



1025 Connecticut Avenue, NW, Suite 200  
Washington, DC 20036-5425 USA

tel +1 202.293.4103

fax +1 202.293.4701

www.acc.com

September 18, 2013

Hon. Victor Marrero  
United States District Judge  
Daniel Patrick Moynihan  
United States Courthouse  
Courtroom 11B  
500 Pearl Street  
New York, NY 10007-1312

*Sent by overnight delivery;  
service copies sent by e-mail*

*Re: Amicus letter from Association of Corporate Counsel supporting  
Citco Defendants' privilege arguments in Anwar v.  
Fairfield Greenwich, Ltd., Master File No. 09-CV-00118 (VM)*

Dear Judge Marrero:

On behalf of the Association of Corporate Counsel, we urge this court to reverse the magistrate judge's decision, and hold that because the communications between the Dutch company and its Dutch in-house lawyer would have stayed confidential in the Netherlands, courts in the U.S. should treat them as privileged.<sup>1</sup>

Different countries have different legal systems. They use a wide range of legal mechanisms to address even common goals, such as protecting communications between clients and their lawyers. The U.S. legal system recognizes the world's legal diversity under the doctrine of comity, by establishing the "touching-base" and other tests to prevent American norms from riding roughshod over the law from other countries. This U.S. respect for laws from elsewhere is especially important to in-house lawyers, whose employers' operations increasingly span national boundaries. Having to already deal with a patchwork quilt of regulations facing their multinational clients, in-house counsel should not have to worry that their legal advice will be subject to the whim of a plaintiff's forum selection.

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<sup>1</sup> This letter uses "attorney-client privilege," the term common in the United States, and "legal professional privilege," the term common in Europe and elsewhere, as synonyms.

Underscoring that widespread concern, this letter points to a number of differences between the Dutch legal system and that of the United States, particularly as they relate to the disclosure of the information sought in this case. For instance, the Dutch legal system protects confidentiality by limiting discovery overall, in stark contrast with the American approach. In addition, Dutch in-house counsel are not even required to be admitted to, or otherwise registered with, the bar in order to practice law for their clients. And the differences don't end there. In the United States, the client famously controls the privilege. In the Netherlands (and many other jurisdictions around the world), the lawyer does. By ignoring those differences, among other things, the magistrate judge imposed American views about confidentiality and discovery onto the Dutch legal system. Doing so not only violates legal precedent, but also ignores the realities of today's global legal profession.

### **I. ACC's interest in protecting in-house privilege**

The Association of Corporate Counsel is a global bar association that promotes the common professional and business interests of in-house counsel. ACC has over 33,000 members who are in-house lawyers employed by over 10,000 organizations in more than 75 countries. Almost 4,200 of our members are in-house lawyers from other countries who work outside the United States. For over 30 years, ACC has advocated to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role and concerns of in-house counsel and the legal departments where they work.

As a core focus, ACC has championed the importance of attorney-client privilege. In the United States and around the world, ACC has pushed courts and agencies to adopt and expand the scope of the privilege. And ACC has especially worked to ensure that a robust privilege applies to a client's confidential communications with in-house lawyers, as the Supreme Court held in *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). ACC also intervened in *Akzo Nobel Chem. Ltd. and Akcros Chem. Ltd. v. Comm'n*, Case C-550/07 P (Apr. 29, 2010), to argue that the European Union's antitrust authority should honor privilege for in-house lawyers just as it honors the privilege for outside lawyers.<sup>2</sup>

The views of the in-house bar are especially important in this case, given that the dispute concerns how to treat advice that a Dutch in-house counsel gave to his Dutch client.

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<sup>2</sup> See <http://advocacy.acc.com/tags/privilege/> (listing recent briefs, letters, and meetings where ACC has advocated for stronger attorney-client privilege.)

