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A Proposed Approach For High Court In Vitamin C Case

By **Michael Kimberly and Matthew Waring** (May 18, 2018, 11:48 AM EDT)

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On April 24, 2018, the penultimate day of oral argument for this term, the U.S. Supreme Court heard oral argument in Animal Science Products Inc. v. Hebei Welcome Pharmaceutical Co. Ltd., an antitrust case that presents the question of how much deference (if any) to give to an interpretation of foreign law offered by a foreign sovereign appearing in an American court. The court's opinion in the case, which is expected by the end of June, may be overshadowed by the many other headline-grabbing cases on the court's docket, but it will have significant implications, not only for antitrust cases but for lawsuits in numerous other areas of law as well. By all that appears, it is safe to expect a narrow ruling instructing lower courts not to give conclusive deference to foreign sovereigns' legal submissions, but a more sensible approach would be to instruct U.S. courts to assess whether these submissions are entitled to any deference in their country of origin and, if so, to give them that deference.

Foreign Law in U.S. Courts

Cases brought in American courts frequently involve issues touching on foreign countries' laws. For example, a breach-of-contract suit in a U.S. court may involve a contract that provides that it is to be interpreted according to the laws of another country. Or a family law matter in a U.S. court may implicate questions of marital status or parentage under foreign law. In cases like these, an American court must determine the answer to the antecedent questions of foreign law in order to adjudicate the parties' ultimate claims under U.S. law. That is often a tall order: Determining questions of foreign law may require interpreting legal materials in other languages or understanding and navigating legal systems that differ greatly from the adversarial common-law system that exists in the United States.

The common law addressed this difficulty by treating questions of foreign law as questions of fact, which placed the burden on the proponent of the foreign law to prove the content and meaning of that law.[1] But that approach was abandoned in 1966, when the Civil Rules Advisory Committee adopted Federal Rule of Civil Procedure 44.1, which made foreign legal issues questions of law and authorized courts to "consider any relevant material or source," whether or not it is admissible under the rules of evidence and whether or not it is submitted by one of the parties.[2] Under Rule 44.1, federal courts interpret foreign law the same way they do American law, and they consult a variety of legal materials, including

primary and secondary foreign legal sources and expert testimony. The Hebei case involves a novel kind of legal source that has become more common in recent years: briefs filed by foreign governments appearing as amici curiae and purporting to explain how their laws apply to the facts of the case in an attempt to influence the outcome of litigation.

Background of the Case

The plaintiffs in Hebei allege that Chinese manufacturers of vitamin C conspired to fix prices in violation of Section 1 of Sherman Act. They brought an antitrust suit against several alleged members of the conspiracy in the Eastern District of New York in 2005, and the case was later consolidated with other class actions in a multidistrict litigation. The defendants moved to dismiss on the ground that their price-fixing was required as a matter of Chinese law.

The Chinese Ministry of Commerce filed an amicus brief in the district court in support of the motion to dismiss, explaining that at the times relevant to the complaint, China required vitamin C exporters to coordinate export pricing. Plaintiffs contended that the price-fixing that occurred was not compelled by the Chinese government, arguing that the vitamin C producers were not required to reach any agreement and that compliance with any agreement would have been voluntary.[3]

The district court sided with the plaintiffs and denied the motion to dismiss. Based on its review of a number of sources, the court concluded that the price fixing had not been mandated by the Chinese government. And although it acknowledged the Chinese Ministry's representations to the contrary, it concluded that those representations were at odds with the "plain language" of the other sources presented to it and thus were not decisive on the issue.[4] The court later denied motions for summary judgment and judgment as a matter of law on the same grounds — again concluding that the ministry's submissions could not be given conclusive deference because they failed to address, and were in tension with, other pieces of evidence on Chinese law.

A jury found for the plaintiffs, and the defendants appealed. The ministry again filed an amicus brief in the Second Circuit, and the court of appeals ultimately reversed the district court's order denying the original motion to dismiss. In the critical passage of its holding, the Second Circuit held 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." Given that the relevant Chinese law was ambiguous and not readily understood through the lens of American tools of legal interpretation, the court of appeals held that deference to the ministry's position was warranted.[5] The plaintiffs petitioned for certiorari, which the Supreme Court granted in January 2018.[6]

The Supreme Court Argument

The oral argument in the Supreme Court, which involved participation by four advocates (petitioner's counsel, respondent's counsel, a lawyer from the solicitor general's office arguing for the United States as an amicus, and counsel for the ministry, which once again appeared as an amicus), revolved around the question of how much a U.S. court should defer to a brief like the ones filed by the ministry. Justice Stephen Breyer framed the question before the court as a choice between three options: (1) treating the foreign sovereign's opinion as singularly determinative (as the Supreme Court would treat the opinion of an American state's highest court on a question of that state's law); (2) Chevron-type deference, in which the foreign sovereign's opinion would receive whatever deference it would be

entitled to under foreign law (just as a federal agency in the U.S. receives deference when Congress has empowered it to interpret federal law); and (3) Skidmore-type deference, where the opinion would only receive deference to the extent that it was persuasive.[7]

