European and International Uniform Law Conference

European and International Uniform Law: How to Achieve a Uniform Legal Practice of the Rules of Uniform Law

26/27 October 2007 at the European University Institute, Florence. The programme:

The State of Development of Uniform Law in the Fields of

1. European and international civil and commercial law (Mattias Lehmann, University of Bayreuth)
2. European and intellectual property law (Annette Kur, University of Stockholm/Max Planck Institute for IP, Munich
3. European and international family and child law (Andrea Schulz, Federal Office of Justice, Bonn)
4. From international conventions to the treaty of Amsterdam and beyond: what has changed in judicial cooperation in civil matters? (Ansgar Staudinger, University of Bielefeld)

How Uniform is Uniform Law?

1. The practitioners' view: the "arts of forum shopping" in a changing world of uniform law (Thomas Simons, Simons Rechtsanwalte)
2. English law and the continental concepts in European law (Jonathan Harris, University of Birmingham)
3. Tearing down barriers – the development of the public policy barrier in Europe (Peter Hay, Emory University Atlanta)

Techniques of international legal information

1. Pleading and proof of foreign law in domestic proceedings (Rainer Hausmann, University of Konstanz)
2. Dynamic legal research: the PIL e-project of the Swiss Institute of Comparative Law (Eva Lein, Swiss Institute, Lausanne)
3. Developing international legal information: Aspects of information technique (Daniela Tiscornia, Istituto di Teoria e Tecniche

dell'Informazione Giuridica, Florence)

There's also a discussion of the Unalex and European Commentary project, a talk by Peter Schlosser, University of Munich on *How to apply the uniform legal rules*, and finally a panel discussion on just *How uniform is the European jurisprudence in the field of uniform law*, with Gunter Hirsch, President of the German Federal Court, chairing.

There doesn't seem to be a website for the conference, but interested parties can contact Sibylle Calabresi-Scholz (email) for further information and booking.

Specific Jurisdiction on Appeal: Does a Recent Decision from the Third Circuit Beg Further Review?

A recent decision by the United States Court of Appeals for the Third Circuit raises a very simple, but still very fragmented, issue regarding U.S. jurisdictional doctrine: When does a claim "arise out of" a foreign defendant's contacts with the forum so as to justify the assertion of specific jurisdiction over him. In *O'Connor v. Sandy Lane Hotel, Inc.*, a Pennsylvania resident sued a Barbados resort in federal district court in Philadelphia, Pennsylvania, for a slip-and-fall accident that occurred in its spa. Plaintiff sought to pin personal jurisdiction over the defendant based on the advertisements and promotional mailings that defendant sent, and plaintiff received, in that state. The District Court found no specific jurisdiction and dismissed the case.

The Third Circuit reversed. In a studious opinion by Judge Chagares, the panel began by recognizing the yet-unsettled nature of the specific jurisdiction doctrine. It noted that the Supreme Court granted certiorari over this very question in 1991, but decided that case – *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) — on other grounds. It then went on to discuss the three-way split among at least five circuits on the required degree of connectedness between purposeful

forum contacts and the plaintiff's claims to justify specific jurisdiction. On the one end of the continuum, the First Circuit uses a narrow "proximate causation" test, and asserts specific jurisdiction only when the forum contact is the proximate cause of the harm and the claim. On the other end, the Ninth Circuit uses an expansive "but-for" test, and asserts specific jurisdiction simply if the harm would not have occurred without the forum contact. The Second and D.C. Circuits apply a fluid "substantial connection" test that falls somewhere in the middle, and pins specific jurisdiciton on the "totality of the circumstances." Judge Chagares purported to take the middle road – requiring more than a 'but-for' link and shy of proximate causation. The Third Circuit now seems comitted to specific jurisdiction so long as the defendant's forum contacts were "meaningfully link[ed]" to the "substance of plaintiff's claims." Apparently, soliciting a "contract for spa services" via out-of-forum mailings is "meaningfully link[ed]" to a later action sounding in tort.

Beyond the uncertainty of the national rule, there is an immediate practical concern as well. For the time being, in at least the Third and Ninth Circuits, there seems to be emerging a categorical rule that any out-of-jurisdiction services solicited by mail or other communication into the forum will give rise to potential tort suits for negligence if the service would not have been provided without the forum contact. That seems to extend the specific juriusdiciton doctrine from its original moorings substantially.

