Book: La Unión Europea ante el Derecho de la Globalización

An interesting volume, collecting the contributions presented at the ***Seminario de Otoño de Derecho Internacional Privado*** (Fall Seminar on Private International Law), hosted in October 2007 by the **University Carlos III of Madrid**, has been recently published by Editorial Colex, under the editorship of *Prof. Alfonso Luis Calvo-Caravaca* and *Prof. Esperanza Castellanos Ruiz*: **La Unión Europea ante el Derecho de la Globalización**.

The papers (in Spanish, Italian and Portuguese) cover various aspects of European Private International Law, analysing its current development in the light of issues arising from globalization. Here's the table of contents:

- *Luís de Lima Pinheiro*: O direito de conflitos das obrigações extracontratuais entre a comunitarização e a globalização – uma primeira apreciação do regulamento comunitario Roma II;
- *Hilda Aguilar Grieder*: La voluntad de conciliación con las directivas comunitarias protectoras en la propuesta de reglamento "Roma I";
- *Alfonso Luis Calvo Caravaca* and *Celia M. Caamiña Domínguez*: El caso Klimt;
- *Javier Carrascosa González*: Sociedad cooperativa europea: aspectos de derecho internacional privado;
- *Esperanza Castellanos Ruiz*: El convenio de Roma de 1980 ante los tribunales españoles: balance de 15 años de vigencia;
- *Ma. José Castellanos Ruiz*: Contencioso Airbus-Boeing;
- *Ma. Pilar Diago Diago*: Aproximación a la mediación familiar desde el derecho internacional privado;
- *Pietro Franzina*: Il regolamento "Roma II" sulla legge applicabile alle obbligazioni extracontrattuali;
- *Rafael Gil Nievas* and *Javier Carrascosa González*: Consideraciones sobre el reglamento 805/2004 de 21 abril 2004 por el que se establece un título ejecutivo europeo para créditos no impugnados;
- *Dario Moura Vicente*: Perspectivas de la armonización y unificación internacional del derecho privado en una época de globalización de la economía;

- *Carola Ricci*: Il foro della residenza abituale nel regolamento Nº 2201/2003 e nella proposta Roma III;
- *Juliana Rodríguez Rodrigo*: Aplicación del derecho de la competencia a los baremos de honorarios de abogados: Arduino y Cipolla;
- *Stefania Serafini*: Il diritto europeo della concorrenza e le risposte alla sfida della globalizzazione. Un caso esemplare: la valutazione delle concentrazioni nel Reg. CE n. 139/2004.

Title: **La Unión Europea ante el Derecho de la Globalización**, edited by *Alfonso Luis Calvo-Caravaca* and *Esperanza Castellanos Ruiz*, Editorial Colex, Madrid, 2008, 515 pages.

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(Many thanks to Pietro Franzina, University of Ferrara, for the tip-off)

Conference: "Le droit français et le droit brésilien d'aujourd'hui : éléments de comparaison"

Centre du droit de l`enterprise at Université Robert Schuman (URS) organizes on 17 June 2008, at Maison Interuniversitaire des Sciences de l'Homme-Alsace (MISHA) (5 allée du Général Rouvillois, Strasbourg), a comparative law day with several private international law related topics on the agenda. The scope of the comparative law day is marked in its title: **"Le droit français et le droit brésilien d'aujourd'hui : éléments de comparaison"** (Contemporary French law and Brasilian law: elements of comparison). The scientific agenda can be consulted here.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2008)

Recently, the May/June issue of the German legal journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***M. Stürner****:* "Staatenimmunität und Brüssel I-Verordnung – Die zivilprozessuale Behandlung von Entschädigungsklagen wegen Kriegsverbrechen im Europäischen Justizraum" – The English abstract reads as follows:

The article examines the impact of the law of State immunity on the scope of international jurisdiction under the Brussels I Regulation. Recently the appellate court of Florence, Italy, has granted enforceability to a judgment in which the Greek Supreme Court, the Areios Pagos, had awarded damages to descendants of victims of a massacre committed in 1944 by German SS militia in the village of Dístomo, Greece. Both Greek and Italian courts have based their jurisdiction on an exception to State immunity which was held to exist in cases of grave human rights violations. This standpoint, however, does not reflect the present state of public international law, nor does it take into account the intertemporal dimension of public international law rules. Neither under the Brussels I regime, nor under domestic Italian law a judgment which was rendered in violation of customary State immunity rules can be recognized or enforced. The Brussels Regulation has a limited scope of application. It is designed to respect public international law rules of State immunity, not to trump them. The Regulation therefore does not apply in cases where the defendant enjoys immunity from civil jurisdiction.

