For in-house lawyers in Asia, claiming privilege is no straightforward matter. There is no legislation which specifically deals with their rights to privilege. In some Asian countries such as Malaysia and Singapore, the laws which confer privilege on private practitioners seem to cover in-house counsel as well, but the courts have either not confirmed this or obscured the position even further. In some places, even where it is accepted that in-house lawyers have privilege, the right can be lost if the tests for claiming it are not met.

India is one such jurisdiction where the position of in-house lawyers is ambiguous. The relevant legislation is section 126 of the Indian Evidence Act 1872, which prohibits barristers or attorneys from disclosing any communication made to them by clients, any documents they came upon for the purpose of their professional employment, or any advice given to clients, unless clients expressly consent to the disclosure.

Strictly speaking, this section does not confer privilege on in-house lawyers. “It essentially covers barristers or attorneys only. As per our Bar Council rules, once a person accepts a job as a legal officer, the licence to practise must be surrendered, and such person is no longer entitled to be called a barrister or attorney,” says Sumeet Kachwaha of Kachwaha & Partners.

In September 2007, the European Court of First Instance held that communications between companies and in-house lawyers are not protected by legal professional privilege. Although the ruling applies only to competition investigations by the European Commission, the decision highlights the need for in-house counsel to know how far they can claim privilege. Sonia Chan spoke to Asia’s litigation experts on the issue.
However, in 1982, the High Court of Bombay held that salaried employees who advise their employers on legal matters would get the same protection as barristers or attorneys under the Evidence Act, provided that the communication between them is not made in furtherance of any illegal purpose. This court decision does not put any uncertainty to rest, according to Kachwaha. “It is possible that other courts may adopt a different interpretation of section 126. I would therefore say that this is a grey area,” he says.

**Malaysia: Based on but not always following the Indian model**

Section 129 of Malaysia’s Evidence Act are based on the Indian Evidence Act, according to Ira Biswas of Chooi & Co. Biswas is not aware of any reported court cases in Malaysia that examined this statute’s applicability to in-house lawyers. “It could be argued that, under those provisions, a person cannot be compelled to disclose any confidential communication which has taken place between him and his legal professional adviser,” she says, adding that although Commonwealth authorities are of persuasive value in Malaysia, it is not known whether the Indian decision that applied the law to in-house counsel will be followed there.

However, Biswas thinks that the Malaysian courts will not extend the privilege to in-house lawyers. “The main provision on privilege, i.e. section 126 of the Evidence Act, applies only to practising advocates, and in Malaysia, an advocate means a person who holds a practising certificate to practise as an advocate or an advocate and solicitor,” says Biswas. “It would imply that only outside counsel are covered, because under our rules, an in-house lawyer cannot be a practising advocate and solicitor.”

The situation in Indonesia is no less equivocal. The relevant legislation is Article 19 of the Advocates Law, which provides that all advocates shall maintain the confidentiality of all matters that came to their knowledge during their professional relationship, including information provided by the client and related documents.

An advocate is defined by the Advocates Law as any person who professionally provides legal services either inside or outside the court. One interpretation is that the term “advocates” encompasses in-house lawyers, and this is the view taken by Tony Budidjaja of Budidjaja & Affiliates.

“The duties, rights, and privileges of advocates set out in the Advocates Law, including the privilege to refuse to disclose confidential communications made with the client, should be applicable to in-house advocates admitted under the Advocates Law,” Budidjaja says.

Iswahjudi Karim of KarimSyah Law Firm puts forward a contrary view. “In Indonesia, we only recognize the admitted lawyer, not in-house lawyers, who are regarded as employees of the company,” he says. “[Accordingly], there is no privilege for in-house lawyers in Indonesia, and they are obliged to testify about their employers if the criminal court or Indonesia’s special court for competition law require them to do so.”

**Singapore’s tale of two laws**

The position of in-house lawyers in Singapore has to be looked at from the perspective of both the common law and domestic legislation. The common law position in Singapore follows that of England and Wales. “A ruling of Lord Denning in the English Court of Appeal in the 70s states that communications involving salaried legal officers will also enjoy legal privilege like lawyers in private practice, provided the legal questions were posed to them in their capacity as legal officers of the company, and they answer those questions in that capacity. So, under those circumstances such communications will be protected by legal privilege,” explains Jimmy Yim of Drew & Napier.

