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LETTER FROM AMERICA

INTERNAL INVESTIGATIONS – A STARK REMINDER OF THE DANGERS OF FAILING TO IMPLEMENT STRICT PROTOCOLS FROM THE OUTSET

A recent ruling in long-running civil litigation against the Bank of China ("BOC") in the United States District Court for the Southern District of New York provides a stark reminder of the dangers of failing to develop and maintain, in coordination with counsel, proper protocols in planning, conducting and monitoring internal investigations into allegations of wrongdoing, from their initial phases right through to completion.[1] BOC's apparent failure to implement strict protocols from the outset of its internal investigation in this instance undermined the confidentiality of its investigative activity, and resulted in the Court compelling the production of related communications and documents to the plaintiffs in this litigation.

BACKGROUND: THE DEMAND LETTER AND BOC'S RESPONSE

In January 2008, BOC jumped into action upon receipt of correspondence threatening the filing of a lawsuit in the US arising from the allegedly unlawful execution of certain wire transfers (the "Demand Letter"). BOC's New York Branch ("BOC–NY"), which had received the Demand Letter, immediately informed BOC's Head Office in Beijing ("BOC–HO"). The next day, in China, the General Manager of BOC's Legal Compliance Department, directed BOC's Chief Compliance Officer to conduct an investigation of the allegations in the Demand Letter and prepare a report and recommendation. The Chief Compliance Officer at BOC–NY initiated a parallel investigation into the Demand Letter. Critically, BOC-NY and BOC-HO did not immediately retain outside counsel for purposes of the investigation.

With the investigations underway and preliminary findings being shared internally, the various BOC offices communicated over the following weeks concerning the need for and possible retention of counsel. These discussions reflected that US counsel had not yet been retained as of late February, when BOC–HO finally provided BOC–NY with approval to retain US counsel. According to BOC-HO, they "began to provide" information to counsel by March 2008.

On March 28, 2008, US counsel first met in-person with BOC's Chief Compliance Officer in China, who had been running the internal investigation for BOC-HO, and others on his team to discuss the allegations. US counsel then travelled to meet with employees in Guangzhou who had also been investigating the matter. Following these meetings, in early April, US counsel "provided a nine-page letter to BOC describing his legal advice regarding the allegations in the Demand Letter including a recommended course of action for BOC." This advice was "based on the information that [BOC] had collected and provided to him during his visits to [China], and in prior and subsequent communications with the Head Office." In the interim, on March 31, 2008, BOC had provided a report to the China Banking Regulatory and the People's Bank of China ('PBOC') relating to the matter. In late May 2008, at the request of the CBRC, BOC provided a report to the Ministry of Foreign Affairs of the People's Republic of China, which was nearly identical to the March 31 Report.

The lawsuit was ultimately filed in August 2008. Though BOC had retained US counsel from which it had been receiving legal advice in connection with the lawsuit, its

[1] *Wultz v. Bank of China Ltd.*, No. 11 Civ. 1266, 2015 WL 362667 (S.D.N.Y. 2015).

non-legal, compliance team continued to meet with third-parties, including PBOC, and prepare related materials concerning the matter without counsel's involvement.

THE DISCOVERY DISPUTE

In discovery, the plaintiffs successfully challenged BOC's efforts to assert privilege based on the involvement in the internal investigation of BOC's in-house lawyers in China who held what are known as "Enterprise Legal Advisor" certificates or "Corporation lawyer" certificates. The Court rejected BOC's "functional equivalent" argument in finding that these individuals did not qualify as lawyers under Chinese law for purposes of the application of US privilege law.[2] The plaintiffs later challenged, via motion to compel, BOC's subsequent efforts to shield from disclosure those communications and materials relating to BOC's internal investigation that did not reflect communications or advice involving a lawyer. Unable to argue that its in-house participants in the internal investigation were lawyers for purposes of the privilege analysis, BOC claimed that the materials at issue relating to its internal investigation of the Demand Letter and the lawsuit were privileged because the investigation was conducted "with the expectation that U.S. counsel would use the information to provide legal advice" and in fact US counsel had used the investigative work for purposes of assessing the matter and providing legal advice.[3] Alternatively, BOC argued that the work product doctrine shielded the materials from production.

