

Malaysia

National aspects

In Malaysia, the law on privilege is a subject matter of legislation supplemented with common law principles where applicable. Generally, then law of privilege only covers communications between a lawyer and his client. However, the Malaysian law on privilege does not protect communications between a registered IP agent and his client.

Discovery procedure and how privilege protection operates against discovery

Under pre-trial case management, the Rules of the High Court 1980 set out a non-exhaustive list of directions which the Judge may make. Where discovery by a party is considered inadequate, application for further or more specific discovery may be made to the court. Failure to comply with an order for discovery can ultimately result in dismissal of the action or striking out of the defense. It is the legal duty of each party and its solicitor to make full disclosure of those documents in his or her possession or control and relevant to the issues in the action, if the party making disclosure relies on those documents or such documents would lead the opponent to a relevant course of inquiry. The disclosure shall be made even if it is helpful to the opponent's case.

Privileged documents are exempt from disclosure. In Malaysia, the law on privilege is generally the subject of legislation supplemented with common law principles where applicable. Section 126 of the Evidence Act 1950 prohibits advocates from disclosing any communication with his or her clients for the purpose of his or her professional activities unless express consent is given by the client. Section 126 reads as follows:

- “(1) No [advocate] 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] by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment: Provided that nothing in this section shall protect from disclosure – (a) any such communication made in furtherance of any illegal purpose; (b) any fact observed by any [advocate] in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.
- “(2) It is immaterial whether the attention of the [advocate] was or was not directed to the fact by or on behalf of his client.”

In addition, the client is also protected by privilege under the Evidence Act as provided in Section 129 as follows:

“No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional advisor unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.”

For example, communications with legal advisors for the purpose of obtaining legal advice are privileged. Documents tending to incriminate a party are also privileged. Documents containing matters confidential to a party and not otherwise privileged must be disclosed, but the Court may order a controlled method of disclosure to protect confidentiality.

Professionals covered by the privilege and secrecy obligation

Under Section 126 of the Evidence Act 1950 and the Interpretation Act which defines “advocate” to mean a lawyer qualified to practice law in any part of Malaysia, the duty to keep communications with clients secret only applies to qualified practicing lawyers and does not apply to IP professionals in Malaysia (patent and trademark agents) who are not qualified lawyers. A qualified lawyer means a person who has been admitted to the Malayan Bar or the Sabah and Sarawak Bar under the Legal Professional Act 1976 and the respective law in Sabah and Sarawak.

On the other hand, under Section 129 of the Evidence Act, the term “legal professional advisor”, and not “advocate”, is used. Consequently, clients’ privilege to keep communications secret does not apply to communications with patent or trademark agents, but may also be extended to in-house lawyers (VL Kandan, Malaysia’s Position on IP Advisor-Client Privilege, WIPO AIPPI Conference on Client Privilege in IP Professional Advice, May 22-23, 2008). Communications with patent agents who are also lawyers are covered by privilege.

Scope of privilege

Generally, the law of privilege in Malaysia only covers communications between a lawyer and his or her client. The scope of privilege is wide and covers all communications in the course and for the purpose of his or her services as a lawyer. It continues even after cessation of his or her employment as a lawyer of the client. Communications protected by privilege would also include communications between the lawyer and third parties (such as independent expert witnesses) during the course of his or her engagement as a lawyer.

The limitations and exceptions to privilege

The limitations and exceptions to privilege have been discussed by the Malaysian Federal Court in a recent case of *Anthony See Teow Guan v. See Teow Chuan and See Teow Koon* (Civil Appeal 02-50-2006, judgment delivered on February 23, 2009). In this case, the Federal Court upheld the common law maxim that “once privileged, always privileged.” The Court held that the client could waive the privilege recognizing the position of the client as the holder of the privilege and the lawyer as the holder of the confidentiality. The waiver must be made with the express consent of the client and as such Malaysian law does not recognize the common law waiver of implication or by imputation. It is also held that the disclosure of any legal opinion did not remove the privilege attached to the legal opinion.

