

NEWSLETTER

July 2024

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Recent Developments Regarding Attorney-Client Privilege in Korea

Attorney-client privilege has once again become a controversial topic in Korean legal practice as there have been reports that in recent criminal investigations, the Korean police and prosecutors have seized confidential attorney-client communications, even those under the custody of attorneys.¹

This newsletter provides an overview of attorney-client privilege in Korea – its scope and limitations – and analyzes the implications of a recent Seoul Southern District Court case in which Lee & Ko successfully protected attorney-client communications from unlawful seizure.

1. An Overview of Attorney-Client Privilege in Korea

Unlike in major common law jurisdictions where attorney-client privilege broadly protects communications between an attorney and a client, the protection of attorney-client communications is not established as an evidentiary privilege under Korean law.

This, however, does not mean that attorney-client communications are entirely unprotected in Korea. Similar to many other civil law jurisdictions, the protection is primarily regarded as a matter governed by the attorney's confidentiality obligations and the attorney's right to refuse to testify in court.² In civil cases, these two safeguards protect attorney-client communications from witness examinations and document production orders. In criminal cases, however, the attorney's confidentiality obligations do not prevent the police or prosecutors from searching or seizing such attorney-client communications.

Due to these limitations, a number of Korean practitioners have argued that a common law style attorney-client privilege should be derived from Article 12(4) of the Korean Constitution, which expressly recognizes a defendant's right to legal counsel.³ On such grounds, in 2009, the Seoul High Court attempted to affirm the existence of a common law style attorney-client privilege, but this was ultimately dismissed by the Korean Supreme Court.⁴ The Korean Supreme Court held that a common law style attorney-client privilege is unnecessary as attorney work product may be sufficiently protected in a criminal proceeding by existing hearsay rules. Even though both the lower court and

the Supreme Court found it necessary to protect attorney work product, they diverged on how to achieve such protection.⁵

The protection provided by the hearsay rules is, however, somewhat limited. The protection under the hearsay rules only applies to communications provided by an attorney. This means that any communications from a client to an attorney, unlike that from an attorney to a client, are not protected. In addition, even if an attorney's communications are not admissible as evidence in court, prosecutors and the police can still seize the communications and use them to assist their investigations before court proceedings take place, which puts a potential defendant at a significant disadvantage. More importantly, the hearsay rules is only an indirect means to protect attorney work product, as the attorney must actively refuse the admission of work product as evidence in court by exercising the attorney's right to refuse to testify. Likewise, if the attorney chooses to testify and have the work product admitted as the evidence, the client can no longer rely on the hearsay rules.⁶

2. The Korean Courts' Evolving Position on Attorney-Client Privilege

Despite the Korean practitioners' continued demand for the adoption of a common law style attorney-client privilege, Korean courts have not substantially deviated from the Supreme Court ruling above over the past twelve years. However, it appears that the Korean courts' position has begun to change.

■ Case Overview

This case involved the seizure of a wide range of attorney-client communications kept by an asset management company (the **Client**). In July 2023, the prosecution initiated an investigation into the executives and employees of the Client for a potential violation of the Korean Financial Investment Services and Capital Markets Act, and seized a large number of electronic attorney-client communications in the Client's custody. The materials seized by the prosecutors included not only legal memos prepared by the Client's attorneys, but also documents, emails, and messages that the Client had exchanged with its attorneys in relation to separate investigations and court proceedings. The Client immediately filed an appeal in objection to the prosecution's seizure of the attorney-client communications before the Seoul Southern District Court.

■ Summary of the Seoul Southern District Court's Ruling⁷

The Seoul Southern District Court ruled in favor of the Client's appeal and ordered the prosecution to return all seized attorney-client communications.

Citing a Korean Constitutional Court's ruling that "giving legal advice to a client is one of the core elements of the constitutional right to legal counsel", the court found that communications made in secret between the attorney and the client for the purpose of obtaining legal advice is protected under Article 12(4) of the Korean Constitution. The court also referred to the attorney's obligation to maintain confidentiality stipulated in the Korean Criminal Act, the Criminal Procedure Act and the Attorneys-At-Law Act as grounds for such protection. The court reasoned that in order for a client to be fully assisted by an attorney when preparing for a criminal prosecution, there must be a trust between the client and the attorney that their communications, including those communications made by a client to its attorney, will be protected.

3. Implications of the Seoul Southern District Court's Ruling

The prosecution appealed the Seoul Southern District Court's ruling, and the case awaits the Korean Supreme Court's final judgment. If the ruling is confirmed by the Korean Supreme Court, this is expected to significantly enhance a criminal defendant's right to legal counsel in Korea. Such a ruling by the Korean Supreme Court will also potentially curtail the prosecution from seizing attorney-client communications at the onset of a criminal investigation, preventing the prosecution from using those confidential communications as indicators to unduly broaden the scope of its investigations. Such a ruling is also expected to revitalize public discussions on the enactment of a statutory attorney-client privilege.

A potential adoption of a common law style attorney-client privilege will be a welcome news for many foreign businesses operating in Korea, especially those from common law jurisdictions. However, until the Korean Supreme Court confirms the lower court's ruling or the Korean National Assembly officially enacts legislation on attorney-client privilege, it is important for foreign businesses operating in Korea to be mindful of the limitations of the current protections available to attorney-client communications, such as its one-sided nature. In addition, when facing criminal investigation, foreign businesses should not be quick to assume that their communications with their attorneys will be automatically protected. If their communications are seized by the police or prosecutors, we advise foreign businesses to be proactive in appealing such seizure at court.

Lee & Ko's International Arbitration & Cross-Border Litigation Group has been successfully representing both domestic and foreign clients in some of the most complex and high-value matters in the world, and has been at the forefront of international disputes before major arbitral institutions and domestic courts. If you need our assistance, please contact any of the key members of Lee & Ko's International Arbitration & Cross-Border Litigation Group.

1 The Seoul Southern District Court case discussed in this newsletter is the latest installment to a series of criminal investigations that have involved the seizure of attorney-client communications. In 2019, the prosecution seized communications under the possession of a law firm defending a chemical company. In 2022, the prosecution raided another law firm representing a defendant in a high-profile corruption case.

2 See Article 26 of the Attorneys-At-Law Act, Article 149 of the Criminal Procedural Act, and Article 315 of the Civil Procedural Act

3 Article 12(4) of the Korean Constitution ("*Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his or her own efforts, the State shall assign counsel for the defendant as prescribed by Act.*")

4 Seoul High Court Judgment No. 2008No2778 dated 26 June 2009

5 Korean Supreme Court en banc Judgment No. 2009Do6788 dated 17 May 2012

6 Sohn, C. (2019). Protection on Confidential Communications between Attorney and Client-Acknowledgment of Attorney-Client Privilege and Interpretation of Relevant Statutes. *Journal of Legal Studies*

7 Seoul Southern District Court Decision No. 2023Bo4 dated 23 February 2024

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