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PRIVILEGE IN ASIA PACIFIC

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Introduction

We are proud to present the fourth edition of our legal guide to "Privilege in Asia Pacific".

The Guide will be of particular interest to businesses engaging in cross-border activities between the highlighted jurisdictions. With the addition of a special chapter on England & Wales, the Guide now covers the law of legal professional privilege or similar rights of confidentiality across a total of 21 jurisdictions.

Legal professional privilege is a complicated but important issue not only in the context of legal proceedings but also corporate investigations. Many enforcement actions either emanate from or involve long-arm jurisdictions outside Asia and span across many jurisdictions in Asia. Given for example the English Bribery Act's broad jurisdiction and extra-territorial reach coupled with aggressive enforcement agencies, clients around Asia (both in civil and common law jurisdictions) are keen to understand how the authorities in England will apply the law of privilege, in addition to how the law is applied across Asia.

Moreover, although English case law is persuasive in most common law jurisdictions, legal advice privilege is an area in which a number of common law jurisdictions, such as Australia, Hong Kong and Singapore, have chosen to depart from English case law. Whilst English case law has confined the concept of the "client" to only those within the client company who are tasked with instructing the lawyers and obtaining their advice on behalf of the company, case law in Hong Kong and Australia adopt a broader approach and now even protect documents of the client organisation which are produced for the dominant purpose that they or their contents be used to obtain legal advice. By way of another example, whilst English law on legal advice privilege does not protect communications involving a third party (unless that party is a conduit/agent for communication between the client and the lawyers and he/she performs no other function), Singapore adopts a broader and more flexible approach. Communications to and from third parties may be protected by legal advice privilege provided that they were made for the dominant purpose of submission to legal advisers. Such protection will extend to communications to/from a third party even if that third party was more than a conduit/agent of the client provided the dominant purpose test is satisfied. Given such notable divergence in common law, we hope that the new chapter on England & Wales and a related comparative question in each of the other 20 chapters across Asia-Pacific will be relevant particularly to multinational companies who operate numerous subsidiaries across borders.

The concept of privilege is not universally recognised across the Asia-Pacific region and those countries where protection exists apply different tests. As a rule of thumb, jurisdictions can generally be divided into those with common law and those with civil law roots. Common law jurisdictions (eg, Australia, Hong Kong, Singapore and India) tend to provide for an obligation on the parties to disclose all relevant documents in civil proceedings, whereas civil law jurisdictions (eg, Japan, China and Indonesia) require parties only to submit to the process the documents on which they wish to rely. As a consequence, common law jurisdictions tend to provide for fairly robust rules which allow the party to claim privilege, whereas civil law jurisdictions will often only impose a duty of confidentiality upon the legal adviser, but will not provide for rights of privilege for the client. In the absence of an express statutory or procedural provision in civil law jurisdictions, authorities are entitled to demand that the client grant access to confidential documents or communications and the client is required to supply the requested information in a prompt, full and accurate manner. As a result, the rights of confidentiality are of limited assistance in enforcement actions.

The rules are, however, not uniform between jurisdictions on the same side of the common/civil law divide. For example, some common law jurisdictions which recognise the concept of privilege do not extend it to legal advice provided by foreign lawyers or in-house lawyers (eg Malaysia). In some civil law jurisdictions, official discussions are being held as to whether legislation should be introduced to protect privilege in limited circumstances. In Japan, for example, discussions are underway as to whether to introduce a limited lawyer-client privilege protection against investigation relating to cartel issues by the Fair Trade Commission. In Korea, recent high-profile cases have brought the issue of legal privilege into spotlight. The Korean Bar Association has been campaigning for the introduction of legislation on legal privilege similar to the protections offered in common law jurisdictions.

We hope that the Guide will prove to be a useful resource to those who seek a preliminary understanding of the different rules of privilege not only across the Asia-Pacific region but also in England and wish to maximise protection of their legally sensitive documents. The Guide owes much to the co-operation of the law firms who have contributed chapters on their respective jurisdictions. We would like to express our gratitude to them for their input. As always, we welcome any feedback from readers. Please contact us if you have any suggestions or comments.

