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In court in England with international lawyers? Your privilege is protected

In *PJSC Tatneft v Bogolyubov and others* [2020] EWHC 2437 (Comm), the English Court examined when a foreign lawyer's advice is privileged from disclosure.

When a case is litigated in England, there is almost always disclosure. This means all parties are normally obliged to disclose documents (usually, the documents that help the other side's case or which damage the party's own case). Disclosure is often a critical factor in the outcome of litigation. The Courts are currently reviewing the disclosure system in England, with the aim of making it cheaper and more focussed. However, it remains one of the most time-consuming phases in the litigation process, particularly if there are disputes about whether certain documents should be disclosed. One of the most frequent grounds for challenge is over whether or not a document is privileged, because privileged documents can be withheld from the other party.

In the recent case of *Tatneft v Bogolyubov*, Tatneft tried to withhold documents from disclosure on the grounds of privilege, and one of the defendants (Mr Kolomoisky) challenged Tatneft's privilege claim. Mr Kolomoisky argued that because Tatneft's in-house lawyers do not benefit from the Russian equivalent of privilege under Russian law, they should not benefit from privilege under English law. The English court disagreed. It held that English legal advice privilege applies to Russian in-house lawyers, regardless of their qualifications or standing under Russian law. This judgment will be crucial to parties engaged in legal proceedings with an international element, particularly when the equivalent foreign rules on privilege are not the same as the rules in England.

What is legal advice privilege?

Legal advice privilege, in simple terms, covers legal advice communications. The key points are:

- It applies to all lawyers (both external and in-house) who are members of the legal profession.

- It applies to confidential communications made in a legal context (i.e. not informal conversations outside of a legal relationship or context).
- It applies to communications where the dominant purpose is to obtain or give legal advice.
- It applies between a client and their lawyer. Where the client is a corporate client, it only applies to communications with employees who are authorised to obtain legal advice (i.e., individual employees within a defined "client" group).

Does it cover the legal advice of foreign lawyers?

Under English law, legal advice privilege extends to foreign lawyers. However, in *Tatneft*, the court examined whether the status of the foreign lawyer under their domestic law affects the position.

For English-qualified lawyers, legal advice privilege will only apply where the lawyer is a member of the legal profession. In practice, that means they hold a relevant qualification and belong to the relevant professional body. In *Tatneft*, Mr Kolomoisky argued that by extension, privilege only applies to foreign lawyers who are "appropriately qualified". Mr Kolomoisky argued that Tatneft's inhouse were not appropriately qualified as they were not Russian Advocates. Under Russian law, only Advocates can assert a concept equivalent to privilege (Advocates' secrecy).

However, the court dismissed Mr Kolomoisky's argument that privilege did not apply. It concluded that the requirement that English lawyers have a relevant qualification and membership of a professional body does not extend to foreign lawyers. Instead, the rule of privilege extends to all foreign lawyers, irrespective of their qualifications.

The only requirement is that the foreign lawyer is acting “*in the capacity or function of a lawyer*”.

What does this mean?

This is a welcome judgment for parties to litigation who have legal advisers in multiple jurisdictions. While there are a number of tests under English law that must be satisfied for privilege to apply, it suggests that a challenge based on the qualification or status of a foreign lawyer will not succeed.

However, caution should be exercised in relying on this judgment. Privilege is a hotly contested issue in many cases where disclosure is likely to be important, and case law often evolves and is refined. Any party with an international dispute would always be well advised to have a discussion at the outset with all its lawyers in the different relevant jurisdictions, to determine how best to protect privilege. This is often simple: for example, asking lawyers in one jurisdiction to instruct inhouse or external lawyers in another jurisdiction to take steps on privileged terms, rather than those lawyers taking the steps of their own volition.

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