1. Introduction

(a) Overview

The jurisdiction of Hong Kong civil courts—their power to decide cases and particular issues arising in cases—is subject to a number of different sets of rules and principles of relevance in the cross-border context.[1] Assuming that the case is not one of the exceptional ones in which the subject matter, or the defendant,[2] are immune from jurisdiction, the crucial issue is whether personal jurisdiction can be established over the defendant. That topic may conveniently be broken down into the following four main issues: **3.001**

1. Whether a defendant is deemed to have submitted voluntarily to Hong Kong jurisdiction and, as such, to have lost any right to dispute it.[3]
2. The means by which a defendant may effectively be served with originating process in Hong Kong.[4]
3. The rules and principles which delimit the circumstances in which the court has jurisdiction to give leave to effect service of such process outside Hong Kong.[5]
4. The appropriateness of *exercising* jurisdiction which exists according to the principles mentioned above.[6] The Latin phrases *forum conveniens* (appropriate forum) or *forum non conveniens* (inappropriate forum) are traditionally used to describe the principles which guide the exercise of discretion in this context.

If the Hong Kong court is prepared to take jurisdiction over a case, applying the principles above, it may in certain circumstances go further and protect the effectiveness of its jurisdiction by granting an injunction (known as an "anti-suit injunction") requiring a person to refrain from, or cease, the pursuit of foreign proceedings on pain of (i) sanction for contempt of court and (ii) non-recognition in Hong Kong of any foreign judgment obtained in contravention of the injunction[7]. The chapter closes with discussion of jurisdiction agreements in contracts[8] and of the application of *forum conveniens* principles to two important Asian jurisdictions (Mainland China and India) in respect of which special issues arise.[9] **3.002**

The focus in this chapter is on the rules and principles of general relevance: their application in particular legal contexts is discussed in Chapters 5, 6, 7 and 8. **3.003**

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1 These are in addition to the rules that apply in a purely domestic case, which are outside the scope of this book: see *Hong Kong Civil Procedure 2017* (Sweet & Maxwell).

2 See Chapter 4 for such exceptional cases, which concern acts of state, certain foreign property and defendants which are, or have certain associations with, states or certain International organisations.

3 See paras.3.005 and 3.009–3.026.

4 See paras.3.006 and 3.027–3.049.

5 See paras.3.007 and 3.051–3.078.

6 Paras.3.079–3.101.

7 Paras.3.102–3.119.

8 Paras.3.120–3.124. For jurisdiction clauses in trust instruments, see paras.8.124–8.126.

9 Paras.3.125–3.131.

(b) Three methods of establishing jurisdiction

3.004 Before proceeding to discuss these topics in detail, a key point to be grasped at the outset is that there are three distinct ways for a plaintiff to establish the jurisdiction of a Hong Kong civil court, corresponding to points (1), (2) and (3) in para.3.001. By way of introduction, the essential principles are as follows.

(i) *By submission*

3.005 Jurisdiction of the Hong Kong court may be established by demonstrating that the defendant has, or is deemed to have, voluntarily submitted to it. In the modern law, the tendency has been to reduce the technical traps which previously lay in store for defendants under this heading. There is however an obvious need for some objective rules in this area (rather than merely focusing on a defendant's intention or upon "reasonableness"); as an inevitable consequence, unwitting submissions occur on occasion. For the most part, the law is clear as to submission, although there is some room for differences of opinion at the margins.[10] It should be remembered that the term submission is used to connote the following different things: (i) an expression of agreement to the court's jurisdiction if subsequently served in an agreed manner, (ii) an agreement to accept service upon or after service being effected, (iii) a step taken after purported service of proceedings which is inconsistent with the pursuit of a challenge to the regularity of that service or to the basis on which leave to serve out of the jurisdiction was obtained. In case (i), submission enables service to be effected in a way that would not otherwise be available to the plaintiff, but service must still be effected, whereas in cases (ii) and (iii) submission renders the defendant unable to challenge that service has been properly effected.

(ii) *By service within Hong Kong*

3.006 Jurisdiction of the Hong Kong court may be established by effecting service of the Hong Kong originating process[11] upon the defendant in Hong Kong in accordance with one of the methods prescribed by Hong Kong law. Whether service has validly been effected in Hong Kong is on occasion a somewhat technical question.[12] Jurisdiction based on valid service within Hong Kong is traditionally known as jurisdiction "as of right". This phrase may mislead, however, since, in the modern law, the plaintiff who establishes jurisdiction by way of service in Hong Kong can no longer necessarily insist upon the case going to trial in Hong Kong rather than somewhere else (as the Hong Kong court will still have to consider the appropriateness of exercising jurisdiction - point (4) in para.3.001 above); nor is the presumption that the case will be permitted to do so as strong as it once was. It is nevertheless desirable for the plaintiff, if at all possible, to establish jurisdiction by this method, as opposed to method (iii) below, because:

(a) it is not dependent upon the nature of the claim;

[10] The principles and rules according to which submission is determined are discussed in paras.3.009–3.027. See also the discussion of jurisdiction agreements in s.7 of this Chapter, starting at para.3.121.

[11] That is, usually, a writ or originating summons.

[12] See paras.3.027–3.049.

(b) once established, there is still a presumption that the Hong Kong court will proceed to hear the merits of the case;

(c) no prior leave of court is required, so the defendant is not given the early tactical opportunities to cause delay, inflict costs and wound the plaintiff's credibility which sometimes arise by virtue of the nature of the leave process.

(iii) *By service, with leave, outside Hong Kong*

3.007 Jurisdiction of the Hong Kong court may be established by obtaining the prior leave of the Hong Kong court to serve the originating process upon the defendants outside Hong Kong,[13] and subsequently effecting such service. Leave is obtained by applying *ex parte* upon affidavit evidence sufficient to (i) demonstrate that the plaintiff has a "good arguable case" that each claim in the proceedings falls within one of the carefully defined categories specified in the rules of court,[14] (ii) demonstrate that the plaintiff's substantive case against the defendant raises "a serious question to be tried", (iii) demonstrate that the Hong Kong court is the appropriate forum in which the case should be tried and (iv) ensure that the court is aware of material facts harmful to the plaintiff's position on the first three points. If the court grants leave, the plaintiff must then comply with what sometimes prove to be troublesome and time-consuming cross-border service requirements.[15] The defendant may subsequently apply to set aside leave on the ground that any one or more of the requirements has not been fulfilled, a possibility which often leads to time-consuming and expensive interlocutory litigation in practice.[16] Jurisdiction established by way of service out of the jurisdiction in this way is sometimes referred to as "long-arm jurisdiction" (a term of US origin).

(c) Interaction of the three methods

3.008 There is a degree of interaction between these three methods in practice. For example:

(a) defective attempts to invoke methods (2) or (3) i.e. defective service may sometimes be cured by method (1) (submission to the jurisdiction);

(b) compliance with certain (essentially mechanical) aspects of methods (2) or (3) may be necessary despite a submission; and

(c) a plaintiff faced with a challenge to his attempt to invoke method (2) may, as well as seeking to uphold such service, apply in the alternative for leave to serve out (method (3)).

Nevertheless, they involve distinct concepts, and the difference has important practical consequences.

[13] The traditional shorthand terminology is "leave to serve out."

[14] Principally RHC Order 11, Rule 1.

[15] See Chapter 11.

[16] The relevant principles as to when leave may be granted and set aside are discussed in paras.3.050–3.078; the mechanics of international service are discussed in Chapter 12.

2. Submission to Jurisdiction

(a) Submission: general principles

3.009 A party may be precluded from objecting to the Hong Kong court's jurisdiction by an agreement or conduct deemed to amount to a voluntary submission to that jurisdiction. The submission may be partial (preventing the submitting party from challenging the existence of jurisdiction, whilst not barring a challenge to its exercise) or complete (precluding the questioning of both the existence and exercise of jurisdiction); it may be indicated prior to the service of proceedings or subsequently. In the event that submission is indicated prior to service, it may, it seems, be revoked[17] unless there is a specific ground (such as a contractual obligation[18] or an estoppel) not to permit this; once service has taken place, however, it may not be revoked. A post-service submission may not be revoked. It should be noted at the outset that even a normally irrevocable submission is subject to the following qualifications in exceptional cases:

1. Whilst a pre-service contractual submission will usually be specifically enforced,[19] there are certain exceptional cases in which its breach will only sound in damages.[20]
2. In principle, it seems that a party who has submitted to the exercise of jurisdiction ought in exceptional cases to be able to persuade the court in its discretion to grant a stay on the ground of *forum conveniens*, by reason of a material change of circumstances beyond that party's control.[21]

(b) Submission: principle

3.010 There is sometimes scope for doubt as to whether the defendant's conduct after the service of proceedings amounts to a submission. The principle is:

> *"The court should adopt a common sense approach. It must not be overly subtle or astute to find that a party has submitted to the jurisdiction. Otherwise the question of submission could easily become a technical trap for the unwary. The real question is whether a party's conduct is so inconsistent with maintaining an option to challenge forum that the party should be assumed to have waived such option. In the case of any doubt, the party proposing to challenge forum should probably be given the benefit of that doubt."*[22]

[17] A different verbal formulation would be to say that until actual service there is no submission, merely a statement of intention to submit which may be withdrawn. It does not matter which is adopted so long as the practical effect is clear.

[18] I.e. a jurisdiction agreement (see s.7, paras.3.120–3.124).

[19] Namely, by the taking or declining of jurisdiction (according to the terms of the clause) or the granting of an anti-suit injunction (see paras.3.102–3.119).

[20] See the discussion of *Donohue v Armco Inc* [2001] UKHL 64, paras.3.121(1) and 3.136(3)(b).

[21] For example, if, subsequent to the submission, but before the Hong Kong action has proceeded very far, unrelated parties bring foreign litigation in respect of the same matter, impleading both of the Hong Kong parties, then it may be that the Hong Kong court will, in its discretion, be prepared to grant a stay of the Hong Kong proceedings if litigation in the foreign forum meets the usual *forum conveniens* criteria (see paras.3.079–3.101). Care must however be taken not to allow a party to escape easily from the consequences of its submission by reference to subsequent developments which it should have anticipated or which there are grounds for thinking it may have had a hand in procuring.

However, certain more specific rules have arisen as to how that principle applies.

(c) Submission: words and deeds

3.011 In the same Hong Kong case from which the quotation in para.3.010 is taken, the possibility of preserving the right to challenge jurisdiction in borderline cases was noted:

> *"A party may be able to preserve an option to challenge forum, despite having engaged in conduct which might be regarded as submission to the jurisdiction, if before or at the time of such conduct he makes it clear that his action is without prejudice to the bringing of a challenge to forum."*

The word "may" in that passage should be highlighted: as another Hong Kong judge has observed, there is a stage at which conduct becomes so inconsistent with a future challenge to jurisdiction that words alone cannot preserve the possibility of such challenge.[23] In practice, it is suggested that words (as opposed to deeds) will rarely make the critical difference outside the contexts of (i) acceptance of service (paras.3.014–3.015) or (ii) essentially defensive interlocutory activity (para.3.022).

(d) Submission: examples

3.012 In addition to the above general principles, certain more specific rules as to submission have evolved, which assist predictability in the most commonly encountered situations.

