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**Preserving Attorney-Client Privilege in Cross-Border
Matters and Related Regulatory and Compliance Issues**

Jordan W. Cowman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
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PASHA S. ANWAR, et al.,

Plaintiffs,

-against-

FAIRFIELD GREENWICH LTD, et al.,

Defendants.

This document relates to the
Citco Cases
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DISCOVERY ORDER

09 Civ. 118 (VM) (FM)

FRANK MAAS, United States Magistrate Judge.

This multi-district litigation consolidates numerous actions brought by investors against various funds, administrators, intermediary banks, and auditors in an attempt to recover losses arising out of the now-infamous Bernard Madoff investment scandal. On April 25, the Plaintiffs deposed Renger Boonstra, a senior in-house lawyer at Citco Bank Nederland, one of several defendant banks alleged to have provided financial account services for the Fairfield Greenwich “feeder” funds. During the deposition, counsel for the Citco Defendants instructed Mr. Boonstra not to answer certain questions, apparently on the theory that the Plaintiffs’ inquiries related to matters protected by the attorney-client privilege.

Mr. Boonstra is a lawyer by education, but he is not a licensed attorney. Although licensure is not a requirement for serving as in-house counsel in the Netherlands, Dutch law does not recognize an attorney-client privilege for communications with unlicensed in-house lawyers. Accordingly, the Plaintiffs have

requested an order overruling the Citco Defendants' privilege objections. In addition, the Plaintiffs seek to compel disclosure of several of Mr. Boonstra's email communications that the Citco Defendants have withheld on privilege grounds.

The Citco Defendants have a rather different view of the matter. They argue that American – not Dutch – law governs the dispute. As a consequence, the Citco Defendants contend that their communications with Mr. Boonstra are privileged even if he was unlicensed because Citco had a “reasonable belief” that Mr. Boonstra was its attorney.

In determining which country's law applies to a privilege dispute involving foreign attorney-client communications, courts in this Circuit consider the country with which the communications “touch base.” Gucci America, Inc. v. Guess?, Inc. (“Gucci I”), 271 F.R.D. 58, 64-65 (S.D.N.Y. 2010). Under this analysis, the Court applies “the law of the country that has the ‘predominant’ or ‘the most direct and compelling interest’ in whether [the] communications should remain confidential, unless that foreign law is contrary to the public policy of this forum.” Astra Aktiebolag v. Andrx Pharmaceuticals, Inc., 208 F.R.D. 92, 98 (S.D.N.Y. 2002) (quoting Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 522 (S.D.N.Y. 1992)). “The jurisdiction with the ‘predominant interest’ is either ‘the place where the allegedly privileged relationship was entered into’ or ‘the place in which that relationship was centered at the time the communication was sent.’” Id. Thus, American law typically applies to communications concerning “legal proceedings in the United States” or “advice regarding American law,” while

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