Another Court Deals With Foreign In-House Lawyers

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In his October 1, 2014 “Privilege Points” release, Tom Spahn discusses the attorney-client privilege and in-house lawyers in foreign countries:

Most foreign countries do not extend privilege protection to communications to and from in-house lawyers, so United States companies normally seek to apply U.S. privilege law when discovery disputes in U.S. courts involve overseas communications. Fortunately for such companies, the commonly-used "touch base" test normally applies U.S. privilege law to (1) communications to and from the United States, and (2) purely overseas communications whose content primarily focuses on the United States.

In Veleron Holding, B.V. v. BNP Paribas SA, No. 12-CV-5966 (CM) (RLE), 2014 U.S. Dist. LEXIS 117509 (S.D.N.Y. Aug. 22, 2014), plaintiff Veleron withheld purely overseas communications to and from in-house lawyers in Russia and the Netherlands — which did not meet the "touch base" standard justifying U.S. privilege law's application. The court therefore applied a "'predominant interest'" standard in selecting the applicable law. Id. at *13 (citation omitted). Significantly, the court rejected Veleron's reliance on contractual choice of law clauses indicating that British and Canadian law governed any disputes — instead applying Russia's and the Netherlands' privilege laws because those countries "have a strong interest in the uniform application of attorney client privilege law for Russian and Dutch attorneys and for communications that occur in their respective countries." Id. at *14. The court then noted that (1) Russia does not recognize privilege protection for in-house lawyers, or outside lawyers who are not licensed by the Russian Administrator of Justice, and (2) Dutch law does not extend privilege protection to "unlicensed lawyers." Id. at *14-15. The court ultimately rejected Veleron's privilege claim, because the company had not established with evidence that its Russian lawyers were licensed outside lawyers, or that its Dutch lawyers were licensed at all.

Companies with foreign operations or (especially) foreign lawyers should monitor the case law for developments in this area, and be prepared to present whatever evidence will support their privilege claims. When appropriate, company employees can also enhance the likelihood of U.S. privilege law's application by copying a U.S. lawyer (in-house or outside) or by focusing on U.S. issues in purely overseas communications.