(i) *Contract to submit*

3.013 A contractual agreement to submit to the jurisdiction, whether before or after the issue of proceedings, is binding, although the question of whether particular words are to be construed as such a submission may sometimes give rise to debate. Such clauses will generally be given full effect in accordance with their terms. However:

[22] *Hwoo Huang Linda v Fu Being San* [2013] 1 HKLRD 259, *per* Deputy Judge Reyes, who emphasised that the court was giving guidelines, not comprehensive statements of the law; the guidelines have subsequently been cited with approval in *New Link Consultants Ltd v Air China* (unrep., HCA 515/2001, 3 May 2004), Deputy Judge Poon. The classical statement in England is that "in order to establish a waiver, you must show that the party alleged to have waived his objection has taken some step which is only necessary or only useful if the objection has been actually waived, or if the objection has never been entertained at all", *per* Cave J in *Rein v Stein* (1892) 66 LT 469, 471, approved, for example, by the House of Lords in *William & Glyn's Bank Plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438; see also *Sage v Double A Hydraulics Ltd* (unrep., *The Times*, 2 April 1992, CA), (proposing as a test "whether a disinterested bystander with knowledge of the case would have regarded the acts of the defendant, or his solicitors, as inconsistent with the making and maintaining of his challenge") and, in Hong Kong, *Lee Fai t/a Fai Kee Timber v Chan Kui* [1997] HKLRD 1154 (CA). See also the discussion, to similar effect, of the general principles as to submission in *Miruvor Ltd v Panama-Globe Steamer Lines SA* [2007] 1 HKLRD 804 case and in *CMIC Finance Ltd v Ke Jun Xiang* (unrep., CACV 175/2005, 15 Nov 2005, [2005] HKEC 1885).

[23] See *Chan Kui v Lee Fai (t/a Fai Kee Timber)* (unrep., HCPI 126/1995, 2 May 1997, [1997] HKLY 537, CFI), Jerome Chan J; the Court of Appeal seems to have agreed: [1997] HKLRD 1154.

1. There is a distinction between an exclusive and non-exclusive submission to Hong Kong jurisdiction, discussed in para.3.122.

2. A contractual submission does not in itself do away with the need to effect service (including, where necessary, applying under RHC O.11 to effect service out of the jurisdiction). In practice, in cases where one or more parties may conceivably not be available in future for service in Hong Kong, it is often convenient to provide in commercial contracts for the deemed service of process upon a particular party through a specified agent in Hong Kong; such a clause, even without more, will be interpreted as a submission.[24]

3. It should be borne in mind that repudiation of a contract to submit may be held to have occurred on ordinary contractual principles,[28] rendering the repudiating party unable to rely upon it[25], if the other party elects to accept the repudiation as brining the contract to an end.[26] The most obvious case is when a party itself commences litigation in a forum other than that provided for in the exclusive jurisdiction clause.

4. There are certain exceptional cases where, by reason of the subject matter of the dispute, an agreement to submit will not be given effect.[27]

(ii) *Unqualified acceptance of service*

3.014 If the defendant (either personally or through a solicitor or other agent) agrees, orally or in writing, to accept service prior to it being effected, without clearly reserving the right to challenge jurisdiction, then this will be taken as a submission to jurisdiction. It will bind the defendant even if, immediately after service is subsequently effected, the defendant

[24] Albeit to the non-exclusive jurisdiction of the Hong Kong court unless the parties have agreed for jurisdiction to be exclusive. The effect of such a clause is made clear by RHC O.10 r.3(1)(b), deeming service in Hong Kong effective if made in accordance with a contract between the parties which "provides that, in the event of any action in respect of the contract being begun, the process by which it is begun may be served on the defendant, or on some other person on his behalf as may be specified in the contract, in such manner, or at such place (whether within or out of the jurisdiction), as may be so specified". RCH O.10 r.3(2) makes clear that, notwithstanding the words just quoted, if service is to take place out of Hong Kong, *ex parte* leave under RCH O.11 must still be sought in the usual way. Whilst this will slow things down and impose some additional expense, such leave ought to be readily obtainable unless Hong Kong is clearly not the *forum conveniens*. Unless the clause provides for *exclusive* Hong Kong jurisdiction, however, the *ex parte* affidavit will have to contain the information essential to the assessment of *forum conveniens*, bearing in mind the limits to what is expected at this stage as discussed at paras.3.073–3.076. Note that RHC O.10 r.3 is not exclusive: other agreements to submit may be given effect on ordinary contractual principles: *Kenneth Allison Ltd v AE Limehouse & Co* [1992] 2 AC 105 (HL). RHC O.11 r.1(1)(d) specifically provides for jurisdiction in the case of claims affecting a contract which "contains a term to the effect that the Court of First Instance shall have jurisdiction to hear and determine any action in respect of the contract", thereby abolishing an anomaly which formerly existed, namely that a party wishing to rely on a Hong Kong jurisdiction clause could not do so unless he could effect service in Hong Kong or establish long-arm jurisdiction independently under one of the other heads of RHC O.11 r.1(1) (*British Waggon Co v Gray* [1896] 1 QB 35 (CA)).

[25] *Downing v Al Tameer Establishment* [2002] 2 All ER (Comm) 545 (CA). That case concerned repudiation of an arbitration agreement but it is suggested that the principle is equally applicable to jurisdiction agreements.

[26] This assumes that the contract is governed by Hong Kong law—the question of whether such a contract has been terminated is a matter for its governing law.

[27] See para.3.025.

seeks to reserve the right to challenge jurisdiction.[28] Acceptance of service of a writ by the (optional) method of an unqualified solicitor's endorsement on a copy of the writ is also a submission.[29] However, it appears that the right to challenge the exercise (as opposed to the existence) of jurisdiction, on the ground of *forum conveniens*, survives an unqualified submission, whether by endorsement or otherwise.[30]

(iii) *Qualified acceptance of service*

3.015 If the defendant's (or his solicitor's or other agent's) oral or written indication of a willingness to accept service is clearly indicated, prior to service, to be without prejudice to the defendant's right to challenge jurisdiction, or equivalent words signifying such intention, then there is no submission.[31] It is suggested that a similar express qualification in an endorsement of service should also be given effect.[32]

(iv) *Acknowledgment of service*

3.016 Merely filing an acknowledgment of service indicating an intention to defend is clearly not, without more, a submission.[33] There is therefore no need to indicate expressly to the

[28] *Manta Line Inc v Seraphim Sofianites* [1984] 1 Lloyd's Rep 14 (CA) (following a dictum of Lord Haldane in *Russell (John) & Co Ltd v Cayzer, Irvine & Co Ltd* [1916] 2 AC 298 (HL); *Burrows v Jamaica Private Power Co Ltd* [2002] 1 All ER (Comm) 374 (HC), Moore-Bick J. In *Burrows v Jamaica* the solicitors' agreement to accept service was indicated by letter; in *Manta Line Inc v Seraphim Sofianites*, it was oral: both amounted to submissions.

[29] RHC O.10 r.1(4) provides that "[w]here a defendant's solicitor endorses on the writ a statement that he accepts service of the writ on behalf of that defendant, the writ shall be deemed to have been duly served on that defendant and to have been so served on the date on which the endorsement was made." Defendants and their solicitors have no obligation to accept service by way of endorsement but plaintiffs' solicitors commonly request it in Hong Kong. Although authority exactly on point appears to be lacking, it is suggested (in accordance with the widespread understanding in Hong Kong, reflected in e.g. *Hong Kong Civil Procedure 2017*, note 10/1/9) that acceptance of service in this way is a submission to jurisdiction, following the logic of the *Manta Line Inc v Seraphim Sofianites* and *Burrows v Jamaica Private Power Co Ltd* cases cited above. But once the defendant's solicitor has endorsed acceptance of service in unqualified terms, it is suggested that the logic of the above authorities is that it is too late then for the defendant to resurrect the right to challenge jurisdiction by filing an acknowledgment of service indicating intention to defend. The logic of the authorities just cited would appear to be that, if acknowledgment of service indicating an intention to defend is filed in addition to returning the endorsed writ to the plaintiff (or plaintiff's solicitor or other agent) then it is ineffective, at least if filed in court after returning the endorsed writ, since the horse will already have bolted by the time the acknowledgment is filed. If the acknowledgment is filed before the endorsement is returned, then perhaps the intention to defend stated in the endorsement will be regarded as effective to preserve the right to challenge jurisdiction, but there must be a risk that a court will hold the intention to defend thereby indicated as being superseded by the unqualified endorsement, so a defendant's solicitor would be unwise to proceed in this way.

[30] See *P.T. Krakatau Steel (Persero) v Mount Kerinci LLC* [2009] 1 HKLRD 264, Stone J, noting that Lord Haldane in *Russell (John) & Co Ltd v Cayzer, Irvine & Co Ltd* had stated that whilst acceptance of service "confers jurisdiction, it does not necessarily make it a duty of the Court to decide the case". Courts in at least two other jurisdictions have taken the same view: *The Jian He* [2000] 1 SLR 8 (Singapore (CA)) and *Binet v Foot* [2008] JRC 074, Jersey Royal Court, para.24 (*obiter*).

[31] *Sphere Drake Ins Plc v Gunes Sigorta AS* [1988] 1 Lloyd's Rep 139 (CA). There are *dicta* in *Manta Line Inc v Seraphim Sofianites* and *Burrows v Jamaica Private Power Co Ltd* to similar effect.

[32] There is nothing in RHC O.10 r.1(4) to address this point expressly, but it would seem self-evidently unjust to adopt any other interpretation. This would also be in accordance with the reasoning in *Sphere Drake Ins Plc v Gunes Sigorta AS*, above.

[33] RHC O.12 rr.7, 8(6) and 8(7) (reversing the former requirement that the defendant either apply for leave to file a conditional appearance or apply to contest jurisdiction prior to the time limited for acknowledging service). Indeed, a defendant who has been lawfully served within Hong Kong *must* file an acknowledgment of service within 14 days thereafter. Otherwise he will be exposed to default judgment or other adverse consequences: for details as to cases in which default judgment may be entered and related issues, see RHC O.13 and related commentary in *Hong Kong Civil Procedure 2017*.

plaintiff that the acknowledgment is being filed without prejudice to the right to challenge jurisdiction.[34]

(v) *Application for a stay*

3.017 An application to stay proceedings is not a submission to jurisdiction if, as is commonly the case, it is made by way of alternative to a simultaneous application to contest jurisdiction.[35] Nor is an application to stay proceedings pending the outcome of foreign proceedings.[36]

(vi) *Plaintiff's submission to cross-claims*

3.018 A plaintiff is deemed to submit not only to counterclaims in the narrow sense,[37] but also to cross-claims that are related to the subject matter of the plaintiff's claim. The defendant need not seek RHC O.11 leave, and it is entirely irrelevant whether the defendant would, if plaintiff, be able to establish jurisdiction or to demonstrate that Hong Kong is the *forum conveniens*.[38] This rule essentially prevents non-resident plaintiffs from taking unfair advantage of their ability to establish Hong Kong jurisdiction by seeking to have only their own preferred part of a particular dispute litigated. It has been held in England that a plaintiff submits to a claim by a party added to an action at the behest of someone other than the plaintiff;[39] there is scope for criticising this as going too far but it is suggested that, on balance, it is right; otherwise, related parties' claims may be left out on technical grounds.[40] However, the court retains power to stay counterclaims on the ground of *forum non conveniens* even if the plaintiff's claim is going to trial in Hong Kong.[41]

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[34] The practice sometimes seen of making this clear by letter to the plaintiff's solicitors at the same time as filing the acknowledgment is harmless but unnecessary.