The Guide complements other titles in the Herbert Smith Freehills series, including the "Guide to Dispute Resolution in Asia Pacific", the "Guide to Financial Services Regulation in Asia", the "Guide to Anti-corruption Regulation in Asia", "Gifts and Entertainment - compliance with anti-bribery regulation in Asia" and the "Guide to Private Wealth in Asia", all of which are updated on a regular basis. Please contact us at asia.publications@hsf.com if you would like hard/soft copies of the Guide or other Herbert Smith Freehills publications.

The information provided in this Guide is accurate as at April 2019. The Guide is for reference purposes only and does not constitute legal advice. We recommend that you seek specific legal advice before taking any action based on this publication.



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13 CONSECUTIVE YEARS IN
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CHINA/HONG KONG
CHAMBERS ASIA PACIFIC
2007-2019

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16 CONSECUTIVE YEARS IN
DISPUTE RESOLUTION,
HONG KONG
LEGAL 500 ASIA PACIFIC
2004-2019

CHINA & HONG KONG
DISPUTE RESOLUTION
INTERNATIONAL FIRM OF
THE YEAR
CHAMBERS ASIA PACIFIC
2016-2019

Indonesia



1. Is there a recognised concept of legal privilege or similar special rights of confidentiality in respect of communications involving lawyers? If so, what kinds of communications would attract such rights and what are the exceptions?

There is no recognised concept of legal privilege under Indonesian law, but it does recognise special rights of confidentiality in respect of communications involving lawyers and their clients. Law No 18 of 2003 concerning Advocates ("Advocate Law") provides that advocates, ie qualifying lawyers as defined in the Advocates Law, must and are entitled to keep confidential, all communications with, and any information received from, their clients as a result of their professional relationship. In addition to the Advocate Law, the Indonesian Advocates' Code of Ethics also provides similar obligations on confidentiality.

The Advocate Law covers all communications between clients and qualifying lawyers, defined as lawyers registered to practice Indonesian law with one of the recognised bar associations. The Advocate Law and Indonesian Advocate Code of Ethics provide that it is the lawyer's obligation to keep all communications confidential and maintain such confidentiality even after the legal relationship between the lawyer and the client has ended.

There are no exceptions to these protections.

2. What are the different categories of privilege or other similar special rights of confidentiality (for instance, in the common law context, legal advice privilege, litigation privilege, common interest privilege and without prejudice privilege for settlement negotiations)?

The Advocate Law does not provide for different categories or levels of confidentiality. It only provides that all communications or any given information from clients as a result of their professional relationship (ie client-lawyer relationship) are to be treated in confidence.

Separately, Indonesian law also recognises the concept of "without prejudice" (*sans préjudice*), which provides that communication (eg offers for settlement) between lawyers is to be treated in confidence and may not be used, shown or presented as evidence in court proceedings provided that such communication is labelled "Sans Prejudice".

The application of this rule came up in 2008 by the Central Jakarta District Court in an industrial design dispute. In that case, a party's counsel tendered as evidence, communication marked "Sans Prejudice". The other party filed an objection to the judges of Central Jakarta District Court who adjudicated the case and also filed a complaint to the Indonesian bar association for the counsel's conduct. The Indonesian bar association did not find the counsel's conduct to violate the ethical codes because the communication in question, despite labelled "Sans Prejudice" was not sent by and between lawyers. The court, however, decided to exclude the evidence given the "Sans Prejudice" mark. It is not clear if this amounts to an expansion of the application of the rule on "Sans Prejudice" communication to cover communications involving non-lawyers or whether this was an aberration.

3. What types of documents may be covered by legal privilege or other similar special rights of confidentiality?

The Advocate Law does not specify types of documents that should be treated as confidential. The common understanding is that such confidentiality covers all forms of communications and correspondence between lawyers and their clients as long as they were generated or provided as a result of the lawyer-client relationship.

