Privilege and antitrust

Key issues and practical considerations

Terry Calvani, William Robinson, Nicholas Frey
October 4, 2017
Agenda on privilege

1. England and Wales
2. European jurisdictions
3. The United States
4. Asian jurisdictions
Today’s presenters

Terry Calvani

William Robinson

Nicholas Frey
Privilege in England & Wales

Key issues post RBS and ENRC
Global relevance of English law of privilege

- English law of privilege is relevant to any document in any jurisdiction if there is any chance it may end up before an English court or a UK regulator/prosecutor.

- Under English law, the application of privilege is a question of *lex fori*. Therefore, an English court will apply English law to determine whether a document or communication is protected by privilege, regardless of where the document was created, or who was involved in its creation.
# Refresher: Legal Advice and Litigation Privilege

## Legal Advice Privilege

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<th>You need:</th>
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<tr>
<td>• A communication (written or oral)</td>
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<tr>
<td>• Between client and lawyer</td>
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<tr>
<td>• Made confidentially</td>
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<tr>
<td>• For the purpose of giving or receiving legal advice</td>
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Legal advice privilege does **not** apply to communications between:

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<td>• A third party and a lawyer; or</td>
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<td>• A third party and the client to enable advice to be sought and given</td>
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## Litigation Privilege

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<tr>
<td>• A communication (written or oral)</td>
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<tr>
<td>• Between (1) client and lawyer or (2) client/lawyer and a third party</td>
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<tr>
<td>• Made confidentially</td>
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<tr>
<td>• Which came into existence for the dominant purpose of conducting that litigation</td>
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## Key points:

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<td>• Narrow definition of the ‘client’ in a corporation</td>
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<td>• ‘Lawyer’ includes in-house qualified lawyers, but not other professional advisors</td>
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<td>• Broad definition of ‘legal advice’</td>
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<td>• There must be a <strong>real likelihood</strong> of litigation – a mere possibility is not enough</td>
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<td>• Civil or criminal proceedings likely to be covered – investigations (even with regulator/prosecutor involvement) may not be</td>
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<tr>
<td>• Document must be created for the <strong>dominant purpose</strong> of conducting litigation</td>
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Recent case law: RBS Rights Issue Litigation [2016] EWHC 3161 (Ch)

Facts

- RBS shareholders were seeking to recover investment losses from RBS
- The claimants sought disclosure of interview notes from interviews with current and former RBS employees
- The interviews were carried out by in-house and external lawyers in relation to two internal investigations
- One of the investigations arose in response to subpoenas by a US regulator

RBS asserted that:

- The interview notes were subject to legal advice privilege
- The interview notes constituted lawyers’ privileged working papers
- The English court should apply US federal law under which the interview notes would be privileged
RBS Judgment – Key findings

Legal advice privilege
• The effect of Three Rivers (No. 5) was to limit the “client” to those authorized to seek and receive legal advice on behalf of the client corporation
• Authority to provide information to lawyers as part of internal or external regulatory investigations was not sufficient to attract privilege
• “Client” comprised only the company’s “directing mind and will”
• Leapfrog to appeal direct to Supreme Court granted but no appeal lodged

Lawyers’ working papers
• On the facts, the notes did not contain material that revealed a trend of advice and therefore were not protected by legal professional privilege

Litigation privilege
• Not argued on the facts
Recent case law: SFO v ENRC [2017] EWHC 1017 (QB)

Facts

• Allegations of overseas bribery and fraud
• Internal investigation carried out by external lawyers on behalf of ENRC
• SFO issued s.2 notice demanding production of documents created during the course of ENRC’s internal investigation:
  - Interview notes made by ENRC’s lawyers of evidence given to them by individuals during the investigation (including employees, former employees of ENRC and its subsidiaries and other third parties, e.g. suppliers)
  - Materials created by ENRC’s forensic accountants as part of a review of “books and records”
  - Documents presented by ENRC’s lawyers to its Board
  - Communications with a qualified lawyer who was not in a formal legal role
ENRC Judgment – Key findings

Litigation privilege

“Reasonable contemplation”

- A criminal investigation by the SFO is not an adversarial proceeding
- A criminal investigation does not necessarily equate to a reasonable contemplation of prosecution
- Prosecution is only reasonably contemplated if the person claiming privilege is aware, at the relevant time, of circumstances that would make prosecution likely

“Dominant purpose of conducting”

- Documents must be prepared for the sole or dominant purpose of conducting rather than avoiding litigation
- Documents created with the specific purpose or intention of showing them to the potential adversary in litigation are not subject to litigation privilege

Legal Advice Privilege

- Courts remain bound by the Three Rivers narrow interpretation of “client”
- Materials not gathered for the purpose of providing ENRC with legal advice

Only Board materials held to be privileged
Application to antitrust investigations

