Questionnaire Q199

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

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National Group: **The Egyptian National Group (AEPPI)**

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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?

Patent Agents Law No. 23 of 1951 ("Patent Agents Law") regulates the profession of patent and trademark agency. Patent Agents Law is silent on the issue of forcible disclosure.

However, Article 79 of Attorneys Law No. 17 of 1983 ("Attorneys Law") states that: "the attorney must keep [confidential] information revealed to him by his client …".

Attorneys, therefore, may not disclose information revealed to them by their clients whether in court, in legal proceedings or otherwise.

Further, Article 66 of Evidence Law No. 25 of 1968 states that: "attorneys, agents, doctors or others may not reveal incidents or information obtained through their profession …". This provision applies only with respect to court testimony.

Failure to keep confidential information as such, unless obligated by law, may result in the application of Article 310 of the Penal Code No. 58 of 1937 ("Penal Code") which provides for a sanction of imprisonment of not more than six months or a fine of not more than five hundred Egyptian Pounds.

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?

Article 66 of Evidence Law (see 1.1) imposes the obligation of non-disclosure on any professional who receives confidential information because of his/her profession. It seems that this rule extends to apply to communications between clients and third parties (such as technical experts) if such third parties' advice is required. However, and as stated in 1.1, Article 66 only applies with respect to court testimony.

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?

The language of Article 66 of Evidence Law is general. It imposes the obligation of confidentiality with respect to information " … obtained through their profession …" regardless of the source of information. Therefore, such third parties (for example technical experts) are obligated to keep confidential information that is revealed to them for the purpose of providing their advice in any court testimony.

Overseas communications

1.4 What protection of clients applies in your country against forcible disclosure of communications applies to clients 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?

There are no specific rules available for overseas IP professionals. The provisions discussed above are general and do not limit themselves to communications with local IP professionals. It seems, therefore, that the provisions on protection against forcible disclosure (1.1 and 1.2 above) apply to local as well as overseas IP professionals.

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 in-house advisers?

(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?

The protection available is that relating to disclosure by lawyers and patent and trademark attorneys (whether lawyers or non-lawyers). The obligation of non-disclosure applies to non-lawyers only with respect to court testimony whereas that of lawyers is absolute (subject to limited exceptions). The foregoing applies to both external advisers and in-house advisers.

(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?

Given that the third parties will not be lawyers/legal advisers, only Article 66 of Evidence law will apply. The obligation of non-disclosure applies to non-lawyers with respect to court testimony only. The foregoing applies to both external and in-house advisers.

(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?

See (ii) 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?

See (i) and (ii) 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?

(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?

Both Articles 79 of Attorneys Law and Article 66 of Evidence Law provide an exception to the rule of non-disclosure/confidentiality. If the client discloses information relating to committing a felony or a misdemeanour, the attorney or other IP professional may reveal this information but only to the competent judicial authority.

(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?

See (i) 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?

See (i) 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 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?

See (i) above.

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?

(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?

The provisions providing protection against disclosure are general and somewhat vague. They do not expressly list the professions with which clients are entitled to protection against forcible disclosure. For example, no express mention is made in neither the Patents Agents Law nor in the Evidence Law. Consequently, courts' approach to and application of the provisions discussed above may differ and clients will not have the desired predictability of confidentiality.

(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?

See (i) above.

(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?

See (i) above.

(iv) as to 1.4 ie the protection applies in your country against forcible disclosure of communications applies to clients 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?

See (i) above.

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?

Applicable laws do not distinguish between local and overseas communications with IP professionals/advisers. Comments provided in 1.7 above are intended to apply to both local and overseas communications.

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?

No. Any communication between the client and his/her attorney/IP professional should be strictly confidential, except if an express exception applies.

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?

Normally, most of the communications between the client and his/her attorney/IP professional is of a confidential nature and will relate to the IP rights of the client. The "dominant purpose" criteria or other similar approach is subject to abuse.

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?

No. The limitations on protection (exceptions to confidentiality obligation) should be expressly stated and narrowly interpreted. The courts should not have discretion regarding what information may be disclosed.

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?

It is essential that the relationship of the client with his/her attorney/IP professional be confidential. This will provide more confidence to reveal further information, and therefore better understanding, to the attorneys/IP professionals. In addition, granting the court the discretion to request the revelation of confidential information may be subject to misuse by the courts and/or other parties involved. The criteria should be strictly objective.

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?

Not applicable.

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. In most cases, the professions of the persons "qualified to give IP advice" will be regulated by law (such as attorneys and patent and trademark attorneys/agents). That qualification should be enough to trigger the protection against forcible disclosure.

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?

Not applicable.

2.8 If for some category of IP adviser in your country, no qualification is required –

(i) What category is that?

Except for attorneys and patent and trademark attorneys and agents, no other professionals who may provide IP advice are required to be qualified (such as technical experts).

(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?

Yes. IP professional advice should be protected from forcible disclosure regardless of whether the communications are with a person from a qualified category or not.

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

Whether or not the person providing the IP professional advice is or must be qualified is a regulatory matter of law. However often advice may be sought by non-regulated advisors but that should not affect the confidentiality between the client and such not-regulated IP professional adviser.

Scope of protection against forcible disclosure – the differences between lawyer-client 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?

No. The standard and scope of protection should be the same in both lawyer-client privilege and litigation privilege.

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?

There is no good reason behind the differences between lawyer-client privilege and litigation privilege. Information disclosed in non-litigation context will be usually used in litigation context.

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. Countries applying the standard referred to in paragraph 2.9 above should be at liberty to vary or abolish a presently applied limitation. However, the variation to be allowed is that aimed at narrowing/limiting the standard rather than increasing/broadening it.

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?

None.

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.

Countries should be allowed to maintain certain exceptions, if they so wish. The crime-fraud exception In particular, crime-fraud exception

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. Countries should be at liberty to vary or abolish a presently applied exception or waiver. However, the variation to be allowed is that aimed at narrowing/limiting the exception rather than increasing/broadening it.

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?

None.

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

2.16 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 Egyptian Group is in favour of the AIPPI proposal.

Proposals from your Group

2.17 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.

The AIPPI proposal refers to "A communication to or from an intellectual property advisor..", where the IP Advisor may obtain confidential information from other sources and not necessarily from the client. Hence, it may be a good idea to expand the protection so that it covers also confidential information received by the IP Advisor through his practice of the profession, and which is not necessarily known to the public.

2.18 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.

None.

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.