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.