Legal professional privilege exists in most jurisdictions but its scope and application varies widely. For example, in some jurisdictions, such as the UK, privilege for in-house lawyers is recognised while in others, such as France, Germany, Sweden, Russia, Thailand and European Commission investigations, it is not. In addition, the recent Three Rivers cases before the Court of Appeal and House of Lords in the UK have redefined the scope of privilege in that jurisdiction (see box, Three Rivers).

As both litigation and regulatory investigations become increasingly international, these differences (and their potential consequences) present a significant risk for companies and their legal advisers. Increasingly regulators are indicating impatience with privilege, which makes it all the more important to understand where the true boundaries lie.

In-house counsel advising companies operating in multiple jurisdictions are particularly exposed. Negotiating a path through competing and frequently contradictory laws on privilege can throw up very unexpected results: advice that is privileged in the country where it is given may not be protected in other countries where a company operates. Similarly, advice produced by a locally qualified lawyer may be privileged, while the same advice produced by a foreign lawyer practising in the jurisdiction might not be privileged.

This article, the first in a two-part feature:

- Discusses the differences in approach to the concept of privilege in the common and civil law jurisdictions.
- Provides an overview of the law on privilege in 25 jurisdictions (including the EU).
- Considers the implications of the different rules on privilege for multi-national companies.
The concept of legal privilege differs across jurisdictions around the world, creating significant risks for multinational companies and their legal advisers. In the first of a two-part feature, Diana Good, Patrick Boylan, Jane Larner and Stephen Lacey overview the law on privilege in 25 jurisdictions.

The second article in this feature will focus on regulatory investigations and the role of in-house lawyers.

Differences in concepts of privilege

Common law jurisdictions and civil law jurisdictions approach the concept of privilege of documents from a very different starting point. In the common law jurisdictions of the US, the UK (England and Wales) and countries in which the civil litigation system is based predominantly on that of the UK, such as Hong Kong and Australia, privilege attaches to confidential documents and communications between client and lawyer which are brought into existence for the primary purpose of giving or receiving legal advice. The right belongs to the client and only he may waive it.

The exact nature of the relationship between client and lawyer varies from jurisdiction to jurisdiction and has been the subject of considerable debate in the UK recently (see box, Three Rivers). But fundamentally the nature of privilege is the same throughout common law jurisdictions – it protects from production confidential documents or communications that have been created either to give or obtain legal advice or in preparation for litigation. There are, though, important differences between the protection provided by the doctrine, even between common law jurisdictions, such as England and the US (see box, US v UK differences).

Civil law jurisdictions approach the question of privilege from a very different angle, which flows from the fact that they do not have a similar system of either trans-
It should be noted that in many of the jurisdictions in which there is no obligation to disclose documents harmful to a party’s case, the court may order the parties, or even third parties, to make specific disclosure of certain documents, either on application of the parties or of its own motion. Such countries include Belgium, France, Germany, Italy, Japan, Luxembourg, The Netherlands, Portugal, Romania, Russia, Slovakia, Spain, Sweden and Switzerland.

**Privilege across the jurisdictions**

This section outlines, in relation to each of the 25 jurisdictions considered, the extent to which:

- A formal process of disclosure exists.
- The concept of privilege is recognised.

Whether privilege applies to in-house lawyers in each jurisdiction will be considered in part two of this feature.

**Belgium**

Disclosure. There is no formal process of disclosure. However, parties must produce their own bundle of exhibits on which they rely, which will be served on the other side and at court.

Privilege. Those entrusted with a duty of confidence by status or profession, such as lawyers and doctors, cannot reveal confidential information except where they are called to give evidence in legal proceedings or where the law requires them to disclose the information in question (article 458, Belgian Criminal Code, 1867). This concept is referred to as “professional confidentiality”.

In addition, the Professional Conduct Rules of the Belgian Bar forbid a lawyer testifying to facts that were revealed to him during the course of the exercise of his profession. Correspondence between a lawyer and his client is confidential by nature. Even the client may not produce correspondence from his lawyer marked as confidential unless the lawyer consents. However, correspondence previously marked by the lawyer as non-confidential may be used in court.