## II. *In-house legal practice has gone global.*

The practice of law is inherently global today for all lawyers, including in-house lawyers. Clients “routinely encounter legal issues that implicate foreign or international law and want the advice of trusted lawyers from other jurisdictions.”<sup>3</sup> While this is true across the United States, it is especially so in New York, whose legal community views globalization with pride. As a report from the New York State Bar Association states, “New York State is fortunate to belong to a nation that is deeply committed to the liberalization of global trade and finance.”<sup>4</sup>

Often even more than other lawyers, in-house counsel operate within the global context. About 13 percent of ACC’s members are non-U.S. members. Others ACC members have U.S. law degrees but work outside the U.S.; still others received their education or training abroad but now work here. Many companies have operations that span national boundaries, and they expect their in-house lawyers to have the flexibility to operate according to the laws and standards in each country. And other companies, such as the Citco defendants in this case, employ in-house counsel who work in their own countries, but can become involved in litigation, disputes, or investigations in the U.S. or elsewhere.

## III. *The touching-base test embodies comity and respect for foreign legal systems.*

The magistrate judge below looked to the touching-base test. That test, which courts in the Second Circuit have used to determine when to apply the law of other countries in discovery disputes, embodies the principles of comity and deference to foreign legal systems.

### A. *Comity encourages courts to apply foreign legal systems in international discovery disputes.*

The touching-base test arises “as a matter of comity.” *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 520 (S.D.N.Y. 1992). Similarly, in *Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 67 (S.D.N.Y. 2010) (“*Gucci P*”), the magistrate judge emphasized that its conclusion “does not offend principles of comity.” And the district court in *Astra Aktiebolag v. Andrx Pharm., Inc.*, 208 F.R.D. 92, 98

<sup>3</sup> Am. Bar Ass’n, Comm’n on Ethics 20/20, “Resolution and Report: Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law),” Report at 1, *available at* <http://tinyurl.com/kpyqz77>.

<sup>4</sup> N.Y. State Bar Ass’n, Task Force on N.Y. Law in Int’l Matters, “Final Report,” (June 25, 2011), at 12, *available at* <http://tinyurl.com/m6ep8tx>.

(S.D.N.Y. 2002) referred to the inquiry as the “the comity or ‘touching base’ approach,” and mentioned comity nearly a dozen times in reaching its conclusions.

Earlier this year, the Second Circuit wrote that at its core, “[i]nternational comity is a consideration guiding courts, where possible, towards interpretations of domestic law that avoid conflict with foreign law.” *Linde v. Arab Bank, PLC*, 706 F.3d 92, 111 (2d Cir. 2013) (*cert. pending*). See also *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (stating comity is “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation”) (*quoted in Linde*); *U.S. v. First Nat. City Bank*, 396 F.2d 897, 901 (2d Cir. 1968) (stating “a court of one country should make an effort to minimize possible conflict between its orders and the law of a foreign state affected by its decision”); *Golden Trade*, 143 F.R.D. at 522 (same, quoting language from *First Nat. City Bank*). As *Golden Trade* emphasized, “sensitivity to the interests of other jurisdictions is perhaps most compelling in the international arena.” *Id.* at 521. And that requires, “where possible, . . . interpretations of domestic law that avoid conflict with foreign law.” *Linde*, 706 F.3d at 111.

*B. The touching-base test enhances comity by applying foreign law absent serious conflicts with U.S. law.*

The touching-base test enhances the sensitivity to the laws of foreign jurisdictions that makes up the essence of comity. Laws of other countries should govern discovery disputes when “these countries have the predominant interest in whether those communications should remain confidential, and enforcement of their laws . . . would not seriously impinge on any significant policy of this forum.” *Golden Trade*, 143 F.R.D. at 522.

To determine which jurisdiction has the “predominant interest” under the test, courts look to “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.’” *Astra*, 208 F.R.D. at 98, *quoting Golden Trade*, 143 F.R.D. at 521–22. As *Gucci I* explained, that means “communications regarding a foreign legal proceeding or foreign law ‘touch base’ with the foreign country.” 271 F.R.D. at 65.

