a party "tak[es] actions inconsistent with its purpose, such as disclosing work product to its adversary or by placing privileged documents 'at issue' in a litigation," *New York Times v. United States Department of Justice*, 939 F.3d 479, 494 (2d Cir. 2019).

Privileges Applicable in Foreign Jurisdictions

The availability of privileges varies by country. For example, England and Wales recognize a legal advice privilege, which protects confidential communications between lawyers and their clients when the lawyers are acting in their professional capacity for the "dominant purpose" of giving or obtaining legal advice. *Civil Aviation Authority v. R Jet2.com* [2020] EWCA Civ 35.

These common law jurisdictions also apply a litigation privilege, which protects confidential communications between and among clients, their lawyers and third parties to obtain information or advice related to current or anticipated adversarial litigation, as opposed to investigative or inquisitorial proceedings. *See Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)* [2005] 1 AC (HL) 610 at ¶¶ 96-102 (Lord Carswell) (describing litigation privilege).

The European Union as an entity recognizes that communications between attorneys and their clients can be subject to a legal professional privilege. For example, in *Orde van Vlaamse Balies and Others v. Vlaamse Regering*, Case C-694/20, ECLI:EU:2022:963, ¶66 (Dec. 8, 2022), the E.U. Court of Justice applied Article 7 of the E.U. Charter of Fundamental Rights, which protects the confidentiality of communications between lawyers and their clients to strike down a Belgian decree that obligated lawyers to disclose potentially aggressive cross-border tax planning to authorities.

The European Union and most of its member states, however, exclude communications between in-house counsel and clients from the scope of that privilege. *See Akzo Nobel Chemicals and Akcros Chemicals v. Commission,* Case C-550/07P (Sept. 14, 2010).

E.U. member states that apply civil law principles generally do not recognize legal professional privilege, but they typically hold that lawyers are bound by a professional secrecy obligation not to disclose confidential client information.

This is not identical to the attorney-client privilege in the United States. For example, one court has noted that the professional secrecy obligation in Italy is not an evidentiary privilege, and that while the attorney-client privilege is absolute in the United States, "[a] foreign tribunal may compel disclosure if it determines the need for the information is sufficient to outweigh the secrecy obligation." *Gucci America v. Guess?*, 271 F.R.D. 58, 67 (S.D.N.Y. 2010) (internal quotation omitted).

What Privilege Law Applies in a Cross-Border Dispute?

Where a cross-border transaction gives rise to a dispute in the United States, a party may argue for the application of foreign law, claiming that it protects materials the party seeks to withhold or requires disclosure of material the party seeks to discover. In resolving disputes regarding which country's law is applicable to a dispute, U.S. courts will generally

require the party invoking foreign law to first show that it conflicts with the law that the court would ordinarily apply. This may be easier said than done.

In *Firefighters' Retirement System v. Citco Group*, retirement and pension funds sued to recover a $100 million investment loss. 2018 WL 2323424 at *1 (M.D. La. May 22, 2018). The plaintiffs sought to compel production of communications between the defendants' lawyers and the employees of an investment bank the defendants had hired to facilitate the underlying transaction. The defendants argued that the communications were protected under English privilege law primarily because their lawyers and the investment bank's employees were all based in the United Kingdom.

The court rejected that position, holding that the defendants did not meet their burden of showing that English privilege law conflicted with federal common law and Louisiana state law. In reaching this conclusion, the court observed that the defendants had only cited three U.K. cases and had failed to establish the substance of English privilege law with reasonable certainty, let alone that "a conflict of law actually exist[ed]."

Ultimately, however, the court concluded that the documents were privileged under Louisiana law. *See also, e.g.*, *Nuss v. Sabad*, 976 F. Supp. 2d 231, 241 (N.D.N.Y. 2013) (rejecting plaintiffs' motion to compel based on the purported absence of privilege under Mexican law because, "[d]espite Plaintiffs' substantial submissions as to Mexican law, they have not proved that it conflicts with New York's law on attorney-client privilege").

In cases where a party establishes the existence of a conflict between foreign law and the law of the forum jurisdiction (or is not required to show such a conflict), courts will apply choice-of-law principles to determine which country's privilege law governs. Courts in the Second Circuit (and many other jurisdictions) use a "touch base" analysis and apply "the law of the country that has the 'predominant' or 'the most direct and compelling interest' in whether…communications should remain confidential, unless that foreign law is contrary to the public policy of th[e] forum." *Mangouras v. Squire Patton Boggs*, 980 F.3d 88, 99 (2d Cir. 2020).

