

Questionnaire Q19

Remedies to protect the right of clients against forcible disclosure Of their IP professional advice

January 19, 2010

Answers - Belarus

1. Q.199 - Questionnaire

The Groups are asked to reply to the following questions in the context of what applies or what they may consider ought to apply in their own country or by agreement between their country and others, as may be appropriate to the particular question. The responses of each Group need to be endorsed by that Group. It will be helpful and appreciated if the Groups follow the order of the questions in their reports and use the questions and numbers for their responses.

Present position

Local position

1.1 What protection of clients against forcible disclosure of communications relating to IP professional advice applies in your country as to such communications between clients and IP professionals within your country? When was this protection introduced into your law?

Patent attorney's activity in Belarus is governed by the Regulations on Patent Attorneys of the Republic of Belarus, approved by the resolution of the Council of Ministers No. 379 of March 11, 1998 (with the latest amendments of December 23, 2008). According to paragraph 7 of the Regulations on Patent Attorneys information, which the patent attorney gets from the client in connection with performing client's instructions, is deemed to be confidential, unless otherwise stated by the client. Thus, a patent attorney of the Republic of Belarus is obliged not to disclose information, submitted by the client, to third persons. The Law of Advocacy of the Republic of Belarus (Art. 16) provides advocate secrecy.

1.2 What protection of clients against forcible disclosure of communications relating to IP professional advice applies in your country as to such communications between clients and third parties (such as technical experts) where their advice is required to enable legal advice related to IP to be obtained and given?

These relations can be regulated by the agreement only. There are no legal restrictions. However, a patent attorney of the Republic of Belarus and an advocate are obliged not to disclose information, submitted by the client, to third persons.

1.3 What protection of clients against forcible disclosure of communications relating to IP professional advice applies as to such communications between IP professionals and third parties (such as technical experts) where their advice is required to enable IP legal advice to be obtained and given?

These relations can be regulated by the agreement only. There are no legal restrictions. As far as we can judge a patent attorney of the Republic of Belarus and an advocate should not disclose this type of information to third persons.

Overseas communications

1.4 What protection of clients applies in your country against forcible disclosure of communications relating to IP professional advice where those communications are (a) between their local IP professionals in your country and overseas IP professionals, and (b) between clients and overseas IP professionals ?

- (a) *These relations can be regulated by the agreement only. There are no legal restrictions. As far as we can judge a patent attorney of the Republic of Belarus and an advocate should not disclose this type of information to third persons,*
- (b) *) These relations can be regulated by the agreement only. There are no correspondent legal norms. A patent attorney of the Republic of Belarus and an advocate should not disclose this type of information to third persons,*
- (c)

Scope of protection – qualifications of IP professional advisers

1.5 As to each of the following sub-paragraphs (i) to (iv) inclusive, to what category or categories (eg lawyer, lawyer/patent attorney, non lawyer patent attorney, lawyer/trade marks attorney, non lawyer trade marks attorney etc) of IP professional adviser does the client protection described in your answer to previous questions denoted below, apply or not apply, including whether your answers apply only to external advisers, or also to inhouse advisers?

Patent attorney passes a qualification exam at the National Center of Intellectual Property and after getting a certificate he/she can deal with any object of the industrial property. An advocate can represent the client in the court.

(i) as to 1.1. ie the protection (if any) of clients against forcible disclosure of communications relating to IP professional advice which applies in your country as to such communications between clients and IP professionals within your country?

Patent attorneys, advocates (please, see comments above)

(ii) as to 1.2 ie the protection (if any) of clients against forcible disclosure of communications relating to IP professional advice which applies in your country as to such communications between clients and third parties (such as technical experts) where their advice is required to enable legal advice related to IP to be obtained and given?

Patent attorneys, advocates (please, see comments above)

(iii) as to 1.3 ie the protection (if any) of clients against forcible disclosure of communications relating to IP professional advice which applies as to such communications between IP professionals and third parties (such as technical experts) where their advice is required to enable IP legal advice to be obtained and given?

Patent attorneys, advocates (please, see comments above)

(iv) as to 1.4 ie the protection (if any) of clients which applies in your country against forcible disclosure of communications relating to IP professional advice as to those communications which are (a) between their local IP professionals in your country and overseas IP professionals, and (b) between the clients and overseas IP professionals?