*C. U.S. courts must not apply rules rigidly, or consider foreign law in a vacuum.*

In order to show respect to the legal systems of other countries, the Second Circuit has made clear that “[m]echanical or overbroad rules of thumb are of little value.” *First Nat. City Bank*, 396 F.2d at 901. See also *Minpeco, S.A. v. Conticommodity*

*S.A.*, 116 F.R.D. 517, 521 (S.D.N.Y. 1987) (same). There is no “reason to read the rule . . . inflexibly.” *Golden Trade*, 143 F.R.D. at 521.

Instead, courts in the Second Circuit look at the totality of the circumstances to make sure that they give proper weight to the legal systems of other countries. The Second Circuit has held that courts must perform a “particularized analysis,” *Linde*, 706 F.2d at 109 (quoting *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 543 (1987), which is “holistic” and “multi-factored.” *Id.* at 112. See also *First Nat. City Bank*, 396 F.2d at 901 (calling for “a balancing of the interests involved.”).

In the context of countries with alternate methods of discovery, it is not appropriate to compare the U.S. system to the foreign system in an a la carte manner. Rather, it is crucial to view the foreign discovery system as a whole. “The scope of discovery in the foreign country is also a valid consideration in resolving choice of law issues.” *Gucci I*, 271 F.R.D. at 68.

The reasoning that the *Astra* court used is instructive. There, the court considered documents in Korea. It decided to apply the American attorney-client privilege, despite differences with the Korean system. According to the court, “vastly different discovery practices, which permit only minimal discovery, are applicable to civil suits conducted in Korea.” *Astra*, 208 F.R.D. at 102. So, where “none of the documents at issue here would be discoverable in a Korean civil suit,” it would “offend the very principles of comity” to disclose the documents in U.S. litigation. *Id.* Acting otherwise would wrongly result in applying foreign law “in a vacuum.” *Id.*<sup>5</sup>

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<sup>5</sup> Other authorities also agree on the need to look at international ethics laws in a holistic manner. As the New York Bar Association stated in an ethics opinion considering professional responsibility in relation to lawyers from other countries, it is not appropriate to “require an identity of ethical and disciplinary rules, which is not likely to be the case.” N.Y. State Bar Ass’n, Comm. on Prof. Ethics, Op. 762 (Mar. 5, 2003), at n.7 (available at [https://www.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions751825/EO\\_762.pdf](https://www.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions751825/EO_762.pdf)). Or, as stated more bluntly by a task force of the American Society of International Law, “it is important to emphasize the need to avoid the parochialism or elitism that can infect discussions of legal professionalism and ethics.” Am. Soc. of Int’l Law, “Report of the ASIL Task Force on International Professional Responsibility,” (Dec. 2007), at 6 (available at <http://www.asil.org/pdfs/taskforcereport.pdf>).

*D. The magistrate judge misapplied the touching-base test by viewing attorney-client privilege in rigidly American terms.*

The magistrate judge here applied the touching-base test in the sort of mechanical manner that the Second Circuit has prohibited. As a result, the magistrate did not display comity toward the Dutch legal system here. It viewed the case through a purely American lens, which precedent prohibits.

The magistrate judge asked whether Dutch law provides for in-house privilege in precisely the same way as the United States does. And when it arrived at the inevitable conclusion that the two legal systems differ, the magistrate judge held that no privilege exists here and closed the matter.

But that sort of crabbed inquiry doesn't acknowledge how Dutch law operates in practice. The Citco Defendants describe that system in the declarations accompanying their opening brief to this Court. They readily admit that attorney-client privilege does not operate the same way for in-house counsel in the U.S. versus those in the Netherlands. Here, of course, courts fully recognize privilege between clients and in-house counsel. *See Upjohn*, 449 U.S. at 390. U.S. law accomplishes that by allowing parties to request documents, and then permitting parties to withhold them pursuant to the privilege. That works just fine. But it is not the only way.

The Dutch system leads to the same result, using a different mechanism. In the Netherlands, the discovery system prohibits parties from asking for attorney-client communications in the first place. This is true whether or not the in-house counsel has a law license. Whether courts label this a "privilege" or something else, the bottom line is exactly the same: parties do not disclose confidential communications about legal questions that occur between a client and a lawyer.