Apart from express waiver, there are statutory provisions that provide for exceptions to privilege. For example, Section 14 of the Anti-Money Laundering and Anti-Terrorism Financial Act 2001 (“AMLATF”) imposes on a reporting institution an obligation to “promptly report to the competent authority any transaction: Exceeding such amount as the competent authority may specify; and where the identity of the persons involved, the transaction itself or any other circumstances concerning that transaction gives any officer or employee of the reporting institution reason to suspect that the transaction involves proceeds of an unlawful activity.”

With effect from September 30, 2004, advocates and solicitors are included as one of the 'Reporting Institutions' in the First Schedule of AMLATF. Lawyers thus have the same obligations as that of financial institutions to report to the competent authority any transaction which falls within Section 14 of AMLATF.

Further, Section 47 of AMLATF is a provision specific to advocates and solicitors which empowers a High Court judge to make an order, in relation to an investigation into a money laundering offence or a terrorism financing offence, requiring an advocate and solicitor to disclose information in respect of any transaction or dealing relating to any property which is liable to seizure under AMLATF.

The legal professional privilege between the advocate and solicitor and his or her client is overridden by Section 20 of AMLATF for the purposes of the reporting obligation. It will not excuse the advocate or solicitor from any failure to report a suspicious transaction.

Consequences of the loss of confidentiality and penalties for disclosure

Any lawyer who discloses confidential documents and privileged documents without the express consent of his or her client will be subject to professional penalties and professional disciplinary proceedings. The discipline of patent agents is not fully provided for under the Patent Regulations 1986. Regulation 45E(3) of the Patent Regulations 1986 only provides that "the Registrar may refuse to renew the registration of any person who has been convicted of an offence involving fraud or dishonesty." This may mean that a registered patent agent who has dishonestly disclosed the client's information may be classified as dishonest, and the renewal of the registration may be refused.

Requirements/qualifications for patent advisors

To be a registered patent agent in Malaysia, one has to pass the patent agent examination set by the Malaysian Intellectual Property Corporation and has to hold an engineering or science degree or be a practicing lawyer. Under the Patents Act and the Patent Regulations 1986, a legal education is not required in order to qualify for a patent agent. A candidate for the patent agent examination has to sit for several subjects, namely, Technology, Malaysian Patent Law and Practice, Malaysian Trademark and Design Law and Practice and Foreign Intellectual Property Law.

Cross-border aspects

Treatment of foreign lawyers and patent advisors

According to Section 126, the duty of confidentiality applies to domestic lawyers. Due to a lack of case law regarding the interpretation of the term "legal professional advisor" in Section 129 of the Evidence Act, it is not clear whether privilege under Section 129 extends to communications with foreign lawyers. One expert assumes that communications with a client and his or her foreign patent attorney who is also qualified as a lawyer are also covered by Section 129 (VL Kandan, Malaysia's Position on IP Advisor-Client Privilege, WIPO AIPPI Conference on Client Privilege in IP Professional Advice, May 22-23, 2008). Since there is no statutory provision establishing privilege for communications between a client and his or her patent agent who is not a lawyer, it is likely that privilege does not extend to foreign patent attorneys who are not lawyers.

Summary

Malaysia provides for statutory client-attorney privilege to qualified lawyers, including in-house lawyers, only. Therefore, patent agents in Malaysia need to be qualified lawyers in order to be able to be covered by privilege. Whether a foreign based lawyer or a foreign based patent attorney who is also a qualified lawyer is also covered by the client-attorney privilege in Malaysia has not been clarified.

According to Section 129 of the Evidence Act, no one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional advisor. Due to the lack of case law regarding the interpretation of the term “legal professional advisor” in the above provision, it is not clear whether privilege extends to communications with foreign lawyers or to foreign patent advisors.