- ***L. de Lima Pinheiro***: "Competition between legal systems in the European Union and private international law"
  The author discusses the idea of competition between national legal

systems and focuses on two aspects: Competition between legal systems and juridical pluralism and competition between legal systems and freedom of choice. Further, the author outlines the mission of private international law in the existing framework of legal pluralism within the EU by emphasising the importance of private international law in a world characterised by globalisation and legal pluralism which should, in the author's view, be reflected in an essential place of private international law in the teaching of law.

- ***P. Scholz****:*"Die Internationalisierung des deutschen ordre public und ihre Grenzen am Beispiel islamisch geprägten Rechts"
  The author examines the internationalisation of the German public policy clause and argues that human rights guaranteed in European and international law have to be taken into account within the framework of German public policy. Further there is, according to the author, no room for a relativization of the German public policy clause in case of internationally guaranteed human rights. Concerns which are expressed towards a supremacy of German values disregarding foreign legal systems are rebutted by the author in reference to the, for several reasons, only limited application of internationally guaranteed human rights.

- ***M. Heckel****:* "Die fiktive Inlandszustellung auf dem Rückzug – Rückwirkungen des europäischen Zustellungsrechts auf das nationale Recht"
  The author examines the impact of the European provisions of service on national law and argues that internal fictional service is, as a consequence of European law, at the retreat in Europe. Nevertheless, internal fictional service is – according to the author – in principle compatible with European law. It was only the statement of claim which had to be served effectively. In case of a fictional service of a statement of claim, a subsequent judgment in default could neither be recognised nor declared enforceable. In view of the right to be heard, internal fictional service was only admissible if the defendant could take notice of the judicial document.

- ***R. Geimer:*** "Los Desastres de la Guerra und das Brüssel I-System" (ECJ – 15.02.2007 – C-292/05 – *Lechouritou*)
  The author reviews the ECJ's judgment in "Lechouritou" which concerned

an action for compensation brought against Germany by Greek successors of victims of war massacres and agrees with the Court that actions brought for compensation in respect of acts perpetrated by armed forces in the course of warfare do not constitute "civil matters" in terms of Brussels I. Thus, the author concludes that consequences of war and occupation can only be dealt with at the level of international law.

- ***C. Althammer:*** "Die Auslegung der Europäischen Streitgenossenzuständigkeit durch den EuGH – Quelle nationaler Fehlinterpretation?" (ECJ – 11.10.2007 – C-98/06 – *Freeport*) – The English abstract reads as follows:

In the case Freeport/Arnoldsson the European Court of Justice has not rewarded the anticipatory obedience that national courts have paid to the judgement Réunion Européenne. Two claims in one action directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict can be regarded as connected (Art. 6 (1), Council Regulation (EC) No 44/2001). In this respect the decision Freeport/Arnoldsson seems correct, although it is criticisable that the ECJ changes his course in such an oblique way. There is no favour done to legal certainty that way. An interpretation of the connection orientated towards the specific case which takes into account the national characteristics is advisable in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. There is no risk of irreconcilable judgments if the proceeding against the anchor defendant is inadmissible. Moreover, the plaintiff must have a conclusive cause of action. Some chance of success seems to be necessary. The possibility of abuse requires an objective handling of the connection. In addition, subjective elements like malice are difficult to prove.

- ***A. Borrás:*** "Exclusive" and "Residual" Grounds of Jurisdiction on Divorce in the Brussels II bis Regulation (ECJ – 29.11.2007 – C-68/07 – *Sundelind Lopez*)
  In the reviewed case, the ECJ has held that Artt. 6 and 7 Brussels II *bis* have to be interpreted as meaning that where in divorce proceedings, a responsent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base

their jurisdiction on their national law if the courts of another Member State have jurisdiction under Art. 3 Brussels II *bis*. The author agrees with the ECJ regarding the final ruling, but is nevertheless critical with regard to the arguments brought forward by the Court and submits that the fact that there was no opinion by an Advocate General had a negative effect on the case. In this respect, the author regrets that this will happen more often in the future since the recent amendments of the Protocol on the Statute of the Court of Justice and of the rules of procedure of the Court provide "for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure".

