A Divided Opinion on the Hague Abduction Convention, With Some Interesting Discussion on the Proof of Foreign Law

The Second Circuit last week issued a split-panel decision in *Duran v. Beaumont*, No. 06-cv-5614 (2d Cir. 2008). The case concerned a Chilean mothers' decision to take her child to the USA and remain there, in derogation of a Chilean court order. The child's parents—both Chilean—are recently separated, with formal custody not yet determined. However, the child lived with the mother, who—by law—could not leave Chile without the father's consent. When the father withheld consent for a trip to the United States, the mother obtained a court order allowing a limited, 3 month journey with her daughter. At the expiration of that 3 months, the mother and the child did not return.

The father petitioned the court in New York for return of the child. The court's jurisdiction under the Hague Abduction Convention was in issue. If the father had "custody rights" under the law of the child's habitual residence—here Chile—then the court could order the requested relief. If, however, the father only had a "right of access," then the court was without power to order this remedy.

The Chilean Central Authority submitted an affidavit supporting the father, espousing that he had "custody" of the child under Chilean law because the child could not leave the country without his consent. The district court, and later the Second Circuit, gave no weight to this opinion. While recognizing that the interpretation given by a sovereign to

its own law is entitled to “some deference” in U.S. courts, it is not entitled to “absolute deference.” Where, for instance, such an interpretation conflicts with prior judicial precedent over an issue, that precedent may govern the case. Here, the Second Circuit had already determined that a “ne exeat” right (i.e. the right to determine whether a child will leave the country) does not amount to custody under the Hague Abduction Convention. Under this authority, the father merely had a “right of access” under the Convention, and not custody, giving the New York Court no jurisdiction to order the child’s return. The dissenting judge strenuously objected to the panel’s refusal to give credence to the Chilean Central Authority.

The decision, and the dissent, can be found here.

This case is interesting not only for the operation of the Convention, but most of all as an illustration of the need (and difficulty) in developing some uniform mechanism for national courts to determine foreign law. Here, even with an international treaty calling on the Central Authority of a contracting state to provide an opinion on its own internal law (art. 3), a court has still chosen to ignore this decision in favor of its own precedent (interpreting Hong Kong law, nonetheless). What develops, then, is a convolution of foreign law concepts in U.S. courts, which tend to be applied over-and-over again in different cases, often erroneously. Can a new international convention on the proof of foreign law adequately address this problem?