The New Solicitor General and Private International Law Cases: 2008 Term Round-Up

Elena Kagan, the new Solicitor General of the United States, had a few notable private international law cases on her desk when she arrived at her new job this past March. By then, the Court had invited the views of the Solicitor General in the first Hague Convention case to garner serious attention since *Schlunk* and *Aerospatialle* in the late 1980's, and had done the same regarding a case which sought to clarify the scope of specific personal jurisdiction over foreign nationals for their tortuous acts abroad. Just this week, she presented the views of the United States regarding those petitions.

In *Abbott v. Abbott*, the Hague Convention case which was previously discussed at length on this site, the United States recommended the Court grant the petition. In very plain terms, the Solicitor General concludes that the court of appeals erred in concluding that a ne exeat right is not a right of custody under the Convention; that there is disagreement among states party to this Convention, as well as among domestic circuits on this issue; and that it is an important question that merits the Supreme Court's review. The Court will decide whether to take the Solicitor General's advice at its June 25 conference. As the SCOTUSBlog aptly notes, if the Court takes this case, it will indirectly be reviewing the work of its newest (proposed) member in Judge Sonia Sotomayor. The Second Circuit was the first court of appeals to consider this question, in *Croll v. Croll*, 229 F.3d 133 (2000), cert. denied, 534 U.S. 949 (2001), where the panel majority held that a ne exeat clause was not a right of custody for purposes of the Hague Convention. Judge Sotomayor wrote a dissenting opinion indicating that she would have held – as the Solicitor General now argues – that the ne exeat clause constitutes a right of custody. The full brief of the United States is available here.

Nearly contemporaneously, the Solicitor General recommended the Court deny the petition in *Federal Ins. Co. v. Kingdom of Saudi Arabia*. This case, which was also previewed on this site in the past, presented not only some important issues regarding the Foreign Sovereign Immunities Act, but also the very open question

of when U.S. courts may exercise personal jurisdiction over civil claims against foreign nationals on the ground that those individuals engaged in acts abroad which had foreseeable consequences in the United States. The Second Circuit held that the Constitution permits the assertion of personal jurisdiction under these statutes only over foreign actors who "directed" or "commanded" terrorist attacks on U.S. soil, but bars such jurisdiction over persons who merely "fores[aw] that recipients of their donations would attack targets in the United States." The Solicitor General, however, thought it was "unclear precisely what legal standard the court of appeals" was applying. Br. at 19. Here is why she sees the issue as not worthy of the Court's attention (and how the Unites States views foreseeability as a function of personal jurisdiction):

> *To the extent that the court of appeals language suggests that a defendant must specifically intend to cause injury to residents in the forum before a court there may exercise jurisdiction over him, that is incorrect. It is sufficient that a defendant took "intentional . . . tortuous actions" and "knew that the brunt of the injury would be felt" in the foreign forum. Calder, 465 U.S. at 789-90. The court of appeals decision, however, is subject to a more limited construction, which focuses on the inadequacy of the particular allegations before it. At several points, the court of appeals stressed that the petitioners' claims were based on the "the [defendants] alleged indirect funding of al Quaeda." Where the connection between the defendant and the direct tortfeasor is separated by intervening actors, the requirement of showing an "intentional . . . tortuous act[]" on the part of the defendant demands more than a simple allegation. Petitioners would need to allege facts that could support the conclusion that the defendant acted with the requisite intention and knowledge. See Ashcroft v. Iqbal, No. 07-1015 (May 18, 2009, slip op. 16-19 [(previewed here)]. . . . . The court's case-specific holdings [that these allegations were not sufficiently plead] do not warrant review by this Court.*

Br. at 19-20. On similar grounds, the Solicitor General also downplays the circuit conflict alleged in the Petition, saying that the "in each of the three appellate cases cited by petitioners evidencing a conflict, the defendant was a primary wrongdoer—not, as here, a person whose alleged tortuous act consisted of providing material support to another party engaged in tortuous activity." Br. at 20-21. The full brief of the United States is available here. Again, we'll likely know whether the Court takes this advice by June 29.

And, just as she was clearing her desk of private international law matters, the Court sent her another invitation: it asked for the views of the United States regarding a new Petition which asks whether the antifraud provisions of the U.S. securities laws extends to transnational frauds. The case is *Morrison v. National Australia Bank, Ltd.*, which presents the deep and long-running split of federal authority over the application of the "conduct and effects test," which courts typically use to determine the scope of their jurisdiction not only in federal securities fraud cases, but in cases that implicate other federal statutes (like civil RICO) as well. The Petition is available here. We'll see this brief from the Solicitor General over the summer, or early next Term, which could shape-up to be an interesting one for private international law matters.