Some other reports on this decision are located here. A link to the decision is provided here.

Magnus/Mankowski's European Commentary on Brussels I Regulation

A new commentary on Brussels I Regulation has been recently published by

Sellier – European Law Publishers, as the first volume of a new series "European Commentaries on Private International Law". It is edited by *Prof. Peter Mankowski* and *Prof. Ulrich Magnus* (both Hamburg) and has been written by a team of scholars from all over Europe. As the editors write in the preface:

> *Legal writing on the Brussels system is thorough and virtually uncountable throughout Europe. Yet no-one has so far taken the effort of completing a truly pan-European commentary mirroring the pan-European nature of its fascinating object. The existing commentaries clearly each stem from certain national perspectives and more or less deliberately reflect certain national traditions. The co-operation across and bridging borders had not truly reached European jurisprudence in this regard. This is why the idea of this commentary was conceived. This commentary for the first time assembles a team of very prominent and renowned authors from total Europe.*

Here's an excerpt of the blurb from the publisher's website:

> *This commentary is the first full scale article-by-article commentary in English ever to address the Brussels I Regulation. It is truly European in nature and style. It provides thorough and succinct indepth analysis of every single article and offers most valuable guidance for lawyers, judges and academics throughout Europe. It is an indispensable working tool for all practitioners involved in this field of law. […]*
>
> *A true first:*
> *– The first truly European commentary on the Brussels I Regulation, the fundamental Act for jurisdiction, recognition and enforcement throughout Europe*
> *– The first commentary on the Brussels I Regulation written by a team from all over Europe*
> *– The first article-by-article commentary on the Brussels I Regulation in English*
>
> *This new series will comment on the Brussels I Regulation and the Brussels IIbis Regulation and as soon as they are enacted on the Rome I and the Rome II Regulation. For the first time this will be done by a team of leading experts from almost all EU member states. The close cooperation among them will initiate a new specific European style of commenting on European enactments merging the various and thus far nationwide differing methods of Interpretation*

of legislative acts. It goes without saying that the new commentaries will pay particular tribute to the practice of the European Court of Justice but to relevant judgments of national courts as well. Moreover, the needs of practitioners and the requirements of the practice will receive particular attention.

The series is intended to be continued by further volumes on existing and future European enactments in the field of private and procedural law.

And this is the authors' list:

Introduction: *Ulrich Magnus;* Art. 1: *Pippa Rogerson;* Arts. 2-4: *Paul Vlas;* Art. 5: *Peter Mankowski;* Arts. 6-7: *Horatia Muir Watt;* Arts. 8-14: *Helmut Heiss;* Arts. 15-17: *Peter Arnt Nielsen;* Arts. 18-21: *Carlos Esplugues Mota/Guillermo Palao Moreno;* Art. 22: *Luis de Lima Pinheiro;* Art. 23: *Ulrich Magnus;* Art. 24: *Alfonso Luis Calvo Caravaca/Javier Carrascosa González;* Arts. 25-26: *Ilaria Queirolo;* Arts. 27-30: *Richard Fentiman;* Art. 31: *Marta Pertegás Sender;* Arts. 32-33: *Patrick Wautelet;* Art. 34: *Stéphanie Francq;* Arts. 35-36: *Peter Mankowski;* Art. 37: *Patrick Wautelet;* Arts. 38-45: *Konstantinos Kerameus;* Arts. 46-52: *Lennart Pålsson;* Arts. 53-58: *Lajos Vékás;* Arts. 59-60: *Paul Vlas;* Arts. 61-76: *Peter Mankowski.*

A TOC can be downloaded from the publisher's website. It provides a useful list of the principal works on Brussels I Regulation and an additional bibliography. A short extract of the volume is also available for download.

Title: **Brussels I Regulation – European Commentaries on Private International Law –** Edited by *Peter Mankowski*, *Ulrich Magnus*. July 2007 (XXVIII, 852 pages).

ISBN: 978-3-935808-32-3. Price: EUR 250. Available from Sellier – European Law Publishers.

German Reference for a Preliminary Ruling – Delimitation between Brussels I Regulation and Insolvency Regulation

The German Federal Supreme Court (*Bundesgerichtshof*) has referred with decision of 21 June 2007 (IX ZR 39/06) the following questions to the European Court of Justice for a preliminary ruling:

> ***On interpreting Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings and Article 1(2)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation (EC) No 1346/2000 in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?***
>
> ***If the first question is to be answered in the negative:***
>
> ***Does an action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation (EC) No 44/2001?***

Jurisdiction with regard to proceedings which are closely connected with the insolvency proceedings themselves is highly contentious.

