

Foreign Law, American Injury: International Comity in U.S. Courts

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On September 20, 2016, the Second Circuit Court of Appeals issued a landmark decision regarding the application of foreign laws on foreign corporations doing business in the United States.

Antitrust Law and International Competition

American antitrust law aims “to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.”¹ In the increasingly global marketplace, however, friction between the American concept of consumer protection and foreign nations’ laws and regulations is becoming more common. In the face of such conflicts, U.S. courts must consider the complicated legal and political landscape within which their decisions will fit. A court’s decision to exercise jurisdiction at all can have significant consequences in the international community.

Second Circuit’s Decision on U.S. Court’s Deference to Foreign Law

In *In re Vitamin C Antitrust Litigation*,² a class action was brought against Chinese entities for allegedly violating U.S. antitrust laws for price fixing and other actions related to the sale of vitamin C. The defendants moved to dismiss on the basis that they acted, as the Second Circuit summarized, “pursuant to Chinese regulations regarding vitamin C export pricing and were, in essence, required by the Chinese Government . . . to coordinate prices and create a supply shortage.”³ But, “by directing vitamin C manufacturers to coordinate export prices and quantities and adopting those standards into the regulatory regime, the Chinese Government required Defendants to violate the Sherman Act.”⁴ The District Court had elected to exercise jurisdiction and awarded the plaintiffs “approximately \$147 million in damages and issued a permanent injunction barring [the Chinese entities] from further violating American antitrust laws.”⁵

On review, however, the Second Circuit observed that the Chinese defendants were in a no-win situation. They could comply with either Chinese law or U.S. antitrust law, but not both.⁶ The question boiled down to one of comity: When considering foreign entities’ extraterritorial activities impacting the U.S., what level of deference do U.S. courts owe to foreign laws that clash with domestic laws?

Multifactor Comity Test for Jurisdiction

As the Second Circuit explained, courts have applied a multifactor comity balancing test to determine whether an American court should exercise jurisdiction in a particular matter.⁷ *In re Vitamin C Antitrust Litigation* was unique in that, unlike other comity cases which have turned on circumstantial evidence and expert opinion regarding the true scope and meaning of a particular foreign law, this case involved legal opinions from the foreign government itself. This came in the form of an *amicus* brief filed by the Chinese government explaining its price fixing and export regulations. The Second Circuit ruled that when a foreign government takes this extraordinary step and “directly participates in U.S. court proceedings . . . a U.S. court is bound to defer to those statements.”⁸ Of particular note, the court recognized that its decision would have a direct bearing on the way American law might be treated in foreign jurisdictions and that to find otherwise would serve to undermine the “respect and treatment that we would expect our government to receive in comparable matters before a foreign court.”⁹

Deferring to the Chinese government’s interpretation of Chinese law, the Second Circuit determined there was a true conflict between the Chinese and U.S. laws.¹⁰ The Second Circuit then conducted a brief analysis of the remaining comity factors and concluded that a dismissal on international comity grounds was required.¹¹

Considerations for International Businesses

The Second Circuit’s decision could lead to additional litigation across the country and may encourage foreign governments to take a more active role in litigation in U.S. courts. Any company with an international presence should have counsel advise them of potentially conflicting laws in each jurisdiction. The potential impact of conflicting laws should be of particular import during the due diligence and risk assessment phases and prior to cross border investments.

1. Fed. Trade Comm’n, The Antitrust Laws, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Sept. 28, 2016).

2. No. 13-4791-CV, 2016 WL 5017312 (2d Cir. Sept. 20, 2016).

3. *Id.* at *2.

4. *Id.* at *10.

5. *Id.* at *4.

6. *Id.* at *1.

7. As reiterated in the Second Circuit’s decision, the comity balancing test includes ten factors “guiding our analysis of whether to dismiss on international comity grounds,” including:

(1) Degree of conflict with foreign law or policy; (2) Nationality of the parties, locations or principal places of business of corporations; (3) Relative importance of the alleged violation of conduct here as compared to conduct abroad; (4) The extent to which enforcement by either

state can be expected to achieve compliance, the availability of a remedy abroad and the pendency of litigation there; (5) Existence of intent

to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and

be under conflicting requirements by both countries; (8) Whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) Whether a treaty with the affected nations has addressed the issue.

Id. at *5-6 (citing *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3rd Cir. 1979); *Timberline Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976)).

8. *Id.* at *9.

9. *Id.*

10. *Id.* at *12.

11. *Id.* at *12-13.

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