

# “Protecting” documents in disputes

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## Litigation privilege in the news

In this briefing we examine recent developments relating to common law litigation privilege. Litigation privilege is one of the “heads” of privilege which permits a party to withhold documents from inspection by another party during a legal dispute.

Of late, the law on litigation privilege has been put under closer scrutiny by the courts. While claims to privilege are considered on a case by case basis, in accordance with established legal principles, it is probably fair to suggest that this area of the law is becoming more complex; correspondingly, lawyers and their clients are having to review how documents are generated, if a dispute is likely. In this context, the Hong Kong courts follow legal principles that are rooted in English case law.

This briefing considers the concept of litigation privilege, along with recent developments in the English courts. These developments are highly persuasive and relevant to parties involved in disputes (and investigations related to disputes) in Hong Kong.

The briefing also considers some practical matters that should be considered in order to protect documents with litigation privilege (where possible). A simple flowchart appears at the end, for illustration purposes.

Given the international nature of some industries, it is very important that local law considerations are taken into account with respect to any dispute. The approach of some common law jurisdictions to issues of privilege and disclosure of documents can vary significantly to (for example) certain codified jurisdictions.

### Some key points for Hong Kong

- Once litigation (or anticipated litigation) is a reasonable prospect, documents created for the dominant purpose of the litigation attract litigation privilege and are protected from inspection by another party. A party can choose to waive the privilege, which would normally only be done on taking legal advice
- There is a real risk that documents and communications from non-legal advisers in the early stages of a matter (which subsequently turns contentious) may not be protected by litigation privilege
- Litigation privilege generally covers a wider group of people than the lawyer-client relationship (including, for example,

### Any comments or queries

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clients and expert witnesses such as accountants or surveyors), but applies to a narrower range of “documents”.

In contrast, legal advice privilege covers a narrower set of players but a wider range of “communications”

- If called upon to do so, the Hong Kong courts will scrutinise claims to litigation privilege carefully. Given that the protection allows a party to withhold otherwise relevant documents (for example, that may be harmful to their case), the courts ensure that the parameters of the privilege are kept within bounds. As such, it is important to understand what the courts look for when deciding whether litigation privilege extends to a document
- If you are in doubt as to whether the creation of a document will be privileged take legal advice immediately. This will increase the chances of ensuring that one of the grounds of privilege applies to your documents; for example, either legal advice privilege (lawyer/client) or litigation privilege

### The concept of litigation privilege

It is a basic principle of litigation in Hong Kong (and other common law jurisdictions) that a party should be able to prepare their case as best they can without fear that documents created for the dominant purpose of a dispute will be revealed to the other side; particularly, if those documents are prejudicial to a party’s case on liability and/or quantum. This means that privileged documents can be withheld from inspection by the other side, even if they are relevant. As such, the courts seek to keep the parameters of the privilege within certain confines.

Unless they are instructed early on, solicitors have limited scope to influence the creation of documents that may be subject to litigation privilege.

Under Hong Kong common law, litigation privilege protects documents which are:

1. confidential
2. between (a) a lawyer and a client; or (b) a client and third party; or (c) a lawyer and third party
3. which are made at a time when litigation (or anticipated litigation) is reasonably contemplated; and
4. which are made for the “dominant purpose” of obtaining legal advice, evidence or information for that litigation. There can only be one “dominant” purpose.

Provided that a document meets the above requirements, it will be protected by litigation privilege and will not be available for inspection by another party. The test may appear reasonably straightforward, but its application in practice can prove problematic.

Where the client communicates directly with their lawyer (for the purpose of receiving legal advice or giving instructions) such “communications” are likely to be covered by legal advice privilege.

### Recent case law – summary

In recent cases, the English courts have scrutinised attempts by litigants to withhold documents under a claim to litigation privilege. Given that the legal principles in Hong Kong have evolved out of the English common law, these developments are highly relevant.

In order to ensure that the parameters of litigation privilege are kept within reasonable limits one can detect that the courts are tightening-up on claims to litigation privilege.

### Commercial case

A recent case on point is *Starbev v Interbrew*<sup>1</sup>. The dispute concerned the potential disclosure of two reports prepared by

1. *Starbev GP Ltd v Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm).

a bank and a firm of accountants for the defendant, Interbrew. The reports related to Interbrew’s potential entitlement to money following the sale of Interbrew’s business by Starbev.

The court held that at the time of commission, the bank report was carried out merely to investigate suspicions. Even a statement by the vice president of Interbrew (to the effect that it occurred to him “*that [the defendant] would end up in another dispute*”<sup>2</sup>) was not enough to meet the requirement that litigation be a reasonable prospect at the time of preparation of the report.