Patent attorneys, advocates (please, see comments above)

Limitations and exceptions

1.6 What limitations (eg dominant purpose test, judges' discretion to do justice etc) and/or exceptions (eg crime/fraud etc) and/or waivers apply to the protection described in your answers to previous questions denoted below?

The information, which the patent attorney gets from the client, is not considered to be a legally protected secret (like, for example, medical or advocate secrecy). That is why a patent attorney, who is engaged in any court proceedings as a witness, will be obliged to speak honestly and fully on

everything he knows about the case, as well as answer all the questions, even if the information he is asked about, is confidential in accordance with the Regulations. Corresponding witness's obligation is set out in Article 93 of Civil Procedural Code, Article 60 of Criminal Procedural Code, Article 4.6. of Administrative Procedural Code and Article 72 of Business Procedural Code. Responsibility for failure to give evidence and false evidence is set out in the Criminal Code of the Republic of Belarus. This information is applicable to (1) – (IV).

(i) as to 1.1 ie the protection (if any) of clients against forcible disclosure of communications relating to IP professional advice which applies in your country as to such communications between clients and IP professionals within your country?

(ii) as to 1.2 ie the protection (if any) of clients against forcible disclosure of communications relating to IP professional advice which applies in your country as to such communications between clients and third parties (such as technical experts) where their advice is required to enable legal advice related to IP to be obtained and given?

(iii) as to 1.3 ie the protection (if any) of clients against forcible disclosure of communications relating to IP professional advice which applies as to such communications between IP professionals and third parties (such as technical experts) where their advice is required to enable IP legal advice to be obtained and given?

(iv) as to 1.4 ie the protection (if any) of clients which applies in your country against forcible disclosure of communications relating to IP professional advice where those communications are (a) between their local IP professionals in your country and overseas IP professionals, and (b) between the clients and overseas IP professionals?

Quality of protection

Local communications

1.7 Does your Group consider that the protection described in answer to questions denoted below is of appropriate quality, or not, and if not, why not – including what are the problems in practice?

The Group finds it reasonable to adopt legal acts in order to have a clear regulation on the correspondent issues. This information is applicable to (1) – (III).

(i) as to 1.1 ie the protection of clients against forcible disclosure of communications relating to IP professional advice which applies in your country as to such communications between clients and IP professionals within your country?

(ii) as to 1.2 ie the protection of clients against forcible disclosure of communications relating to IP professional advice which applies in your country as to such communications between clients and third parties (such as technical experts) where their advice is required to enable legal advice related to IP to be obtained and given?

(iii) as to 1.3 ie the protection of clients against forcible disclosure of communications relating to IP professional advice which applies as to such communications between IP professionals and third parties (such as technical experts) where their advice is required to enable IP legal advice to be obtained and given?

Communications with overseas IP advisers

1.8 Does your Group consider that the protection described in answer to question 1.4 above is of appropriate quality or not, and if not, why not – what are the problems in practice?

The Group finds it reasonable to adopt legal acts in order to have a clear regulation on the correspondent issues. This information is applicable to (1) – (III).

2. Remedies

The 'device' to be agreed and applied within and between countries

The Working Guidelines indicate that such a 'device' could be on a scale between unilateral changes and treaties. However, unilateral changes will not solve the problem that no country is immune from the potential that IP legal advice which is protected from disclosure within its own borders, will be required to be disclosed in another country or countries (see para 2.4 (viii)). The Groups are requested to focus on the standard or principle required to remedy problems nationally and internationally (see para 4.6).

Limitations

Tests such as the 'dominant purpose' test.

2.1 Does your Group agree that provision should be made in the agreed principle or standard that countries may limit the documents to which protection applies in their country to such standard or by such test as defines what relationship is required between the documents and the IP legal advice for which protection from disclosure is claimed? *Yes, it does.*

2.2 As to your answer to 2.1 (bearing in mind that it would not be mandatory for any country to have such a limitation), why?

Clear regulation.

Judicial discretion to deny protection

2.3 Does your Group agree (as para 2.7 of the Working Guidelines suggests) that provision should be made in the agreed principle or standard, that countries may allow judicial discretion to deny protection from disclosure where that is found on reasonable grounds to be required in order to enable the court to do justice between the parties? *Yes, it does.*

2.4 As to your answer to 2.3 (bearing in mind that it would not be mandatory for any country to have such a limitation), why?