- RBS and ENRC will both be relevant – and deal with attempts to use privilege to shield the findings of an internal investigation from disclosure in subsequent litigation (RBS) and to the relevant regulator (ENRC)

- Uncertainty remains over whether an antitrust investigation constitutes an adversarial proceeding sufficient to trigger litigation privilege: Tesco v Office of Fair Trading [2012] CAT 6

- It is unclear how persuasive the judgment in ENRC will be with regard to proceedings related to the UK’s criminal cartel offense

- The availability of privilege may depend on the stage of the investigation/individual fact pattern when the document was created
Practical implications/considerations

• Do not assume that documents created abroad will not need to be disclosed in the UK
• UK regulators and prosecutors may be more likely to challenge privilege after ENRC/RBS
• Litigation privilege may be particularly difficult to claim/establish where extent of problem is unknown or unclear
• Need to consider in each case whether written work product is necessary
• Interview notes (falling outside litigation privilege) should show “trend of legal advice” – “transcript” will not be privileged
• Consider having separate counsel for individual prepare note of interview in appropriate cases
• Consider identifying (broad) “client” group at outset – and ensure document preservation/circulation notices are followed
• For litigation privilege, ensure that a document is created with the dominant purpose of conducting litigation
• Ensure that relevant privileged documents, where appropriate, are disclosed to regulators on a “no waiver” basis
Privilege in European jurisdictions

Cross-border perspectives
Privilege in other European jurisdictions

**Ireland (Common Law)**
- Recognizes in-house privilege
- Protects external advice

**European Commission**
- Separate rules – do **not** recognize in-house/non-EEA lawyer privilege

**France**
- No in-house privilege
- Some protection for external advice

**Spain**
- In-house advice arguably protected

**The Netherlands**
- Recognizes in-house privilege
- Protects external advice

**Germany**
- No in-house privilege
- Some protection for external advice

**Austria**
- No in-house privilege
- Some protection for external advice

**Switzerland**
- No in-house privilege
- Some protection for external advice
Disclosure and privilege after the Damages Directive

• Implementation of the “Damages Directive” (Directive 2014/104/EU) has significantly broadened the scope for claimants (and defendants) to seek and receive disclosure in litigation following on from a finding of a breach of EU or national competition law

• Limitations on the rights of disclosure under the Damages Directive include a requirement for Member States “to give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence” (Article 5(6)) and to ensure that disclosure is limited to what is proportionate (Article 5(3))

• It remains to be seen how the national courts of civil law Member States will approach this privilege issue in relation to significantly broader disclosure requests, and also whether this “new regime” will impact areas of law outside the competition sphere
Privilege in the United States

Cross-border perspectives
Types of privilege protection

The Legal Professional Privilege in the United States

The Attorney-Client Privilege

• Protects from discovery the essence of the communications between the client and lawyer and only extends to information given for the purpose of obtaining legal representation

• Contrary to the misperception of some business executives, information cannot be placed under an evidentiary “cloak” of protection simply because it has been told or copied to the lawyer

The Work Product Doctrine

• Protects a lawyer’s notes, observations, thoughts and research from discovery processes

• This protection serves to strengthen the ability of counsel to adequately represent the interest of his or her client, but unlike the attorney-client privilege is more limited and is not absolute
Privilege in the United States

Some important caveats

Little Supreme Court authority

- Most of the law in this area is made in the lower courts, and as a result the treatment of these issues can vary among the appellate circuits.

- Accordingly, it is very important to consult the law of the forum when you confront an issue

The choice of law issue must be confronted before analyzing the issue

- Foreign law may govern the appropriate treatment of the professional privilege in US courts

The US antitrust authorities have traditionally applied *lex fori* to the attorney client privilege even where conflict of law principles might provide otherwise

- Thus communications between foreign in-house lawyers and lawyers not licensed in the forum, e.g., the United States, with their corporate clients might be accorded the legal professional privilege in the United States even when their home courts might reach a different decision
# The United States and the UK: comparisons

## Key differences between US and UK regimes

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<th>Issue</th>
<th>UK</th>
<th>US</th>
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<td>Third party communications covered by privilege in absence of actual litigation</td>
<td>No, only if litigation is reasonably in prospect</td>
<td>Yes, provided purpose is to assist lawyer in providing advice to the client</td>
</tr>
<tr>
<td>Who is the client?</td>
<td>A limited group within the company – only those appropriately authorized to give instructions to the lawyers and act on their advice</td>
<td>Any employee providing information to form the basis of legal advice (federal and most states)</td>
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<td>Which law applies?</td>
<td>Law of the forum – English law</td>
<td>Sometimes the law of the country in which the privileged communication took place</td>
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Privilege in Asia

Cross-border perspectives
Privilege in Asia – Hong Kong

Asia is legally and geographically diverse, comprising both common law jurisdictions (such as the Hong Kong and Singapore) and numerous civil law jurisdictions.