4. What are the criteria required to establish legal privilege or other similar special rights of confidentiality?

There is no concept of legal privilege under Indonesian law as mentioned above.

As regards the concept of confidentiality, they may be claimed over all communications between clients and their Indonesian-registered lawyers are covered by the Advocate Law and/or Indonesian Advocate Code of Ethics.

5. When compared to England & Wales, is the law in this jurisdiction different on privilege or another similar right of confidentiality? Where relevant, state the key similarities or differences.

One significant difference is the absence of the concept of privilege under Indonesian law.

The concept of confidentiality, in that regard, is less expansive as it only covers, arguably, communications with Indonesian-registered lawyers.

6. Are there circumstances in which documents may be protected from full discovery in court proceedings or investigations which are confidential but not privileged (for example, documents containing trade secrets)?

No. Indonesian civil procedure provides that the parties present their own evidence. There is no discovery or disclosure process compelling parties to disclose documents on which they do not wish to rely.

Indonesian civil courts do not play an active role. Their examination is confined to the evidence (ie documents) presented before them.

7. Is privileged material or material that is protected by another similar right of confidentiality created for the purpose of one legal action still privileged or protected by a similar right of confidentiality in subsequent litigation?

Confidentiality applies generally to all documents and/or information between lawyers and clients communicated as a result of their professional relationship. As such, confidentiality is not created on a case per case basis (ie for one specific legal action only). Therefore, the level of confidentiality that applies to any given document applies similarly in every proceeding (ie subsequent legal action or litigation process).

8. Under what circumstances may privilege or another similar right of confidentiality not apply or be lost?

As discussed in the answer to question 1 above, confidentiality and/or privilege apply to any communications and/or information between clients and lawyers. The protection under the Advocate Law is specific to an Indonesian licensed lawyer. It is the lawyer's obligation to keep all communications confidential and maintain such confidentiality even after the legal relationship between the lawyer and the client has ended.

The Advocate Law and/or Indonesian Advocate Code of Ethics are silent on particular circumstances that may exclude or waive such protections.

However, different sets of legislation such as the Indonesian criminal code also provide broad rules on "hampering investigations" or "obstruction of justice" which can be translated to mean that if an advocate refuses to provide a particular communication with its client to the authority, the advocate can be considered to be hampering investigations. We have seen instances where local authorities sought to rely on this argument when requiring a particular document to be produced and this has triggered an on-going debate within the legal community on whether the confidentiality obligations under the Advocate Law is effective. No court jurisprudence has dealt with this issue to date and therefore, it remains to be seen as to how the judiciary will resolve this issue going forward.

9. What are the requirements for the disclosure of documents in civil and criminal proceedings?

Indonesian civil procedure does not provide for compulsory disclosure of documents. The parties will produce their own evidence to support their respective case.

In criminal proceedings, however, the position is unclear as generally criminal sanctions can be imposed if a party is considered to be hampering an investigation. Procedural laws give the court discretion to order specific disclosure of documents critical to the facts of a case, but the courts very rarely make such orders.

10. How are legally privileged or other similarly confidential documents treated in the disclosure process in civil and criminal litigation?

As discussed above, Indonesian civil procedure does not provide compulsory disclosure of documents and the parties present only documents that they wish to rely on. While in criminal proceedings, the court might order specific disclosure of documents critical to the facts of a case. There is, however, no specific procedure at law as to how to deal with the disclosure of confidential documents and it remains at the discretion of the court to deal with such disclosure as is appropriate in the circumstances.

11. Would communications generated in another jurisdiction and/or between a party and its foreign legal advisers (whether the foreign legal advisers are based in Indonesia or otherwise) be covered by privilege or other similar rights of confidentiality? Which law determines whether documents are protected by privilege or other similar rights of confidentiality?