THE COURT'S ANALYSIS

The Court rejected BOC's articulated grounds for application of **the attorney-client privilege** finding it unsupported (and actually contradicted) by prevailing law, emphasizing that BOC provided no clear indication when substantive communications with counsel concerning the investigation began, let alone what, if any, investigative activity was conducted at the direction of or in coordination with counsel. The Court found that BOC had not consulted counsel at the outset of the investigation for the purpose of obtaining direction or advice with respect to the investigation, and instead began the information gathering process, and its review and analysis of facts neither directed nor aided by counsel. It concluded that the inferences fairly drawn from the evidence strongly suggested that counsel had no involvement in the matter prior to the beginning of March, over a month following the initiation of the investigation by BOC. Any expectation of BOC as to counsel's possible reliance on its work was irrelevant under these circumstances. That BOC later shared the investigation's factual development and analysis with counsel and that counsel relied on it in formulating legal advice did not alter the Court's analysis. As a general matter, the Court highlighted BOC's failure (and the resulting perceived inability) to offer specificity as to the timing and nature of counsel's involvement, and the substance of any advice requested or received.

As to materials prepared following the filing of the lawsuit, the Court deemed it insufficient that counsel had been formally engaged and was advising on the lawsuit at that time. Rather, BOC was still required to—but did not—demonstrate that the specific documents at issue, none of which directly involved counsel, were prepared in connection with the provision of legal advice. BOC's failure to make this showing precluded the application of privilege to communications among and materials prepared by non-lawyers. That even after the initiation of the lawsuit BOC's non-legal personnel continued their own independent work and engaged in discussions with third-parties without counsel further belied the broad application of privilege.

While the **work product doctrine** does not require the involvement or participation of counsel, the Court nonetheless rejected its application because BOC failed to demonstrate that the materials in question were "prepared in anticipation of litigation."[4] Specifically BOC did not prove the materials "would have been prepared in essentially similar form irrespective of litigation," as is required. While accepting that the Demand Letter triggered the investigation, the Court observed that BOC had failed to establish it would not have investigated had it become aware of the underlying issues uncoupled from the litigation threat. In further support of its decision, the Court discussed both the reputational and regulatory concerns which appeared to have driven the investigative efforts separate and apart from the litigation threat.

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[2] *Wultz v. Bank of China Ltd.*, 979 F.Supp.2d 479, 493-96 (S.D.N.Y. 2013).

[3] Under US law, the party seeking to invoke the attorney-client or work product privilege—here BOC—bears the burden of establishing its applicability.

[4] The Court noted that the plaintiffs had offered additional grounds for rejecting application of the work product privilege but addressed only one because it was dispositive of the issue. *Wultz*, 2015 WL 362667, at *10.

A TRANSATLANTIC COMPARISON – THE ENGLISH LAW POSITION

Under English law, there are two applicable forms of legal professional privilege: (i) legal advice privilege, and (ii) litigation privilege.

Legal advice privilege in England and Wales only applies to confidential communications between a lawyer and client, which have come into existence for the purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context.[5] It has been established that legal advice privilege will only attach to communications between a lawyer and his client. A 'lawyer' for the purpose of legal advice privilege includes all members of the legal profession such as solicitors, barristers, in-house lawyers (acting in their capacity as lawyers and not in an executive or compliance capacity) as well as foreign lawyers.[6] On the instant motion, the plaintiffs did not seek any documents in which BOC communicated with any of its outside counsel but only sought documents relating to BOC's own investigation. Because the in-house participants in the investigation were not equivalent to in-house lawyers under English law, the legal advice privilege would equally not apply to those communications and documents.

