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'Wultz' May Influence U.S. Cross-Border E-Discovery Law

Case tackles privilege issues arising from Chinese documents.

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As the reach of U.S. e-discovery law radiates across the globe, U.S. courts increasingly are being tasked with choice-of-law and cross-border e-discovery issues that arise when documents are sought in discovery from countries with very different legal systems. Enter U.S. District Judge Shira A. Scheindlin, presiding over *Wultz v. Bank of China Limited*,[1] a high-profile international litigation that has required her to adjudicate the e-discovery obligations of a major Chinese bank. As with *Zubulake v. UBS Warburg*[2] a decade ago, Scheindlin has the right case at the right time, and her decisions in *Wultz* may well chart the course of U.S. cross-border e-discovery law going forward.

Wultz is one of a number of litigations brought on behalf of an American family seeking discovery and damages in connection with a 2006 suicide bombing in Tel Aviv that killed a son and seriously injured the father. Lawyers for the Wultz family are seeking discovery and damages against entities around the world, and this ongoing case in the Southern District of New York offers a smorgasbord of U.S.-Chinese discovery issues for Judge Scheindlin, working with U.S. Magistrate Judge Gabriel W. Gorenstein.

Wultz required Scheindlin to adjudicate a number of cross-border discovery disputes involving the Chinese bank defendant that was asked to produce documents and communications from its China offices, as well as discovery requests directed to other entities with documents in other jurisdictions. These disputes included the bank defendant's objections based on Chinese secrecy laws, which we will touch on briefly for context before examining more closely at Scheindlin's rulings on the privilege issues presented when seeking documents from Chinese sources.

Chinese State Secrecy Laws. The Chinese bank resisted production of communications and documents that it asserted, among other things, were prohibited from transfer abroad by Chinese bank secrecy, state secrecy, and anti-money laundering laws. China does not have the sort of data privacy laws found in Europe and elsewhere that often lead to restrictions on transfer of documents to the United States for use in litigation. Rather, transfers of information out of China requires careful document-by-document review prior to transfer to avoid producing anything that the Chinese government may deem to fall within the ambit of its secrecy laws.

To determine whether the Chinese secrecy restrictions should be allowed as a justification for the bank not turning over documents in *Wultz*, Scheindlin's May 1, 2013 decision[3] applied the U.S. Supreme Court's multi-factor comity

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analysis in *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct. for the Southern Dist. of Iowa*, 482 U.S. 522, 539-40 (1987), with additional factors provided by district court decisions in the Southern and Eastern Districts of New York).[4] The court took a limited approach and ordered the bank to produce relevant documents except "confidential regulatory documents created by the Chinese government whose production is clearly prohibited under Chinese law."[5] Scheindlin's order emphasized in a footnote that this exception did "*not* apply to materials created by [the bank] and provided to the Chinese government in the course of regulatory reviews."[6]

The bank produced 5,751 documents in response in May 2013, but withheld thousands of documents from production based on privilege, submitting two privilege logs listing 6,523 documents for which the bank asserted attorney-client privilege, work-product doctrine protection, or both.[7]

Application of U.S. Privilege Law as to Documents Created in China. Scheindlin handled the Chinese bank's assertions of privilege in two decisions and orders in late 2013, which examined these two questions:

1. Can a Chinese party assert U.S. privilege protections over documents residing in China if Chinese law does not recognize the attorney-client privilege or work-product doctrine as understood in American law and instead recognizes only a duty of confidentiality?

2. How should U.S. privilege law be applied to Chinese legal and compliance departments, particularly given that the Chinese sometimes assign legal tasks to employees of their legal and compliance departments who are not licensed attorneys?

Should Chinese or American Law Apply to Privilege Questions on Chinese Documents? Scheindlin addressed these questions in an Oct. 25, 2013 ruling on plaintiffs' third motion to compel the bank to produce documents located in China under the bank's control. At issue was whether the bank could claim privilege over the 6,523 items identified in its privilege logs under the attorney-client privilege, work-product protection, or both.