Since the Insolvency Regulation does not contain an explicit provision on this matter – even though referring to "judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings" in Recital No. 6 – there are, briefly summarised, three different approaches: According to the first opinion jurisdiction has to be based on the

Brussels I Regulation, according to a second approach it has to be referred to national law, while a third position suggests an analogous application of Art. 3 (1) Insolvency Regulation.

In the present case the Court of Appeal (*Oberlandesgericht Frankfurt*) favoured the first approach and held that Art. 1 (2) lit. b Brussels I Regulation had to be – in view of the Regulation's goal to establish uniform rules in civil and commercial matters – interpreted narrowly and did therefore, as Art. 3 (1) Insolvency Regulation, only include collective insolvency proceedings, not however actions to set aside transactions in insolvency (*Insolvenzanfechtungsklagen*). Consequently the application of the Brussels I Regulation was not excluded, which led in the present case to the result that German courts lacked international jurisdiction.

This point of view is supported by some German legal writers who argue that Art. 1 (2) lit. b Brussels I Regulation had to be, at least since the entry into force of the Insolvency Regulation, construed more strictly. This, however, can be regarded as a departure from the previous case law of the ECJ (*Gourdain v. Nadler*) as well as the *Bundesgerichtshof.* In *Gourdain v. Nadler*, the ECJ held that Art. 1 (2) No. 2 Brussels *Convention* (which is identical with Art. 1 (2) lit. b Brussels *Regulation)* includes all proceedings which "derive directly from the bankruptcy or winding-up and [are] closely connected with the proceedings […]." The same view was taken by the *Bundesgerichtshof* in 1990 (judgment of 11 January 1990 – IX ZR 27/89, ZIP 1990, 246) by holding that avoidance proceedings by a trustee in bankruptcy are *in*cluded by Art. 1 (2) No. 2 Brussels Convention and therefore *ex*cluded from the scope of the Convention.

Contrary to the Court of Appeal, the *Bundesgerichtshof* tends in the present case, in accordance with a widely held opinion in German literature, to apply Art. 3 (1) Insolvency Regulation and assumes therefore international jurisdiction of German courts in the present case. However, since the *Bundesgerichtshof* regards the question not to be unambiguous, it decided to refer the aforementioned questions to the ECJ.

The referring decision can be found at the website of the Bundesgerichtshof as well as in the following legal journals:
ZIP 2007, 1415 et seq.; DB 2007, 1693 et seq.; ZInsO 2007, 770 et seq.

An annotation by *Lars Klöhn* and *Olaf Berner* (both Göttingen) arguing in favour

of an application of Regulation 44/2001 – and not 1346/2000 – can be found in ZIP 2007, 1418 et seq.

The case is pending at the ECJ as *Rechtsanwalt Christopher Seagon als Insolvenzverwalter über das Vermögen der Frick Teppichboden Supermärkte GmbH v. Deko Marty Belgium N.V.* (C-339/07).

Comity and the Recognition of Foreign Judgments in Long Beach v Global Witness

A very interesting judgment was handed down in the High Court on 15th August 2007 in the case of ***Long Beach & Nguesso v Global Witness*** [2007] EWHC 180 (QB). Professor Jeremy Phillips at the IPKat blog has posted an excellent summary of the case. I have reproduced sections of his post here, and supplemented them with a little more detail on the private international law issues.

Nguesso, son of the President of the Congo, was also President and Director General of the marketing arm of Cotrade, the Congolese state-owned oil company. He owned Long Beach, a company registered in Anguilla. This application was brought by Nguesso and Long Beach against Global Witness, a non-profit-making English company which campaigns against corruption and which was nominated for a Nobel Prize for its work back in 2003.

Kensington, a vulture fund that buys debts cheaply in the hope of getting something back, brought proceedings in Hong Kong in order to trace and seize assets belonging to the Congo. That court ordered a company in Hong Kong to disclose information and documents to Kensington. Those documents, which disclosed information about the financial activities of Nguesso and Long Beach, were referred to at a hearing of the Hong Kong court that was open to the public. Kensington then passed copies of the documents to Global Witness, which posted

them on its website.