[35] *The Sydney Express* [1988] 2 Lloyd's Rep 257 (HC) Sheen J (applying the principles established by the House of Lords in *William & Glyn's Plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438).

[36] *William & Glyn's Bank Plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438 (HL). It was, moreover, held in *William & Glyn's Bank Plc* that there was no submission even though the defendant sought to have the application to stay decided first. The principle is the same where the stay is sought in favour of an arbitration (*Finnish Marine Ins Co Ltd v Protective National Ins Co* [1990] 1 QB 1078 (HC), Deputy Judge Hamilton QC, in which the court also held, correctly it is respectfully suggested, that it matters not that the stay application was made before the jurisdiction challenge application, since the stay application was merely an "invocation of the court's jurisdiction to decide if it has jurisdiction, not the jurisdiction to decide the merits".).

[37] That is, claims of the defendant which operate by way of set-off as against the plaintiff's claims: see the notes to RHC O.14 in *Hong Kong Civil Procedure 2017* for a convenient summary of the relevant principles.

[38] *Metal Scrap Trade Corp Ltd v Kate Shipping Co Ltd* [1990] 1 WLR 115 (HL).

[39] *Union Bank of the Middle East v Clapham* (1981) 25 SJ 862 (CA).

[40] It is important to remember that the court has a discretion whether to add parties in the first place.

[41] It has, however, been held that where a counterclaim is "an integral part of the defence to the claim", then the court should allow it to proceed without even needing to consider *forum conveniens*: see *Stuart James Bromley v CIC Hightime Resources Ltd* (unrep., HCMP 2623/2005, 20 May 2008, [2008] HKEC 876), Kwan J, applying *Australian Commercial Research Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65, Browne-Wilkinson VC.

(vii) *Defence*

3.019 Filing or serving a defence is almost always regarded as a submission to jurisdiction,[42] but merely describing the nature of one's defence in affidavits filed in connection with a jurisdiction challenge is not.[43]

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[42] See *Miruvor Ltd v Panama-Globe Steamer Lines SA* [2007] 1 HKLRD 804 for the exceptional circumstances in which this may not be the case. In *Miruvor* the defendants took the unusual course of filing a defence which commenced with a statement that it was "made strictly without prejudice to" their application "to have the writ served against it set aside". This was followed by an application to challenge jurisdiction (in the form of an application to challenge the orders extending the validity of the writ) two days later, just before the deadline for such applications under RHC O.12 r.8. The Court of Appeal, reversing Stone J, held that acts alleged to amount to submissions would not be found to be such unless the only possible explanation for the conduct relied on is an intention on the part of the defendant to have the case tried in England (relying on a statement of principle adopted by Morritt C in *Global Multimedia International Ltd v Ara Media Services* [2007] 1 All ER (Comm) 1160 and other English authorities cited therein). The Court of Appeal in its judgment of 9 Feb 2007 concluded that the reservation of the right to apply to set aside service contained in the defence was not a submission when regarded "fairly and sensibly". One factor which influenced the court in reaching that conclusion was that the notes to RHC O.12 r.8 in *Hong Kong Civil Procedure* indicated that time for filing a defence was not suspended by an application to challenge jurisdiction, and that RHC O.12 r.8 was therefore not the complete procedural regime which Stone J had held it to be. An application was subsequently made for the Court of Appeal to reconsider its judgment on the basis that RHC O.18 r.3(2) did in fact provide for such an application to have the effect of suspending the requirement to file a defence, but in its judgment of 21 Mar 2007 the court declined to do so, stating that "in circumstances where the *Hong Kong Civil Procedure* is misleading; it would be insincere of this court to hold that the party should have had in mind a provision of the Rules which this court and those appearing before it overlooked". It is respectfully suggested that, whilst *Miruvor Ltd v Panama-Globe Steamer Lines SA* could perhaps be regarded as justifiable only on the narrower ground just quoted, with the more general conclusions stated in the 9 Feb 2007 judgment being regarded as *per incuriam* in view of the significant reliance placed on an incorrect consideration, the reality is that the more general propositions in *Miruvor* do not create unacceptable uncertainty in view of the fact that a defendant who reserves the right to challenge jurisdiction in a defence will still lose that right if the time limit for making such an application under RHC O.12 r.8(1) expires without it having been made. This is also consistent with the English authorities relied upon in *Miruvor*, which make expressly clear that the policy of giving the defendant the benefit of the doubt applies to alleged acts of submission carried out *before* the expiry of the time for applying to challenge jurisdiction, and assume that the defendant makes such a challenge in compliance with the rules. Stone J at first instance in *Miruvor* asked rhetorically what a plaintiff was to do on receiving a defence stated to be without prejudice to a challenge to jurisdiction. It is suggested that a plaintiff put in that position would be justified in waiting for the time limited by RHC O.12 r.8(1) to expire before starting to prepare its pleading in reply to the defence, and that a defendant who serves a defence of this sort then fails to challenge jurisdiction should be penalised in costs if that defendant fails also to agree to extend the 28-day period for filing of the reply (RHC O.18 r.3) so that it starts to run only upon the expiry of the period rather than upon service of the equivocal defence. The underlying consideration here is that, whilst it is amateurish for a defendant to adopt the approach taken in *Miruvor*, it does indeed seem a little harsh to regard the defendant as having submitted in circumstances when the opposite was expressly stated. A defendant who does adopt the heterodox *Miruvor* approach can, however, expect to lose the costs of preparing the defence if the jurisdiction challenge is successful, and the solicitor may well be in difficulties even on a solicitor-own client taxation unless the client gives informed consent. In *ABN Amro Bank NV v Charles Fabrikant Fortgang* [2008] 2 HKLRD 349, the defendant applied to challenge jurisdiction then filed a "bare denial" defence without stating, in the defence itself or its covering letter, that it was filed without prejudice to the challenge to jurisdiction. Sakhrani J distinguished *Miruvor*, ruling that the defendant had thereby submitted to the jurisdiction. With respect, that was clearly right—the service of an unqualified defence after a jurisdiction challenge can only sensibly be interpreted as an abandonment of any jurisdiction challenge.

[43] *Victor Chandler (International) Ltd v Zhou Chu Jian He* (unrep., HCA 300/2005, 31 Mar 2006, [2006] HKEC 626, CA), Deputy Judge Carlson. Indeed, a defendant applying for a stay on *forum conveniens* ground is required to state its defence with sufficient particularity to demonstrate its *bona fides*: see para.3.110.

1. Introduction

(a) Perspective

The correct approach to choice of law in respect of civil obligations—contracts, torts and restitution—often proves an exceedingly confusing matter in a case with cross-border elements even of only moderate complexity.[1] Indeed, those who have to analyse, for example, the choice of law aspects of a commercial case by reference to the traditional English texts may sometimes feel themselves to be in the darkest of legal forests. In the hope of providing some guidance as to the larger underlying issues, the following introductory observations are offered. They are intended to do no more than to guide the unwary traveller towards an understanding of the position and shape of particular trees within the forest; even more diffidently, it is suggested that those in a position to take on the role of arborist, nurseryman or lumberjack may wish to consider the matter from the following broad perspective before re-trimming, planting or felling particular specimens: **5.001**

1. *Emergent principle.* It is suggested that there is an emergent principle to the effect that an obligation is governed by the law of the place with which it has its closest and most real connection.
2. *Contracts.* The principle of closest connection is already long-established in the case of contractual liability, with relatively little technical restriction, subject to the parties' largely untrammelled freedom to choose their own governing law.
3. *Torts.* As for tortious liabilities, it will be suggested below that the overall effect of the modern case law (in particular, the modern approach to determining the place where a tort is deemed to have taken place, coupled with the modern relaxation of the rule of double actionability) has been to give effect to a principle of closest connection in the cases where it matters, albeit that this underlying phenomenon is obscured by a glare of surface complexity.
4. *Restitution.* In the case of restitutionary liabilities, the rule of closest connection has fairly broad support, but the question of whether its application is to be fettered by more specific sub-rules or principles, and if so, which, remains unsettled. Characterisation problems also arise in this context as between the law of obligations and the law of property.
5. *Minimisation of characterisation problems within the law of obligations.* For the practitioner and judge, one important practical corollary of the notion of a broader principle, if accepted, is that it makes it unnecessary to devote too much energy to the fascinating problems of choice of law and characterisation which are often available for the taking in complex cross-border cases. Instead, it may well be that in many such cases the most just outcome will be to determine, quite simply, that all substantive issues of personal obligation in a case should be regarded as governed by the single

[1] See *Cheshire*, p 665 (The problem of ascertaining the applicable law is more perplexing in the case of contracts than in almost any other area), p 766 (The problem of ascertaining the applicable law in the case of torts is scarcely less perplexing than in the case of contract), p 768 (The problem of ascertaining the applicable law in cases of restitution is arguably more difficult than in respect of other obligations).

system of law with which the matter as a whole has its closest connection, thereby avoiding the injustices likely to result from applying, to a single factual scenario, for example, (i) the common ground between the Macanese law of delict and the Hong Kong law of tort,[2] (ii) the Hong Kong law of restitution[3] and (iii) the Mainland Chinese law of contract.[4] This approach is heterodox as matters currently stand (though one suspects that it is, perhaps, pragmatically already applied more often than is admitted), and it certainly cannot be applied without qualification.[5] However, it is suggested that it provides the only sure guide in cases in which the analysis otherwise threatens to become over-complicated, artificial, unjust and possibly even absurd.

(b) Divergence of Hong Kong law from English law

5.002 It should also be highlighted at the outset that the fact that the Hong Kong courts are no longer bound to follow English authority is more than usually important in connection with obligations, given that the spring of relevant English case law has, to a significant extent, dried up. In particular, choice of law questions concerning obligations are now regulated in England principally by the Rome I and II Regulations,[6] with certain specific areas being regulated by EU or UK legislation or regulations. The UK's planned exit from the EU will not necessarily mean that it will cease to be a party to the Rome Regulations. It seems likely that the divergence between English and Hong Kong law in this area will remain for a considerable period if not indefinitely.

This, together with the complex, and in some respects unsettled, nature of the law in this area, points up the need for a principled approach. Having said that, the temptation to be over-reductive must of course be resisted: there are some unavoidable complexities, and a host of special rules have already been recognized by case law or created by statute; further specific rules, with appropriate qualifications, will doubtless benefit from recognition from time to time.

2. Contracts

(a) Introduction

5.003 By way of overview:

1. *Choice of law.* If parties expressly choose to govern their relationship by a particular law, this will, except in certain specialised contexts,[7] be upheld. In contrast to the approach taken in some legal systems, there is usually no need to demonstrate

[2] E.g. by virtue of the rule of double actionability: see paras.5.077 *et seq*.
[3] E.g. by virtue of one of the sub-rules sometimes suggested in respect of the law of restitution: see paras.5.099–5.145.
[4] E.g. by virtue of the principle of closest and most real connection, or in deference to an express choice of law by the parties.
[5] Myriad qualifications may be identified, ranging from the need to distinguish the relationship of specific parties in a case from those between other parties, to the need to respect governing law clauses in written contracts. The purpose of the proposal is not to pre-empt legitimate arguments of this nature.
[6] I.e. Regulations (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) and 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).
[7] See paras.5.041–5.074.

that the expressly chosen system of law has anything to do with the parties or their transaction. In the absence of an express agreement between the parties for a particular law to govern their relationship, the Hong Kong court will, except in cases concerning international carriage or negotiable instruments,[8] usually apply a broad principle of "closest and most real connection", largely unfettered by more specific rules or presumptions. These concepts are sufficient to resolve the overwhelming majority of issues concerning choice of law in contract which arise in practice. The more detailed rules and exceptions are discussed below.