She began by noting that Federal Rule of Evidence 501 directs that questions of privilege are "governed by the principles of common law," and "common law" applied under FRE 501 includes "choice of law" questions.[8] She applied the "touch base" approach applied in *Golden Trade S.r.L. v. Lee Apparel*, 143 F.R.D. 514, 521 (S.D.N.Y. 1992), a Southern District of New York decision looked to in the Second Circuit to determine which country's privilege should apply to foreign documents. "The 'touch base' analysis typically considers which country 'has the predominant' or 'the most direct and compelling interest' in whether those communications should remain confidential, unless that foreign law is contrary to the public policy of this forum."[9]

'Wurtz' required Judge Shira A. Scheindlin to adjudicate a number of **cross-border discovery disputes** involving the Chinese bank defendant that was asked to produce documents and communications from its China offices.

Based on the "touch base" analysis in *Golden Trade*, Scheindlin concluded that U.S. privilege law applied to all documents created after Jan. 28, 2008"—the date of plaintiff's initial demand letter to the bank—"that do in fact related to the demand letter and the subject matter that gave rise to this lawsuit, because those documents pertain to American law 'or the conduct of litigation in the United States.'"[10] Because the court found Chinese law does not recognize the attorney-client privilege or the work-product doctrine, it ordered the bank to produce those items listed on its privilege logs that the bank claimed were protected from production by Chinese privilege law including (1) documents dated prior to plaintiff's Jan. 28, 2008 demand letter sent to the bank (i.e., not created as part of an investigation of plaintiffs' claims), and (2) the documents dated after Jan. 28, 2008 that do not relate to plaintiffs' demand letter.

Chinese Bank Requested Privilege Protection When a Communication Includes the 'Functional Equivalent' of A Licensed Attorney. With U.S. privilege law controlling, the bank asked that the court recognize its attorney-client privilege and work-product assertions despite that many of the in-house counsel in its legal and compliance departments who were senders or recipients of the documents at issue were not licensed attorneys. The bank argued that "the application of a strict rule denying a Chinese company the protection of the attorney-client privilege makes little sense" because even though Chinese law does not require in-house counsel to be licensed, their role is the "functional equivalent" of a lawyer and they are permitted to give legal advice.[11] According to the bank, "a reasonable application of the American law of privilege" would recognize that the bank's in-house legal staff, even if unlicensed, "serves all of the same functions as outside lawyers."[12] While U.S. privilege law protects only communications between a client and his or her attorney, the bank argued that this rule is too rigid for application to Chinese law departments, and that the privilege should be extended to anyone who serves as the "functional equivalent of a lawyer."

Scheindlin, however, found "cognizable distinctions between a 'lawyer' and an 'in-house counsel' in Chinese law, most critically that it is 'not essential' for in-house counsel to be members of a bar or have 'some form of legal credentials.'"[13] "While the Chinese legal system may be developing," she wrote, "the distinctions between lawyer and in-house counsel are clear and presumably exist for a good reason." Referencing the classic privilege decision in *United States v. United Shoe Mach.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950), Scheindlin concluded:

I see no compelling reason to depart from the long-standing principle of

United Shoe and create a "functional equivalency" test for the invocation of the attorney-client privilege when applying United States law. To the extent [the bank] has claimed privilege over communications from, to and among members of legal or other departments who are not licensed attorneys, the attorney-client privilege does not apply.[14]

On Nov. 6, 2013, the bank filed a motion for limited reconsideration of the court's October 25 ruling, including with respect to documents it claimed were created as part of its investigation of the claims made in plaintiffs' Jan. 28, 2008 demand letter to the bank. In her Nov. 20, 2013 ruling on the limited reconsideration motion, Scheindlin granted the bank's request for clarification that the bank "may assert attorney-client or work-product protection over those documents pertaining to its internal investigation provided it can satisfy its burden of establishing that the privilege or protection is appropriate."[15]

Bank Management's Investigation of Plaintiffs' Demands Does Not Qualify for U.S. Work-Product Doctrine Protection. Having restricted the bank's privilege to communications to, from or among licensed attorneys, Scheindlin's October 25 decision then addressed the bank's assertions of work-product doctrine protection over documents created after Jan. 28, 2008 pertaining to the bank's investigations into the allegations of plaintiffs' demand letter of that date. She referred back to her April 9, 2013 order that neither attorney-client privilege nor work-product protection applied to these documents because the record showed that after the bank's chief compliance officer "received plaintiffs' demand letter, he called outside counsel, then set about performing the investigation within the Compliance Department, without the involvement of any counsel, and not for the purpose of obtaining legal assistance."[16] Scheindlin concluded that "privilege does not apply to 'an internal corporate investigation made by management itself.'"[17]