On the application of Nguesso and Long Beach, the Hong Kong court – sitting in private and without Global Witness being a party to the proceedings – ordered Global Witness not to publish the documents or even to disclose the facts of the making of the application.

Nguesso and Long Beach then sued Global Witness in England and Wales, relying on

1. their rights to confidentiality and privacy under English law;
2. Nguesso's right of privacy under Article 8 of the European Convention on Human Rights, alleging misuse of the documents by both Global Witness and Kensington.

According to the applicants,

1. an English court was required, as a matter of comity between courts in friendly jurisdictions, not to question the correctness of the judgment of the Hong Kong court;
2. the documents remained private and confidential, even though they were referred to in court open to the public in Hong Kong;
3. Nguesso's rights under Article 8 were clearly engaged and the publication of the documents infringed those rights.

On the issue of the **recognition and enforcement of the Hong Kong judgment**, Burnton J. stated (at para. 23),

> *As appears from the terms of their application, the Claimants issued this application seeking relief under section 25 of the Civil Jurisdiction and Judgments Act 1982. At the beginning of the hearing, I pointed out that, under our rules for the recognition and enforcement of foreign judgments, it did not seem that GW was subject to the jurisdiction of the Hong Kong court [since it did not carry on business in Hong Kong], and therefore it would not be bound by any final order made by that court. It seemed to me that that consideration is most material to the grant of relief under section 25. Having been given time to consider the point, the Claimants decided not to pursue their claim under section 25.*

> *It follows that for the purposes of this application the Claimants must rely on their substantive rights, i.e. their rights to confidentiality and privacy, on the Second Claimant's rights under Article 8, and on what they contend was a misuse of documents by Kensington and GW.*

The Claimants then turned to the principle of **comity**, arguing tht it required the English court to not question the correctness of the Hong Kong decision, and should not undermine or question its subsequent injunction against publication of the documents. Burnton J. held (at para. 26),

> *Comity requires this court to treat the judgments and orders of the courts of Hong Kong with due respect and even deference. However, in effect, the Claimants seek to treat those judgments and orders as binding on GW. GW was not a party to the Hong Kong proceedings when the judgment of 30 June 2007 was given, and they cannot be bound by it. Furthermore, since it does not carry on business in Hong Kong, it is not subject to that jurisdiction under our rules for the recognition of foreign judgments, and these courts do not regard it as having an obligation to comply with the judgments of that jurisdiction. The fact that the order of 6 July was made against them ex parte, in circumstances in which they had been informed of the Claimants' application on the previous day, and presumably, given the time difference, less than 24 hours before the hearing before Mr Justice A Cheung, reinforces this point. True it is that GW could apply in Hong Kong to set aside the order of 6 July, but that would require a non-profit-making organisation to expend considerable resources on legal representation there and may involve its submitting to that jurisdiction. In any event, the rights of free expression on which they rely are rights under our law, not under Hong Kong law.*

Burnton J. went on to hold that,

- The significant public interest in the subject matter of the disclosed documents was such that Global Witness's right of communication under Article 10 of the European Convention on Human Rights would be violated if an English court considered itself bound by the restrictions on reference to the procedures of the Hong Kong court;
- the specified documents were, when disclosed to Kensington, confidential

by their very nature and content. That they were referred to in open court was clear, though the extent of that reference was not. This being so, court should proceed on the basis that there was sufficient reference to them as would have removed their confidential status if they had been disclosed on discovery and referred to in open court in England;

- neither Long Beach ot NGuesso had shown that they were likely to establish at trial that the documents were protected by confidentiality;
- while Nguesso's right of privacy under Article 8 was undoubtedly engaged, there was a clear and overwhelming case for refusing relief on the ground that there was an important public interest in the publication of the specified documents and the information derived from them;
- once there was good reason to doubt the propriety of the financial affairs of a public official, there was a public interest in those affairs being open to public scrutiny.

(Visit the IPKat blog for news and views in IP law.)

