



IN-HOUSE COUNSEL AND LEGAL PRIVILEGE IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE

Issues surrounding the breadth of legal professional privilege under English law are once again in the spotlight following last week's decision of the Court of Appeal in **ENRC v SFO**.

HFW's briefing on that decision can be found at: <http://www.hfw.com/ENRC-v-SFO-Court-of-Appeal-Judgment-September-2018>. But developments in the English law of privilege have broader repercussions outside of the UK. In this briefing, HFW Dubai explores how English legal professional privilege may apply in the Courts of the Dubai International Financial Centre. We also provide practical considerations for members of in-house counsel teams of UAE corporations based outside of the DIFC who may be used to litigating in the local UAE courts,

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where concepts of disclosure and privilege are significantly less familiar.

The Dubai International Financial Centre (DIFC) is an 'opt-in' jurisdiction, meaning that corporate entities and individuals need not be based within the DIFC itself in order to avail themselves of the adjudicatory regime of the DIFC Courts. As such, DIFC law and jurisdiction is an increasingly popular choice for onshore, UAE-domiciled entities in respect of both their local and international contractual relationships. Even parties who do not elect DIFC law and jurisdiction in their contracts may still find themselves involved in litigation before the DIFC Courts if they do business with entities located in the DIFC. UAE companies must therefore familiarise themselves with concepts of disclosure and privilege, both of which are salient features of litigation before common law courts.

HFW was recently instructed in a dispute between two prominent international institutions before the DIFC Court, where opponents did not accept that communications sent by a senior member of an in-house legal team in the UAE attracted privilege under DIFC law.

In its decision, the DIFC Court ruled that communications and advice sent by a person holding the position of a senior lawyer within an in-house legal team in the UAE did not attract legal advice privilege,

in circumstances where historical evidence of the advisor's professional qualifications could either not be produced, or were no longer available. The decision therefore proves a timely reminder regarding record keeping and privilege awareness for corporate litigants with in-house legal teams in the UAE.

In this briefing, HFW explores the legal principles and practical steps for an in-house team in the UAE, so that advice given in confidence within an organisation is given maximum protection under the DIFC laws on privilege.

What is “privilege” under DIFC law?

Privilege is not a recognised concept under UAE law but, even if it was, it would most likely never need to be invoked in circumstances where disclosure does not form part of regular litigation procedure before the local UAE courts. On the other hand, litigants in proceedings before the DIFC Courts are ordinarily required to produce to their opponents documents available to them on which they rely to make out their case. They must often also produce documents relevant to issues in dispute, if requested by their opponents.

A party may, however, resist providing documents to their opponents on grounds of “*legal impediment or privilege*” (Rules of the DIFC Court 2018 (RDC) 28.28(2)).

“*Privilege*” is defined in the RDC as “*the right of a party to refuse to disclose a document or to produce a document or to refuse to answer questions on the ground of some special interest recognised by law*” (Schedule of Definitions to RDC Part 2).

However, these terms do not receive any further elaboration in the DIFC Courts Rules or practice directions, and there is no statutory regime in the DIFC that otherwise defines the scope and limits of legal privilege. The issue has also only required consideration by the DIFC Court in a very limited number of cases to date. As such, it is open to the DIFC Court judicial officers and/or judges pursuant to RDC 28.28(2) to make a finding of legal privilege “*under the legal or ethical rules¹ determined by the Court to be applicable*”.

This provides wide discretion to the DIFC Courts to refer to an existing, or create a new set of privilege rules applicable to disputes resolved before the DIFC Courts. However, it is perhaps to be expected that the DIFC Courts will fall back on common law notions of privilege as developed in other common law jurisdictions. This is indeed what occurred in *Georgia Corporation v Gavino Supplies (UAE) FZE* [2016] DIFC ARB 005, one of the few if not the only published case in the DIFC on privilege, where the English test of “without prejudice” privilege

¹ <https://www.difccourts.ae/glossary/rules/>

was applied. This seems to indicate that common law and English legal principles of privilege will be influential in the DIFC Courts.

How does privilege protect the legal advice of in-house lawyers under English law?

Under English law, where a party can show that a particular communication (i) was confidential; (ii) passed between a client and the client's lawyer; and (iii) created for the purpose of giving or receiving legal advice, the document is not able to be used or relied upon by either party (without waiver) in court proceedings.

The protection of legal privilege, however, applies only to advice given by members of the legal profession, which, under English law at least, includes members of the English Bar, the England and Wales Law Society, and the English Chartered Institute of Legal Executives (CILEX) (which includes, by extension, foreign lawyers).

Members of an in-house legal team may also be able to rely on the protection of legal privilege, as legal advice given to the company is considered advice to their "client" for the purposes of the English law test: *Alfred Crompton v Customs & Excise (No. 2)* [1972] 2 QB 102.

It must be noted, however, that the English Court has in its decisions in *Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)* and *The RBS Rights Issue Litigation 2016* significantly narrowed the scope of legal advice privilege in circumstances where the advice is given by in-house counsel, such that not all recipients of legal advice within a company are deemed to be the "client" of the in-house lawyer. As such, only when in-house advice is sent to a narrow class of selected employees of the company can the privilege be relied on. This position remains unaffected by the decision of the *English Court of Appeal in ENRC v Serious Fraud Office* [2018] EWCA Civ 2006, handed down on 5 September 2018, as a result of which the debate over the scope of privilege under English law has once again been enlivened. Although *ENRC v SFO* was decided on the

basis of litigation privilege such that the Court of Appeal did not consider it necessary to determine the question of legal advice privilege, the Court did suggest – at least in its obiter remarks – that although it would have felt bound to follow the decision in *Three Rivers*, at the same time, that decision may need to one day to be reviewed by the Supreme Court.