2. *Jurisdiction.* Subject matter jurisdiction is not restricted in contractual cases. As for personal jurisdiction, there are widely-drafted heads of long-arm jurisdiction available for the bringing of claims in respect of most contracts having a substantial connection with Hong Kong, albeit that a fairly technical, perhaps too technical, body of case law has grown up in relation to the precise meaning of certain aspects of these heads.

(b) Choice of law in contract

(i) *Three main rules*

5.004 Hong Kong courts' general approach to choice of law in contracts is as follows: (1) the primary rule is that if the parties have expressly agreed upon the law to govern their contract, then this will generally be respected, subject to certain points noted below; (2) in the absence of an express choice, the court will consider whether there is a factual basis for inferring such an agreement; (3) failing that, a residual rule (closest and most real connection) is applied. The overlap between the second and third of these rules is considered below. It is possible in principle for parties to be held to have implicitly agreed to change the governing law of their contract, though examples are scarce.[9]

(ii) *First rule: an express agreement will generally be respected*[10]

5.005 Subject only to some narrow statutory exceptions for certain types of contract,[11] it is well established that the parties' choice of a law to govern their contractual relationship will generally be respected. The following points should, however, be noted:

1. *Non-state law.* First, although the most common case in which an express agreement is given effect is where the parties choose a legal system of a state[12] recognized as such by the Chinese Central People's Government, it appears that this is not strictly necessary. This point has two main practical aspects. The first aspect is that it appears that the law of a non-recognized state will be given effect by the Hong Kong courts

[8] See paras.5.051–5.061.
[9] See the *obiter* remarks as to this possibility in *James Miller & Partners Ltd v Whitworth Street Estates Ltd* [1970] AC 583 (HL), *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 3 All ER 252, (HC), Staughton J.
[10] For a comparative discussion, see Nygh, *Autonomy in International Contracts* (Oxford: Oxford University Press, 1998).
[11] Considered at paras.5.041–5.074.
[12] By "a legal system of a state" is meant not only a legal system which applies throughout the state in question (e.g. Japanese law, French law) but also a legal system which applies in a territorial sub-division of the state in question (e.g. Scots law, Louisiana law). The two are indistinguishable for present purposes.

so long as it is the law of a "civilised and organized society", unless there is a strong Hong Kong public policy requiring it not to be given effect.[13] Thus, of particular relevance in Hong Kong, it appears that a choice of "the law of the Republic of China" will be given effect in accordance with its obviously intended meaning by the Hong Kong courts.[14] The second aspect, which is unresolved as a matter of authority, is whether a Hong Kong court will give effect to a choice of non-state law such as "the *lex mercatoria*" or "international practice" or "internationally recognized principles of law". It is suggested that in principle such a choice should not be denied effect merely on the ground that a non-state law has been chosen.[15] Moreover, whilst there has hitherto been a question mark over whether such clauses are sufficiently certain to be workable, it is suggested that an appropriate solution in a commercial case[16] will usually be to interpret such clauses as requiring the application of the UNIDROIT Principles of International Contracts.[17]

2. *Bona fide and legal.* Secondly, it was said by the Privy Council in 1939 that the choice must be "bona fide and legal".[18] The precise meaning of this concept has

[13] *Per* Lord Wilberforce in *Carl Zeiss Stiftung v Rayner & Keeler* [1967] 1 AC 853 (HL). The position should in principle be the same irrespective of whether the parties have expressly chosen such a law or whether it is the implied or most closely connected law.

[14] It is suggested that public policy should not bar the application of Republic of China (i.e. Taiwanese) law. See by way of analogy *Chen Li Hung Ting Lei Miao* [2000] 1 HKLRD 252, in which the Court of Final Appeal decided that Taiwanese judgments are enforceable in Hong Kong other than, perhaps, in certain exceptional cases. Enforcement of judgments raises, if anything, more substantial arguments as to public policy issues than choice of law. It is also suggested that references to "Taiwanese law" ought to be construed as a choice of RoC law in accordance with common usage. In practice, RoC law has been applied without comment in a number of Hong Kong decisions; there appears to be no reported instance in which a party has even sought to avoid its application on public policy grounds. As well as Taiwan, there are other national entities with some degree of recognition as states, which are not currently recognized as such by the People's Republic of China, such as Kosovo and Somaliland. It is suggested that a contract to be governed by the law of e.g. Kosovo, should, like one to be governed by the law of Taiwan, be given effect in accordance with its intended meaning.

[15] The usual exceptions, such as public policy, are of course applicable in such cases, as they are in cases where state law is chosen.

[16] "Commercial case" should be broadly understood. It would be surprising to find an attempt to incorporate "international practice" into a consumer contract, and there may well be grounds for avoidance of such an attempt on grounds of public policy.

[17] It is submitted that the Principles are, at the very least, strong presumptive evidence of international practice. The Principles specifically contemplate their application "when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like". That of course cannot be enough in itself to justify their application in cases in which it must be doubtful whether parties who fail to refer to the Principles have ever heard of them. However, it is suggested that the status of the Principles is such that to apply them is a closer approximation of justice than the alternatives of (i) avoiding the parties' choice on grounds of uncertainty or (ii) attempting to derive general principles from other sources, as to which there may be considerable argument. The Principles were originally produced in 1994 and followed by a second edition in 2004 which, amongst other things, filled various *lacunae*. The fact that the Principles have not yet acquired a substantial case law about their interpretation ought not to be sufficient objection to deny their application: international arbitrators have long been supportive of the notion that commercial parties may rationally prefer, and effectively choose, the application of broad principles with a minimum of technical rules and fine distinctions, and the English courts have been supportive of this at least in the arbitration context (*Channel Tunnel Group Ltd v Balfour Beatty Constructions Ltd* [1993] AC 334 HL). It is suggested that a modern Hong Kong court ought to take a similar approach where the matter is to be resolved judicially rather than by way of arbitration.

[18] *Vita Food Products Inc v Unus Shipping Co Ltd (in liq)* [1939] AC 277 (PC), on appeal from Nova Scotia) *per* Lord Wright: "It is true that in questions relating to the conflict of laws, rules cannot generally be stated in absolute terms, but rather as *prima facie* presumptions, but, where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy".

not been entirely clarified by subsequent case law. It is submitted that it should not have any independent[19] role to play in the modern conflict of laws other than, perhaps, in the extreme case where the choice is a sham.[20]

3. *Absence of connection not fatal.* Thirdly, it appears now to be settled that the chosen law will be given effect even if it has no connection with the transaction.[21] Moreover, with reference to point (2) above, it is has recently been stated in Hong Kong, correctly it is respectfully suggested, that "the absence of such connection cannot by itself be evidence of lack of bona fides".[22] In contrast, summary judgment has recently been refused in Hong Kong on the basis, the utility of which as a workable legal concept may respectfully be doubted, that "where there is no connection at all with the transaction the fact that the choice is designed to avoid the application of another law may be evidence that the choice is not bona fide".[23]

4. *Certainty.* Fourthly, the choice must be sufficiently certain to be enforceable. The courts do not adopt any particularly harsh rules or presumptions of construction in connection with such agreements. They do, however, insist on certain requirements of conceptual clarity. This issue is discussed at paras.5.155–5.165.

5. *Foreign illegality.* Fifthly, foreign illegality or violation of foreign public policy may in certain circumstances lead to the unenforceability of a contract irrespective of its proper law. This complex topic is considered at para.5.012.[24]

[19] It is of course possible that a choice of law may be impugned as, in a sense, "not *bona fide*" (e.g. as having been procured by the fraudulent misrepresentation of the party seeking to rely upon it) according to the ordinary domestic principles of the putative proper law (see para.5.010); and it may be denied recognition on grounds of illegality in circumstances considered at para.5.012.

[20] That is, where all parties "have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating". (*Snook v London & West Riding Inv Ltd* [1967] 2 QB 786, (CA) *per* Diplock LJ. This is a concept of domestic English (and Hong Kong) law but it is suggested that it may nevertheless have an overriding role to play in the conflict of laws. Other than in such extreme cases, however, it is submitted that attacks on the *bona fides* of a chosen law should be regarded as matters of material validity governed by the "putative proper law" (see para.5.010).

[21] See *Credit Agricole Indosuez v Shanghai Erfangji Co Ltd* (unrep., HCA 14569/1999, 12 June 2002), Deputy Judge Gill, para.29, following the decision of the Privy Council in *Vita Food Products Inc v Unus Shipping Co Ltd (in liq)* [1939] AC 277. See similarly *per* Lord Diplock in *Amin Rasheed Shipping Corp v Kuwait Insurance Co (The Al Wahab)* [1984] AC 50, para.62: "If it is apparent from the terms of the contract itself that the parties intended it to be interpreted by reference to a particular system of law, their intention will prevail and the latter question as to the system of law with which, in the view of the court, the transaction to which the contract relates would, but for such intention of the parties, have had the closest and most real connection, does not arise". (Contrast the view of Upjohn J that "the parties' expression of intention is only *prima facie* evidence as to the proper law" and that the court "will not necessarily regard [the parties' common intention] as being the governing consideration where a system of law is chosen which has no real or substantial connection with the contract looked on as a whole". *Re Helbert Wagg & Co Ltd* [1956] Ch 323 (HC), Upjohn J.

[22] *Shenzhen Development Bank Co Ltd v New Century Int'l Holdings Ltd* (unrep., HCA 2976/2001, [2002] HKEC 1087), Court of First Instance, Deputy Judge Lam. In that case, there was an express Hong Kong governing law clause but performance of the contract was alleged by the defendant to be required by the contract to be in the Mainland and to be illegal under Mainland law. The court gave summary judgment to the plaintiff on the basis that, *inter alia*, performance was not in fact required to be in the Mainland.

[23] *Credit Agricole Indosuez v Shanghai Erfangji Co Ltd* (unrep., HCA 14569/1999, 12 June 2002). On the facts of that case, it is suggested that the same conclusion (a denial of summary judgment) could have been reached more appropriately by application of the principle that a choice of law will not be given effect where performance is illegal under the laws of the place of required or intended performance (see Chapter 4).

[24] These issues arise equally where the proper law is determined not by the parties' express choice but instead according to the second or third rules considered below.

6. *Mandatory Hong Kong law and public policy.* Sixthly, the parties' choice must not violate Hong Kong's mandatory laws[25] or domestic public policy. Domestic public policy without more, however, plays only a minimal role, save where it has been implemented by various specific statutory provisions.[26] It is reserved for extreme cases.[27]

(iii) *Second rule: an implied agreement may be found*

5.006 In theory, the secondary rule is that if there is scope for inferring an agreement as to governing law on particular facts, then this will be given effect. The test for whether such an agreement is in fact to be inferred is however a very general one,[28] and it will in practice often be impossible to differentiate the reasoning and result of this approach from those of applying the principle of "closest and most real connection".[29] Thus, the test is sometimes said to be a three-stage one: (1) express agreement; (2) if none, implied agreement; (3) if none, closest and most real connection.[30]

5.007 In practice, courts often ignore the second stage in cases where it has no practical significance. The second stage has, however, on occasion been emphasised. Thus:[31]

[25] The principle was pithily stated by Diplock LJ in *Mackender v Feldia AG* [1967] 2 QB 590 (CA), as the corollary of the *Kahler* principle: "English courts will not enforce an agreement, whatever be its proper law, if it is contrary to English law, whether statute law or common law; nor will they enforce it, even though it is not contrary to English law, if it is void for illegality under the proper law of the contract".