Equally important, looking to the second prong of the touching-base test, no U.S. interest suffers by recognizing the Netherlands' alternate system for maintain confidentiality. The United States strongly protects confidential legal communications between clients and their lawyers, in order to encourage people to learn about the law and obey it. As the Supreme Court held in *Upjohn*, the privilege's "purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. *See also Gucci Am., Inc. v. Guess?, Inc.*, No. 09 Civ. 4373, 2011 WL 9375 at \*2

(S.D.N.Y. Jan. 3, 2011) (“*Gucci II*”) (same). The Dutch system arrives at that same place, albeit by a different route.<sup>6</sup>

Given the international reach of the legal issues today, described above, the U.S. has a strong interest in protecting attorney-client communications wherever they may occur. The fact that the U.S. system protects confidentiality in one manner, and the Dutch system chooses a different mechanism, is hardly material. In the words of the *Astra* court, the magistrate judge here wrongly looked at the Dutch system in a “vacuum.”

#### **IV. *The Akzo opinion has no relevance to this case.***

Finally, ACC notes that in their submission to the magistrate judge, the plaintiffs relied in part on the European Commission case of *Akzo Nobel*, and it is possible that they pointed to it in their sealed brief to this Court. But *Akzo* offers no support to the magistrate judge’s opinion.

ACC is extremely familiar with *Akzo*. As mentioned above, ACC intervened in that case, to argue that the European Union’s antitrust authorities should respect in-house legal privilege. Unfortunately, the Court of Justice held that the privilege did not apply in that case. But it made absolutely clear that its holding has no authority outside of EU antitrust investigations. It wrote that “[i]n the context of . . . national proceedings and search measures, any protection afforded by legal professional privilege is neither ‘withdrawn’ or ‘eroded; on the contrary it continues to apply without restriction.” *Akzo* at ¶ 186. It continued that the holding “applies only to competition proceedings and investigations conducted by the Commission; *it does not affect the law governing national proceedings.*” *Id.* (emphasis added).

In fact, earlier this year the Supreme Court of the Netherlands declined to follow *Akzo*, and instead upheld the validity of in-house legal privilege in the context of national legal proceedings. *See* LJN BY6101, 12/02667 (Mar. 15, 2013) (*available at* <http://tinyurl.com/ofb8x9l>.) In Belgium, the Brussels Court of Appeal reached essentially the same conclusion in a different case. *See En Cause De Belgacom*, S.A., 2011/MR/3 (Mar. 5, 2013) (*available at* <http://tinyurl.com/n56qb98>).

Given the strong limits that the Court of Justice placed on its *Akzo* holding, and the refusal of the Supreme Court of the Netherlands to adopt *Akzo* for national

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<sup>6</sup> To further emphasize the different mechanism that Dutch law uses to protect attorney-client privilege, even for Dutch lawyers with law licenses, the attorney holds the legal professional privilege. That contrasts with the U.S. system, where the client controls privilege.

proceedings, there are no grounds to expand it to a situation such as this one, with no connection whatsoever to a European Commission antitrust investigation.

## V. *Conclusion*

The magistrate judge's opinion denying privilege has multiple flaws. It ignores the reality of global in-house practice, and it completely fails to grant the proper level of respect and comity to the Dutch legal system. That system does protect the confidentiality of communications between clients and authorized in-house lawyers, whether or not they have law licenses. It simply uses a different mechanism to that end. When considered in context, it should be clear that the Dutch attorney-client communications here should stay protected.

In parsing out differences between Massachusetts and New York law, then-Judge Benjamin Cardozo emphasized that “[w]e are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.” *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111 (N.Y. 1918). When it comes to international discovery disputes in U.S. courts, the Second Circuit has made clear that it is not at all “provincial.”

Therefore, ACC respectfully requests that this Court reverse the magistrate judge's privilege decision.