The Republic of Belarus has already included these provisions in the legislation.

2.5 If your Group considers that the limitation in relation to judicial discretion would be acceptable if expressed differently from 2.3, how would you express it?

Qualifications required of IP advisers

2.6 Does your Group agree (as para 4.14 of the Working Guidelines suggests) that the standard required by the principle agreed should be no more than requiring the IP adviser 'to be qualified to give the IP advice in relation to which the question arises, in the country in which the advice is given'?

Yes, it does.

2.7 If your answer to 2.6 is no, if your Group considers that the limitation would be acceptable if differently expressed, how would you express it?

2.8 If for some category of IP adviser in your country, no qualification is required – (i) What category is that?

(ii) Do you think that protection from forcible disclosure of IP professional advice should apply to communications relating to the advice between clients and persons in that category? -----

(iii) As to your answer to sub-para (ii), why?

Scope of protection against forcible disclosure – the differences between lawyerclient privilege and litigation privilege

2.9 Does your Group agree in principle (para 4.25 of the Working Guidelines raises this question) that the standard or principle agreed should allow countries to limit the protection they provide according to categories of privilege which are currently part of their law?

Yes, it does.

2.10 If no to 2.9 (bearing in mind that such a limitation would not import any effect on a country that does not already have such a limitation unless it voluntarily adopted such a limitation), why?

2.11 As to any country which applies a limitation referred to in para 2.9, do you agree that the agreed standard or principle should not deny such a country the right to vary or abolish such a limitation should it wish to do so in the future – in other words, there should be liberty to vary or abolish a presently applied limitation?

Yes, we agree.

2.12 If yes to 2.11, what limitation (if any) should apply to the liberty to vary or abolish a previously applied limitation and how would you express it?

For the moment it is difficult to formulate.

Exceptions and waivers

2.13 Does your Group agree in principle (para 4.30 of the Working Guidelines suggests this) that the standard or principle agreed should in any particular country be subject to any exception (such as the crime-fraud exception) and waivers which are already part of the law of that country.

Yes, it does.

2.14 Assuming that the maintenance of exceptions and waivers already part of the law of any country is accepted in AIPPI, does your Group agree that the allowance of existing exceptions and waivers should not deny any country the right to vary or to abolish any such an exception or waiver should it wish to do so in the future, in other words, that there should be liberty to vary or abolish a presently applied exception or waiver?

Yes, it does.

2.15 If yes to 2.14, what limitation (if any) should apply to the liberty to vary or abolish a previously applied exception or waiver and how would you express it, in particular should e.g. the limitation for the “3-point-exception” as discussed in para 4.28 above also set limits in this case?

For the moment it is difficult to formulate.

2.16 Since the introduction of protection against forcible disclosure of IP professional advice in your country, have you experienced any adverse effects including as reported in case law or known empirically, from that introduction - if so, what are the details?

No, we have not.

The AIPPI proposal compared with the alternative described in Section 5 above

2.17 Leaving aside the potential need to provide for limitations and exceptions in relation to the AIPPI proposal, and assuming there are no other proposals, from the Groups as an alternative to the AIPPI proposal, which of these two proposals (the AIPPI and the alternative in Section 5 above), does your Group prefer and if so why?

The AIPPI proposal seems to be more flexible.

Proposals from your Group

2.18 Assuming that your Group would prefer a proposal different from those proposed by AIPPI or in Section 5, please describe the preferred proposal of your Group.

For the moment it is difficult to formulate.

2.19 The Groups are invited to submit any further comments they might have with regard to the principles of remedies in the context of this Questionnaire, which have not been dealt with or mentioned specifically in the Questionnaire.

For the moment it is difficult to formulate.

2.20 With the introduction of protection against forcible disclosure of IP professional advice or any other remedy as discussed above into your national law, do you expect any adverse effects on your national law, the patent system as such or any other? If so, what are the details?

It is difficult to foresee adverse effect at the moment.

Note:

It will be helpful and appreciated if Groups follow the order of the questions in their Reports and use the questions and numbers for each answer.