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Report from Washington

Supreme Court Holds That U.S. Courts Are Not Bound by a Foreign Government's Interpretation of Its Own Law

June 18, 2018

"A federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements."

— Justice Ginsburg

Introduction

On June 14, 2018, the Supreme Court in *Animal Science Products, Inc. v. Hebei Welcome Pharm. Co. Ltd.*, No. 16-1220, unanimously held that U.S. courts analyzing the meaning of foreign law under Federal Rule of Civil Procedure 44.1 need not accept as binding a submission from a foreign government characterizing or interpreting its own law. Rather, a court must only accord such submissions "respectful consideration" and is not required to "accord conclusive effect to the foreign government's statements." The decision settles a circuit split by roundly rejecting the "bound to defer" standard that had been utilized by the Second and Ninth Circuits and endorsing the holistic approaches used by the other Circuits.

Background

In 2005, a group of Vitamin C purchasers in the United States brought suit against Hebei Welcome Pharmaceutical Co., a Chinese Vitamin C manufacturer, and other alleged Chinese co-conspirators, alleging that the defendants established an illegal cartel to inflate worldwide prices of Vitamin C in violation of U.S. antitrust laws. The plaintiffs alleged that, since December 2001, the defendants had coordinated with the China Chamber of Commerce of Medicines & Health Products Importers & Exporters to restrict the supply of Vitamin C to create a global shortage. According to plaintiffs, the Chinese suppliers controlled 60% of the worldwide Vitamin C market and accounted for 80% of the Vitamin C exports to the United States. Plaintiffs alleged that defendants used their market position to restrict the supply of Vitamin C, thereby driving up prices in violation of Section 1 of the Sherman Act, which condemns price fixing agreements as *per se* illegal.

Defendants moved to dismiss the complaint on the basis that they were required by Chinese law to sell exports at the prices coordinated with and by the Chamber of Commerce, and argued that this should operate as a total defense against plaintiffs' claims. The Chinese

“When a foreign government makes conflicting statements or, as here, offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government’s submission.”

— Justice Ginsburg

Ministry of Commerce (“MOFCOM”) supported the defendants’ position and filed an amicus brief, arguing that the Chinese government did in fact require price coordination in order to legally export Vitamin C from China. In response, plaintiffs argued that—notwithstanding MOFCOM’s submission—the actual government policy gave exporters the option to opt out of these requirements and contended that any coordination was therefore voluntary.

The District Court declined to accept MOFCOM’s position on Chinese law and denied the motion to dismiss. The parties repeated their arguments at various stages of the case, and following a jury trial defendants were found to be in violation of Section 1 of the Sherman Act and the jury awarded plaintiffs approximately \$147 million in damages.

Defendants appealed to the Second Circuit, which held that the District Court abused its discretion by failing to dismiss plaintiffs’ complaint at the motion to dismiss stage. The Second Circuit remanded the case with instructions that plaintiffs’ claims be dismissed on international comity grounds, explaining that “when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations . . . a U.S. court is bound to defer to those statements.” And where, as in this case, deference is owed to foreign law under applicable principles of comity, the plaintiffs’ claims should be dismissed.

Summary of the Court’s Opinion

In an opinion by Justice Ginsburg, the Court ruled that, although a district court should give respectful consideration to a foreign government’s interpretation of its own laws, U.S. courts are not bound to defer to such interpretations. The opinion relied on the historical context of Rule 44.1, the realities of today’s globalized world, and parallels to the interpretation of state law in federal courts.

Justice Ginsburg began the opinion by noting that the adoption of Federal Rule of Civil Procedure 44.1 marked a departure from the common law practice of treating the content of foreign laws as “question[s] of fact,” which had a number of “undesirable consequences,” including that appellate review was deferential and trial courts could make decisions based solely on admitted evidence. Thus, with the adoption of Rule 44.1, U.S. courts were authorized to treat interpretations of foreign law as a legal issue and to “consider any relevant material or source.” This change aligned the process of determining the meaning of foreign law with that of determining the meaning of domestic law.

“Given the world’s many and diverse legal systems, and the range of circumstances in which a foreign government’s views may be presented, no single formula or rule will fit all cases in which a foreign government describes its own law.”

— Justice Ginsburg

Justice Ginsburg then noted that Rule 44.1 does not assign the weight to be given to a foreign government’s perspective, and indeed it would be impossible to craft a single rule that would apply in all circumstances. While acknowledging that prior Supreme Court decisions such as *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. Of Iowa*, 482 U.S. 522 (1987), require careful consideration of a foreign state’s interpretation according to principals of “international comity,” the Court recognized that the appropriate weight to give such an interpretation will vary from case to case. Justice Ginsburg identified a number of factors to consider when weighing the submission of a foreign government, including “the statement’s clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement’s consistency with the foreign government’s past positions.”

Justice Ginsburg explained that these considerations are relevant, in part, because of the world’s “diverse legal systems” and the “range of circumstances in which a foreign government’s views may be presented,” hinting that U.S. courts should be keen to understand not only the strict legal question presented, but also the political and other circumstances that prompted the foreign government to offer a submission. Thus, while never expressly suggesting that some foreign submissions might be politically motivated, which had been a theme during [oral argument](#), this reference could be interpreted as a subtle reminder that blind deference to foreign submissions would potentially have unintended political consequences.

Finally, the Court compared the question of interpreting foreign law to the task a district court faces when determining the meaning of state law in federal court. While a district court is bound by a decision of a state’s highest court, the view of a state’s attorney general garners only “respectful consideration.” The Court pointed out that such a dichotomy appears to similarly be the norm in the international context. First, the Court cited the fact that when the United States appears in foreign courts to advance its interpretation of U.S. law, it historically has not argued that foreign courts are bound to accept that interpretation. Second, the Court pointed to two international treaties that have mechanisms for obtaining the perspective of a foreign government, the European Convention on Information on Foreign Law and the Inter-American Convention on Proof of and Information on Foreign Law. Although the United States is not a party to either treaty, the Court highlighted them as examples of an international consensus that a court is not bound by the perspective of a foreign government when interpreting that government’s law.

Implications

The factors identified by the Court for evaluating a foreign government's interpretation of its laws will be relevant to future antitrust cases and may implicate political issues.

From an antitrust perspective, it may now be more difficult for foreign companies to successfully defend a competition suit by arguing that they are compelled to act due to the law of their home country. The factors highlighted by the Court will give lower courts leeway to interpret the meaning of foreign law, and lower courts may evaluate the submissions of foreign governments more skeptically.

The fact that both the Ministry of Commerce and the U.S. Justice Department were allotted time during oral arguments underscores the larger international dynamics motivating this case. Those political overtones could have ramifications for U.S. companies doing business abroad, for example, U.S. companies that currently utilize the antitrust exclusion for export-only activities authorized by the Webb-Pomerene Act may find that this case is used against them in foreign courts.

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