Correspondence between Belgian lawyers is also confidential in principle and cannot be used in evidence (article 444, Judicial Code). However, some correspondence between lawyers will be classified as “official” and can be produced in court. The Professional Conduct Rules determine how the distinction should be made. Conflicts are resolved by the head of the bar.

**Brazil**

Disclosure. There is no obligation on a party to list or disclose documents but parties will generally produce those documents they consider support their own case.

Privilege. All documents relating to the relationship between client and lawyer are privileged under federal law, including documents held at the client’s premises. Privilege must be respected by all investigative bodies.

**Czech Republic**

Disclosure. Neither party is obliged to disclose documents before trial, although the claimant will generally submit documentary evidence in support of its case to the court with the claim.

Privilege. There is no concept of privilege expressly recognised in Czech law.

However, communications between a lawyer (attorney) and his client are protected generally, as a lawyer is obliged to keep the affairs of his client confidential (section 21 of Act No 85/1996 Coll, on the Legal Profession (as amended)). Communications between an attorney and his client are therefore “privileged” from disclosure as long as they are in the attorney’s possession, unless the client consents. The same communications, however, may not always be privileged in the possession of the client.

**EU**

Distinct rules apply in the context of investigations by the European Commission.

That being so, the codes of civil procedure, certainly those of Western European jurisdictions, include provisions which impose on a lawyer, acting in the course of his profession, a duty not to disclose confidential communications between himself and his client. It is not that the communication itself is privileged, but that the lawyer is under a duty not to disclose the information in it. In some jurisdictions a lawyer may not even be relieved of that duty by his client, although often the client remains free to disclose the information if he so wishes. Many jurisdictions refer to this duty as legal, professional or client “confidentiality”.

Codes of civil practice are often promulgated and administered by the local bar association, which has responsibility for the regulation of lawyers in its area, and to which lawyers usually have to belong in order to practise in that jurisdiction. In some countries, however, the duty is imposed by statute. Failure to comply with the obligation may even lead to criminal sanctions.

In practice, in cross-border disputes, a litigant or a company involved in a regulatory investigation may find itself obliged to disclose a document in one jurisdiction while benefiting from privilege in relation to the same document in another.

With that in mind, the differing approaches to privilege in jurisdictions across the world are considered below.

In some countries disclosure is not even made to the other side but to the court. There exists in most jurisdictions the right to apply to the court for an order that the other party disclose a specified document or series of documents. The evidence needed to support such an application varies from jurisdiction to jurisdiction.

In part one of this feature, the concept of privilege has been considered in relation to the different approaches across the world with the aim of outlining the different rights granted to parties to a dispute and the extent to which, in the different jurisdictions, those rights are exercised.

In part two of this feature, the different approaches to privilege will be considered in detail. In particular, the differences in approach to privilege under the civil law and common law systems will be examined.
Neither Articles 81 and 82 of the EC Treaty, nor any of the regulations implementing them, contain any provisions in relation to legal privilege. The principles governing such privilege have largely been developed through the case law of the European Court of Justice (ECJ). The AM&S case (AM&S v Commission [1982] ECR 1575) established the principle that Regulation 17 (setting out the rules implementing Articles 81 and 82) must be interpreted as protecting the confidentiality of written communications between lawyer and client. (Regulation 17 has now been replaced by Regulation 1/2003, the Modernisation Regulation, but the position remains the same.)

This principle is subject to two conditions:

- The communications must be made for the purpose and in the interests of the client’s right of defence.
- The communications must emanate from independent lawyers established within the EU (that is, the privilege of in-house and non-EU qualified lawyers is not respected (see part two of this feature for further details)).

France

Disclosure. There is no process in French civil procedure that is equivalent to documentary discovery or disclosure. Parties to civil proceedings in France generally only produce the documents that they consider to support their respective cases.

Privilege. The relationship between a lawyer (avocat, admitted to the local bar) and his client is protected by professional confidentiality unless there is express indication to the contrary (articles 66-5, Law of 31 December 1971). A client cannot release his lawyer from his obligation to keep these documents confidential but is not himself bound by this confidentiality obligation.