Basic Law of Hong Kong

- Article 8: “The laws previously in force in Hong Kong, that is, the common law … shall be maintained, except for any that contravene this Law. …”

- Article 35 of the Basic Law: “Hong Kong residents shall have the right to confidential legal advice. …”

- Article 84: “The courts of the Hong Kong Special Administrative Region … may refer to precedents of other common law jurisdictions”
Privilege in Hong Kong

**Competition Ordinance** (Cap 619)

- Section 58 Legal Professional Privilege
- “[T]his Part does not affect any claims, rights or entitlements that would ... arise on the ground of legal professional privilege”
- Competition Commission guide on “Investigation Powers of the Competition Commission and Legal Professional Privilege”

**Other examples**

**Securities and Futures Ordinance** (Cap 517), Section 380(4)

**Prevention of Bribery Ordinance** (Cap 210), Section 15
Privilege in Hong Kong

- The common law of Hong Kong delineates the range of legal professional privilege:
  - Litigation privilege – same position as in England and
  - Legal advice privilege – *CITIC Pacific Ltd -v- Secretary for Justice and another* [2015] HKCA 293 (29 June 2015) (*CITIC No. 2*)

**CITIC No. 2**
- CITIC sought to claim legal advice privilege in relation to documents and records of communications seized pursuant to a search warrant
- The issue: whether legal advice privilege would attach to those confidential communications between the in-house lawyers and other employees of CITIC Pacific, as a part of information gathering exercise, for the dominant purpose of seeking legal advice from the external lawyers of CITIC
Privilege in Hong Kong

CITIC No. 2

• The Court of First Instance followed Three Rivers (No.5) – legal advice privilege did not apply to such communications

• The Court of Appeal, having cited Article 35 of the Basic Law, stated:
  - “55. In the context of a corporation, where the necessary information may have to be acquired by the management from employees in different departments or at various levels of the corporate structure, there is a need to protect the process of gathering such information for the purpose of getting legal advice. It would be meaningless to have a right to confidential legal advice if the management is hampered in such process by the concern that statements taken in that process could be open to discovery”

• The Court of Appeal therefore concluded:
  - “63. To sum up, we respectfully disagree with the restrictive definition of client in the context of legal advice privilege as laid down by the [English] Court of Appeal in Three Rivers (No. 5). As the rationale for LPP is equally applicable to litigation privilege and legal advice privilege, there has to be effective and meaningful protection for confidentiality in the process of obtaining legal advice in the litigious as well as the non-litigious context
Regulatory investigation scenario

1. Competition regulator
   - disclosure
   - Whether the interview notes are disclosable?
   - Whether the expert reports are disclosable?

2. External lawyers
   - seek / receive legal advice

3. In-house lawyers
   - A. interview notes
       - Company employees
         - B. expert reports

4. External experts

Company employees

Company
Privilege in Singapore

- **Evidence Act** (Cap 97)
  - “Section 128. No advocate or solicitor shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate or solicitor by or on behalf of his client. …”

- **Skandinaviska Enskilda Banken AB (Publ), Singapore Branch -v- Asia Pacific Breweries (Singapore) Pte Ltd and others** [2007] SGCA 9 (22 February 2007)
  - Having characterized **Three Rivers (No. 5)** as a “legal hiccup at common law in recent times,” the Singapore Court of Appeal stated:
    - “41. The only relevant issue is whether the communication is made for the purpose of obtaining legal advice, and if so, the communication falls within the privilege, provided the other requirements of the privilege are present, viz, that the communications are confidential in nature, and the purpose of the communication is for the purpose of seeking legal advice”
### Privilege in Asia: civil law jurisdictions