As for the report prepared by the firm of accountants, Interbrew failed to persuade the court that it was made for the dominant purpose of litigation. The court looked at other contemporaneous documents created around the date of the accountant’s report and could not find that the dominant purpose of the accountants’ report was to obtain information for litigation, when the retainer for the accountant’s instruction made no such reference to litigation.

#### Liquidation case

Another recent English case is *Rawlinson and Hunter v Akers*<sup>3</sup>. In this case, a firm of accountants was requested to prepare five reports by liquidators of a company, who subsequently tried to assert litigation privilege over them. The case went to the English Court of Appeal, which reinforced the requirement that, in order to attract litigation privilege, a document must have been prepared for the sole or dominant purpose of obtaining information or advice in connection with litigation.

The liquidator’s key argument was that the liquidation in question was of an inherently litigious nature and, therefore, litigation was always in contemplation. The court held that the liquidator’s primary duty was to establish the assets and liabilities

of a company, which in turn meant that litigation is not always inherently in prospect. Further, the court agreed with the lower court’s position that the language used in the liquidator’s evidence of “[*identifying*] potential causes of action as well as the defendants to possible claims” fell short of the necessary threshold for proving that litigation was reasonably contemplated.<sup>4</sup>

#### Shipping case

For marine cases in particular, one can look to *Westminster v Dornoch*<sup>5</sup> for some guidance. In a case concerning Shipowners and a major casualty at sea, the defendant insurers were entitled to refuse to disclose a report prepared by surveyors instructed to comment on the claimant’s survey report. However, the judge did note in this case that:

*“The onus of establishing the existence of the privilege lies on the party that asserts it and is to be determined in the light of the evidence as a whole.”*<sup>6</sup>

As such, it does not mean that all investigations prepared by insurers in connection with a claim will attract litigation privilege. Rather, it depends on the particular facts and the contemporaneous evidence in a particular case.

The judge picked-up on the *Sagheera*<sup>7</sup> case, where it was stated:

*“In the present case the retainer is said to be for the purpose of investigating and advising on the casualty. In my judgment that meets the dominant purpose test, for the purpose of investigation is inseparable from the purpose of advice.”*

This reinforces the need to ensure that retainers with professional service providers (such as surveyors, investigators, accountants) are clear and specific as to the purpose of any reports or investigations sought.

2. Ibid, para 16.
3. *Rawlinson and Hunter Trustees SA & Others v Akers and Anor* [2014] EWCA Civ 136.
4. Ibid, para 24.
5. *Westminster International BV & Ors v Dornoch Ltd & Ors* [2009] EWCA Civ 1323.
6. Ibid, para 36.
7. *Hellenic Mutual War Risks Association (Bermuda) Ltd and General Contractors Importing and Services Enterprises v Harrison (the Sagheera)* [1997] 1 Lloyd’s Rep 160 at page 168.

## Practical advice for the Shipping industry in Hong Kong

The general rule is to err on the side of caution.

- Consider what the governing law of a dispute is. For example, for charterparty disputes governed by Hong Kong law and arbitration or English law and arbitration, the general principles set out here will apply
- When instructing a non-legal adviser (such as a surveyor or a local correspondent) in a matter which may turn contentious, ensure that you consider and clearly record from the outset of any instructions (eg a retainer letter) that:
  - (i) litigation is contemplated and
  - (ii) the main purpose of the work is to obtain information or advice for such litigation
- Consider whether a legal adviser should be present when third parties are carrying out inspections, fact finding exercises, conducting interviews or collecting anything which may be potentially used as evidence. If possible, get lawyers to do the leg work
- It is quite possible that investigations carried out without the supervision of lawyers and of a more fact-finding nature will be deemed to be for a non-litigious dominant purpose and, therefore, not covered by litigation privilege. This is a particular concern with respect to an organisation’s internal investigations, which (without any lawyer input) may be for a non-litigious purpose
- Communications with your lawyer for the purpose of obtaining legal advice or giving instructions are likely to attract legal advice privilege
- Be careful with the language you use when communicating with a non-legal adviser. As touched upon in *Rawlinson & Hunter v Akers*, phrases such as “civil recovery opportunities”, “potential offences and potential defendants” and “possible claims” are not necessarily enough to indicate that litigation is reasonably in prospect. Be specific, rather than generic
- Simply “copying-in” a legal adviser may not be enough to attract litigation privilege
- Consider the following questions:
  - is the matter, or are aspects of the matter, disputed or contentious (or do they have the potential to be)?
  - who will you be instructing and corresponding with in relation to the matter? Are they non-legal advisers?
  - have you got a retainer or engagement letter setting out the terms under which your adviser is acting for you? Ensure that it clearly states the purpose of their instruction relates to a dispute
  - should you involve a legal adviser? If yes, do so early on