The Code of Conduct of Indonesian Advocate Organisation ("Code of Conduct") provides that the provisions in the Code of Conduct also apply to foreign lawyers practising in Indonesia, which means that foreign lawyers practising in Indonesia must observe the obligations of confidentiality mentioned above in the answer to question 1.

12. What are the rules, if any, relating to legal privilege or other similar special rights of confidentiality in arbitration proceedings?

In arbitrations in Indonesia, the arbitral tribunals typically adopt the Indonesian procedure rules in relation to the presentation of documents in court proceedings.

13. Are legally privileged or other similarly confidential documents protected from disclosure to enforcement and regulatory authorities?

No, documents can be disclosed to enforcement or regulatory authorities in some situations.

In a recent high-profile corruption case, the constitutional court ordered a secretly recorded telephone conversation between a lawyer and their client to be played in an open hearing. This case, despite being a very specific situation regarding corruption and the public, may result in the courts being more willing to order confidential documents or communications to be disclosed in the future.

Further, fairly recently, specific regulatory and enforcement authorities such as the Commission on the Eradication of Corruption have been provided with the power to seize or request the disclosure of documents, in which case there is no right to withhold the documents on the basis of confidentiality or similar rights of privilege. Further, relevant regulations give the authorities the right to send a summons letter to a party who is resisting the seizure of confidential client-lawyer communications or other types of confidential information where such documents are required for the investigation.

14. Where legally privileged or other similarly confidential documents are disclosed to enforcement and regulatory authorities or to other third parties will the privilege or similar special rights of confidentiality be lost in all circumstances?

Indonesian law does not recognise the concept of partial waiver. If a client wishes to ensure that a particular communication with his lawyer remains confidential, then it is best to address the communication to the lawyer only and to avoid copying additional parties. There are only very rare circumstances in which documents may be disclosed voluntarily to a limited number of third parties in confidence or to the regulatory authorities without losing the right of confidentiality more generally.

15. Are there specific rules or a protocol on e-disclosure or the disclosure of electronic documents? Do the same rules of privilege or other similar rights of confidentiality apply to electronic documents?

Indonesian law does not have specific rules on e-disclosure or the disclosure of electronic documents. However, since the Advocate Law does not specify types of documents that should be treated as confidential, it should cover all forms of communications and correspondence between lawyers and their clients including electronic documents.

16. Do communications by in-house lawyers enjoy legal privilege or other similar rights of confidentiality?

Yes, provided that the in-house lawyer is a licensed Indonesian lawyer. In this situation, it is the licensed lawyer who owes the duty to his/her company pursuant to the Advocate Law.

17. Are there circumstances in which communications may be covered by privilege or a similar right of confidentiality where such communications are with other non-lawyer professionals giving legal or non-legal advice (eg accountants)?

No. The confidentiality rights only apply to communications between lawyers and their clients.

18. What practical steps can be taken to establish and maintain legal privilege or similar rights of confidentiality when creating, sending or storing documents generated in-house and by external counsel?

As stated above, lawyers must keep all communications with their clients confidential. If a client wishes to ensure that a particular communication with their lawyer remains

confidential, then it is best to address the communication to the lawyer only and to avoid copying additional parties. It is also advisable to label each document or communication sent to the lawyer as "Subject to Confidentiality Protections pursuant to the Advocate Law" and to store all case-related original documents in the lawyer's office (if possible).

As regards company and in-house counsel communication, ensure that the communication clearly states that the information being sought or discussed is in relation to procuring a legal advice. Business and legal advice should not be mixed so as to avoid the uncertainty of the privilege status. A higher degree of precaution should be taken when communicating sensitive information with a third party or across the business. Consider to seek and obtain the information verbally instead of written communication between non-lawyer employees of the company and a third party.

As a general approach, consider keeping password-protected sensitive and privileged information with the in-house legal team or, if possible and practicable, storing the information off-site in a more privilege-friendly jurisdictions. Lastly, disclosure of information in a legal proceeding should consider the risk of wider loss of confidentiality (for example, cross reference to other communication or documents).