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<th>Jurisdiction</th>
<th>Japan</th>
<th>South Korea</th>
<th>Mainland China</th>
<th>Indonesia</th>
<th>Vietnam</th>
<th>Taiwan</th>
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<tr>
<td><strong>General privilege principles</strong></td>
<td>A lawyer has an obligation to keep the information that the lawyer receives during the course of discharging the lawyer’s professional duties confidential, pursuant to the <em>Attorney Act of 1949</em> (Article 23) and the <em>Code of Attorney Ethics of the Japan Federation of Bar Associations</em>; a violation of such obligation is a criminal offence, pursuant to the <em>Penal Code of 1907</em>.</td>
<td>LPP as such does not exist under South Korean laws; however, a lawyer has an obligation to keep any client-lawyer communication confidential, pursuant to the <em>Attorney-at-Law Act</em> (Article 26) and the <em>Korean Bar Association’s Ethics Code for Lawyers</em> (Article 16); a violation of such confidentiality is a criminal offense, pursuant to the <em>Criminal Act</em> (Article 317).</td>
<td>LPP as such does not exist under PRC laws; however, a lawyer has an obligation to keep the information that the lawyer receives during the course of discharging the lawyer’s professional duties confidential, pursuant to the <em>Law on lawyers</em> (Article 38).</td>
<td>A lawyer has an obligation to keep the information that the lawyer receives during the course of discharging the lawyer’s professional duties confidential, pursuant to the <em>Advocate Law No. 18/2003</em> and the <em>Code of Ethics for Indonesian Advocates</em>.</td>
<td>A lawyer has an obligation to keep the information that the lawyer receives during the course of discharging the lawyer’s professional duties confidential, pursuant to the <em>Law on Lawyers</em> (Article 29).</td>
<td>A lawyer has no obligation to keep the information that the lawyer receives during the course of discharging the lawyer’s professional duties confidential, pursuant to <em>Article 39 of the Code of Ethics for Lawyers</em>.</td>
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| **Investigation** | A lawyer also has the additional ground for refusing to disclose the client’s confidential information, pursuant to the *Criminal Procedure Act* (Articles 105 and 222). | A lawyer has the additional ground for resisting a seizure of a confidential document "entrusted to the lawyer," pursuant to the *Criminal Procedure Act* (Article 112). | The government may not conduct any audio surveillance when a lawyer interviews a client, pursuant to the *Law on lawyers* (Article 33), and a lawyer also has the additional ground for refusing to disclose the client’s confidential information, pursuant to the *Criminal Procedure Law* (Article 46). | Authorities may not seize a lawyer’s documents without a Court order, unless otherwise permissible under another statute, pursuant to the *Criminal Procedure Code* (Article 43). | Apparently weak protection due to the *Criminal Procedure Code* (Article 58.3): “depending on each stage of the procedure, when collecting documents and/or objects related to the cases, defense counsels shall have to deliver them to investigating bodies, procuracies or courts.” | Same obligation applies, pursuant to *Article 245 of the Code of Criminal Procedure*. |

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Privilege in Asia: Civil law jurisdictions – Practical impact

• Dawn raid or request for information:
  - a company has no ability to resist disclosure on grounds of legal professional privilege

1. Storing your confidential documents with your external lawyer – away from your premise or possession – as the external lawyer has the legal right, or the obligation, to resist disclosure

2. Japan FTC considered, but rejected, the introduction by statute of legal professional privilege in antimonopoly investigations (April 2017), but is considering guideline
Questions
Forthcoming webinar topics in our antitrust webinar series

- **Antitrust in Asia: business impact of fast-evolving competition laws**
- **Robinson-Patman Act: what you should know**
- **Antitrust compliance considerations**

- We welcome suggestions for future webinars. Please send your suggestions to [kaethe.carl@freshfields.com](mailto:kaethe.carl@freshfields.com).
Thank you for joining us

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Host: Terry Calvani

Terry has over 45 years of experience in antitrust law. He has extensive experience in acquisitions/joint ventures and their review by numerous competition agencies, civil and criminal investigations by both federal and state authorities, and antitrust counseling to a large number of companies and several trade associations.

Prior to joining Freshfields, Terry served as Commissioner of the US Federal Trade Commission (1983 – 1990) where he was acting as Chairman from 1985 to 1986, and later as a member of the Board of the Irish Competition Authority and Director of the Criminal Cartel Division.

Terry has taught antitrust law at Vanderbilt University School of Law, Duke University School of Law, Harvard Law School, Trinity College, Dublin, Columbia Law School, and Cornell Law School.
Panelist: William Robinson

William is a hands-on, practical and creative commercial litigator who specializes in multijurisdictional disputes, investigations and regulatory issues.

In addition to commercial disputes, William’s practice spans a range of risk management issues, including antitrust investigations and litigation, corporate crises and investigations, antibribery and corruption and sanctions issues.

William’s clients span a wide variety of sectors, including consumer products, food, tobacco, technology and private equity. His work is multinational and involves coordinating strategies across borders.

William has been based in Hong Kong since 2013 and leads the Asia Dispute Resolution group.
Panelist: Nicholas Frey

Nicholas advises on competition law and commercial disputes.

He has particular experience of competition litigation, such as cases involving gas-insulated switchgear, power cables, marine hoses and credit-card charges.

Nicholas has also co-ordinated global investigations, including investigations into global benchmark rates such as LIBOR, and abuse of dominance; and led on complex domestic and multijurisdictional commercial disputes, including litigation before the UK and European courts (both at General Court and ECJ levels) and arbitration.

Clients typically come from the TMT, general industry and financial services sectors, but Nicholas has also worked for energy, aviation, mining and publishing clients.

Nicholas is a native Swedish speaker, and also has French, Russian, Danish and Norwegian language skills.