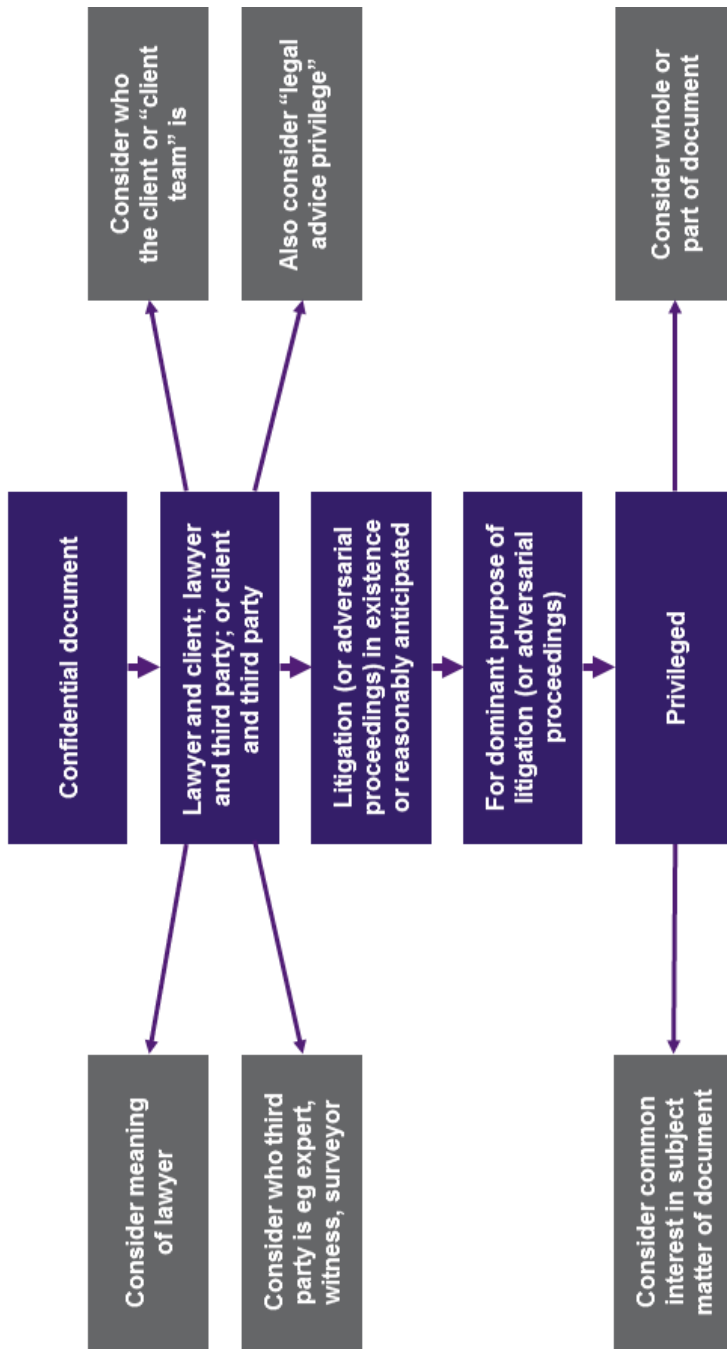
### Brief summary

Litigation privilege is basically a common law protection in aid of preparing for a dispute; at the risk of oversimplification, litigation privilege protects “evidence gathering” for contentious matters. It can apply to different types of documents, provided they are created for the “dominant purpose” as described above. Of course, litigation privilege and legal advice privilege are not mutually exclusive; an important point, because the sooner a party “communicates” with their lawyer, the earlier lawyer and client privilege can apply.

*This Smyth & Co article is intended to give general information only and may be of general common law interest. It is not a complete statement of the law. It is not intended to be relied upon or to be a substitute for legal advice in relation to particular circumstances. Specific circumstances require specific advice.*

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“Litigation privilege” – Guide: Hong Kong  
“Narrow(er) range of documents, wide(r) set of players”



The diagram is intended to convey general information and is for illustration purposes only. It is not a complete statement of the common law in Hong Kong. It is not intended to be relied upon or to be a substitute for legal advice in relation to particular circumstances. Specific circumstances require specific advice.  
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