CONCEPT OF LEGAL PROFESSIONAL PRIVILEGE IN SAUDI ARABIA

In the Kingdom of Saudi Arabia (KSA), the primary source of law is Islamic law Shari’a. In addition to Shari’a, the law in Saudi Arabia is derived from secular legislation passed by the government. Further, the KSA government, from time to time, issues rules and regulations with the objective of supplementing Islamic law when the need arises. Yet, the Legal Profession Law in Saudi Arabia does not have provisions concerned with the legal professional privilege. The lawyer-client legal professional privilege is interpreted in the KSA under Islamic law.

The constitution of KSA is Shari’a. The Shari’a in this respect does not refer to lawyers but refers to one who has been given a power of attorney (’Wakalah/Powers of Attorney’). Powers of attorney are special enabling documents granted by Saudi Arabian persons or entities for use in Saudi Arabia that must be made before the competent notary public or other official having competence in order to be effective. They can create rights and obligations in various aspects, including civilian, criminal and competition enforcement. Enduring the Power of Attorney (POA), the attorney must take into account any instructions from the grantor of the power stipulated in the POA. The attorney has an absolute duty to act in the best interest of the grantor at all times. An attorney who acts improperly can be held personally and criminally liable for losses. The attorney must keep and preserve accurate records and accounts for all dealings and transactions when exercising his powers. Failure to do so is an offence. The attorney(s) cannot be paid for work done on behalf of the grantor, except out-of-pocket expenses directly connected to carrying out his duties. The attorney(s) cannot pay himself a wage for duties performed under the POA but may claim travelling expenses incurred in the performance of his duties.

Without prejudice privilege exists in the KSA and applies to all communications between parties (or their lawyers) which are aimed at the settlement of a dispute. All such oral and written communications should be expressed to be ‘Without Prejudice’, although the use of the term is neither necessary nor sufficient. There must be a genuine attempt at settlement for this privilege to apply.

In many civil law jurisdictions in the region, the concepts of legal professional privilege and ‘without Prejudice’ communications do not exist per se, and the parties have the right to use any document which may support their position in civil litigation. However, lawyers are bound by duties of confidentiality which, in many cases, incorporate concepts similar to legal advice privilege: for example, under the Saudi Law of Advocates, a lawyer may not disclose a secret with which he has been entrusted, or of which he has become aware in the course of practising his profession, unless such non-disclosure constitutes a violation of a Shari’a requirement.

SCOPE OF LEGAL PROFESSIONAL PRIVILEGE IN SAUDI ARABIA

What is protected by legal professional privilege?

Lawyer-client privilege protects all communications between a professional legal adviser and his clients from being
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disclosed without the permission of the client. The privilege is that of the client and not that of the lawyer. The purpose behind this legal principle is to protect an individual’s ability to access the justice system by encouraging complete disclosure to legal advisers without the fear that any disclosure of those communications may prejudice the client in the future. When a lawyer is not acting primarily as a lawyer but, for instance, as a business adviser, member of the board of directors or in another non-legal role, then the privilege generally does not apply. The privilege protects the confidential communication, and not the underlying information. For instance, if a client has previously disclosed confidential information to a third party who is not a lawyer, and then gives the same information to a lawyer, the privilege will still protect the communication with the lawyer, but will not protect the communication with the third party.

A lawyer will not have any obligations under the legal professional privilege protection with respect to documentation or information which the lawyer can demonstrate:

- was in the public domain at the time it was disclosed to the lawyer
- entered the public domain subsequent to the time it was disclosed to the lawyer through no fault of the lawyer, or
- was in the lawyer’s possession free of any obligation of confidence at the time it was disclosed to the lawyer, evidenced by records in existence at the time of disclosure.

Notwithstanding the lawyer-client privilege, a lawyer may disclose certain documents/ information to the extent such disclosure is required by a valid order of a court or other governmental body having jurisdiction, provided that the lawyer provides the client with reasonable prior written notice of such disclosure and makes a reasonable effort to obtain a protective order preventing or limiting the disclosure and/or requiring that the documents/information so disclosed be used only for the purposes for which the law or regulation required, or for which the order was issued.

Are in-house counsel protected by legal professional privilege?

The Legal Profession Law does not include in-house counsel who provide their services on an employment basis and subject to the Saudi Labour Law. It should be noted that most in-house counsel in the KSA are non-national, and they would accordingly be subject to the professional obligations of their home countries.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

A non-Saudi national can be entitled to practise law in accordance with the terms of agreements concluded between the KSA and other countries.

How is legal professional privilege waived?

Legal professional privilege may be waived if the confidential communications are disclosed to third parties. Other limits to the legal professional privilege may apply depending on the situation being adjudicated. The Legal Profession Law states that a lawyer shall practise the profession in accordance with the Shari’a and laws in force. He shall refrain from any act that compromises the dignity of the profession and shall comply with the relevant rules and instructions. A lawyer shall not refer to personal matters concerning his client’s adversary or representative, and shall refrain from any offensive language or accusation in connection with the content of his written or oral argument. A lawyer shall not disclose any confidential information which has been communicated to him or of which he has become aware in the course of practising his profession even after expiration of his power of attorney, unless such non-disclosure constitutes a violation of Shari’a requirements.

Similarly, he shall not, without a legitimate cause, decline to represent his client before the case has been concluded.

RECENT CASES AND/OR OTHER LEGAL DEVELOPMENTS IN SAUDI ARABIA
In 2007, HRH King Abdullah issued royal decrees with the aim of reforming the judiciary and creating a new court system. The reforms will be fully implemented by the beginning of 2017, once they are, they will include the creation of a Supreme Court and the transfer of the Board of Grievances’ commercial and criminal jurisdictions to a restructured general court system. New specialist first instance courts will be established comprising general, criminal, personal status, commercial and labour courts. The Shari’a courts will therefore lose their general jurisdiction to hear all cases and the workload of the government’s administrative tribunals will be transferred to the new courts. Another important change is the establishment of appeal courts for each region in Saudi Arabia. We see the changes taking place on the ground, even though King Abdullah’s vision of reforming the judiciary has not yet materialised in full.

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