Each of these options has its drawbacks — as the justices recognized. The first approach — i.e., giving a foreign sovereign's opinion conclusive deference — would give the legal submissions of foreign sovereigns greater weight in U.S. courts than the United States' submissions receive in foreign courts (or, for that matter, U.S. courts). Justice Elena Kagan pressed the ministry's counsel to cite a single country that applies a rule of conclusive deference, and he could not do so.[8] At the opposite end of the spectrum, a Skidmore-type approach — giving a foreign sovereign's opinion nothing more than "respectful consideration," as several justices put it[9] — would require American courts to constantly second guess the opinions of foreign sovereigns. And a Chevron-type approach requires a more complicated inquiry than other approaches: not only must the U.S. court determine the right answer to the ultimate question of foreign law being posed, it must also determine the legal weight that the foreign sovereign's opinion would have in the foreign legal system.

The justices generally appeared to agree at the argument that a rule of binding deference like the one the Second Circuit applied would go too far and unduly tie the hands of U.S. courts in deciding questions of foreign law. Although it is always hazardous to predict the outcome of a case based on an oral argument, the justices seem likely to hold that something like "respectful consideration" is all that is due a foreign sovereign's opinion.

Taking Chevron Abroad

We think that a "respectful consideration" approach to assessing foreign sovereigns' legal submissions is preferable to an approach that gives those submissions conclusive deference. The conclusive-deference approach would encourage foreign sovereigns to manipulate outcomes in American courts by filing legal briefs that support local interests. The implications for antitrust law alone would be enormous: Every nation in the world would have a powerful incentive to protect their domestic firms from antitrust liability by appearing in U.S. courts when those firms stand accused of violating U.S. antitrust law and the case involves some element of foreign law.

And that is hardly the only context in which the issue would arise. As one amicus brief for a group of conflicts-of-laws and civil procedure scholars noted, the opportunities for mischief would be nearly endless.[10] A foreign government could aid one of its corporations in a breach of contract case by arguing that the contract was illegal under its foreign law. It could intervene in a cross-border custody or divorce proceeding. Or it could argue that an activity is taxable under foreign law in order to invoke U.S. protections against double taxation. Opening the door to this kind of manipulation of American lawsuits would be self-evidently unwise.

A Chevron-type approach is preferable to either of these approaches. The ultimate question before a U.S. court in this context is what the substance of foreign law is. When a foreign sovereign appears in court and takes a position on the substance of its own law, it seems sensible to given that opinion that same independent legal weight that it would receive under the sovereign's own foreign law, in its own courts. If a foreign government agency's interpretation would receive conclusive deference in that government's own courts, a U.S. court's failure to afford similar deference would itself represent an error of foreign law (and a potential offense to international comity). By the same token, if a foreign entity's interpretation would be accorded no legal weight under that country's legal system, it would be erroneous (and strange) to afford it decisive weight in American courts.

To be sure, as the petitioning plaintiffs counsel noted at the oral argument in Hebei, applying a Chevron-type analysis would present American courts with new challenges: They would have to understand how the various components of a foreign government work together and how to map a deference doctrine onto those components' statements.[11] But for better or worse, Rule 44.1 presumes that U.S. courts can make such assessments of foreign law competently and accurately; while requiring courts to assess whether arms of foreign sovereigns can make law in their respective countries would add to their workload, it would not be a significant departure from the kind of analysis they already perform, whether with respect to the law of foreign nations or of the various states comprising the United States. The court should consider empowering lower courts to make this more detailed deference inquiry, rather than simply instructing them to give "respectful deference" to foreign sovereign legal opinions — it would accord more appropriate respect to foreign sovereigns and their legal systems.

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[1] See, e.g., Arthur R. Miller, Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine, 65 Mich. L. Rev. 615, 617 (1967).

[2] Fed. R. Civ. P. 44.1.

[3] Br. for Pet'rs at 14-17, Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd., 2018 WL 1156616.

[4] In re Vitamin C Antitrust Litig., 584 F. Supp. 2d 546, 557 (E.D.N.Y. 2008).

[5] In re Vitamin C Antitrust Litig., 837 F.3d 175, 189 (2d Cir. 2016).

[6] Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 734 (2018).

[7] Oral Arg. Tr. at 45, Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd., https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1220_4hd5.pdf.

[8] Id. at 49.

[9] Id. at 45, 50, 53.

[10] Br. of at 26-27, Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd., 2018 WL 1202845.

[11] Oral Arg. Tr. at 8:17-23.