In *Gucci America v. Guess?,* Gucci America sought a protective order precluding disclosure of communications between its U.S. outside counsel, its U.S. employees and the in-house intellectual property counsel of its non-party Italian affiliate.

In determining whether to apply U.S. or Italian law, the court noted that "communications relating to legal proceedings in the United States, or that reflect the provision of advice regarding American law, 'touch base' with the United States and…are governed by American law, even [if] the communication may involve foreign attorneys or a foreign proceeding." *Gucci Am.,* 271 F.R.D. at 65. "Conversely, communications regarding a foreign legal proceeding or foreign law 'touch base' with the foreign country."

Ultimately, the court applied U.S. privilege law, concluding that the communications "touched base" with the United States because they addressed litigation strategy for the U.S. lawsuit, evidence collected in preparation for the U.S. lawsuit, and Gucci's investigation that became the subject of the U.S. lawsuit.

By contrast, in *Tulip Computers International v. Dell Computer,* a federal court in Delaware applied Dutch law in evaluating privilege claims raised in the course of a Dutch computer company's lawsuit against Dell for allegedly infringing on its U.S. patented motherboard design. 2002 WL 818061, at *1 (D. Del. Apr. 30, 2002).

During discovery, Dell sought to compel the production of a letter from a Dutch patent attorney to the plaintiff's C.E.O. regarding both the U.S. patent at the heart of the litigation as well as a related European patent. *Tulip Computers*, 2002 WL 31556497, at *1 (D. Del. Nov. 18, 2022).

After reviewing the documents *in camera*, the court applied Dutch law because the letter involved

the patent attorney's legal advice and review of the patents based on his expertise in Dutch law. Citing the Dutch Code of Civil Procedure, it concluded that "these documents fall within the privilege of non-disclosure [under Dutch law] since they involve information entrusted and sought in the capacity of [the patent attorney's] profession." *See also, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.,* 2005 WL 1925656, at *3, 5 (S.D.N.Y. Aug. 11, 2005) (applying English law to preclude discovery of certain documents exchanged between client and a member of the English bar relating to prospective litigation in England while ordering production of several other documents because defendants had failed to show that they were attorney-client communications that conveyed legal advice).

In limited circumstances, however, U.S. courts may apply U.S. privilege law even if the communications at issue do not "touch base" with the United States.

For example, in *Astra Aktiebolag v. Andrx Pharmaceuticals*, the plaintiff in a patent litigation sought to preclude discovery of communications with lawyers in various jurisdictions, including Korea. 208 F.R.D. 92 (S.D.N.Y. 2002). The court found that the communications in question did not "touch base" with the U.S. because they involved Korean attorneys providing legal advice on Korean law and litigation, but applied U.S. privilege law to protect the documents, finding that application of Korean law, which does not recognize privileges but has narrow discovery requirements, would offend principles of comity and public policy of the U.S. forum.

Finally, unlike claims of attorney-client privilege, courts do not apply a choice-of-law analysis to claims of work-product doctrine protection because the doctrine is procedural in nature and thus are subject to the law of the forum jurisdiction without consideration of which country has the greatest interest in the litigation. *Gucci America*, 271 F.R.D. at 73.

Conclusion

Counsel advising clients in cross-border transactions that implicate tax considerations in multiple jurisdictions must be conscious of both the extent to which their advice will be privileged in the country where they are acting and the privileges that may or may not be available in other jurisdictions (including the potential application of mandatory disclosure obligations imposed by certain jurisdictions, *see, e.g.*, Código Fiscal de la Federación [CFF], art. 197, Diario Oficial de la Federación [DOF] 31-12-1981, últimas reformas DOF 12-11-2021 (Obligation of Tax Advisors to Reveal Reportable Schemes).

Counsel further need to prepare for the possibility that the tax effects of a transaction will be disputed in more than one country and anticipate that an adverse party in each jurisdiction may contest privilege claims.

U.S. counsel involved in negotiating cross-border transactions should take care to ensure that U.S. privilege law will apply to any disputes that arise in the United States. To do so, they need to have a strong command of the scope of the privilege law applied in the implicated jurisdictions.

They should also take steps to ensure that advice regarding the U.S. implications of the transaction is provided by lawyers trained and based in the United States and their engagement letters should clearly describe the expectation that the transaction will have consequences in the United States and specify that they are being engaged to advise regarding those U.S. consequences.