- ***H. Roth****:* "Der Kostenfestsetzungsbeschluss für eine einstweilige Verfügung als Anwendungsfall des Europäischen Vollstreckungstitels für unbestrittene Forderungen" (OLG Stuttgart – 24.05.2007 – 8 W 184/07)
  The author approvingly reviews a decision of the Court of Appeal Stuttgart dealing with the question whether an order for costs for an interim injunction constitutes a "judgment" in terms of the Regulation creating a European Order for uncontested claims. The case concerned the question whether a certification of the order for costs as a European Enforcement Order had to be refused due to the fact that the underlying decision constituted an interim injunction which had not been given in adversarial proceedings. Thus, the case basically raised the question of the interdepence between the order for costs and the underlying decision. Here the court held that it was sufficient if the defendant was granted the right to be heard subsequently to the service of the decision.

- ***D. Henrich:*** "Wirksamkeit einer Auslandsadoption und Rechtsfolgen für die Staatsangehörigkeit" (OVG Hamburg – 19.10.2006 – 3 Bf 275/04)
  In the reviewed decision, the Higher Administrative Court Hamburg had to deal with the question of acquisition of German nationality by adoption and thus with the question which requirements an adoption has to comply with in order to lead to the acquisition of German nationality.

- ***M. Lamsa****:* "Allgemeinbegriffe in der Firma einer inländischen Zweigniederlassung einer EU-Auslandsgesellschaft" (LG Aachen – 10.04.2007 – 44 T 8/07)
  The author critically examines a decision of the Regional Court Aachen

which has held – in view of the freedom of establishment – that the registration of a subsidiary of an English Limited could not be refused even if the trading name does not meet the requirements of German law.

- ***H. Sattler****:* "Staatsgeschenk und Urheberrechte" (BGH – 24.05.2007 – I ZR 42/04) – The English abstract reads as follows:

More than a decade after the fall of the Berlin Wall, the German Bundestag, in the course of a public ceremony in Berlin, donated to the United Nations three sections of the former Wall which had been painted by an Iranian artist without the landowner's assent. The Bundesgerichtshof dismissed the artist's claim for damages. The court found that the donation did not infringe the plaintiff's rights of distribution (§ 17 German Copyright Act), because the parts of the wall were handed over only symbolically in Berlin whereas the actual transfer took place later in New York. The court further held that the painter had no right to be named (§ 13 German Copyright Act) during the Berlin ceremony, since his work was not exhibited at that presentation and had not been signed by the artist. It can be criticized that the court explicitly refused to deal with potential copyright infringements in New York solely due to the fact that the claimant, when stating the facts of his case, had not expressly referred to the applicable US law.

- ***C. F. Nordmeier*** discusses two Portuguese decisions dealing with the question of international jurisdiction of Portuguese courts with regard to actions against German sellers directed at the selling price. ("Internationale Zuständigkeit portugiesischer Gerichte für die Kaufpreisklage gegen deutsche Käufer: Die Bedeutung des INCOTERM für die Bestimmung des Lieferortes nach Art. 5 Nr. 1 lit. b EuGVVO")

  (Tribunal da Relação de Porto, 26.4.2007, Agravo n° 1617/07-3ª Sec., und Supremo Tribunal de Justiça, 23.10.2007, Agravo 07A3119)

- ***W. Siebericchs*** addresses the qualification of the German civil partnership as a marriage which is provided in a note of the Belgium minister of justice ("Qualifikation der deutschen Lebenspartnerschaft als Ehe in Belgien")

- ***C. Mindach*** reports on the development of arbitration in the Kyrgyz Republic ("Zur Entwicklung der Schiedsgerichtsbarkeit in der

Kirgisischen Republik")

- ***H. Krüger/F. Nomer-Ertan*** present the new Turkish rules on private international law ("Neues internationales Privatrecht in der Türkei")

Further, this issue contains the following **materials**:

- The Turkish Statute No. 5718 of 27 November 2007 on private international law and the international law of civil procedure ("Das türkische Gesetz Nr. 5718 vom 27.11.2007 über das internationale Privat- und Zivilverfahrensrecht")
- Statute of the Kyrgyz Republic on the arbitral tribunals of the Kyrgyz Republic of 30 July 2002, Nr. 135 ("Gesetz der Kirgisischen Republik über die Schiedsgerichte in der Kirgisischen Republik – Bischkek, 30.7.2002, Nr. 135")
- Première Commission – Résolution – La substitution et l'équivalence en droit international privé – Institut de Droit International, Session de Santiago 2007 – 27 octobre 2007

As well as the following **information**:

- ***E. Jayme*** on the 73rd Session of the Institute of International Law in Santiago, Chile ("Substitution und Äquivalenz im Internationalen Privatrecht – 73. Tagung des Institut de Droit International in Santiago de Chile")
- ***S. Kratzer*** on the annual conference of the German-Italian Lawyers' Association ("Das neue italienische Verbrauchergesetzbuch – Kodifikation oder Kompilation und Einführung des Familienvertrages ("patto di famiglia") im italienischen Unternehmenserbrecht – Jahrestagung der Deutsch-italienischen Juristenvereinigung in Augsburg")

Developments in the Recognition of Foreign Class Action Judgments

With the courts of Canadian provinces willing to take jurisdiction over a "national" class claim, involving a plaintiff class which includes members located in other provinces, and with American courts willing to take jurisdiction over "international" classes, involving a plaintiff class which includes members located in Canada, Canadian courts are increasingly having to confront the issue of whether to recognize a foreign class action decision. If a defendant settles a class claim brought in the United States which purports to bind class members in Canada, that defendant then will raise that settlement, as approved by judicial order, in response to subsequent class claims in Canada. Given the value of class claims, the decision whether or not to recognize the foreign decision has significant economic repercussions.

Two relatively recent Canadian decisions on whether to recognize such judgments are *Parsons v. McDonald's Restaurants of Canada Ltd.* (available here) and *Currie v. McDonald's Restaurants of Canada Ltd.* (available here). These decisions generally support recognition of such judgments, but they impose particular conditions relating to the process followed in the foreign court and the notice given to the people affected in Canada. More recently, two Quebec decisions have addressed the recognition of foreign class action judgments. See *Lépine v. Société Canadienne des postes* (available here; affirmed on appeal) and *HSBC Bank Canada c. Hocking* (lower court decision available here; appellate decision will be available on CanLII). The latter decision has just been released, and the former decision has been appealed to the Supreme Court of Canada, so further guidance on these issues is likely forthcoming.

Some of these issues are addressed in Janet Walker, "Crossborder Class Actions: A View from Across the Border" (2003) Mich. St. L. Rev. 755; Debra Lyn Bassett, "U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction" (2003) 72 Fordham L. Rev. 41; Ellen Snow, "Protecting Canadian Plaintiffs in International Class Actions: The Need for A Principled Approach in Light of *Currie v. McDonald's Restaurants of Canada Ltd.*" (2005) 2 Can. Class Action Rev. 217; and Craig Jones & Angela Baxter, "Fumbling Toward Efficacy: Interjurisdictional Class Actions After *Currie v. McDonald's*" (2006) 3 Can. Class

Action Rev. 405.

ECJ: Judgment on Service Regulation (Weiss und Partner)

Today, the ECJ delivered its judgment in case C-14/07 (*Weiss und Partner*).

The German Federal Supreme Court (*Bundesgerichtshof*) had referred the **following questions** to the ECJ for a preliminary ruling:

> *Must Article 8(1) of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ('the Regulation') be interpreted as meaning that an addressee does not have the right to refuse to accept a document pursuant to Article 8(1) of the Regulation if only the annexes to a document to be served are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands?*
>
> *If the answer to the first question is in the negative:*
>
> *Must Article 8(1)(b) of the Regulation be interpreted as meaning that the addressee 'understands' the language of a Member State of transmission within the meaning of that regulation because, in the exercise of his business activity, he agreed in a contract with the applicant that correspondence was to be conducted in the language of the Member State of transmission?*
>
> *If the answer to the second question is in the negative:*
>
> *Must Article 8(1) of the Regulation be interpreted as meaning that the addressee may not in any event rely on that provision in order to refuse acceptance of such annexes to a document, which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, if the addressee concludes a contract in the exercise of his business activity in which he agrees that correspondence is to be*

conducted in the language of the Member State of transmission and the annexes transmitted concern that correspondence and are written in the agreed language?

The Court now held in its **judgment:**

1. Article 8(1) of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters is to be interpreted as meaning that the addressee of a document instituting the proceedings which is to be served does not have the right to refuse to accept that document, provided that it enables the addressee to assert his rights in legal proceedings in the Member State of transmission, where annexes are attached to that document consisting of documentary evidence which is not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, but which has a purely evidential function and is not necessary for understanding the subject?matter of the claim and the cause of action.

It is for the national court to determine whether the content of the document instituting the proceedings is sufficient to enable the defendant to assert his rights or whether it is necessary for the party instituting the proceedings to remedy the fact that a necessary annex has not been translated.