[26] Considered at paras.5.014–5.074.

[27] A rare example is *Royal Boskalis Westminster NV v Mountain* [1999] QB 674 in which the English Court of Appeal held that, although a contract was valid under its proper law (Iraqi law), the duress by which it had been procured raised concerns of English public policy and the English court would not recognize it because, *per* Phillips LJ: "In short, it was expropriation. I do not believe that any civilised system of jurisprudence would recognize the effect of such an agreement". This was said to be a special class of duress "so unconscionable that it will cause the English court, as a matter of public policy, to override the proper law of the contract". See also *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R 378; *Queensland Estates Pty Ltd v Collas* [1971] Qd R 75.

[28] In *The Al Wahab* [1984] AC 50, Lord Diplock, para.61 stated the court should "examine the [contract] in order to see whether the parties have, by its express terms or by necessary implication from the language used, evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained". Lord Diplock continued: "As Lord Atkin put it in *R v International Trustee for the Protection of Bondholders Akt* [1937] AC 500, 529: 'The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive. If no intention be expressed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances'." Conceptually this must be a distinct test from the principles applicable under Hong Kong domestic law to the implication of terms, since the governing law of the contract is in issue. However, although the domestic law tests for the implication of terms are somewhat more, the practical result is unlikely to be different in most cases.

[29] The validity of the three-stage test was acknowledged in *Bank of India v Gobindram Naraindas Sadhwani* [1988] 2 HKLR 262, (CFI), Nazareth J and *York Air Conditioning & Refrigeration Inc v Lam Kwai Hung* [1995] 2 HKLR 256, (CFI), Kaplan J.

[30] Rule 180 in the 11th (1987) edition of *Dicey* (the last before the case law was replaced in England by the Contracts (Applicable Law) Act 1990, implementing the Rome Convention) stated it as follows by means of three sub-rules: 1: "When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention, in general, determines the proper law of the contract". 2: "When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract". 3: "When the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred from the circumstances, the contract is governed by the system of law with which the transaction has its closest and most real connection".

[31] *Century Yachts Ltd v Xiamen Celestial Yacht Ltd* [1994] 1 HKLR 385, (CA).

> *"Where the relationship between the parties is informal, in the way they were in this case, one would not expect to find the parties stating expressly what the governing law should be. The task of the court is then to infer their intention from all the relevant circumstances… In considering the question whether the parties intended by implication that the sales contracts should be governed by Hong Kong law, the test is what ordinary reasonable businessmen would have been likely to have agreed if their minds had been directed to the question. In my judgment, there can be no doubt what [the relevant parties] would have said, before the dispute arose in this case. They would have said that Hong Kong law governed their contracts. It would have been highly improbable that they would have selected PRC law, having regard to the commercial realities of the matter."*

5.008 This is reminiscent of the approach taken to the implication of terms in contracts under Hong Kong domestic law,[32] and even more reminiscent of the approach to the interpretation of contracts under Hong Kong domestic law,[33] although, *ex hypothesi*, the governing law is not yet established.[34]

(iv) *Third rule: in the absence of an express or implied agreement, the general rule is that proper law depends on the contract's closest and most real connection*

5.009 In the absence of an express or implied agreement between the parties as to the law which is to govern their contract,[35] the general rule is that a Hong Kong court will regard the contract as governed by "the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion".[36]

1. *Particular contracts.* It is important to remember that the closest and most real connection principle does not apply in connection with certain contracts, discussed in paras.5.041–5.074.

2. *Nature of the closest connection principle.* There has long been a theoretical debate as to whether "closest and most real connection" is an objective principle of law which the parties may agree (expressly or implicitly) to disapply, or whether it is better regarded as a matter of presumed common intention which will apply in the absence of an express or factually inferred common intention to the contrary. The theoretical distinction does not usually have practical consequences, but the fact that it is more than merely an "implied term" is indicated by the fact that it applies even where the parties have expressly turned their minds to the question

[32] I.e. the "business efficacy" test (derived from *The Moorcock* (1889) 14 PD 64) or the "officious bystander" (*Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206) test.

[33] I.e. the "business common sense" approach as most famously set out in Lord Hoffmann's much cited speech in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, (HL).

[34] The "ordinary reasonable businessmen" terminology appears to have been picked up only once in a subsequent reported case (by Deputy Judge McCoy in *Continental Mark Ltd v Verkehrs-Club de Schweiz* [2001] HKC 469, (CFI).

[35] Paras.5.005–5.008.

[36] *Per* Lord Simonds delivering the opinion of the Privy Council on appeal from the High Court of Australia in *Bonython v Commonwealth of Australia* [1951] AC 201. In Hong Kong, see e.g. *S Megga Telecommunications Ltd v Etowaru Co Ltd* [1995] 2 HKC 761, (CA).

of governing law but left their contract silent by virtue of their failure to reach agreement upon it.[37]

3. *Closest and most real connection: of what, with what.* Clarity of analysis is assisted by keeping in mind that:

   (a) The relevant connection is with a *system of law*, not with *a place* as such.[38] Of course, in many cases a connection with a place will be the best indication of a connection with a system of law but a very strong connection with a particular place may well not prevail in particular circumstances. Thus, for example, in one case where contract documents used English law terminology, the contract was eventually held (not without some significant contrary judicial opinions[39]) to be governed by English law notwithstanding that the contract was more closely connected with Kuwait as a place than with England.[40]

   (b) It is the connection of the substance of the contractual transaction, not merely the contractual documents, with a particular system of law that matters.[41]

4. *Application of the closest and most real connection principle in practice.* The references in the older authorities to relatively clear-cut indicators of governing law, dignified with Latin names, such as *lex loci* contractus (law of the place of contracting) or *lex loci* solutionis (law of the place of intended performance) no longer represent the law, having been rejected by a gradual judicial process, in view of their artificiality in many cases. A problem of the more modern, broadly expressed principle of closest and most real connection is, of course, potential uncertainty in its application. The following *cri de coeur* is illustrative:

> *"In order to determine the proper law of the contract, the courts at one time used to have a number of presumptions to help them. Now we have to ask ourselves: what is the system of law with which the transaction has the closest and most real connection? This is not dependent on the intentions of the parties. They never thought about it. They had no intentions on it. We have to study every circumstance connected with the contract and come to a conclusion. This new test is all very well. It is often easy to apply. But, there are sometimes cases where it is quite indecisive. The circumstances do not point to one country only. They point equally to two countries, or even to three. What then is a legal adviser to do? What is an arbitrator or a judge to do? Is he to toss up a coin and see which way it comes down? Surely not. The law ought to give some help. It ought to provide a pointer to a solution, if only as a last resort."*[42]

This is partly mitigated by case law, which has over time suggested certain factors[43] that may be of particular importance in determining the closest and most real connection. These are, however, merely indicative, and reasonable judgments may often differ in practice as to the conclusion to be reached in a particular case. The factors are:

(a) *Location of subject matter of the contract.* If the contract's subject matter is land, then that will be a powerful factor pointing in favour of it being governed by the laws of the place where the land is situated.[44] Similarly in principle for movable property located in a particular place at the time of contracting, although in that case other factors often become more important.[45] It is less significant if the asset is intangible or if a tangible asset represents merely one, not necessarily dominant, aspect of the transaction.

(b) *Place of intended performance.* Notwithstanding the abandonment of the old *lex loci solutionis* principle, the place of intended performance is still generally viewed as a very important factor in determining the system with which the contract has the closest and most real connection.[46]

[37] *S Megga Telecommunications Ltd v Etowaru Co Ltd* [1995] 2 HKC 761 *per* Bokhary JA: "In the present case, there was no express choice of the proper law. Nor can one reliably draw any inference as to the intention of either side in that regard. It seems very likely that here, as in the case of *The First National Bank of Chicago v Carroway Enterprises Ltd* [1990] 2 HKLR 10, (CFI) Bokhary J, the parties deliberately refrained from making an express choice as to the proper because they could not agree upon one. In those circumstances, our task is to decide which system of law is the one with which the contract has the closest and most real connection, and to hold that the contract is governed by that system and its laws."

[38] This was settled, following same confusion, in *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583 (HL): "the two tests [of country and system of law] must be combined" *per* Lord Reid, at 604.

[39] Those of Bingham J and Robert Goff LJ (as they then were).

[40] *The Al Wahab* [1984] AC 50. The particular result in the case may be best understood as an example of the second, as distinct from the third, of the rules set out above.

[41] *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34, (CA) *per* Morris LJ at 46: "I think it is not without significance to note that the connection which has to be sought is expressed to be connection between the *transaction*, i.e. the transaction contemplated by the contract, and the system of law. That, I believe, indicates that, where the *actual* intention of the parties as to the proper law is not expressed in, and cannot be inferred from, the terms of the contract (so that it is impossible to apply the earlier part of the *Bonython* formula, the system of law 'by reference to which the *contract was made*' ([1951] AC at 219)), more importance is to be attached to what is to be done under the contract—its substance—than to considerations of the form and formalities of the contract or considerations of what may, without disrespect, be described as lawyers' points as to inferences to be drawn from the terms of the contract."

[42] *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34, (CA) *per* Lord Denning MR at 44. In England, of course, the position has subsequently reverted to one based on relatively clear, strong presumptive rules, albeit derived from a civil law tradition and very different in content from those of the old common law: Contracts (Applicable Law) Act 1990.

[43] The list of factors at (a) to (j) below as set out in the second edition of this book was adopted by the Court of First Instance in *Waxman v Li Fei Yu* [2013] 3 HKLRD 711, Judge A. To.

[44] See further para.5.044.

[45] For examples, see e.g. *Cammell v Sewell* 157 ER 615, 157 ER 1371, *Inglis v Robertson* [1898] AC 616, HL (Scotland), *Winkworth v Christie, Manson & Woods Ltd* [1980] Ch 496, (HC), Slade J, *Macmillan Inc v Bishopsgate Inv Trust Plc (No.3)* [1996] 1 WLR 387, (CA). See further paras.5.045–5.049.

[46] In *Bank of India v Gobindram Naraindas Sadhwani* [1988] 2 HKLR 262 (CFI) Nazareth J confirmed that "great weight" should be given to the law of the place of performance, though "[t]hat is not to say that it is not to be weighed against the other factors." In *Cim Co Ltd v Koo Chi Yun* (unrep., HCA 14293/1999, 6 Dec 2001, [2002] HKEC 48, CFI), Chung J adopted *Dicey & Morris's* statement that "a debt is situate in the country where the debtor resides" to assist in establishing the place of performance, and in turn applied that place of performance as a guide to the governing law. In *First National Bank of Chicago v Carroway Enterprises Ltd* [1990] 2 HKLR 10, (CFI), Bokhary J, it was stated that "there is a tendency to regard the fact that payment under a contract is to be made in a particular place as a strong indication that the legal system of that place is the one with which the contract has the closest and most real connection". In *The Cavalry* [1987] HKLR 287, (CFI), Hunter J, the place of the lender's business, together with the place where the money was lent and was repayable were together considered to be "crucial" factors in determination of proper law. Place of performance was also considered in *The Dong Do* [1991] 2 HKLR 563, (CFI) Sears J (appeal dismissed: [1992] 2 HKC 116). See also, in connection with letters of credit, *Cooperatieve Centrale*

(c) *Place of making or negotiating the contract.* The place where the contract was made is relevant but certainly not determinative.[47] The location of negotiations prior to the entering into of the contract is also often considered by the courts.[48] With the great ease of modern international transport it is suggested that these factors are now of much diminished significance as a pointer to a contract's closest and most real connection.