Germany

Disclosure. There is no duty to disclose documents to the other side, other than those upon which a party intends to rely. Only very limited means of obtaining disclosure from the court exist.

Privilege. The relationship between a lawyer and his client is protected by a number of professional confidentiality regulations. In the absence of the consent of the client, a lawyer is prohibited from divulging any confidential information or documents obtained in the course of his professional activities (section 203(1), Criminal Code). This obligation to preserve confidentiality is mirrored by the right of the lawyer to refuse to divulge such information (sections 383 and 142(2), Civil Procedure Code).

In addition, documents entrusted to a lawyer in his professional capacity, and which remain in his possession, are protected from disclosure (section 97, Criminal Procedure Code). However, documents located at the client’s premises that are not related to the client’s defence of criminal or regulatory offences are not privileged from seizure by regulatory and other investigative bodies.

Hong Kong

Disclosure. Parties are obliged to disclose documents which are in their possession, custody or power and which relate to matters in question in the action.

Privilege. Legal professional privilege is recognised in the same way in Hong Kong as it was in the UK before the first Court of Appeal judgment on privilege in the case of Three Rivers (Three Rivers District Council v The Governor and Company of the Bank of England ([2002] EWHC 2730 (Comm)) (see UK below and box, Three Rivers). Legal advice privilege protects communications between lawyer and client (that is the company as a whole and not just a section of it) and other documents created by the client for the dominant purpose of the giving or receiving of legal advice. Litigation privilege protects the same documents, as well as communications with third parties for the purpose of the giving or receiving of legal advice or gathering evidence in connection with the proceedings. Internally circulated documents revealing or reproducing privileged lawyer-client communications also are privileged, even where such documents are brought into existence for a non-privileged purpose.

Lawyer-client communications held at the client’s premises are generally protected from production to regulatory and other investigative bodies, except where they relate to fraud offences.

Hungary

Disclosure. There is no obligation under Hungarian law to disclose documents before the commencement of a trial. The parties to the dispute prepare evidence in support of their case and rely on them at the trial.

Privilege. Lawyers (attorneys) are obliged to keep confidential all information that comes to their knowledge in connection with the provision of their professional services (Hungarian Act on Attorneys (Act 11 of 1998)). This provision on legal privilege extends to all documents containing any relevant facts or information prepared or held by the attorney.

In addition, the Hungarian Acts of Civil Procedure (Act IV of 1959 (the Code of Civil Procedure is separately enacted as Act III of 1952)) and Criminal Procedure (Act I of 1973) both provide specific provisions in relation to the right to refuse to testify in respect of information protected by legal privilege. In the course of an official investigation, the attorney may not reveal information relating to his client, although he must not obstruct the actions of the public authority in question.
Three Rivers

Over the last 18 months legal advice privilege has come under attack in two Court of Appeal judgments in the long-running litigation between the Bank of England (the Bank) and the liquidators and creditors of the collapsed Bank of Credit and Commerce International (BCCI). These judgments (Three Rivers District Council v The Governor and Company of the Bank of England No 5 [2003] EWCA Civ 474 (No 5) and No 10 [2004] EWCA Civ 218 (No 10)), concerning the Bank’s obligations to disclose material created during the Bingham Inquiry into the BCCI collapse, appeared to restrict severely legal advice privilege.

In No 5 the Court of Appeal decided that employees of the Bank were third parties for the purposes of claiming privilege. Documents they prepared could not attract legal advice privilege. Only those within the unit (the BIU) created by the Bank to deal with external lawyers in co-ordinating its response to the Bingham Inquiry were within the “client” such that their communications with lawyers could attract legal advice privilege.

Subsequently, in No 10, the Court of Appeal looked at communications between the BIU and the Bank’s external lawyers. It held that these could only attract legal advice privilege if made for the purpose of the giving or receiving of “legal advice”, which the court said was advice on a party’s legal rights and obligations. Advice on how the Bank should present material to the Bingham Inquiry was “presentational” and therefore was not privileged. The court even queried whether legal advice privilege should exist.

