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Supreme Court Rules That Federal Courts Are Not Bound to Give Conclusive Effect to Foreign Governments' Statements About Their Laws

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The Supreme Court ruled today that, when a foreign government presents a formal submission to a federal court about the content of the government's own laws, the court should accord "respectful consideration" to the government's statements, but is not bound to grant them "conclusive effect." The decision in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.* (No. 16-1220) resolves a Circuit split about the weight to accord a foreign government's description of its own law and could lead to more in-depth litigation of the content and meaning of foreign law, with expert witnesses on both sides addressing the issues.

Background

Two years ago, we blogged about the Second Circuit's decision in *In re Vivendi, S.A. Securities Litigation*, which affirmed a ruling excluding certain foreign shareholders from a certified class in a securities class action against a non-U.S. issuer because of a concern that courts in some foreign countries might not give preclusive effect to a U.S. class-action judgment. The Second Circuit's decision confirmed that the "superiority" analysis conducted as part of the class-certification inquiry may properly consider whether foreign class members would or would not be bound by a U.S. class-action judgment if they were to sue in their home courts. *Vivendi* held that "[c]oncerns about foreign recognition of our judgments are reasonably related to superiority" because, if a foreign court would not grant preclusive effect to the judgment, the parties and the court would waste their time and resources litigating and adjudicating the claim.

The *Vivendi* case followed on the heels of the Second Circuit's ruling in *In re Vitamin C Antitrust Litigation* 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, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." *In re Vitamin C*'s deference to foreign governments' interpretations of their laws seemed to create an incentive for parties litigating judgment-recognition issues to try to involve foreign governments in disputes about judgment recognition – as had been done in *amicus* briefs submitted by certain governments in other securities class actions.

The Supreme Court has now spoken and has changed the analysis in the Second Circuit.

In re Vitamin C – captioned *Animal Science Products* in the Supreme Court – is an antitrust action by U.S. purchasers of vitamin C against several Chinese producers of vitamin C. The plaintiffs alleged that the Chinese defendants had violated U.S. antitrust laws by conspiring to fix the price and supply of vitamin C sold to U.S. companies.

The defendants moved to dismiss, claiming they had acted pursuant to Chinese regulations governing vitamin C export pricing and had essentially been required by the Chinese government (through the Ministry of Commerce) to coordinate prices and create a supply shortage. The defendants therefore asked the court to dismiss the case under principles of international comity and other doctrines involving international relations. In support of their position, the defendants submitted an *amicus curiae* brief from the Ministry explaining China's policies and regulations on vitamin C exports. That submission marked the first time the Chinese government had ever appeared as an *amicus* in any U.S. court.

The district court denied the motion to dismiss as well as a later motion for summary judgment, and the case went to trial, resulting in a verdict against the defendants. The Second Circuit, however, reversed and ruled that the district court should have abstained on grounds of international comity. In so doing, the Second Circuit held that the district court should have accepted the Chinese government's proffered interpretation of its laws.

The Supreme Court, in a unanimous decision by Justice Ginsburg, reversed.

Supreme Court's Decision

The Court held that "[a] federal court should accord respectful consideration to a foreign government's submission" concerning its own laws, "but is not bound to accord conclusive effect to the foreign government's statements," as the Second Circuit effectively had done. Instead, federal courts must follow Federal Rule of Civil Procedure 44.1, which provides that, in determining the meaning of foreign law, "the court may consider any relevant material or source . . . whether or not submitted by a party." The Advisory Committee's 1966 Note on Rule 44.1 similarly states that a court "may engage in its own research and consider any relevant material thus found."

The Supreme Court acknowledged that "Rule 44.1 does not address the weight a federal court determining foreign law should give to the views presented by the foreign government." The Court also recognized that, "[i]n the spirit of international comity, . . . a federal court should carefully consider a foreign state's views about the meaning of its own laws." But the Court concluded that "the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt a foreign government's characterization nor required to ignore other relevant materials."

The Court listed some "relevant considerations" for federal courts to evaluate in assessing the weight to give to a foreign government's submission, 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."

The Court remanded the case to the Second Circuit to reevaluate the various submissions on Chinese law in light of those principles.

Implications

The Supreme Court's decision is likely to intensify the use of foreign-law experts, especially in cases where a foreign government submits a statement of its own position. A federal court cannot view the government's statement as conclusive; it must conduct its own research and analysis – thereby creating an incentive for the parties to retain experts to present their own views to the court.

In the judgment-recognition context discussed in *Vivendi*, where the court is entitled as part of the class-certification process to require foreign plaintiffs to show that their home courts would recognize a U.S. class-action judgment, the battle of experts might intensify after the *Animal Science Products* decision. A foreign government's position statement or *amicus* brief cannot conclusively resolve the issue, so the parties will likely introduce their own evidence on the relevant foreign countries' judgment-recognition and *res judicata*policies.

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