(d) *Domicile or residence of parties.* The residence or domicile of the parties is frequently considered in the case law, but it is suggested that it is inappropriate to give it much weight unless the domicile or residence of both, or most, of the parties on different sides of the contractual relationship is the same.[49]

(e) *Adoption of particular legal terminology.* If a contract adopts the technical legal terminology of a particular legal system then that may lead the court to conclude that that is its proper law. This must, however, be distinguished from the case where a contract has one proper law but particular words or phrases within it are to be interpreted according to their technical meaning in another legal system. Drawing the distinction may on occasion be difficult.[50]

(f) *Language.* This has sometimes been considered relevant, but it will often be a relatively unimportant factor. It may well have no weight at all in a case where there are plainly other realistic explanations for adopting a particular language, such as it being common to the parties or, more generally, a language (such as English) which is commonly used in many countries, particularly for the purpose of international commerce. Even the use of technical phrases connected with one legal system rather than another may not be a particularly relevant indicator: for example, if a German company and a Chinese company negotiate an English language

Raiffeisen-Boerenleenbank BA v Bank of China (unrep., HCCL56/2001, 23 July 2004, CFI), Stone J, and the decision of the Singapore Court of Appeal cited therein, in *Sinotani Pacific Pte Ltd v Agricultural Bank of China* [1999] 4 SLR 34.

47 See e.g. *Cim Co Ltd v Koo Chi Yun*, (unrep., HCA 14293/1999, 6 Dec 2001, [2002] HKEC 48).

48 See *Bank of India v Gobindram Naraindas Sadhwani*, [1988] 2 HKLR 262.

49 In *Bank of India v Gobindram Naraindas Sadhwani* [1988] 2 HKLR 262 (CFI) two of the four guarantors resided in Japan including the only guarantor who played an active part and took decisions. This contributed to the outcome of Japanese law having the closest and most real connection to the contract. Where the agreement was for the purpose of assisting a corporate entity, its place of headquarters and control was relevant (*Cim Co Ltd v Koo Chi Yun* (unrep., HCA 14293/1999, 6 Dec 2001, [2002] HKEC 48, CFI)). The residence of the parties (together with other factors) pointed to Hong Kong law being the proper law in *The President Polk* (unrep., HCAJ 311/1991, [1992] HKEC 174). In *Hong Kong Shanghai (Shipping) Ltd v The Owners of the Ship or Vessel "Heroinae"* [1987] HKLR 287, CFI, Hunter J, the place of the lender's business was said to be one of "the factors crucial to any objective determination of the proper law". Also considered in *The Dong Do* [1991] 2 HKLR 563, (CFI). *Cf* the English statutory position which, stripping away the technicalities, usually makes a presumption in favour of applying the law of the home base of the suppliers of goods and services.

50 In *Bank of India v Gobindram Naraindas Sadhwani* [1988] 2 HKLR 262, the use of provisions drafted by reference to particular rules of the common law and decisions of the English courts did not render the contract only intelligible by reference to the common law. This was stated in relation to the finding of an implied agreement, highlighting the confusion between the second and third stages of the test. The fact that legal terminology and language was more in line with the Hong Kong system than the Chinese system was considered relevant in *First National Bank of Chicago v Carroway Enterprises Ltd* [1990] 2 HKLR 10, (CFI), also considered in *The Dong Do* [1988] 2 HKLR 262.

joint venture agreement in Hong Kong, with the party having conduct of the documents utilising the services of an international law firm based in England or the United States, then phrases derived from English law or US law will inevitably find their way into the documents as a result. This is probably not, in itself, of any real relevance in modern circumstances as an indicator of governing law.[51] On the other hand where the decision depends upon the construction of documents in one language and the competing courts are on the one hand, courts whose working language is that of the documents and, on the other hand, courts whose working language is not that of the documents, it has been held to be in the interests of the parties and of justice that the true meaning should be decided by the former and not the latter.[52]

(g) *Express choice of a place for dispute resolution.* If the parties choose a particular court or place of arbitration for the resolution of any disputes but fail to address the issue of governing law, then it may be held that this implies a choice of the substantive governing law of the place in which that forum is located. The House of Lords[53] has made clear that there is no strict rule or strong presumption that an express choice of a tribunal is an implied choice of proper law.[54] Nevertheless, such a choice was still said to be "an important factor and in many cases it may be the decisive factor"[55] or a "strong implication [which may be overcome by] an overwhelming implication from the other terms all pointing to one single other system of law as the proper law of the contract as distinct from the curial law"[56] or "a weighty indication, but one which may yield to others".[57] Selection of a place for arbitration probably carries less weight than a selection of

51 *Cf The Al Wahab* [1984] AC 50.

52 *Seashell Shipping Corp v Mutualidad de Seguros del Instituto Nacional de Industria* [1989] 1 Lloyd's Rep 47, *Hady v Bazar* [2012] 3 HKLRD 29, CFI, Deputy Judge Peter Ng.

53 *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572. In the case itself, a provision for arbitration in England was held not to imply English governing law. *Per* Viscount Dilhorne, p 593: "[I]t is, in my view, inconceivable that a French company registered in French Somaliland and a Tunisian company where the law is based on the Code Napoleon, having negotiated in French in Paris, could have intended that a contract for the carriage of oil between two Tunisian ports with the freight payable in francs should be governed by English law." Cited with approval in *The Komininos S* [1991] 1 Lloyd's Rep 370, and *Chan Chi Keung v Delmas Hong Kong Ltd* (unrep., HCCL 40/2003, 7 June 2004, [2004] HKEC 1042). In *Chan Chi Keung* Hon Sakhrai J held that several factors connecting the contract to Hong Kong law were not sufficient to displace the "strong and compelling inference that the parties intended that the proper law of the contract should be the law of the forum where the parties intended their disputes to be determined". On an analogous point, note *York Air Conditioning & Refrigeration Inc v Lam Kwai Hung* [1995] 2 HKLR 256, (CFI) in which was held that a "fairly overwhelming combination of factors" or an express choice would be required to displace the inference that the proper law was that of the country where arbitration was to be held.

54 Contrast the older case law: *Hamlyn & Co v Talisker Distillery* [1894] AC 202 (arbitration), (HL), *Spurrier v La Cloche* [1902] AC 446, (HL), *NV Kwik Hoo Tong Handel Maatschappij v James Finlay & Co Ltd* [1927] AC 604, (HL), *Naamlooze Vennootschap Handels-En-Transport Maatschappij Vulcaan v A/S J Ludwing Mowinckels Rederi* [1938] 2 All ER 152, (HL), *Vita Foods Products Inc v Unus Shipping Co Ltd (in liquidation)* [1939] AC 277, (PC); *Tsortzis v Monarch Line A/B* [1968] 1 All ER 949, English Court of Appeal.

55 *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA per* Lord Reid.

56 *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA per* Lord Diplock.

57 *Per* Lord Wilberforce (with whom Viscount Dilhorne agreed), p 596. Lord Wilberforce went on to say at 600: "Always it will be a strong indication; often, especially where there are parties of different nationality or a variety of transactions which may arise under the contract, it will be the only clear indication. But in some cases it must give way where other indications are clear."

jurisdiction since "arbitrators may be accustomed to and competent to deal with disputes by the application of some system of law other than that of their own country".[58]

(h) *Exemption clauses.* It has been held in England that if an exemption clause is valid under law A but invalid under law B, then this points to law A as the proper law on the domestic English law principle that a contract should be construed so as to make it valid rather than invalid.[59] It is however suggested that an artificial factor such as this ought to have no great significance as an indicator of a closer connection to one legal system rather than another.[60]

(i) *Currency.* It has been held that references to a particular currency are indicative of the law of the country of that currency being the chosen law (i.e. the implied choice of the parties, rather than the place of closest and most real connection).[61] There are, however, clearly limits to the relevance of this factor.

(j) *Related transactions.* The courts often draw inferences that related contracts are intended to be governed by the same system of law.[62] However, much depends on context. Thus, whilst the most likely implication is, all other things being equal, that a guarantee is governed by the same law as that which governs the primary obligation,[63] the proper law of the underlying contract is irrelevant for the purpose of a claim under a bill of exchange.[64]

(c) The scope of the proper law

5.010 The following propositions appear to represent Hong Kong law:

1. The effect, interpretation and discharge of a contract are determined by its proper law. This extends to issues of causation and recoverable loss in a breach of contract claim.[65] So are, at least as a general rule, the restitutionary consequence of a failed, discharged or breached contract.[66]

[58] *Per* Lord Morris of Borth-y-Gest at 588. Lord Wilberforce (with whom Viscount Dilhorne agreed) also noted the artificiality of earlier statements to the effect that arbitrators appointed to an English arbitration are presumed only to know English law.

[59] *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34, (CA) *per* Lord Denning MR at 44, applying *P & O Steam Navigation Co v Shand* (1865) 3 Moo PC 272 and a *dictum* of Lord Halsbury LC in *Re Missouri Steamship Co* (1889) 42 Ch D, p 337.

[60] An exception may be if the parties have used a particular form of words that has significance under a particular system of law. This would however simply be a particular instance of the situation considered in the *The Al Wahab* [1984] AC 50. However, in *Bank of India v Gobindram Naraindas Sadhwani* [1988] 2 HKLR 262 (CFI), it was accepted that "the inability to enforce a contract according to one system of law has long been accepted as a relevant factor to be weighed in determining whether it is to be governed by some other law under which it is enforceable" (*per* Nazareth J).

[61] *Bank of India v Gobindram Naraindas Sadhwani*, above; *Cim Co Ltd v Koo Chi Yun* (unrep., HCA 14293/1999, 6 Dec 2001, [2002] HKEC 48, CFI).

[62] *Dow MBF Ltd v Detrick Ltd* [1988] 1 HKLR 344, (CFI) Hooper J.

[63] *First National Bank of Chicago v Carroway Enterprises Ltd* [1990] 2 HKLR 10.

[64] *York Air Conditioning & Refrigeration Inc v Lam Kwai Hung* [1995] 2 HKLR 256.

[65] See Chapter 2.

[66] Considered further at paras.5.107–5.108.