However, Singapore’s Evidence Act enacted in the past centuries may cast doubt on in-house lawyers’ entitlement to privilege. “The statutory position states that only communications between legal professional advisers and clients are privileged,” Yim says. “What has not been decided by our Courts is the extent of the meaning of the phrase ‘professional legal advisers’ – whether it extends to salaried legal officers of the company. This is a question mark and there has not been any authoritative court decision yet.”

There are no guidelines which in-house lawyers can rely upon. “This is yet an undecided, untested situation. You will find views one way or the other, depending on which camp one is in. And it needs to be decided,” he adds.
Japan’s grey area

In Japan, not only is the position of in-house lawyers unclear; the extent to which private practitioners, i.e. attorneys-at-law (bengoshi) and patent attorneys (benrishi), can claim attorney-client privilege is itself a grey area. “I think it is fair to say that there is a type of attorney-client privilege in Japan, in the sense that all private lawyers owe a duty of confidentiality to their clients,” says Daiske Yoshida of Latham & Watkins in Tokyo.

Some in-house lawyers try to maintain this privilege by setting up a mini lawyers’ office within the company, and have sensitive documents stored inside. Yoshida explains: “So, for that space, the lawyer is able to say: ‘Well, I’m a lawyer, I have a duty of confidentiality to the client.’ Therefore, if the government comes knocking, the lawyer can say: ‘I cannot let you into my office, because it’s my confidences.’”

However, a statement made by the Japan Fair Trade Commission (JFTC) several years ago generated much uncertainty. “In response to public comments on proposed revisions to Japan’s Anti-Monopoly Law, the JFTC stated its position that ‘there is no attorney-client privilege in Japan.’ This caused some consternation, but I think what the JFTC meant was that attorney-client privilege cannot be used as an absolute shield from a government investigation,” says Yoshida.

It should be noted that by reason of two factors, attorney-client privilege has limited significance in Japan as compared with the US or the UK. The first factor is that the number of in-house lawyers who are admitted attorneys is very small. Non-admitted legal staff are subject to the same duties as any company employee.

The second factor lies in the lack of any discovery requirements in Japan. “The need for attorney-client privilege comes from the idea that there is an obligation to produce information or documents to the other side. But here in Japan, there’s no obligation to produce any documents at all,” says Craig Cehniker of Morrison Foerster in Japan. “So, the concept of attorney-client privilege is much less important. Nevertheless, communications between counsel and his or her client are taken for granted to be confidential, and are within the broader category of internal, private communications that are outside the scope of what companies would ever produce or give in a litigation setting.”

In light of the uncertainties of the law, lawyers should take a cautious approach in handling information. “A lot of lawyers, especially those who don’t practise in Japan, are just not aware of these rules, and so they’re fairly free about sending legal advice by email to their client, even if there’s a risk of a criminal investigation or government investigation,” says Yoshida. “With more sophisticated clients, they’re very cautious about how they communicate with outside counsel.”

Clarity in South Korea

In South Korea, the situation appears to be more positive for in-house lawyers. According to Byung-Chol Yoon, head of the international arbitration practice group at Kim & Chang, South Korea, as a civil law country, generally regards the protection of attorney-client communications as an aspect of the attorney’s professional duty of secrecy. “The attorney has both a right and a duty to maintain the secrecy of client communications, and the client may not waive or extinguish that duty.”

Failure to maintain client confidences is punishable under Korea’s Criminal Code. Provisions in the Criminal Procedure Act and Civil Procedure Act give attorneys the right to refuse to testify regarding client confidences. The Criminal Procedure Act also gives an attorney the right to reject a search and seizure order if information that would be seized contains secrets entrusted by a client. This protection, however, may be overridden by a compelling public interest in accessing the documents or by the client’s consent to the seizure.

Yoon says the Korea Bar Association (KBA) has confirmed these protections apply not only in criminal investigations, but also during the process of administrative investigations. “The KBA reasoned that this protection is essential to ensure the constitutional right to representation by counsel, since forcing an attorney to disclose legal advice during an investigation process would destroy the purpose and meaning of protecting attorney-client communications during litigation,” he says.
In Yoon’s view, in-house counsel are afforded the same protection as private lawyers, and his reason is based on how the law is drafted. “Korea’s Lawyer Act and Criminal Procedure Act make no distinction between in-house counsel and external counsel. Thus the same protections apply whether the attorney serves as in-house or external counsel.”