EU Draft Reform Treaty (Part 2): a Detailed Analysis of the New EC/EU Treaties

Following swiftly on from our previous post on the amendments provided by the Draft Reform Treaty to the provisions dealing with judicial cooperation in civil matters, we would like to point out **a very detailed analysis of the entire text of the Treaties, prepared by *Prof. Steve Peers*** (University of Essex) **and published on the statewatch.org website**. The analysis is divided in several parts, each consisting of an article by article comparison, with comments, of the text resulting from the Draft Reform Treaty, the current version of the TEC/TEU and the 2004 Constitutional Treaty. The new Title IV of the future Treaty on the Functioning of the European Union, on the "Area of Freedom, Security and

Justice", is the subject of the Analysis no. 1 (Justice and Home Affairs issues).

Here's a presentation by the author, including a list of the various parts of the analysis (the .pdf files can be downloaded from the home page of the project):

> *In order to further public understanding of and debate upon the draft Reform Treaty, the following Statewatch analyses make the text of the draft Treaty comprehensible, by setting out the entire texts of the existing TEU and TEC and showing precisely how those texts would be amended by the draft Treaty. There are explanatory notes on the impact of each substantive amendment to the Treaties, and each analysis includes general comments, giving an overview of the changes and pointing out exactly which provisions of the draft Reform Treaty were taken from the Constitutional Treaty, and which provisions are different from the Constitutional Treaty.*
>
> *There are 3 analyses, divided into ten parts.*
>
> ***Analysis no. 1***
>
> - *focusses on the issue of Justice and Home Affairs*
>
> ***Analysis no. 2 is the amended text of the TEU, and is divided into 2 parts:***
>
> - *the non-foreign policy part of the Treaty (basic principles and key institutional rules of the EU) and*
> - *the foreign policy part of that Treaty*
>
> ***Analysis no. 3 is the amended text of the TEC, and is divided into seven parts more or less following the structure of the Treaty:***
>
> - *Part One of the Treaty on general provisions*
> - *Part Two on non-discrimination and citizenship*
> - *half of Part Three on the internal market and competition (except for the JHA clauses, which are the subject of analysis no. 1)*
> - *the second half of Part Three, on other internal EU policies (such as social policy, monetary union and environment policy)*
> - *Parts Four and Five, on the associated territories and external relations (including trade and development policy)*
> - *Part Six, on the institutional rules (including the rules on the political*

institutions, the Court of Justice and the 'flexibility' rules)
- *Part Seven, the final provisions*

(Thanks to Allard Knook, of the ECJBlog, for the tip off)

Brussels II bis: Its Impact and Application in the Member States

The newly-published 14th book in the European Family Law Series from Intersentia is "**Brussels II bis: Its Impact and Application in the Member States**" by K. Boele-Woelki and C Gonzalez Beilfuss. Here's the book blurb:

> *The Brussels II bis Regulation which contains uniform rules for jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility became effective as of 1st March 2005 for 24 Member States of the European Union. This book addresses the impact and application of the new rules in the form of national reports. The authors provide answers to questions such as: What is the impact of the Regulation on national private international law on the one side, and on substantive law, on the other? Does the Regulation mean that changes have to be made in the national systems? Are there any difficulties as regards the consistency of the private international law system? In how far does the Regulation match the substantive law both as regards divorce and parental responsibility? Are there any difficulties as regards the implementation of the Regulation in the national systems? Have any implementing measures been taken?*
>
> *A comparative synthesis of the impact and application of the Brussels II bis Regulation within the European Union and a general introduction into the Europeanisation of private international law in family matters complement the book. As a result it contains the latest update of international family law in Europe.*

Purchase details for Intersentia customers can be found here. If you are a UK customer, you can order the book from Hart Publishing for £60. ISBN: 90-5095-644-0.

Second Issue of 2007's Revue Critique de Droit International Privé

The second issue of 2007's *Revue Critique de Droit International Privé* has been released. In addition to ten case notes, it contains two articles on conflict issues.

The first is authored by Professor Sylvain Bollée, of Reims University, and deals with the extension of the scope of the method of unilateral recognition (*L'extension du domaine de la méthode de reconnaissance unilatérale*). The English abstract reads:

> *While the method of unilateral recognition is traditionally considered to apply only to foreign judgements or decisions, one can observe that it is now taking on a more extensive form, in particular insofar as it covers the effect of non-decisional foreign public acts. In such cases, closer analysis reveals that recognition does not actually apply to the public act itself, but to the rules by virtue of which such an act produces legal effects within the foreign legal system. These rules are therefore given effect independantly of any designation by a bilateral conflict of laws rule of the legal system to which the acting authority belongs. This is a discrete and perfectly legitimate expression of unilateralism, of which the precise conditions need to be determined. In this respect, it is submitted that rules governing the recognition of foreign judgements could be applied here, except for discrete adjustments and the exclusion of any enforcement procedure such as exequatur.*