2. Material or essential validity (that is, whether a contract came into existence at all, or is voidable or terminable for reasons connected with the manner in which it came into existence) is determined according to the *putative* proper law, that is, the law which would govern if the contract were valid. This putative proper law governs issues such as whether the parties have reached a legally binding agreement, consideration, privity, mistake, fraud, duress and misrepresentation. In certain extreme cases, Hong Kong public policy may however override this principle.[67]

3. Formal validity[68] is determined by a more liberal rule, namely that the contract will be upheld if it complies either with the formal requirements of the place where it was made[69] or with those of the putative proper law.[70] It is suggested that a requirement of nominal consideration is a formality for this purpose, where a requirement for valuable consideration would be a matter of material validity.[71]

4. Contractual capacity is a more complex issue: see Chapter 7 for discussion.

(i) *Cases where more than one system of law governs*

5.011 It is possible in principle for different aspects of a contract to be governed by different laws,[72] albeit that it appears that such a conclusion will only be drawn in exceptional cases where the parties have expressly or by clear implication agreed it. The courts "will not split the contract … readily and without good reason".[73] Another possibility, which is conceptually distinct but may lead to a similar practical result, is that all or particular aspects of a contract may be interpreted in accordance with principles derived from a system of law other than its proper law.[74]

[67] See e.g. the extreme case of duress considered in the *Royal Boskalis Westminster NV v Mountain* [1997] 2 All ER 929. in which English law (the law of the forum) overrode the proper law (Iraqi law) under which the contract would have been valid. The circumstances there were distinguished from *Dimskal Shipping Co SA v Int'l Transport Worker's Federation* [1992] 2 AC 152 (HL), in which the issue of duress was held to be governed by the expressly chosen law of the contract, at least insofar as the party chose to escape from the contract chose to rely upon it.

[68] E.g, requirements that a contract be made in writing, under seal, before witnesses and so forth.

[69] Which may of course have little of substance to do with the transaction. See paras.5.023–5.026 for discussion, and a critique, of the complex body of rules which has grown up in relation to the issue of where a contract is "made" for RHC O.11 purposes.

[70] As a matter of principle it also seems that where the contract concerns property, compliance with the law of the place where that property is located (*lex situs*) will be sufficient, irrespective of whether it is immoveable. See in this context successive editions of *Dicey*. And it is cited with approval in *Philipson-Stow v Inland Revenue Commissioners* [1961] AC 727, (HL). See also *Anthony v Popowich* [1949] 4 DLR 640, *Custodian of Expropriated Property and Phoebe Kroenig v Commissioner of Nature Affairs (re Mortlock Islands)* [1971–1972] PNGLR 621.

[71] There appears to be no authority on point and the suggestion is made as a matter of principle. In *Re Bona Cina* [1912] 2 Ch 394, the English Court of Appeal addressed the somewhat different question of whether a written instrument signed in Italy and with Italian proper law but unsupported by consideration would be recognized as an enforceable debt.

[72] This is sometimes referred to as *depeçage*, literally meaning dismemberment: the word has long been used by common lawyers in the conflict of laws context to indicate the application of different laws to different issues in the same case. It has less prominence in the English tradition than in the US tradition, however: see Reese, *Depeçage: A Common Phenomenon in Choice of Law* (1973) 73 Colum L Rev 58. It is not common in Hong Kong case law.

[73] *Kahler v Midland Bank* [1950] AC 24 *per* Lord Macdermott.

[74] "There is nothing unusual in a situation where, under the proper law of a contract, resort is had to some other system of law for purposes of interpretation. In that case, that other system becomes a source of the law on which the proper law may draw. Such is frequently the case where a given system of law has not yet developed rules and principles in relation to an activity which has become current, or where another system has from experience built up a coherent and tested structure, as, for example, in banking, insurance or admiralty law, or where countries exist with a common legal heritage such as the common law or the French legal system. In such a case, the proper law is not applying a 'conflicts' rule (there may, in

(ii) *Foreign illegality and foreign public policy as exceptions to the proper law*

5.012 The following principles appear to represent Hong Kong law. The underlying rationale is international comity coupled with Hong Kong public policy.[75]

1. First, if the contract is unenforceable under its proper law (whether chosen by the parties or otherwise), then it will not be enforced by the Hong Kong court.[76] The importance of this principle is that it applies to limit the enforceability of the contract regardless of the place of required, intended or actual performance.[77] Moreover, it is irrelevant whether the bar on enforcement is a foreign penal law of the sort which will not be directly enforced by a Hong Kong court.[78]
2. Secondly, if the performance of the contract requires or necessarily involves conduct which is illegal under the laws of the place where it is required to be performed, then it will not be given effect regardless of its proper law.[79]

fact, be no foreign element in the case) but merely importing a foreign product for domestic use." *Per* Lord Wilberforce in *The Al Wahab* [1984] AC 50, 69. An example is *Forsikringsaktieselskapet Vesta v Butcher (No.1)* [1989] AC 852, (HL): an insurance contract was governed by Norwegian law and a back-to-back reinsurance contract by English law. It was held that, having regard to this factual matrix, a specific warranty in the reinsurance contract which mirrored the terms of a warranty in the insurance contract was to be interpreted in accordance with Norwegian law so as to ensure that the scope of the reinsurance corresponded to that of the insurance. See also *Hamlyn & Co v Talisker Distillery* [1894] AC 202, (HL) (arbitration clause); *Re Helbert Wagg & Co* [1956] Ch 323, (HC) Upjohn J (loan agreement); *Re United Railways of The Havana and Regla Warehouses Ltd* [1960] Ch 52, (CA) (trust agreement and lease); *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co* [1987] 3 WLR 1023, (CA) (arbitration clause).

75 *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 *per* Lord Reid: "To my mind, the question whether this contract is enforceable by English courts is not, properly speaking, a question of international law. The real question is one of public policy in English law; but, in considering this question, we must have in mind the background of international law and international relationships often referred to as the comity of nations." *Per* Pill LJ in *Royal Boskalis Westminster NV v Mountain* [1997] 2 All ER 929: "While English law was the proper law of the contract in *Regazzoni*'s case, the principle stated by Lord Reid does not appear to me to be confined to such contracts and would apply also to contracts where the proper law is foreign."

76 *Ryder Industries Ltd v Chan Shui Woo* (2015) 18 HKCFAR 544. For earlier English cases see *Kahler v Midland Bank* [1950] AC 24 (HL), *Zivnostenka Banka National Corp v Frankman* [1950] AC 57 (HL); *Re Helbert Wagg & Co Ltd* [1956] Ch 323, (HC) Upjohn J.

77 In *Kahler v Midland Bank* the House of Lords specifically rejected the contention that foreign penal or revenue laws should be denied "recognition" by this means. *Kahler* was distinguished by McNair J in *Rossano v Manufacturers Life Assurance Co Ltd* [1963] 2 QB 352(HC) on the basis that the proper law (applying the closest and most real connection test) was Ontario law, so Egyptian exchange control regulations did not apply.

78 *Ryder Industries Ltd v Chan Shui Woo* (2015) 18 HKCFAR 544. For earlier English cases see *Kahler v Midland Bank per* Lord Radcliffe, p 56: "If the proper law of the contract is the law of Czechoslovakia, that law not merely sustains, but also, because it sustains, may also modify or dissolve, the contractual bond. The currency law [which rendered performance illegal in that case] is not part of the contract, but the rights and obligations under the contract are part of the legal system to which the currency law belongs… For my part I should not regard the application of this principle to this case as a concession of extra-territorial operation to foreign currency regulations. I should regard it rather as an insistence that in applying the proper law of a contract—a conception which is inescapable in private international law—it is the full complex of substantive law that must be applied." Lord Normand, who was of similar opinion, significantly noted that he found it unnecessary to consider the Bretton Woods Agreements Order in Council (which provided for the recognition of foreign exchange controls).

79 *Ryder Industries Ltd v Chan Shui Woo* (2015) 18 HKCFAR 544. *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 1 KB 614, *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301, *Mackender v Feldia AG* [1967] 2 QB 590. In *Royal Boskalis Westminster NV v Mountain* [1997] 2 All ER 929, Phillips LJ expressed the opinion that "[t]he principle of comity whereby the court will not enforce a contract that involves breach of the law of the place of performance does not extend to requiring the court not to recognize the effect of a contract that has been performed in such a manner". However, the majority view which it is submitted should be preferred in Hong Kong was that, *per* Pill LJ, "[a] distinction cannot be drawn, in terms of enforceability in the English courts, between relying on the contract to make a money claim and relying on it to enforce the waiver of an otherwise valid claim."

3. Thirdly, the contract will not be given effect regardless of its proper law "if the real object and intention of the parties [at the time of concluding the contract] necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally".[80]
4. Fourthly, while violation of foreign laws in the actual performance of a contract may, even though not required or initially intended, lead to the unenforceability of the contract before a Hong Kong court, regardless of its proper law, not every breach of foreign law will result in unenforceability. There may be cases in which a sufficiently serious breach of foreign law in the actual performance of a contract, which reflected important policies of the foreign state or separate law district, may be such that it would be contrary to public policy to enforce a contract. However minor breaches of the law which amount to mere administrative contraventions will not result in a contract being unenforceable in Hong Kong.[81]
5. Fifthly, the above four principles apply irrespective of whether the illegality under foreign law existed at the time of contracting or arose subsequently.[82]
6. Sixthly, there are certain exceptional cases where a foreign law rendering a contract or its performance illegal will not be recognized by the Hong Kong court on grounds

80 *Ryder Industries Ltd v Chan Shui Woo* (2015) 18 HKCFAR 544. *Foster v Driscoll* [1929] 1 KB 470, (CA), *per* Sankey LJ, p 521. However, mere contemplation that it would so be performed is insufficient to invalidate: *Toprak v Finagrain* [1979] 2 Ll Rep 98, (CA), followed in Hong Kong in *Shenzhen Development Bank Co Ltd v New Century International Holdings Ltd* (unrep., HCA 2976/2001, [2002] HKEC 1087), Deputy Judge Lam. In *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301, Lord Somervell observed: "'It is not a case' said Sankey LJ [in *Foster*] 'where one or other of them merely knew that the whisky was going to the States'… If the question is one of illegality under our law the contract is unenforceable if the defendant knew that the goods or money or other consideration were to be used for a purpose immoral or illegal under our law. It would be convenient if the same principle was applied [in the case of foreign illegality], but it does not arise directly in this case." It is suggested that the principle is indeed the same in both situations.

81 *Ryder Industries Ltd v Chan Shui Woo* (2015) 18 HKCFAR 544 not following *Barros Mattos Jnr v MacDaniels Ltd* [2005] 1 WLR 247 (HC), Laddie J, and approving the statement in the second edition of this book that " a more flexible approach having regard to the seriousness of the foreign illegality is required to determine whether public policy and comity really require enforcement of the contract to be denied". It should be noted that these conflict of laws principles as to enforceability of foreign contracts differ from the rules as to illegality in contract in domestic law, under which it has been held that any claim involving reliance on illegality in a contract will fail (*Tinsley v Milligan* [1994] 1 AC 340). However the Court of Final Appeal in *Ryder Industries* in laying down the rules set out at sub-paragraph 4 above, expressly relied on the approach adopted in English domestic law as regards illegality which merely consists in the actual mode of performance of a contract, see *Euro-Diam v Bathurst* [1990] 1 QB 1, (CA), previously followed in Hong Kong in e.g. *Li Pui Wan v Wong Mei Yin* [1998] 1 HKLRD 84.