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Thailand



1. Is there a recognised concept of legal privilege or similar special rights of confidentiality in respect of communications involving lawyers? If so, what kinds of communications would attract such rights and what are the exceptions?

The Thai legal system does not have a direct or exact equivalent to the common law concept of legal professional privilege. A similar concept, however, exists which seeks to protect confidential information provided by a client to his lawyer. This concept enables lawyers to refuse to disclose confidential information acquired or made known to them in their professional capacity as lawyers.

The concept mentioned above is embodied within several laws and regulations as follows:

- the Penal Code contains a provision that prohibits a lawyer from disclosing confidential information or a "private secret" of another person, obtained or known to him by virtue of his/her profession, in a manner which is likely to cause injury to any person. The offence carries the penalty of imprisonment and a fine;
- in relation to court proceedings, the Civil Procedure Code and the Criminal Procedure Code contain provisions which seek to enable lawyers to refuse to give oral evidence or produce documentary evidence that covers "any confidential document or fact" entrusted to or imparted by a person to him/her in his/her capacity as a lawyer. "Confidential document or fact" is not defined but it is likely to cover information that cannot be obtained from publicly available or secondary sources. The court has the power to compel disclosure if it considers that the refusal to do so is unreasonable; and
- the Regulation of the Lawyers Council on Conduct of Lawyers 1986 (which binds all lawyers) imposes a similar duty of confidentiality. Under the Regulation, a lawyer has a duty not to disclose any secret of his client obtained by virtue of his/her profession, unless allowed by the client to do so or in cases where the disclosure is ordered by the court. Although the regulation does not have the force of law, violation of its provisions may result in a lawyer being disbarred.

It is possible for a lawyer to rely on the laws and the regulation mentioned above to justify non-disclosure of information received from a client. An exception to these rules would apply where the client allows the lawyer to disclose the information or

where the court deems that the lawyer has no reasonable grounds to refuse disclosure in court proceedings.

However, client cannot rely on the laws and regulations mentioned above to refuse to disclose any information - regardless of whether this is information entrusted or imparted to a lawyer or contains legal advice received from a lawyer.

2. What are the different categories of privilege or other similar special rights of confidentiality (for instance, in the common law context, legal advice privilege, litigation privilege, common interest privilege and without prejudice privilege for settlement negotiations)?

There are no different categories of rights of confidentiality under Thai law.

3. What types of documents may be covered by legal privilege or other similar special rights of confidentiality?

The laws do not prescribe the types of document that would be protected. Therefore, any type of document or communication would be protected provided it passes as a "confidential document or fact" or "private secret".

4. What are the criteria required to establish legal privilege or other similar special rights of confidentiality?

The criteria for protection are (i) the information must be a "confidential document or fact" or a "private secret" and (ii) the lawyer must have acquired it in his capacity as a lawyer or in the course of exercising his/her profession. It is for the party who refuses to produce or disclose any particular information or fact to argue that the information is "confidential". The court has the discretion to consider the matter on a case by case basis. If the court considers that the information is not confidential, the court has the right to compel disclosure.

5. When compared to England & Wales, is the law in this jurisdiction different on privilege or another similar right of confidentiality? Where relevant, state the key similarities or differences.

Generally speaking, the Thai legal system does not recognize the concept of legal privilege in anywhere near the same

degree as in England and Wales where it has been recognized by the English courts as a fundamental human right; thus gaining an absolute protection. As explained in the answer to question 1 above, while there may be different bodies of law which offer a similar right of confidentiality by prohibiting the disclosure of confidential information in a manner which is likely to cause injury or harm to another person, Thai courts still have the overriding power to compel disclosure if it considers that the refusal to do so is unreasonable. Thus the concept of privilege does not enjoy the absolute protection in Thailand as it does in England and Wales. Moreover, the concept of privilege is not as clearly distinguished in Thai law as it is in England and Wales. In addition, there is no distinction made in Thailand between different types of privilege, such as legal advice privilege, litigation privilege and other forms of privilege under English law.