How are English-law tests for legal advice privilege likely to be applied in the DIFC?

In the DIFC, it is assumed that legal advice privilege will similarly protect from disclosure to an opposing party the majority of communications between a lawyer and client.

But exactly how the test will be formulated, and who will be allowed to rely on the privilege, remains to be seen.

In circumstances where the *Three Rivers* and *RBS* cases have received criticism from common law legal commentators, and in light the English Court of Appeal's obiter remarks in *ENRC v SFO*, it will be interesting to see whether the English Courts' approach to in-house privilege will be followed in the DIFC Courts, particularly where it has been otherwise rejected in other jurisdictions, including Australia in *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122, in Singapore in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] SGCA 9 and in Hong Kong in *Citic Pacific Limited v Secretary for Justice and Commissioner of Police* (unrep, 29/06/2015, CACV 7/2012)).

Further, the legal profession in the UAE is a unique environment made up of expatriate lawyers from a wide array of jurisdictions who continue to be regulated by the relevant authority in their home jurisdiction, and who have the right to practice as legal consultants in the UAE by extension to their registration in their home jurisdiction.

Thus, if the DIFC Courts were to strictly apply English law tests of privilege as it would apply in England (which appeared to be the argument deployed by our opponents in

the recent case handled by HFW), many lawyers would fall afoul simply because they are not English qualified. A strict application of the English test is clearly not designed for UAE conditions; it may produce arbitrary results in relation to the advice of UAE-based lawyers and in-house counsel, and is unlikely in our view, to be what the creators of the DIFC Courts' intended.

How then might the English law of privilege be adapted to meet local requirements in the UAE, Dubai, and the DIFC? How might a client prove that any lawyer is a qualified lawyer at the material time by reference to the English test? With which professional body should the lawyer be registered and what practicing certificate maintained?

These are all theoretical questions with no clear answer. However, in our experience:

- The DIFC Courts would be unlikely to adopt the English law position as it would apply in England as this would produce an absurd result whereby legal advice privilege would, as a matter of DIFC law, only apply to members of the legal profession of England & Wales.
- It is most likely that a modified reading of the English test will apply in the DIFC Courts. Whilst the DIFC Court ultimately rejected the claim for privilege in our recent case, it did confirm in its decision that "legal advice privilege is limited to professional advice from a member of the legal profession (**whether domestic or foreign**)" (our emphasis added).
- It is equally unlikely that the DIFC Courts will uphold a bare assertion of privilege in respect of a UAE-based in-house counsel solely on the basis that he or she is employed in the capacity of a qualified legal advisor, and will require evidence to be produced of lawyers' (including in-house lawyers') professional membership and entitlement to practice. We think it is likely that the DIFC Courts will consider members of the legal profession in the DIFC to include those acting as:

- UAE qualified local advocates licensed to practice before the civil courts across the Emirates;
- Dubai or Abu Dhabi registered legal consultants with foreign legal qualifications and current foreign practicing certificates (as regulated by the Dubai Legal Affairs Department established as per Law No. (32) of 2008); and
- DIFC registered lawyers (as registered with the DIFC Dispute Resolution Authority).

Tips for UAE In-House Counsel to maximise DIFC privilege protections

In light of the above, generally, in-house counsel and HR teams for UAE companies that have some link to the DIFC or which elect to resolve their disputes in the DIFC Courts under DIFC law should, as far as practical, adopt a prudent approach by ensuring professional memberships and practicing certificates are maintained by their in-house lawyers. This should be done in as many combinations as possible to ensure that there is some basis to claim that advice given was at all times qualified advice, in case of a later dispute in the DIFC Courts. This might include:

- **For Emirati lawyers:** maintaining Dubai and/or Abu Dhabi licence to practice, ensuring these do not lapse and that all fees are paid up.
- **For expatriate lawyers:** (i) maintaining status as a foreign legal consultant with Dubai Legal Affairs Department or the Abu Dhabi Legal and Risk Management Affairs Advisory Unit of the Executive Affairs Authority; and (ii) holding at all times a valid practicing certificate(s) in the expatriate lawyer's home jurisdiction.
- **For all In-House lawyers:** Exercising caution in drafting to ensure that:
 - Legal advice is clearly marked "Privileged & Confidential" in the body and title of emails. Although this will not of itself cloak communications with privilege, it is a good indicator of the intention of the drafter;
 - Legal advice is isolated and sent in its own email, separate from other comments, general administration, business, or personal discussion; and
 - Legal advice is only sent to as many people as are vitally necessary (and not to widespread distribution lists, or any unnecessary recipients in "cc").
- For persons other than In-House lawyers within an organisation who receive/handle advice provided by their In-House legal team:
 - Being aware that there is a risk that privileged legal advice received from internal or external lawyers will lose its privileged status if forwarded or distributed by the in-house recipients further within or outside the organisation.
- **For HR staff:** maintaining up-to-date records of admission details of all lawyers' employed by the business, keeping copies of lawyers' practicing certificates, records of payment to professional bodies, and professional memberships.

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