Sincerely yours,



Amar D. Sarwal  
Vice President and Chief Legal Strategist  
sarwal@acc.com

Evan P. Schultz  
Senior Counsel and Director of Advocacy

cc:

aarffa@paulweiss.com  
adeckinger@bsflp.com  
agordon@paulweiss.com  
agrant@kasowitz.com  
amcgovern@ghblaw.com

amy.crawford@kirkland.com  
andrew.genser@kirkland.com  
andrew.levander@dechert.com  
atarragona@bhlawpa.com  
aurena@bhlawpa.com



basar@whafh.com  
bbaird@cov.com  
bgraifman@gkblaw.com  
bkarp@paulweiss.com  
blevitt@hlhlawfirm.com  
brad.samuels@kobrekim.com  
brenton.rogers@kirkland.com  
cave@hugheshubbard.com  
clovell@lshllp.com  
coatesj@gtlaw.com  
cochoa@maglaw.com  
cstine@wolfpopper.com  
ctorell@cohenmilstein.com  
cwhitfield@bhlawpa.com  
david.mcgill@kobrekim.com  
dbarrett@bsfllp.com  
dbenson@kasowitz.com  
dfeinberg@ghblaw.com  
dfetterman@kasowitz.com  
dgehn@gkblaw.com  
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drothstein@dkrpa.com  
dsommers@cohenmilstein.com  
dstone@stonemagnalaw.com  
eglasser@bsfllp.com  
eizquierdo@ghblaw.com  
emily.nicklin@kirkland.com  
espiro@magislaw.com  
gfBruckner@pomlaw.com  
ghurand@maglaw.com  
gkachroo@kachroolegal.com  
gkurtz@whitecase.com  
gonzalezr@gtlaw.com  
hoffner@hoffnerpllc.com  
hsobel@zsz.com  
hvcantwell@debevoise.com  
hvickery@bsfllp.com  
jacobsonj@gtlaw.com  
jbaldwin@stblaw.com  
jbogert@bogertrembold.com  
jclark@bhlawpa.com  
jdevore@cohenmilstein.com  
jennie.krasner@dechert.com  
jharrod@wolfpopper.com  
jhouchin@bhlawpa.com  
jkaplan@dkrpa.com  
jkrisiloff@lshllp.com  
jlee@milberg.com  
jmestre@riveromestre.com  
jonathan.cogan@kobrekim.com  
jpollard@bsfllp.com  
jray@kachroolegal.com  
jroether@stblaw.com  
justin.sommers@kobrekim.com  
jzwerling@zsz.com  
kbronson@milberg.com  
kmcgregor@milberg.com  
krasner@whafh.com  
lecurran@lecurran.com  
lecurran@lecurran.com  
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michael.kim@kobrekim.com  
mithlo@gtlaw.com  
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mpgoodman@debevoise.com  
mschirmer@straus-boies.com  
msiegel@brownrudnick.com  
nelless@sullcrom.com  
nespole@whafh.com  
neuhausj@sullcrom.com  
nmackiel@wolfpopper.com  
pedans01@yahoo.com  
pflaming@stblaw.com  
pkazanoff@stblaw.com  
pmirrer-singer@stblaw.com  
psirkis@stblaw.com

psomers@paulweiss.com  
ranello@maglaw.com  
rbrodsky@thebrodskylawfirm.com  
rfinkel@wolfpopper.com  
rlinkin@dkrpa.com  
rschachter@zsz.com  
rspeirs@cohenmilstein.com  
rwallner@milberg.com  
Sara.Ricciardi@Shearman.com  
sboruchow@bsflp.com  
skirwan@zsz.com

ssinger@bsflp.com  
stoll@cohenmilstein.com  
sweinstein@ellklaw.com  
tbattin@strauss-boies.com  
tim.duffy@kirkland.com  
tmccabe@cm-p.com  
tmullen@ghblaw.com  
victornj@ix.netcom.com  
whetstonel@gtlaw.com  
william.oconnor@tklaw.com  
woconnor@crowell.com