6. Are there circumstances in which documents may be protected from full discovery in court proceedings or investigations which are confidential but not privileged (for example, documents containing trade secrets)?

As mentioned above, documents may be protected by means of confidentiality under the applicable laws. Moreover, specific types of documents may be protected under the laws, including trade secrets under the Trade Secret Act B.E. 2545 (2002), medical information of a patient under the National Health Act B.E. 2550 (2007), information which may have an adverse effect on the Thai monarchy under the Official Information Act B.E. 2540 (1997), credit information under the Credit Information Business Act B.E. 2545 (2002) and transmission of personal computer data under the Computer-related Crimes Act B.E. 2550 (2007).

Under Thai law, a witness can refuse to testify or submit confidential information to the court. However, the court has the power to summon a person who possesses confidential information or a person of authority in relation to such information in order to question whether it is reasonable to keep such information confidential. If after questioning, the court still deems that there are no reasonable grounds to keep such information confidential, the court can compel the witness to disclose such confidential information.

7. Is privileged material or material that is protected by another similar right of confidentiality created for the purpose of one legal action still privileged or protected by a similar right of confidentiality in subsequent litigation?

Under Thai Law, the protection of privileged material or confidential information is based on the content or nature of the material or information. If the information or material is protected under Thai Law, it will remain protected as long as its contents fall within the prescribed scope of protection.

Therefore, privileged material or confidential information which is created for the purpose of one legal action would remain protected in subsequent litigation as well. However, as mentioned above, this is subject to the courts' discretion to compel disclosure of confidential information.

8. Under what circumstances may privilege or another similar right of confidentiality not apply or be lost?

The exceptions to confidentiality are: (i) where the client permits the lawyer to disclose the confidential information, or (ii) the court orders disclosure in court proceedings. It is up to the court's discretion to evaluate the confidential nature of the document, whether there are reasonable grounds to refuse disclosure, and whether disclosure is necessary for the proceedings.

9. What are the requirements for the disclosure of documents in civil and criminal proceedings?

In civil and criminal proceedings, the parties have no duty to disclose/produce all documentation relating to the issues in dispute. The parties can choose to disclose only those documents that they intend to rely upon to support their case. The concept of mutual disclosure of documents and inspection, which ensures that the parties to legal proceedings "put their cards on the table" at an early stage in respect of documentary evidence, does not exist under Thai law.

Briefly, each party is required to file with the court a list setting out the documents which it intends to rely upon at least seven days before the court hearing to hear the oral evidence in the case. In addition, the party also has the duty to file with the court and serve on the opposing party, copies of documents upon which it wishes to rely. The law also states clearly that only original documents are admissible in evidence, unless (i) all parties agree that the copy is true and correct, or (ii) in the case where the original is missing, the court in its discretion permits and accepts production of a copy thereof.

The absence of the duty of disclosure and discovery under Thai law has the effect of preventing one party from knowing exactly the type or nature of the documents or information that is in the possession of the other party, except where the party making the request either has a copy of the document requested or some other evidence that indicates the existence of the document or information required. For example, if a party is seeking production of a lease agreement, the party making the request might have in its possession a letter in which reference is made to the lease agreement in question. In practice, therefore, such a request can only successfully be made if the party requesting disclosure either (i) has a copy of the document in its possession, or (ii) is able to point to some reference to the required document in another document. In most cases, requests are made for the production of the original of a document, which one party believes is in the possession of the other party in the proceedings.

10. How are legally privileged or other similarly confidential documents treated in the disclosure process in civil and criminal litigation?

As outlined above in the answers to questions 1 and 2, if a party can prove that certain information, or a certain document or fact is either "confidential" or a "private secret" and that it was obtained in the process of acting as a lawyer, that party is entitled to refuse to disclose that information, document or fact in court proceedings. It is for the party who refuses to produce the information to prove that the information is confidential or a private secret.