These decisions caused much consternation. No 5 applied a narrower interpretation of “client” than was previously understood and failed to give guidance for delineating this concept. It raised the question of whether every employee outside the small group dealing with external lawyers on a daily basis would always have to be treated as a third party. The Court of Appeal’s view of “legal advice” in No 10 meant that practical advice risked falling outside the protection of legal advice privilege even where the communication was between lawyer and “client” as defined by No 5. The concern was that the uncertainties created by these judgments would lead to far fewer clients being prepared to confide in their lawyers.

The Court of Appeal’s view of “legal advice” in No 10 in 2004. As the issues involved were of general importance to all lawyers in the UK, the Law Society, the Bar Council and the Attorney-General all submitted intervening briefs. Linklaters represented the Law Society in its intervention.

Following a four-day hearing concluding on 29 July 2004, their Lordships overruled No 10 after just 15 minutes’ deliberation. In their reasoned judgment, handed down on 11 November 2004, the Lords reaffirmed the existence of legal advice privilege and held that the Court of Appeal’s view of “legal advice” was too narrow. Provided a lawyer has been instructed to act in a “relevant legal context” then any confidential communication between client and lawyer directly related to the performance of the lawyer’s duties should be protected, not just those communications containing advice on the law.

The Lords declined, however, to consider the Court of Appeal’s definition of “client” in No 5, which will remain the guiding authority on that point. As a result, potential for dispute in that area remains. Although the Lords’ clarification of the issues in No 10 was most welcome, it is unfortunate that they did not take the opportunity to deal with a ruling that will undoubtedly create difficulty for clients and practitioners in the future. As Lord Carswell asked at the main hearing (when faced with the suggestion that communications from the Governor of the Bank would not be privileged as he was regarded as a third party outside of the BIU) does No 5 create a distinction of which the law can be proud?

However, attorney-client communications held at the client’s premises are not protected from disclosure.

Italy

Disclosure. There is no formal process of disclosure. The parties must produce their own bundle of exhibits on which they rely, which will be served on the other side and at court.

Privilege. There is no recognised doctrine of privilege in Italy. However, there are certain circumstances in which Italian law will protect particular documents and communications from disclosure where that is necessary to safeguard the lawyer-client relationship. For example, a lawyer cannot be obliged to give evidence of any information acquired by reason of his profession, including conversations and communications with his clients (article 200, Italian Code of Criminal Procedure), nor can he be obliged to disclose any document which is in his possession as a result of his professional activities if he declares in writing that the document is covered by professional confidentiality (article 256, Italian Code of Criminal Procedure). Likewise, lawyer-client communications held at the client’s premises are generally protected from disclosure.

Japan

Disclosure. There is no concept of disclosure in Japan, although applications may be made to the court for production of specific documents.

Privilege. Although Japan does not have a doctrine of legal professional privilege akin to client-attorney privilege or the work product doctrine, it recognises as privileged from disclosure confidential communications between a bengoshi (registered lawyer) and a client (Lawyers Law and Professional Ethics Code). The protection only operates to prevent the lawyer having to disclose those communications — the same communications are not so privileged in the hands of the client.

Luxembourg

Disclosure. A party is obliged to disclose only the documents on which it wants to rely.
Privilege. A right to legal privilege is expressly recognised in the Criminal Code, in the Law of August 1991 on the legal profession (the Law), and in the Luxembourg Bar Association Regulation (LBAR). A lawyer is subject to a duty of professional confidentiality in accordance with Article 458 of the Criminal Code (article 35, the Law). He must keep confidential all aspects of a matter on which he is instructed, and must not communicate or publish any information regarding the matter under consideration.

The LBAR reiterates the lawyer’s duty, stating that a lawyer “is subject to a duty of professional confidentiality under Article 458 of the Criminal Code” (article 5.1.1, LBAR). The duty extends to any information that the lawyer obtained as a result of his being instructed on a matter, from the client or a third party, and whether the information concerns the client or a third party (article 5.1.2, LBAR). The duty is general and unlimited in time (article 5.1.3 LBAR).