The bank's motion for limited reconsideration also asked the court to "revise its holding as to the application of Chinese privilege law to documents dated prior to plaintiffs' demand letter to state that American privilege law should apply to documents pertaining to 'other U.S.-based legal matters' unrelated to the present litigation.'"[18] Scheindlin granted this request "in order to clarify that American privilege law applies to all communications that properly 'touch base' with U.S. legal matters, even if those matters are unrelated to the present litigation."[19]

Sufficiency of Privilege Logs. Finally, the court tackled the controversy over the bank's privilege logs. Plaintiffs' complained that, while the bank's logs asserted privilege protection over communications between various business units, it did so "without showing any involvement of an individual lawyer" and that the bank "asserted privilege over communications involving 'entire departments' at the bank without identifying the members of the department, the individual involved in the communication and 'whether that person was an attorney.'"[20] Rather, the logs stated that the documents "were prepared or received by the Legal and Compliance Department and that they involved requests for or provision of legal advice."[21]

The bank argued that "a privilege log need not identify all of the individuals involved in a given communication to support a claim of privilege," an argument the court found unsupported in the law. Noting that the bank had stated in a letter to the court that the Legal and Compliance Department consisted of 12 employees in 2006, six of whom were licensed attorneys, Scheindlin found "this fact has a significant impact on the privilege determinations and only bolsters plaintiffs' need for similar breakdowns for all departments where [the bank] has claimed a group privilege over communications."[22] She pointed to another letter from one of the bank's Legal and Compliance Department officers stating that the department "routinely provided legal advice" and that it was the "general practice" of the group "to sign responses to requests for legal advice" as a unit, but confirmed that it was "not essential" to be a member of the Chinese bar to join the Department.[23] Scheindlin found that this "clarifies that not all communications from the Legal and Compliance Department, or other business departments, consisted of legal advice to and from licensed attorneys."[24] She concluded that its privilege logs were "not sufficient to allow either plaintiffs or this court to evaluate what, if any, claims of privilege [the bank] may have."[25] She gave the bank 10 days to submit amended privilege logs that comply with her rulings, or risk waiver of any claims of privilege over the documents.[26] This deadline was extended after the bank sought more clarity on the court's privilege rulings, as described above.

Impact of 'Wultz' on Jurisprudence of Cross-Border E-Discovery. The discovery disputes in *Wultz* continue as this article heads to publication, and so we can perhaps expect it will produce more rulings on various cross-border e-discovery issues. Given the increased economic importance of China on the world stage, and Judge Scheindlin's reputation as an e-discovery jurist, the rulings in *Wultz* on discovery of Chinese documents may have outsized and lasting influence. Her approach also may influence choice-of-law and substantive e-discovery decisions involving documents residing in other jurisdictions that share some characteristics with the Chinese approach to privilege and data transfer restrictions.

1. *Wultz v. Bank of China Limited*, 11 Civ. 1266 (SAS).
2. *Zubulake I*, 217 F.R.D. 309 (S.D.N.Y. May 13, 2003); *Zubulake III*, 216 F.R.D. 280 (S.D.N.Y. July 24, 2003); *Zubulake IV*, 220 F.R.D. 212 (S.D.N.Y. Oct. 22, 2003); *Zubulake V*, 229 F.R.D. 422 (S.D.N.Y. July 20, 2004).
3. 942 F. Supp. 2d 452 (S.D.N.Y. 2013).
4. See *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 438-39 (E.D.N.Y. 2008); *Minpeco S.A. v. Conticommodity Servs.*, 116 F.R.D. 517, 523 (S.D.N.Y. 1987)).
5. *Wultz v. Bank of China*, 2013 WL 5797114, 5 (S.D.N.Y. Oct. 25, 2013).
6. Id. at 5 n.46 (emphasis added).
7. Id. at 6, 7.
8. Id. at 7.
9. Id. at 15.
10. Id. at 23.
11. Id. at 26.
12. Id.
13. Id.at 29.
14. Id. at 30.
15. *Wultz v. Bank of China*, 2013 WL 6098484 at 4 (S.D.N.Y. Nov. 20, 2013).
16. *Wultz*, 2013 WL 5797114 at 30, 31.
17. Id. at 31.
18. *Wultz*, 2013 WL 6098484 at 2.
19. Id. at 5,6.
20. *Wultz*, 2013 WL 5797114 at 31, 32.
21. Id. at 32, 33.
22. Id.
23. Id. at 34.
24. Id.
25. Id. at 35.
26. Id.