Pending Cases at the U.S. Supreme Court

As the current term of the United States Supreme Court winds-down, two decisions remain outstanding that are of some interest to the readers of this site.

The first pending case is *Abbott v. Abbott*, which was argued in January. As previewed at length on this site (here and here), *Abbott* is a rare family-law case before the Supreme Court involving an American child taken to Texas from his home in Chile by his mother, without his father's consent. Under the 1980 Hague Convention on the Civil Aspects of Child Abduction, children must be automatically returned to the country from which they are taken, so long as the removal was "in breach of rights of custody." The Supreme Court is asked to decide whether the father had a "right of custody" under the treaty, because at the time of the divorce the Chilean family court—and Chilean law as a matter of course—entered a "*ne exeat*" order prohibiting either parent from removing the child from the country without the consent of the other. A discussion of the argument, and the issues raised by the justices, have been previously discussed on this site here.

The second pending case is *Morrison, et al., v. National Australia Bank, et al.* (08-1191), which was argued in March. As some commentators have "read[] the tea leaves" in *Morrison*, it looks as though the United States Supreme Court could be on the verge of deciding one of the more significant cases on the presumption against extraterritoriality in recent memory, and restricting the prescriptive jurisdiction of the Securities and Exchange Act of 1934 in the process. The case involves a class action brought by foreign plaintiffs against a foreign stock issuer on a foreign exchange for alleged fraud that occurred on foreign soil. At oral argument, the justices strongly questioned whether the Act should extend to reach such conduct, and gave strong indications that it was prepared to apply the territorial limitations of *Hoffman-La Rouche v. Empagran* to the securities fraud context.

The case at one time had an American investor in it, but as it reached the Court, only three Australians who bought stock in that country's largest private bank, and did so on Australia's stock market, remained involved as plaintiffs. That set of

facts alone seemed to bother the Justices. “This case,” Justice Ruth Bader Ginsburg said, “has Australia written all over it.…Isn’t the most appropriate choice of law that of Australia, not the United States? . . . What conflict of laws is all about is you have two jurisdictions, both with an interest in applying their own law, but sometimes one defers to the other.” Other justices, too, acknowledged that conflicts is the root of this issue. Justice Alito asked the plaintiffs to “assume that on the facts of this case they could not prevail under Australian law in the Australian court system. Then what United States interest is there that should override that?” According to Justice Scalia, plaintiffs “are talking about a misrepresentation … made in Australia to Australian purchasers; it ought to be up to [Australia] to decide . . . whether there has been a misrepresentation, point one; and whether it’s been relied upon by the … plaintiffs, point two . . . And here you are dragging the American courts into it.”

Others, like Justice Breyer, had also keenly noticed the fact that the governments of Australia, Britain and France had submitted briefs urging the Court not to let American courts enforcing U.S. law tread on other countries’ sovereign territory and right to regulate their internal markets. Defendants’ lawyer built-on these sentiments at argument, charging that the plaintiffs were trying to use their lawsuit to carry off “a massive transfer of wealth” outside of Australia, involv[ing] “the kind of financial imperialism” that seriously offends foreign governments. Indeed, most of the Justices reacted with more sympathy to the foreign governments’ submissions than they did to those of the U.S. government’s lawyer at the lectern. The full transcript of the argument is available here.

Unlike *Abbott*, the outcome of *Morrison* seems predictable—that the prescriptive reach of the Act will be pulled-back—but there remains a live issue of whether the Court would put up a bar only to investors’ lawsuits, or whether it will also restrict the Securities and Exchange Commission’s powers to reach trans-national frauds. The federal government tried to persuade the Court to leave open its ability to enforce the Securities Exchange Act in some trans-national fraud cases—if it decides to reach that question. Both decisions are expected no later than June.