There is nothing in Luxembourg law to prevent the seizure by regulatory and other investigative bodies of lawyer-client communications held at the client’s premises. However, any documents seized must be returned (article 35, Law on the Legal Profession of August 1991).

The Netherlands

Disclosure. Dutch law does not provide for a general duty to disclose comparable to the UK or US discovery rules. However, the Dutch law of procedure does contain a limited number of specific regulations which allow the court to order the disclosure of specific documents.

Privilege. Those entrusted with a duty of confidence by status or by profession (such as priests, doctors, lawyers and notaries) cannot be forced to reveal confidential information (article 843a sub 3, Dutch Act on Procedure in Civil Matters (Wetboek van Burgerlijke Rechtsvordering) (Rv) and article 165 sub 2b, Rv). This right to legal privilege only relates to information revealed to lawyers in their professional capacity. The Professional Conduct Rules of the Bar forbid a lawyer from testifying to facts that were revealed to him by his client in the course of the exercise of his profession, although a client can give his lawyer permission to use specific confidential information in court.

Information about the client revealed to the lawyer by third parties is not subject to legal privilege, except where it has been revealed to him within a separate client relationship. Correspondence between Dutch lawyers is confidential in nature and cannot be used in court, except where the client’s interests require this. However, even in such a case, the prior consent of the other party or the president of the local bar is required.

Lawyer-client communications held at the client’s office are protected from seizure by regulatory and other investigative bodies.

People’s Republic of China

Disclosure. Generally, parties to litigation will need to apply to the court for an order to effect exchange of evidence.

Privilege. The concept of legal privilege is not recognised in the People’s Republic of China (PRC).

A lawyer must keep confidential information relating to the state and commercial information that he learns as a result of his professional practice (article 33, PRC Lawyers Law). There are, though, no regulations on legal privilege that entitle a lawyer to refuse to disclose confidential information in court proceedings or pursuant to a request from a government authority. On the contrary, the People’s courts, the People’s legal representatives and the public security organs have authority to collect or obtain evidence as necessary (PRC Criminal Procedure Law). Anyone who falsifies, conceals or destroys evidence, regardless of which side of a case he is on, may be subject to criminal investigation and sanction.

Poland

Disclosure. There is no obligation on parties to litigation to disclose any documents other than those on which they intend to rely.

Privilege. There are two separate bodies comprising the legal profession, each with its own independent governing body and regulations: advocates (adwokaci), and legal advisers (radcowie prawni). The main difference between the two is that, on the whole, only advocates can represent clients in criminal procedures. Both may act, with minor exceptions, in civil cases.

Advocates and legal advisers are obliged to keep confidential all material obtained in connection with giving legal advice (Advocates Law 1982 and the Legal Advisers Law 1982 (as amended)). This obligation extends to all support staff working with a given advocate or legal adviser. However, there are exceptions to privilege in money laundering cases and certain limitations contained in particular in the Polish Civil Procedure Code and the Polish Criminal Procedure Code. In addition, lawyer-client communications held at the client’s premises are not protected from disclosure.

Portugal

Disclosure. Disclosure must be made of documents that a party intends to use to support its own case, to enable its opponent to prepare its defence.

Privilege. A lawyer (advogado) must keep confidential all facts that come to his knowledge during the course, and as a result, of the exercise of his legal profession (article 81, Portuguese Bar Association Professional Conduct Rules). The confidentiality in communications between a lawyer and his client can be waived by the client, although confidentiality in communications between lawyers acting for opposing parties may only be waived with the consent of the Portuguese Bar Association (Ordem dos Advoctados).

Investigative bodies may not seize lawyer-client communications held at the client’s premises.
Legal Risk: Privilege

Romania
Disclosure. There is no obligation on parties to disclose documents unless the court specifically requires a party to do so.