The second article is authored by Professor Ana Quinones Escámez, of Pompeu

Fabra University (Barcelona). The article offers a proposition for the creation, the recognition and the effect of marriages and like unions (*Proposition pour la formation, la reconnaissance et l'efficacité internationale des unions conjugales ou de couple*). The English abstract reads:

> *Linked to the proliferation of new forms of marriage or quasi-marriage, the latest methodological effort required of Private international law is to apply the development of a real lex matrimonii in which the law of the place of registration coincides with the lex fori, sometimes hidden under the mantle of public policy. Analysis of situations born of a public act reveals the lex matrimonii as the product of the maxim auctor regit actum and the unilateralist problematic of conflict of public authorities. It leads to proposing solutions which as far as the formation of marriage is concerned, subordinate the issue of choice of applicable law in order to concentrate on issues of jurisdiction and which, at the level of international movement of the new status, make recognition depend on a proximistic-type of assessment of the jurisdiction of the foreign authority and the substantive conformity of the foreign institution to the requirements of forum public policy. For situations resulting from common law or other non formalised marriages the bilateral application of the law of the common habitual residence is recommended.*

The article of Professor Quinones Escámez builds on her recent book on *Uniones conyugales o de pareja : formación, reconocimiento y eficacia internacional (actos públicos y hechos o actos jurídicos en el derecho internacional privado)*, Barcelona, 2007.

Articles of the *Revue Critique* cannot be downloaded.

French Translation of the CLIP

Comment

Professor Jean-Christophe Galloux, one of the CLIP members, made sure that the Group' message is effectively conveyed to the French-speaking addressees as well. Previously reported text (see here and here) has been translated and published in the *Propriété intellectuelle*, No. 24 of July 2007, pp. 291-299. The French introduction to the "*Les relations conflictuelles de la propriété intellectuelle et la réforme du droit international privé en Europe*" reads:

> *Les décisions rendues par la Cour de justice des communautés européennes le 13 juillet 2006, sonnent le glas d'un certain nombre d'espoirs qui avaient été placés dans la Convention de Bruxelles puis dans le règlement 44/2001 du 22 décembre 2000 pour fluidifier le contentieux de la propriété intellectuelle en général et du brevet en particulier au sein de l'espace communautaire. Ces espoirs s'appuyaient sur la volonté politique de créer un espace judiciaire unifié, réaffirmée par les textes fondateurs, des jurisprudences nationales audacieuses et une vraie nécessité de fournir des instruments procéduraux rendant efficace la lutte contre la contrefaçon transfrontalière. La révision du règlement de 2001, la mise en chantier d'un règlement sur les obligations contractuelles (Rome I) et les travaux menés ces dernières années à l'OMPI et à la Conférence de La Haye permettent de repenser le droit international privé communautaire applicable à la propriété intellectuelle dans des termes enfin moins conflictuels en vue de réaliser les buts que nous venons d'énoncer.*

South African Conflict of Law Rule for Validity of Marriage: Law of the Place of Conclusion of

Marriage

In the case *Phelan v Phelan* 2007 (1) SA 483 (C) (judgment date 27 July 2006), the High Court of South Africa (Cape Provincial Division) confirmed the conflict of law rule that the place of marriage celebration determines the validity of the marriage. That law applies not only to formal validity, but also to substantial validity, eg whether the parties had the capacity to conclude a valid marriage etc. In this case, the validity of a marriage concluded in New South Wales, Australia was questioned. The parties were ordinarily resident in Ireland at the time of the marriage. One of the spouses had prior to the marriage obtained a divorce order in the Dominican Republic, while neither he nor his ex-spouse had any connection with that country (no domicile, residence, nationality). (It was impossible to divorce in Ireland at the time.) There was no reciprocity regarding the recognition of decrees between the Dominican Republic and Australia. The High Court came to the conclusion that the divorce could therefore not be recognised in Australia and that no valid marriage had come into existence.

The use of the law of the place of marriage celebration to determine validity has the advantage of applying one set of legal rules to both formal and substantive validity. It also reduces the risk of limping marriage, ie the situation where people are married in one country, but divorced in another.