In criminal proceedings, the Criminal Procedure Code provides a right to refuse to give evidence of "any confidential document or fact which has been acquired by or made known to him by virtue of his professional duty." This right of refusal is only available to the lawyer. The same principle applies to civil proceedings. The Civil Procedure Code provides the right to refuse to give testimony or evidence of "any confidential document or fact which was entrusted or imparted by a party to him/her in his/her capacity as a lawyer." Therefore, in both criminal and civil proceedings, the right to refuse only applies to the lawyer, and not the client.

11. Would communications generated in another jurisdiction and/or between a party and its foreign legal advisers (whether the foreign legal advisers are based in Thailand or otherwise) be covered by privilege or other similar rights of confidentiality? Which law determines whether documents are protected by privilege or other similar rights of confidentiality?

According to the Conflict of Law Act of Thailand, a foreign law can be enforced in Thailand to the extent that such law does not contravene Thai laws or public morals. Therefore, a privilege under foreign law can be asserted regarding documents/communications generated in another jurisdiction and/or between a party and its foreign legal advisers (regardless of where such foreign legal advisers are based). Such privilege will be recognised so long as it is not inconsistent with Thai laws or public morals. Nonetheless, a Thai court does have the authority to call the relevant party and inquire about the reason to keep such information confidential and will weigh whether it is reasonable to keep it confidential or not. If the court deems that there are no reasonable grounds to keep it confidential, the court can compel disclosure of such information. However, we understand that compelling such information in these circumstances is not common practice.

In other words, the parties can claim the right under the foreign law protection to refuse disclosure in the court proceedings. However, as the Thai Procedure Codes empower the court with the final decision on whether such refusal is reasonable or not, the final decision on whether to compel disclosure will rest with the Thai court.

12. What are the rules, if any, relating to legal privilege or other similar special rights of confidentiality in arbitration proceedings?

There is no specific provision under the Thai Arbitration Act which relates to legal privilege or rights of confidentiality. In relation to arbitration proceedings, the Thai Arbitration Act provides that an arbitral tribunal may apply provisions under the Thai Civil Procedure Code to the proceedings of the arbitral tribunal mutatis mutandis. However, as the arbitral tribunal is not a court and has no authority to compel the disclosure of confidential information like a court, the provisions which give the court the power to compel the disclosure of confidential information will not apply to the arbitration proceedings. If the arbitrator wishes to compel disclosure, he will have to ask for the Thai court's assistance.

13. Are legally privileged or other similarly confidential documents protected from disclosure to enforcement and regulatory authorities?

The same principles regarding protection as outlined in the answer to question 1 above apply where disclosure is sought by enforcement and regulatory authorities. Even though the regulatory and enforcement authorities would be exercising their rights under specific laws when seeking disclosure of documents and information, the same rules for protection apply. A person seeking protection would have to argue that disclosure of the information requested would result in that person committing an offence under the Penal Code and prove that the information is (i) confidential or a private secret obtained in the course of exercising his/her profession, and (ii) disclosure is likely to cause injury to a third party. Disclosure can only be compelled by the court.

14. Where legally privileged or other similarly confidential documents are disclosed to enforcement and regulatory authorities or to other third parties will the privilege or similar special rights of confidentiality be lost in all circumstances?

The right of the court to compel disclosure of confidential information is a procedural power which may be exercised on a case-by-case basis depending upon the court's discretion. Even if the documents/information are disclosed during court proceedings, the documents/information itself are still protected under the contractual agreement between the parties and/or under the relevant law. In addition, if the court compels a party to disclose information, it is possible that the court may limit such disclosure to be made only during and for the purpose of the relevant proceedings/court hearing. Furthermore, the parties or the court itself can request or provide for proceedings to be made private either by providing that certain facts about the case are not revealed to the public, or by forbidding the public from attending the hearing or forbidding the publication of certain private facts or circumstances. In the event of a closed hearing, the information can only be revealed between the parties, their lawyers and the court and shall not be revealed to other third parties.