Privilege. Those entrusted with a duty of confidence by status or by profession (such as lawyers, doctors and pharmacists) may not reveal confidential information, except where their clients give permission or where the law requires them to disclose the information in question (under civil procedure and the Criminal Procedure Codes). This concept is referred to as “professional confidentiality”. In addition, a lawyer is forbidden from testifying to facts that were revealed to him in the course of the exercise of his profession unless prior permission has been given by the client (Lawyers’ Law No. 51/1995 (as amended), and the Professional Conduct Rules of the Bar). Exceptions are very limited (for example, in relation to money laundering actions). However, documents are only protected for as long as they are in the lawyer’s possession.

Russia
Disclosure. There is no obligation on parties to disclose documents unless the court specifically requires a party to do so.

Privilege. Russian legislation recognises as privileged any information or communications between an advocate (a lawyer who is qualified to represent clients in court) and his client, if they are produced in the course of the provision of legal assistance by the advocate to the client. An advocate may not disclose confidential client information. In addition, he cannot appear as a witness in court proceedings, nor be questioned on the information he has gained in the course of carrying out his professional duties as an attorney at law (USSR Law on the Bar).

In contrast, a Russian lawyer (who can be anyone who has completed a law degree) does not benefit from such protection against disclosure and must disclose any information requested by an authorised regulatory or investigative state body. This extends to communications between lawyer and client held at the client’s premises.

Singapore
Disclosure. Parties are obliged to disclose documents which are in their possession, custody or power and which relate to matters in question in the action.

Privilege. Legal professional privilege (known as solicitor-client privilege) exists under sections 128(1) and 131 of the Evidence Act (Cap.97) (the Act), and also under the common law to the extent that it is not inconsistent with the Act.

An advocate or solicitor (that is a lawyer admitted to the Singapore Bar to practise law in Singapore) may not disclose, without his client’s consent, any communication made by or on behalf of the client to the advocate or solicitor, the contents of any document obtained during the course of his employment as advocate or solicitor, or any advice given to the client (section 128(2), the Act). Generally, communications for the purpose of obtaining business advice, or for any other purpose, are not privileged.

Common law also provides that all letters and other communications passing between a client and his solicitor are privileged from production if they are confidential, and written to or by the solicitor in his professional capacity, for the purpose of getting legal advice or assistance for the client.

Slovakia
Disclosure. Parties must disclose to the court the documents upon which they wish to rely. The other side then has access to these.

Privilege. An advocate is obliged to keep confidential all information acquired in connection with litigation, subject to certain defined exceptions (Act 586/2003 Coll, on Advocacy (Act on Advocacy)). The scope of the information protected against disclosure by an advocate is not defined any further.

In legal theory and practice it is generally accepted that this duty applies not only to the documents prepared for a client but also to all information communicated to an advocate by a client. In addition, it includes information not directly communicated by a client but acquired by an advocate in the process of advising on a particular case, where the information concerned is not publicly known.

However, an investigating authority will not be prevented from obtaining communications between a lawyer and client held at the client’s premises.

Spain
Disclosure. Disclosure must be made of the documents that a party intends to use to support its own case.

Privilege. Lawyers (abogados, for whom membership of the bar is obligatory) must keep confidential all facts and matters that they come to know through the conduct of their professional obligations (article 542, Law of Judicial Authority (Ley Organica del Poder Judicial)). This is reinforced by the imposition on lawyers of a duty not to disclose facts and documents that have come into their possession as a result of their professional activities (Spanish Professional Conduct Code (June 2000) and General Statute for Spanish Lawyers (Estatuto General de la Abogacía Español, approved by Royal Decree 658/2001 of 20 June). Clients may not release their solicitor from this duty, although they are not bound by it themselves. However, relevant documents in the client’s possession continue to benefit from confidentiality and do not have to be disclosed to investigative bodies.

Disclosure of confidential information contrary to professional confidentiality obligations is punishable with a prison term, fine and/or disqualification from practice (article 199.2, Spanish Criminal Code).