2. Article 8(1)(b) of Regulation No 1348/2000 is to be interpreted as meaning that the fact that the addressee of a document served has agreed in a contract concluded with the applicant in the course of his business that correspondence is to be conducted in the language of the Member State of transmission does not give rise to a presumption of knowledge of that language, but is evidence which the court may take into account in determining whether that addressee understands the language of the Member State of transmission.

3. Article 8(1) of Regulation No 1348/2000 is to be interpreted as meaning that the addressee of a document served may not in any event rely on that provision in order to refuse acceptance of annexes to the document which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands where the addressee concluded a contract in the course of his business in which he agreed that correspondence was to be conducted in the language of the Member State of

transmission and the annexes concern that correspondence and are written in the agreed language.

See for the full judgment the website of the ECJ and with regard to the background of the case our previous post on the opinion of Advocate General Trstenjak which can be found here.

Inconsistent State Laws in Australia

Australian commentators have long speculated about whether the federal Constitution contains any rule that would resolve a direct conflict between the statute law of two States. Thus far, the High Court has defused potential conflicts without the need for such a constitutional rule. In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, the potential conflict between ACT and NSW law was resolved by a common law choice of law rule; and in *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 a potential conflict between NSW and Victorian law was resolved by a process of statutory construction.

Most recently, in *Betfair Pty Limited v Western Australia* [2008] HCA 11, the High Court resolved a potential conflict between the laws of Tasmania and Western Australia by striking down the Western Australian statute because it infringed s 92 of the Constitution (which prevents protectionist burdens on interstate trade and commerce). The Court noted in passing that its conclusion about s 92 made it "unnecessary to consider whether [the WA law] is invalid by reason of the alleged direct conflict between it and … the Tasmanian Act. This is not the occasion to consider what may be the controlling constitutional principles were there demonstrated to be such a clash of State legislation." Since no such occasion has

yet arisen in the 108 years of Australian federation, the direct conflict between State laws is perhaps a problem of greater theoretical than practical importance.

High Court of Australia Considers Hague Convention on Child Abduction

The High Court of Australia has recently addressed the Hague Convention on the Civil Aspects of International Child Abduction: *MW v Director-General, Department of Community Services* [2008] HCA 12. In a 3:2 decision, the Court considered that the Director-General (as State Central Authority) had not sufficiently established that the removal of a child from New Zealand to Australia was wrongful, and thus the Family Court of Australia ought not to have made an order for the return of the child.

In Australia, the Hague Convention does not apply of its own force, but is instead implemented by the Family Law Act 1975 (Cth) and the Family Law (Child Abduction Convention) Regulations 1986(Cth). The case turned on reg 16(1A)(c) of the Regulations, which provides that "the person, institution or other body seeking the child's return had rights of custody in relation to the child under the law of the country in which the child habitually resided immediately before the child's removal to, or retention in, Australia". As such, the High Court was required to address difficult factual and legal questions relating to the child's circumstances in New Zealand. At least in the case of New Zealand law, that task was eased in Australia by the Evidence and Procedure (New Zealand) Act 1994 (Cth).

Recent Article Entitled “Pleading and Proving Foreign Law in Australia”

James McComish, my Australian Conflict of Laws.net co-editor, has recently had published an article entitled “Pleading and Proving Foreign Law in Australia” in volume 31(2) of the *Melbourne University Law Review*. The abstract reads:

> *Foreign law lies at the heart of private international law. After all, a true conflict of law cannot be resolved unless and until the content of foreign law is established. Despite this, the pleading and proof of foreign law remain among the most under-explored topics in Australian private international law. In light of the High Court of Australia’s significant change of direction on choice of law since 2000, most notably in cases such as John Pfeiffer Pty Ltd v Rogerson, Regie Nationale des Usines Renault SA v Zhang and Neilson v Overseas Projects Corporation of Victoria Ltd, it is all the more important to answer some of the basic questions about the pleading and proof of foreign law. Who pleads foreign law? What law do they plead? Are they obliged to do so? How do they prove its content? When can local law be applied in the place of foreign law? This article addresses these and related questions with a particular focus on Australian law as it has developed since 2000. It concludes that Australian courts take a more robust and pragmatic approach to these issues than might be supposed. In particular, the so-called presumption of identity is a label that masks a much richer and more complex reality.*

The article’s full citation is (2007) 31(2) *Melbourne University Law Review* 400.

