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Lex Mundi Global Attorney-Client Privilege Guide

Singapore

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Attorney-Client/Solicitor-Client Privilege (ACP)

Is the ACP recognized in your jurisdiction?

ACP is known as legal professional privilege (**"LPP"**) in Singapore. There are two types of recognized LPP:

a. Legal advice privilege which protects from disclosure communications between legal professional advisors and clients made in the context of obtaining legal advice; and

b. Litigation privilege which protects from disclosure all communications, information and/or materials created and collected where there is a reasonable prospect of litigation and where such communications, information and/or materials were created for the dominant purpose of litigation.

Legal advice privilege

Legal advice privilege exists at common law and has been codified under the Evidence Act (Cap 97) (**"EA"**), specifically, sections 128, 128A and 131.

Sections 128(1) and 128A(1) of the EA specifically prevents advocates and solicitors and legal counsel (collectively, **"legal professional advisers"**) from disclosing, without clients' consent, three forms of communications in the course and for the purpose of his employment:

a. "*any communication made to him … by or on behalf of his client*";

b. "*the contents or condition of any document with which he has become acquainted*"; and

c. "*any advice given by him to his client*".

Section 131 of the EA further provides that:

> "*No one shall be compelled to disclose to the Court any confidential information which has taken place between him and his legal professional adviser 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*".

Litigation privilege

Litigation privilege exists by virtue of common law. There is no inconsistency between the common law and the statutory provisions under the EA. Section 2(2) of the EA "*applies to confirm the applicability of litigation privilege at common law*". This was so held in the Singapore apex court decision of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Brewries (Singapore) Pte Ltd and Other Appeals* [2007] 2 SLR (R) 367 (Court of Appeal) ("***Skandinaviska***") at [67].

If the ACP is not recognized in your jurisdiction, are there rules of professional confidentiality or other rules that would enable a lawyer or a client to withhold attorney-client communications or work product prepared by counsel from disclosure in a civil proceeding? Note: This question is directed primarily to civil law jurisdictions that do not recognize common law	N/A

jurisdictions' privilege doctrines.	
Is a distinction made in applying the ACP or professional confidentiality rules in civil and criminal proceedings? May government authorities require disclosure of attorney-client communications and legal work product?	In addition to the provisions in the EA, Rule 6 of the Singapore Legal Profession (Professional Conduct) Rules 2015 (**"PCR"**) which expressly provides that "*a legal practitioner's duty to act in the best interests of the legal practitioner's client includes a responsibility to maintain the confidentiality of any information which the legal practitioner acquires in the course of the legal practitioner's professional work*". <u>Distinction in applying LPP in civil vs criminal proceedings</u> There is no distinction drawn between the applicability of LPP or professional confidentiality rules in civil and in criminal proceedings. <u>Disclosure to government authorities</u> Sections 128(2) and 128A(2) of the EA expressly provide that these provisions do not protect the advocate and solicitor and/or legal counsel from disclosure of: a. any communication between (i) advocate / solicitor and client; or (ii) legal counsel and employer made in furtherance of any illegal purpose; and b. any fact observed by any advocate / solicitor or legal counsel in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment. Section 128A of the EA further provides that the provision does not protect legal counsel from disclosure of: c. any such communication made to legal counsel which was not made for the purpose of seeking his legal advice; or d. any document which the legal counsel was made acquainted with otherwise than in the course of and for the purpose of seeking his legal advice.
In the corporate context, what test is applied to determine who within a corporation is considered the client for the purposes of the ACP? (e.g., in	In Singapore, all individuals within the corporation who have been authorized, expressly or impliedly, to communicate with its legal advisers are considered clients for the purposes of legal professional privilege: see *Skandinaviska* at [41].

the U.S.: the Upjohn approach, control group test, etc.)	
Is in-house counsel expected to meet a higher burden than outside counsel in order to establish that privilege applies to in-house counsel's communications?	Section 128 of the EA – which provides for legal advice privilege in the context of advocate/solicitor and client and that of section 128A of the EA – which provides for legal advice privilege in the context of (in-house) legal counsel and employer are worded similarly. In other words, the legislation does not draw a distinction between communications made to outside and to in-house counsel.
Civil Law Jurisdictions: May in-house counsel assert privilege or professional confidentiality?	N/A
Civil Law Jurisdictions: Is in-house counsel allowed to be active members of your jurisdiction's bar?	N/A
Is the common interest doctrine recognized in your jurisdiction?	Yes
How is the doctrine articulated in your jurisdiction?	The High Court of Singapore has articulated the common interest doctrine in the case of *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd and others* [2018] 4 SLR 391 at [114] and [115], reproduced below *in extenso*: "114 … *Traditionally, common interest privilege has two aspects… First, it can be used to* ***enable party B to shield behind the privilege of party A and prevent party C from obtaining or using documents from B which were disclosed pursuant to the common interest between A and B*** *in the subject matter of the communications… Second, it can also be used to* ***enable A to obtain from B documents which B can withhold on the ground of privilege against the rest of the world****, on the basis that it is inconsistent with their common interest for B to claim privilege against A in relation to these documents …* 115 … *In any case, for either aspect of common interest privilege to apply, some similar interest should be at stake…*" (***emphasis added***)