Sweden
Disclosure. There is no concept of disclosure of documents in Swedish law, although during the preparation for trial each party must submit all documents.
US v UK differences

Because of the shared origins and many similarities between the US and UK (England and Wales) legal systems, there tends to be a common perception that the laws on privilege are broadly similar in both jurisdictions. This is true to a large extent, as the US attorney/client privilege and work product doctrine are the approximate equivalents of legal advice privilege and litigation privilege in the UK (see main text, UK and US). However, in addition to the developments in legal advice privilege in the Three Rivers litigation (Three Rivers District Council v The Governor and Company of the Bank of England No 5 [2003] EWCA Civ 474 and No 10 [2004] EWCA Civ 218) (see box, Three Rivers), there are important differences between the two jurisdictions:

- **Third party communications in the absence of litigation.** One key difference between the two jurisdictions is that, in the US, attorney/client privilege can apply to communications to third parties if the purpose of the communication to the third party is to help the attorney to provide legal advice to the client, for example, where a financial adviser is hired by an attorney to assist the attorney in understanding the client’s financial information. By contrast, these communications would not be protected under UK law unless litigation was reasonably in prospect at the time.

- **Selective waiver.** A further important difference is the possibility of selective waiver in the UK, which allows the sharing of a copy of a legally privileged communication with a third party without losing privilege. Under UK law, as long as the document has not entered the public domain and remains confidential, then privilege will not necessarily be lost by the fact that the document has been shared with a third party provided the document was disclosed (by way of example to a regulator) for a limited purpose. This is not the case in the US. There, the majority view is that disclosure of a single copy of a privileged document to third parties, including regulators (even if that disclosure takes place abroad), results in complete loss of privilege as to the entire subject matter of the privileged documents.

- **Definition of the “client”.** Following the House of Lords’ refusal to review the Court of Appeal’s judgment in Three Rivers No 5 (see box, Three Rivers), the Court of Appeal’s narrow definition of the “client” remains good authority in England. This is in contrast to the position in the US. When examining the classes of employees that could create privileged documents, the US Supreme Court (Upjohn Co v United States (1981) 449 US 383) rejected the proposition that only a narrow class of employees could create privileged documents. In that case it had been argued that only the “control group” of employees responsible for acting on the legal advice received could create privileged documents. The Supreme Court, though, held that the documents created by other Upjohn employees in response to requests for information from attorneys could attract privilege. The Supreme Court’s criticism of the contrary view serves equally well as a criticism of the English Court of Appeal’s decision in Three Rivers No 5: “Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.”

Privilege. The concept of legal professional privilege is recognised, although it is limited and depends on the identity of the lawyer.

Legal privilege is primarily an exception to the general obligation to give testimony provided by the Swedish Procedural Code (SPC). Swedish advokats (that is, members of the Swedish Bar Association) and their assistants have a right to legal privilege, which protects all confidential information gained by them in the provision of legal services generally (chapter 36, section 5, SPC). In addition, investigative authorities are not entitled to seize lawyer-client communications held at the client’s premises. This right may be overridden where the examination is authorised by law or the client consents to the disclosure.

However, legal privilege available to non-advocate trial lawyers is limited to protecting only confidential client communications entrusted to the lawyer for the purposes of the litigation.

Switzerland Disclosure. In civil proceedings, the procedural rules of many cantons provide that a respondent can be ordered, but not compelled, to deliver documents in its possession. The court can, however, draw adverse conclusions from a respondent’s refusal to produce a document. Third parties have a duty to deliver documents requested by court order.

Privilege. Information received by an independent lawyer from a client or from third parties in the context of an attorney-client mandate remains confidential. Lawyers are obliged not to disclose such information and can invoke a privilege based on the applicable procedural laws to protect it.

The information is protected if it is in the lawyer’s possession. The protection will include correspondence between lawyer and client, memorandum, notes and, to some extent, documents received from the client. All such material is protected provided it relates to legal advice. No protection is granted to information relating to other services by external lawyers.
Privilege does not extend to material in the client’s possession. As a result, correspondence between lawyer and client found at the premises of the client or third parties is not protected. An exception to this general rule exists in criminal proceedings, while in regulatory investigations the issue is subject to debate.

Thailand Disclosure. Any party to proceedings intending to rely upon any document as evidence in support of his allegations or contentions must deliver a copy to the court and to the opposing party.

