法律专业保密权

Legal Professional Privilege(LPP) in Citic Court Case

(中英版)

引言

今年三月廿八日，上诉庭就中信泰富(CITIC Pacific) 上诉一案，对法律专业保密权 (Legal Professional Privilege) 提出重要的观点。现与大家分享。

在 2008 年全球金融危机当中，中信泰富的投资亦受影响。但似乎中信泰富未有按上市规则在合理可行时间内作出盈警通知，结果中信泰富要面对证监会的调查。在调查过程中，中信泰富向证监会提供文件以作证监会调查之用。中信泰富其后得悉证监会已将该文件送往律政署寻求法律意见。与此同时，警方亦对中信泰富展开调查，并希望取得该文件。中信泰富便入禀高等法院原讼庭，要求法庭颁令该六份文件只限证监会调查之用，并不得再向第三者(如警方)披露。原讼庭不同意中信泰富的观点，判中信泰富败诉。故中信泰富便向上诉庭提出上诉。上诉庭三位法官一致裁定中信泰富胜诉。而上诉庭的判词对法律专业保密权作出详尽的解释。

特权由来

法律专业保密权的原意是肯定律师及其客户之间沟通(包括文件及通话) 的保密性。当沟通受到法律保障时，客户便可向律师说出事实真相，好让律师可以履行责任，向客户提供专业意见。所以在法律专业保密权的保障下，当事人有权拒绝向第三者披露这些受保障的文件和数据。在诉讼过程中，任何一方亦不可逼令对方披露法律保障的文件和数据(除非法庭裁定这些文件不受法律专业保密权所保障)。

例外

尽管这些沟通和文件受到保障，亦不代表绝对的。首先，保障只限于律师和客户的关系上所进行的沟通。换言之，与律师在社交场合所作的沟通不受保障。

第二，保障的范围只限于寻求法律意见的沟通及法律意见引伸的事项。所以一名被告不可将杀人贼赃交予律师保管，以享受法律专业保密权。

第三，保密权是给予客户，只有客户才可放弃保障。例如当客户授权律师向法庭或对方披露受法律保障的文件时，便等同放弃法律专业保密权。这里要强调一点，法律专业保密权在于客户而不在律师。

第四，法律专业保密权不得被滥用。法庭不会容许客户使用这项特权，以执行犯罪或欺

诈的企图。

<u>案中关键</u>

其实中信秦富的律师向证监会提供文件时，已在信中清楚说明文件只限证监会调查之用。代表政府的大律师辩称当中信泰富同意披露文件时，中信泰富已<u>全面</u>放弃法律专业保密权。但上诉庭不同意，并认为中信泰富只是向证监会放弃<u>部份</u>保密权，中信泰富并没有向其它方(例如警方) 放弃保密权。

<u>总结</u>

上诉庭的判决无疑是再一次肯定法律专业保密权，而法律专业保密权亦加强香港的人权保障。此外，相信律师界亦欢迎上诉庭对法律专业保密权的合理及中肯的厘定 。

<u>Introduction</u>

On 28 March 2012, the Court of Appeal delivered a judgment on the issue of legal and professional privilege in Hong Kong: *<u>CITIC Pacific Limited v Secretary for Justice and Commissioner of Police</u>* <u>CACV 60 of 2011</u>.

During the global financial crisis in 2008, CITIC was exposed to fluctuations in the foreign exchange markets thereby leading to predicted financial losses.   Profit warning was issued by CITIC accordingly but CITIC was accused of failing to comply with the time line specified by the Listing Rules governing profit warning, i.e. "as soon as is reasonably practicable".   It was alleged that CITIC intentionally delayed the announcement.

The Securities and Futures Commission (the "SFC") stepped in and commenced investigation against CITIC.   During the course of investigation, CITIC handed over 6 documents to the SFC.   The 6 documents were then passed to the Department of Justice for the purpose of seeking legal advice.   At the same time, the Police also probed into CITIC's activities and intended to investigate the documents.   Against this background, CITIC applied to the High Court to ask for return of the documents in order to stop disclosure to any third party including the Police.   CITIC lost in the first instance.   On appeal, the Court of Appeal allowed CITIC's appeal and clarified the law relating to legal and professional privilege.

<u>Origin of the privilege</u>

The privilege was intended to protect confidentiality of the communications (including documents and conversations) between lawyer and his clients. Under this principle, confidentiality and legal privilege are both sides of the same coin. The advantages are to ensure a man's fair access to legal advice and encourage frank and full disclosure by client to his lawyer and in return, to enable the lawyer to render faithful professional advice to the client. With this privilege, a client is entitled to refuse disclosure of privileged documents or information to any third party in any investigation or court action. Unless it is ordered by the court, no person can compel a party to disclose any privileged document or information between a man and his lawyer.

Exceptions

Despite the legal privilege, such protection is not absolute and can be lost in certain circumstances. Firstly, the privilege is confined to the communications based upon the relationship of lawyers and clients. In other words, casual talks between a lawyer and a man on social occasions are not protected.

Secondly, the protection only attaches to the communications for the purpose of seeking legal advice or any matters generated during the communications. For example, a defendant is not allowed to claim privilege merely because he passed to his lawyers some evidential materials such as the stolen goods in question for legal advice. The reason being that such evidential material itself is not "generated" from the communications between the legal adviser and his client.

Thirdly, the privilege belongs to the client but not to lawyers. Only client is entitled to waive such privilege by agreeing to disclose the documents. A lawyer cannot decide for his client.

Lastly, the legal privilege cannot be abused. The court does not allow any person to claim privilege to serve illegal or fraudulent purposes.

Key issue of the case

It has to be noted that the letter from CITIC's lawyers to the SFC stated plainly that the documents were disclosed for the purpose of the SFC's investigation only. It cannot go so far as to say that CITIC was prepared to waive privilege in the documents to the whole world. However, Counsel for the Government argued that when agreeing to disclose the documents, CITIC fully waived the legal and professional privilege. The Court of Appeal endorsed CITIC's approach and took the view that CITIC's disclosure only amounted to partial waiver and CITIC did not waive the legal and professional privilege to a third party such as the

Police.

Observation

    The judgment should be welcomed by the legal profession as the principle of legal professional privilege is reassured.   It is believed that the ruling can also reinforce human rights such as the right to confidential legal advice under Article 35 of the Basic Law which provides, amongst other things, Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for the protection of their lawful rights.