However, documents generated by non-legal employees of a corporation and third parties can be protected under English law if **litigation privilege** applies. Litigation privilege is therefore wider in scope than legal advice privilege since, where it applies, it can protect communications by a client or his lawyer and a third party.[7]

Under English law, a 'dominant purpose' test is applied to litigation privilege, which can be contrasted with the work product doctrine in the US, whereby the party claiming the privilege had to satisfy the counterfactual test (i.e. demonstrate that the materials would not have been prepared in essentially similar form irrespective of the litigation).

To attract litigation privilege the communication must have been made for the dominant purpose of litigation which is pending, reasonably contemplated or existing. Determining the dominant purpose can be problematic and particularly tricky where documents are produced for a dual purpose, for instance where documents are produced on the instruction of liquidators who have statutory duties.[8]

It is likely that litigation privilege would apply to internal fact finding investigations such as that of BOC in this if, at the time they are created, there is a *real likelihood* of adversarial proceedings. English courts have established that litigation must be a 'real likelihood' rather than a 'mere possibility'.[9] The Demand Letter to BOC-NY, which expressed an intent to file a lawsuit against BOC, would probably satisfy this test.

LESSONS TO BE LEARNED

BOC ran into trouble here when non-lawyers undertook to investigate the allegations levied in the Demand Letter without first seeking guidance from and the involvement of counsel. As a direct result, BOC could not satisfy the predicates for application of the attorney-client privilege—in particular that the communications and materials in questions were made and prepared for the purpose of obtaining legal advice. The failure to engage counsel prior to initiating its investigation facilitated this unfortunate outcome.

This decision reinforces the need for international companies to adopt best practice in adhering to US norms in order to secure the protections from disclosure afforded by US courts in litigation. The decision also militates strongly in favor of engaging US external counsel at the outset and without delay, and avoiding involving non-lawyers in the conduct of an independent internal review as was done in this instance. One of counsel's principal functions is to develop and implement an investigative plan which guides and directs the activities of non-lawyers assisting in document collection, analysis

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[5] *Three Rivers District Council & Ors v The Bank of England* [2004] EWCA Civ 218.

[6] *R (Prudential PLC and another) v Special Commissioner of Income Tax and another* [2013] UKSC 1.

[7] There is little authority on the question of whether advice and other communications from, for example claims consultants in adjudication proceedings would attract litigation privilege. *Walter Lilly and Company Limited v Mackay and DMW* [2012] EWHC 649 (TCC).

[8] *Rawlinson and Hunter Trustees SA and others v Akers and another* [2014] EWCA Civ 136 (20 February 2014), where the reports generated by the liquidators as part of an internal investigation were not protected by litigation privilege.

[9] *USA v. Philip Morris Inc* [2004] EWCA Civ 1089.

and other fact-finding efforts in the investigation. This type of counsel-designed and -directed program was absent in BOC's case rendering BOC unable to show the Court how its investigative efforts related to the provision of legal advice. Ultimately, where the applicability of the privilege to an internal investigation must be established in litigation, the ability to demonstrate the timely retention of counsel who has both designed and directed the investigation should go a long way towards protecting the investigative efforts from disclosure.

It is similarly essential to maintain counsel's involvement in all discussions concerning the matter under investigation. Non-lawyers, whether acting at management's direction or otherwise, should not take action or participate in communications concerning the matter outside the investigative scope and except as instructed by counsel. While there are circumstances where in-house counsel may be positioned to conduct an internal investigation without outside counsel, it must be certain that this in-house counsel is a fully qualified attorney under the local law, so as to avoid the issues identified by the Court with the work performed at the direction of BOC's quasi-legal personnel in China. The Court's application of the "anticipation of litigation" prong of the work product privilege shows that companies should not rely on its availability when engaging non-lawyers—whether internal audit, compliance or other putatively functionally equivalent personnel—to manage investigations.

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