As to disclosure to third parties, under the Trade Secret Act, information determined as a trade secret will lose its protection as a trade secret if it is disclosed to the public. However, there is no court precedent determining when a trade secret is deemed to have been made public (eg whether disclosing information to one third party can be deemed to make the trade secret "public" or not). In addition, in relation to other protected documents there are no laws that specify at what point and to what extent the protection of confidentiality is lost if the documents or information are shared with one or more third parties. Moreover, we have found no published court decision that addresses this issue.

15. Are there specific rules or a protocol on e-disclosure or the disclosure of electronic documents? Do the same rules of privilege or other similar rights of confidentiality apply to electronic documents?

There is no specific rule on e-disclosure or the disclosure of electronic documents.

Under Thai Law, the protection or privilege given to any information or data depends on the content or nature of such information or data, but not on its format. Therefore, if the content is protected under Thai law or by contract, the same rules of privilege or rights of confidentiality would also apply to such content which is in electronic form.

16. Do communications by in-house lawyers enjoy legal privilege or other similar rights of confidentiality?

The protection from disclosure set out in the Penal Code, Civil Procedure Code and the Regulation of the Lawyers' Council on Conduct of Lawyers is available to all lawyers who hold a Lawyers' Licence (issued by the Lawyers' Council of Thailand). Whether lawyers who do not hold a Thai lawyer's licence would enjoy the same protection is not entirely clear, but there is certainly scope to argue that they would not be protected on the basis that they would not be deemed to be exercising their profession or acting in the capacity of a lawyer.

Non-lawyer professionals shall have a right to denial of disclosure (section 92 of Civil Procedure Code and section 231 of Criminal Procedure Code) in the court if such information is protected by the relevant law. Nonetheless, a court does have the authority to call the relevant person and inquire about the reason to keep such information confidential and will weigh whether it is reasonable to keep it confidential or not. If the court deems that there are no reasonable grounds to keep it confidential, the court can compel disclosure of such information.

While in-house lawyers can hold Lawyers' Licences, the law does not clearly state whether an in-house lawyer is or is not granted the same kind of right. Therefore, it is arguable that the provisions of the Criminal Procedure Code and the Civil Procedure Code also apply to confidential communications or documents between a company and its in-house lawyers. However, even if a lawyer refuses to provide testimony, such refusal is subject to the court's discretion as to whether it is based on reasonable grounds. For example, a court might conclude that certain information was attained by an in-house lawyer by way of his management or administrative duties, and not his/her legal duties.

17. Are there circumstances in which communications may be covered by privilege or a similar right of confidentiality where such communications are with other non-lawyer professionals giving legal or non-legal advice (eg accountants)?

Apart from lawyers, the Penal Code also provides that a person who obtains a secret of another in the exercise of his/her profession or duties such as a medical practitioner or doctor, pharmacist, druggist, midwife, nursing attendant, priest, or auditor, or by reason of being an assistant to such a professional shall not disclose such secret in a manner that could harm any person. Otherwise, the person who obtains the secret will be subject to punishment as prescribed by law.

In addition, the Code of Ethics for Professional Accountants No. 19 issued under the Accountant Act also contains provisions requiring professional accountants to keep information of the client confidential.

Furthermore, the National Health Act provides that the personal health/medical records shall be protected and kept confidential. As a result, a person who has a profession that relates to the handling of patient medical records such as a doctor, pharmacist, nurse, etc shall have a duty to keep such information obtained as a result of his/her profession confidential.

Note that a client cannot rely on the laws and code mentioned above to refuse to disclose any information.

18. What practical steps can be taken to establish and maintain legal privilege or similar rights of confidentiality when creating, sending or storing documents generated in-house and by external counsel?

The protection under the law does not require any system to be adopted or any specific labelling of documents. If the information is "confidential", the protection is automatic. In practice, a party can label the document as confidential and treat it as confidential by limiting access to the document (eg for soft files, the company can restrict access to only certain ranked employees with prescribed passwords). A company can also identify the types of confidential documents in the company regulations and implement strict measures to protect such confidentiality.

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