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SDNY Holds No Attorney-Client Privilege Applies to Communications With In-House Legal Department in China

A US District Court in the Southern District of New York recently ordered Bank of China Limited (BOC) to produce thousands of documents that the court found not to be protected by the attorney-client privilege or work-product doctrine. The court analyzed BOC's claim of privilege under both Chinese and US law and concluded that the subject documents were not entitled to protection under either system of law.

Plaintiffs are relatives of individuals killed or injured in a 2006 suicide bombing in Israel. They sued BOC under the Antiterrorism Act for its alleged role in providing material support to a terrorist organization. The plaintiffs sought documents that had been prepared by BOC's legal department in China, as well as communications to and from that department. BOC asserted that these documents and communications were protected under the attorney-client privilege and/or work-product doctrine.

In conducting its analysis, the court noted that Chinese law does not recognize or contain a functional equivalent of the attorney-client privilege or work-product doctrine. Thus, the court held that BOC's documents could not be protected on the basis of privilege under Chinese law. Alternatively, BOC had tried to prevent disclosure of the subject documents and communications by arguing that Chinese law does not allow civil litigants—such as the plaintiffs in this case—to serve document requests on another party. However, the court rejected this argument, noting that Chinese law does contain provisions that compel parties to provide documents under limited circumstances and therefore BOC would have to produce the documents.

Analyzing BOC's defense under US law, the court pointed out that the protection offered by the attorney-client privilege is limited in its application to communications involving licensed attorneys. However, in China, the court noted, it is not essential for in-house counsel to be members of a bar or even to have legal credentials. The court found that in this case BOC had not made a sufficient showing that the individuals in its legal department in China who were involved in the subject communications were, in fact, licensed members of a bar. In rejecting BOC's defense, the court declined to adopt a functional equivalency test that had been adopted by district courts in Illinois and Delaware that may have enabled BOC to protect the communications by arguing that its legal personnel in China were functionally equivalent to licensed attorneys.

This case underscores the need to tread carefully when dealing with foreign legal departments or counsel. One cannot assume that such communications will be privileged. This case makes clear that it is always necessary in such circumstances to confirm whether a

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foreign legal team is comprised of licensed attorneys—especially true when dealing with countries such as China where it is common practice for legal departments to employ individuals who do not have legal credentials.

The full decision can be read [here](#).

Wultz v. Bank of China Ltd., No. 11-cv-1266 (SAS) (S.D.N.Y. Oct. 25, 2013).

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