Privilege. Privilege is available to prevent the disclosure by a lawyer of any confidential document or fact that was entrusted or imparted by a party or witness to the lawyer in his capacity as a lawyer (section 92, Civil Procedure Code and section 231, Criminal Procedure Code). The privilege belongs to the client or witness, who may give permission for the disclosure. Lawyer-client communications also are protected from disclosure to regulatory and similar authorities where they are held at the client’s premises (section 92, Civil Procedure Code and section 231, Criminal Procedure Code). In addition, unauthorised disclosure of confidential information by a lawyer may be a criminal offence (Penal Code).

For privilege to apply, the information must relate to legal professional advice or representation. The privilege attaches to communications which include or refer to documents or facts provided in confidence to the lawyer for this purpose. Communications between lawyer and client which do not fall into this category are not privileged.

UK Disclosure. A party to litigation must disclose, broadly, those documents on which he relies and those that adversely affect his own case, adversely affect another party’s case, or which support another party’s case (Civil Procedure Rule 31.6).

Privilege. Documents that are covered by legal privilege are protected from disclosure. Legal privilege comprises two main types:

- Legal advice privilege. This applies to confidential communications between a lawyer and his client that come into existence for the purpose of giving or receiving legal advice, in respect of the client’s legal rights and obligations. (The “client” is tightly defined for these purposes.) Communications between the lawyer and (the client’s employees, or) third parties are not covered.

- Litigation privilege. This arises once litigation is in reasonable prospect. Documents that come into existence at the request of a lawyer or at the request of a client with the intent to pass them on to the lawyer (including those generated by third parties, for example, witnesses and experts), will be privileged from disclosure, provided that they are for the purpose of obtaining evidence or giving or receiving legal advice in connection with the litigation.

Relevant documents held at a client’s premises will be protected from disclosure to regulatory and other investigative bodies.

The law of privilege has recently been reviewed by the House of Lords in the case of Three Rivers District Council v The Governor and Company of the Bank of England (No.5 [2003] EWCA Civ 474 and No.10 [2004] EWCA Civ 218) (see box, Three Rivers).
to request disclosure of documents from the opposing party, as the mandatory disclosure requirements under the federal rules are quite limited and the states in the main have no such rules.

Privilege. US jurisdictions recognise several legal privileges, with two being the most common: the attorney-client privilege and the work product doctrine.

The attorney-client privilege protects confidential communications between an attorney and his client that are made:

- In the course of legal representation.
- For the purpose of providing legal advice to the client by the attorney.

It protects only the communication and not the underlying facts. A client cannot shield documents from disclosure simply by sending them to his lawyer.

The work product doctrine protects documents and tangible things prepared in anticipation of litigation by an attorney or an attorney’s agent. It does not provide absolute protection. However, it does not prevent disclosure of an attorney’s mental impressions, conclusions, opinions or legal theories with respect to actual or reasonably anticipated litigation.

Other applicable privileges in the US are the common interest privilege and privilege against self-incrimination. This is not an exhaustive list.

The treatment of lawyer-client communications by regulatory and other investigative bodies is considered in more detail in the second part of this feature.

Implications for companies

The above overview shows the scale of the differences between the concepts of legal privilege in the various jurisdictions. Perhaps most concerning for large companies is the fact that, in many of these civil law jurisdictions, privilege only covers documents in the hands of a lawyer. Accordingly, any other document, even a letter of legal advice from a lawyer, will not necessarily be privileged in the client’s hands.

In the past, this absence of privilege for documents in a company’s hands in these jurisdictions might have been less of an everyday concern, given the absence of the disclosure obligation in litigation in most civil law jurisdictions. However, that view can no longer be maintained, in light of the increase in regulation and, particularly, the ability of regulators across the world to demand access to documents. For this reason it is most important that companies educate staff as to the risks involved in document creation, particularly e-mail communications, in which writers tend to be more frank and less guarded than in other forms of written (and even oral) communication.

The second part of this feature will be published to PLCGlobal Counsel Web in early 2005.