However, there are precautions which in-house counsel must take if they are to protect their claim to privilege. Yoon explains: “It is important, however to distinguish between the in-house counsel’s role as a legal adviser and as a provider of business advice. While the former is protected, the latter is not, and it is thus important to clearly distinguish legal advice where possible.”

When all the requirements for protecting attorney-client communications are established, it is essential to jealously guard their confidentiality. “As only confidential documents entrusted to the attorney’s safekeeping are protected, failure to diligently protect their confidentiality may result in a waiver of any claim against their production,” Yoon adds.

**Hong Kong has its limits**

In Hong Kong, in-house counsel’s communications are also recognized to enjoy privilege in a similar way to those of private lawyers. According to Robert Pe, partner of Orrick, Herrington & Sutcliffe in Hong Kong, English cases are still of persuasive authority in Hong Kong and the English Court of Appeal and the House of Lords judgments in *Three Rivers District Council & Ors v. Governor and Company of Bank of England (No. 5)* are therefore relevant.

Although the case has been cited by judges in Hong Kong, there has not been any detailed analysis or commentary on how the case would apply to in-house lawyers here. Pe advises: “It is prudent to assume that the key parts of the Court of Appeal and the House of Lords judgments in this case would be followed in Hong Kong.”

“In order for legal advice privilege to apply, the dominant purpose of the communication must be the giving of legal advice,” adds Pe. “The in-house counsel needs to have this mind, particularly when corresponding by email. If he/she is pulled into a dialogue or discussion about commercial rather than legal issues, then privilege will not apply.”

In-house counsel often work for their company in more than one role. Apart from being a legal adviser, they may have an executive or operational role. Pe points out: “Since only communications prepared in the role of the legal adviser giving legal advice will attract privilege, it is important to distinguish between different roles. Indeed it often makes sense to have a title that reflects multiple roles – for example, Executive Vice President, Global Human Resources and General Counsel.” To highlight that a document is prepared in the individual’s capacity as a legal adviser, Pe says that the document should be signed off by the individual purely as “General Counsel”. The document should also be expressly labelled “privileged and confidential”.

There is a second requirement which needs to be satisfied. “In order for privilege to apply, the communication must be between lawyer and client. The English Court of Appeal in *Three Rivers (No. 5)* makes clear that the client will be defined narrowly. It will not be the company as a whole but only a small group of individuals responsible for the particular matter. In-house counsel have to keep in mind that only communications with this group will be covered by privilege. Wherever feasible, it is helpful to define in writing the client for the particular matter.”

According to Pe, the European court’s decision in *Akzo Nobel v Commission* not to extend privilege to in-house lawyers is not directly relevant in Hong Kong; the decision applies only in the context of European Commission investigations and not more generally.
In-house lawyers want equality

The issue of in-house lawyers’ privilege has obvious importance in the context of criminal or regulatory investigations. However, there is another equally significant dimension to the issue, namely, the equal treatment of private practitioners and in-house counsel. In the eyes of the European Court, by reason of the bond of employment between companies and their in-house lawyers, the latter are no longer sufficiently independent as private practitioners. This has drawn heavy criticism from the Law Society of England and Wales, who has applied to intervene in the forthcoming appeal of the Akzo case.

The desire for placing in-house counsel and external lawyers on equal footing is not exclusive to European practitioners. The Corporate Counsel Association (CCA) of Singapore, for instance, wants in-house lawyers to be on par with private counsel, and has expressed the stance that in-house communications with employers should be privileged.

However, the Singaporean government has not accepted the position of the CCA. As Jimmy Yim of Drew & Napier explains: “The last thing the government wishes to see is that communication between the legal department and some executives in the company relating to, say, share trading, are free from disclosure, when the government stands for a very well regulated market in which shenanigans are not tolerated”

Understandably, the Singaporean government’s worries are probably shared by law enforcement agencies throughout Asia and around the world, and are difficult to dispel. In-house counsel need to be recognized as impartial, independent advisers if they are to enjoy privilege like their external counterparts. But this is also a challenge, as in-house lawyers are expected to know more about their employers than any other advisers. Ironically, the close relationship between companies and their internal lawyers, which has long been regarded as an asset, may grow to become a liability. It looks like there is still a long way to go before the disparity between in-house and external lawyers in claiming privilege disappears.