Rome II: a Critical Appraisal of the Conflict Rule on Culpa In Contrahendo

Prof. Rafael Arenas Garcia (Universitat Autònoma de Barcelona and Àrea de Dret Internacional Privat blog) has written an interesting article on the controversial issue of the **law applicable to culpa in contrahendo**, discussing the conflict rule set out in **Art. 12 of the Rome II regulation**: **"La regulación de la responsabilidad precontractual en el Reglamento Roma II"**.

The article (in Spanish) will be published in the forthcoming issue (2007) of the *Anuario Español de Derecho Internacional Privado* (Spanish Yearbook of Private International Law – AEDIPr.), but it can be downloaded as a .pdf file from the Àrea de Dret Internacional Privat blog.

The English abstract reads as follows:

> *Article 12 of Rome II Regulation governs the obligations arising out of dealings prior to the conclusion of a contract. It establishes that the law applicable to these obligations shall be the law applicable to the contract. Where it is not possible to determine such law, the second paragraph of article 12 establishes the application of the general connecting factors of Rome II Regulation. It is also possible to choose the law applicable to culpa in contrahendo.*
>
> *These solutions are not problem-free. The application of the law governing the future contract is not suitable in order to forbid the breaking of negotiations, without giving to the parties the possibility to rely on the law of the country in which the party has its habitual residence to establish that he can broke off negotiations without liability. It can also be criticized that there is no provision about the cases in which a contract between the parties has been concluded in order to rule the negotiations. As a result of this lack of provision in these cases the law governing culpa in contrahendo will be the law of the future contract instead of the law of the contract that rules the negotiations.*
>
> *This article analyses these problems and the difficult delimitation between contractual and non-contractual fields in matters relating to obligations arising*

out of dealings prior to the conclusion of a contract. It also includes de lege ferenda proposals.

Interesting Case at the Confluence of Choice of Law, Comity and the Hague Abduction Convention

"At the heart of this sad case, which raises questions of international and federal law under the Hague [Abduction] Convention, is a custody battle over a young girl who has not seen either of her parents in years." That was the lead-in from Judge Jordan to the recent decision by a three-judge panel of the Third Circuit. *Carrascosa v. McGuire*, No. 07-1748/4130 (3rd Cir., March 20, 2008), involved a Spanish mother, once married to an American father, whose child was habitually resident in New Jersey. Upon their divorce, the couple signed a "Parenting Agreement" that established an "interim resolution" of the custody issue and prohibited either of them from traveling outside the country with their daughter. Shortly thereafter, the mother took the daughter to Spain.

A judge in New Jersey issued several orders for the daughter's return, and when each went unanswered, issued a warrant for the mother's arrest. In the meantime, however, purporting to follow the Hague Abduction Convention, the Spanish Courts had decided that the Parenting Agreement violated Article 19 of the Spanish Constitution (regarding the freedom to chose one's place of residence), determined that the removal to that country was not "wrongful" within the meaning of the Convention, and ordered that the daughter remain. When the mother returned to the United States to attend to the divorce proceedings, she was arrested. She challenged her detention as "in violation of the laws and treaties of the United States" through a writ of habeas corpus. In essence, she argued that a decision of the Spanish Court that the Parenting Agreement was null and void should be afforded comity, and void the charges of

contempt against her.

The Federal District Court for the District of New Jersey denied the writ, and the Third Circuit affirmed. Applying the Hague Convention and its implementing legislation, the Court recognized that "[t]here is no dispute that [the daughter's] place of habitual residence, prior to . . . her [removal] to Spain, was the United States, in particular New Jersey." As to whether her removal to Spain was wrongful under Article 3 of the Hague Convention, the District Court examined whether the father's custody rights were breached by Victoria's removal. Because, under New Jersey law, the father had custody rights by virtue of a valid Parenting Agreement, and the mother breached those rights by removing the daughter to Spain without his consent, the removal was "wrongful" within the meaning of Article 3 of the Hague Convention.

The Spanish court, however, in nullifying the Parenting Agreement, never applied New Jersey law, despite their explicit recognition that the daughter's habitual place of residence was New Jersey. They instead based their decision on the "wrongfulness" of the removal solely on Spanish law, while paying only "lip-service" to the Convention. According to the U.S. Court, this "glaring departure . . . from the mandate of the Hague Convention"—i.e. the "total failure to determine [the father's] rights of custody under [the law of the child's habitual residence]"—the decision of the Spanish court was given no weight. The removal was wrongful under the Convention, and the mother's detention was held to be not "in violation of the law or treaties of the United States."