	Where common interest privilege applies, the mere voluntary disclosure of documents from one party (the "sharing party") to another party with a common interest (the "receiving party") does not waive privilege as against third parties.
Must a common interest agreement be in writing?	There is no express requirement that a common interest agreement must bein writing.
Is litigation funding permitted in your jurisdiction? Are there any professional rules in this respect?	Yes, litigation funding is presently permitted in a limited context in Singapore. Prior to the enactment of the Civil Law (Amendment) Act 2017, litigation funding (which involves the assignment of a cause of action or fruits of such action) was permitted: a. Where a company was in liquidation – pursuant to section 272(2)(c) of the Companies Act (Cap. 50, 2006 Ed.), a sale of a cause of action or fruits of an action falls within a liquidator's statutory power of sale. b. At common law, as held in the case of *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 (H.C.) at [43], where: i. the party funding the litigation has a genuine pre-existing commercial / legitimate interest in the outcome of the litigation (as in the case of *Lim Lie Hoa and another v Ong Jane Rebecca* [1997] 1 SLR(R) 775 (C.A.)); or ii. the cause of action was assigned incidental / ancillary to a transfer of property; or iii. There is no realistic possibility that the administration of justice may suffer as a result of the assignment. In this regard, the following should be considered: 1. Whether the assignment conflicts with existing public policy that is directed to protecting the purity of justice or the due administration of justice, and the interests of vulnerable litigants; and 2. The policy in favour of ensuring access to justice.

	Under the Civil Law (Amendment) Act 2017 read together with the Civil Law (Third-Party Funding) Regulations 2017, litigation funding is now permitted on an expanded basis. A qualifying Third Party Funder is permitted to fund international arbitration proceedings, or related court or mediation proceedings. There are legal professional rules governing third-party funding. Rule 49A (1) of the PCR provides that "*a legal practitioner must disclose to the court or tribunal, and to every other party to those proceedings –* a. *the existence of any third-party funding contract related to the costs of those proceedings; and* b. *the identity and address of any Third-Party Funder involved in funding the costs of those proceedings.*" Rule 49A(2) of the PCR further provides that the disclosure "*must be made –* a. *at the date of commencement of the dispute resolution proceedings where the third-party funding contract is entered into before the date of commencement of those proceedings; or* b. *as soon as practicable after the third-party funding contract is entered into where the third-party funding contract is entered into on or after the date of commencement of the dispute resolution proceedings.*"
Have the courts in your jurisdiction addressed whether communications with litigation funders may be protected by the ACP or the work-product protection	As liberalization to allow third-party funded litigation is still in its infancy in Singapore, the courts have not yet addressed this specific issue.
Is the crime-fraud exception recognized in your jurisdiction?	Yes, the crime-fraud exception is recognized in Singapore.
What statutes or key court decisions articulate the crime-fraud exception in your jurisdiction?	Please see sections 128(2) and 128A(2) of the EA reproduced above. In *Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd* [2010] 1 SLR 833, the Singapore High Court held that "*there is no doubt that fraud includes all forms of criminal and civil fraud, and no privilege can arise in respect of documents and communications made in furtherance of such nefarious purposes*".

	Further, in *Public Prosecutor v Soh Chee Wen and another* [2019] SGHC 235, the Singapore High Court at [19] also held that "*fraud*" could extend to cover "*misconduct or abuse of process, such as witness tampering or witness coaching*".
Work Product Doctrine/Litigation Privilege (doctrine that protects materials prepared in anticipation of litigation or for trial)	
Is there a statute or rule that protects information obtained or prepared in anticipation of litigation from disclosure in legal proceedings? (In the U.S.: What state rule is your jurisdiction's analog to FRCP 26(b)(3)?)	Yes, as stated above, litigation privilege exists under the common law in Singapore.
What are the elements of the protection in your jurisdiction?	In Singapore, for litigation privilege to apply, two conditions must be satisfied (see *Skandinaviska* at [69]-[71], [73] and [74]): a. First, the party claiming such privilege must show that there is a reasonable prospect of litigation. b. Second, the dominant purpose for which the advice was sought or obtained must have been for anticipation or contemplation of litigation. Litigation privilege applies to every communication, whether confidential or otherwise, and to communications from third parties (*Skandinaviska* at [44]).
Other Privileges	
Does your jurisdiction recognize an accountant-client privilege?	There are no reported cases in Singapore dealing with the issue of accountant-client privilege *per se*. However, as the EA has been held to be inclusionary and not exclusionary, the absence of any provision providing for accountant-client privilege in the EA would indicate that any professional privilege which may be claimed are exhaustive within the confines of the EA.

Does your jurisdiction recognize a mediation privilege?	Mediation privilege is recognised in the Mediation Act 2017 ("**MA**"), which came into force on 1 November 2017. Mediation privilege applies to any "*mediation communication*", which is broadly defined in Section 2 of the MA, to cover "*(a) anything said or done; (b) any document prepared; or (c) any information provided, for the purposes of or in the course of the mediation, and includes a mediation agreement or mediated settlement agreement*". The general rule restricting disclosure to third parties is contained in Section 9(1) of the MA, which provides that "*a person must not disclose any mediation communication relating to a mediation to any third party to the mediation*". Further, Section 10 of the MA also provides that "*mediation communication is not to be admitted in evidence in any court, arbitral or disciplinary proceedings except with the leave of a court or an arbitral tribunal under section 11*".
Does your jurisdiction recognize a settlement negotiation privilege?	Yes. In Singapore, genuine settlement negotiations are treated as "*without prejudice*" under the EA. Documents and communications related to the negotiations, therefore, cannot be used in court as evidence of admissions against the interest of the party that made them. The general rule is that any document and/or communication arising from settlement negotiations is inadmissible as evidence if: a. It represents an admission; and b. It was made "*either upon express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given*" (Section 23(1) of the EA).

alternative to the engagement of local counsel and should consult with the Lex Mundi member firm in the relevant jurisdiction. Please note that this entry refers to laws and regulations in force on the date of submission by the contributing Lex Mundi member firm and is subject to change by future legislation.