82 So far as principle (i) is concerned, see *Kahler v Midland Bank* [1950] AC 24; *Zivnostenka Banka National Corp v Frankman* [1950] AC 57; the point was specifically highlighted by McNair J in *Rossano v Manufacturers Life Assurance Co Ltd* [1963] 2 QB 352(HC) at 218. See also *R v International Trustee for Protection of Bondholders Aktiengesellschaft* [1937] AC 500, and *Perry v Equitable Life Assurance Society of USA* (1929) 45 TLR 468. As regards principles (ii), (iii) and (iv), the House of Lords in *De Beéche v South American Stores Ltd & Chilian Stores Ltd* [1935] AC 148 held at p 156 that "the law of this country will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of something which the supervenient law of that country has rendered it illegal to do" and in *Regazzoni v KC Sethia (1994) Ltd* [1958] AC 301, Viscount Simonds observed at 320 that "the case is *a fortiori* if the illegality is not supervenient but, as in the case under appeal, existent and known at the time of the contract". In the case of supervening illegality, there is of course more scope for sympathy for the party who has lost out, but the restitutionary consequences may be complex even in a purely domestic case, and in the international case they will depend upon the law governing the restitutionary obligation.

of Hong Kong public policy.[83] Further, if an arbitration award refers to an enterprise with an illegal object which the English courts view as contrary to public power policy, the award will not be enforced in England;[84] similarly in the case of a foreign judgment.[85] However, most foreign public laws will be recognized in this context: examples which have been recognized include exchange controls[86] and prohibitions of trade in certain goods[87] or with certain countries.[88] The position as regards foreign revenue laws suffers from some residual uncertainty,[89] but it is suggested that as a matter of comity and modern Hong Kong public policy, the principles applicable to revenue laws should be recognized as being no different from those applicable in relation to other foreign penal laws, so that, whilst the Hong Kong courts should not enforce such laws as such, they should decline to assist in their violation and should accordingly refuse to enforce[90] a contract which contravenes them, provided that the case is sufficiently connected to the foreign legal system, a question which is determined by whether it falls within categories (1) to (4) above.

7. Seventhly, a contract may be enforced by a foreigner through the Hong Kong courts even though he thereby commits an offence under the laws of his own country, so long as such enforcement does not contravene the above principles. The proper law of the contract and the parties' intention as to the place of performance may assume great significance in such a case.[91]

[83] In *Regazzoni v KC Sethia* Lord Reid accepted that there may be rare exceptions: "I can imagine a foreign law involving persecution of such a character that we would regard an agreement to break it as meritorious". Similarly, Lord Simonds appeared to envisage the possibility in extreme cases of a foreign law not being recognized as being "contrary to essential principles of justice and morality". Lord Simonds also noted that the requirements of public policy in this regard may vary from one age to another. Similarly, Lord Reid in *Kahler v Midland Bank* [1950] AC 24 said that the principle was that: "…if it is established that the proper law of a contract is the law of a foreign country and that the courts of that country would hold that performance of that contract cannot be enforced, an English court must also so hold *unless the ground on which the foreign court would so hold is a ground which an English court ought not to recognize*" (emphasis added).

[84] *Soleimany v Soleimany* [1999] QB 785, (CA). However, in *Hebei Import and Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKCFAR 111 (CFA), Litton PJ said that an award must be "so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook its objection" in order to refuse enforcement.

[85] See *obiter dicta* in *Soleimany v Soleimany*, including discussion of the English court's possible attitude to judgments from jurisdictions which take a more relaxed view of illegality than the English courts.

[86] *Kahler v Midland Bank* [1950] AC 24; *Zivnostenka Banka National Corp v Frankman* [1950] AC 57, and *Re Helbert Wagg & Co Ltd* [1956] Ch 323.

[87] *Foster v Driscoll* [1929] 1 KB 470.

[88] *Regazzoni v KC Sethia* [1958] AC 301.

[89] *Ibid., per* Lord Simonds (*obiter*): "It does not follow from the fact that today the court will not enforce a revenue law at the suit of a foreign state that today it will enforce a contract which requires the doing of an act in a foreign country which violates the revenue law of that country. The two things are not complementary or co-extensive." In neither *Foster v Driscoll*, above, nor *Regazzoni v KC Sethia*, was a revenue law directly in issue. Some eighteenth-and nineteenth-century authorities cited in *Regazzoni v KC Sethia* suggest that a contract will be enforced notwithstanding that performance will inevitably violate a foreign revenue law, but public policy may have moved on since then. In *Kahler*, Lord Normand appeared to regard the distinction between revenue laws and other laws as irrelevant, though in that case the proper law of the contract was that of the place whose exchange laws rendered performance illegal. In *Mackender v Feldia AG* [1967] 2 QB 590, 601, however, Diplock LJ said that "[t]he exception [to the rule in *Ralli Bros*], the precise scope of which is unsettled and need not be determined in the present case, is where the illegality is a breach of a revenue or fiscal law of a foreign State."

[90] The decision of McNair J in *Rossano v Manufacturers Life Assurance Co Ltd* [1963] 2 QB 352 illustrates the distinction: an English court would not allow an Egyptian garnishee order obtained by the Egyptian authorities over the proceeds of an insurance policy to secure payment of tax to be set up as a defence by the insurance company when sued by its insured, since to do so would be to enforce a foreign revenue law indirectly.

[91] *Per* Lord Reid in *Kahler v Midland Bank* [1950] AC 24: "The law of England will not require an act to be done in performance of an English contract if such act would be unlawful under English law or if it would be unlawful by the law of the country in which the act has to be done, but I know of no authority for the proposition that an English court will not enforce performance in England by a foreigner of an act which is lawful in England merely because the law of the foreigner's country prohibits him from doing that act in England." A practical illustration of a case in which a contractual action succeeded in such circumstances is *Rossano v Manufacturers Life Assurance Co Ltd*. The illegality arose from Egyptian exchange control legislation. Notwithstanding that the contract was made in Egypt between an Egyptian national, resident in Egypt, with the Egyptian office of a Canadian company, it was enforced by McNair J because (i) the proper law of the contract was Ontario law, applying the closest and most real connection test, so the *Kahler* principle did not apply; (ii) performance in Egypt was not *required*, so the *Ralli* principle did not apply.

8. Eighthly, whilst the public policy (as opposed to positive illegality) of a foreign state will not in itself lead a Hong Kong court to deny enforcement of a Hong Kong law contract, it seems that the Hong Kong courts will not enforce a Hong Kong law contract which is to be[92] performed abroad where (i) it relates to an adventure which is contrary to a head of Hong Kong public policy which is founded on general principles of morality and (ii) the same public policy applies in the country of performance so that the agreement would not be enforceable under the law of that country. In such a case, international comity combines with Hong Kong domestic public policy to militate against enforcement.[93]

(iii) *Appeals against decisions as to the proper law of a contract*

The House of Lords has indicated a reluctance to interfere with the decision of arbitrators as to the proper law of a contract.[94] The English Court of Appeal has expressed a similar principle as regards appeals from a judge.[95] 5.013

[92] It is submitted that the distinctions as to agreement and purpose made in the three foregoing principles in relation to illegality are of equal validity in connection with public policy.

[93] *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448, (HC) Phillips J, followed in *Westacre Inv Inc v Jugoimport-SDPR Holding Co Ltd* [2000] QB 288,(CA); *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 All ER (Comm) 146, English High Court, Timothy Walker J; *Tekron Resources Ltd v Guinea Investment Co Ltd* [2003] EWHC 2577, English High Court, Jack J. All four cases involved contracts for the purchase of personal influence; *Lemenda* and *Tekron* concerned actions brought to enforce the contracts directly; *Westacre* and *Omnium* concerned the enforcement of Swiss arbitration awards upon the contracts. The following statement of principle by Colman J at first instance in *Westacre* is of note: "Outside the field of such universally condemned international activities as terrorism, drug-trafficking, prostitution and paedophilia, it is difficult to see why anything short of corruption or fraud in international commerce should invite the attention of English public policy in relation to contracts which are not performed within the jurisdiction of the English courts. That it should be the policy of the English courts to deter the exercise of personal influence short of corruption and fraud to obtain valuable contracts in foreign countries in which such activity is not contrary to public policy by refusing to enforce contracts would involve an unjustifiable in-road into the principle of *pacta sunt servanda*. It is therefore the additional factor of international comity which led to the conclusion that the contract in the *Lemenda Trading* case should not be enforced" ([1998] 4 All ER 570, 599).

[94] "I venture to think that a question of the proper law of a commercial contract ought to be regarded as primarily a matter to be found by arbitrators; for, after all, the question is one of estimating competing factors in the light of commercial intention. As was said long ago 'the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract' (*Jacobs v Credit Lyonnais* ((1884) 12 QBD 589, 601)). The expertise of City of London arbitrators (which motivates the use of London arbitration clauses) suggests that these considerations are best left to them and the proposition that this being a 'matter of law' is something better left to the courts is one the correctness of which is open on the record. If, for uniformity or otherwise, supervision by the courts is sometimes required, I cannot but think that, otherwise than in exceptional cases by leave, decision by the commercial judge should end the matter." *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572, *per* Lord Wilberforce at 600.

[95] *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34, (CA) *per* Lord Denning MR. However, prominent appeals against proper law decisions have been successfully pursued, for example, in *The Al Wahab* [1984] AC 50 and *Armar Shipping Co Ltd v Caisse Algerienne d'Assurance et de Reassurance The Armar* [1981] 1 WLR 207; and reviewed in *Macmillan Inc v Bishopsgate Inv Trust Plc (No.3)* [1996] 1 WLR 387, and *Monterosso Shipping Co Ltd v International Transport Workers' Federation* [1982] 3 All ER 841.

(iv) *No* renvoi

5.014 There is no place in the Hong Kong conflict of laws for applying *renvoi* in relation to contracts. One sometimes encounters express exclusions of *renvoi* in choice of law clauses, particularly in contracts drafted using American precedents, e.g.

> *"This contract shall be governed by and construed in accordance with the laws of Ruritania, excluding the rules and principles of the Ruritanian conflict of laws."*

It is not usual in Hong Kong practice, at the time of writing, to include such language, but it does no harm.

(v) *Agency*

5.015 Agency raises two choice of law issues. The first concerns the governing law of the principal-agent relationship: it seems clear that this is to be determined simply by applying the closest and most real connection principle in the ordinary way: an agency relationship is, in effect, regarded as contractual irrespective of its characterisation under any relevant applicable law.[96] This law governs, amongst other things, the question of the agent's authority as between agent and principal. The second issue concerns a third party's ability to rely upon the agent's authority: this, it seems clear, is a matter for the law of the contract (or putative contract) between the third party and the principal.[97] This difference between the laws governing the two issues is no accident but rather a practical and necessary distinction arising out of the requirements of two very different relationships. It would be obviously wrong for a third party's right to rely upon an agent's apparent authority to depend on the governing law of the contract between agent and principal as to which the third party will, *ex hypothesi*, not have a complete understanding, given that the agent's authority is disputed.[98]

(d) Long-arm jurisdiction in contractual cases

(i) *Relevant heads of Order 11*

5.016 If service within Hong Kong cannot be effected,[99] then long-arm jurisdiction in respect of a contractual claim[100] may be established under one of the following heads of O.11, r.1(1) of the Rules of the High Court. In condensed summary, the relevant heads are:

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[96] For examples from the English case law, see *Arnott v Redfern* (1825) 2 C&P 88, *Great Northern Railway v Laing* (1848) 10 D 1408, *Maspons v Mildred* (1882) 9 QBD 530, *R v Doutre* (1884) 9 App Case 745, *Re Maugham* (1885) 2 TLR 115, *Re Anglo-Austrian Bank* [1920] 1 Ch 69, *Prager v Blatspiel, Stamp & Heacock Ltd* [1924] 1 KB 566, *SCF Finance Co Ltd v Masri (No.2)* [1987] QB 1002, *JH Rayner (Mincing Lane) Ltd v Department of Trade & Industry* [1989] Ch 72 (CA).

[96] *Maspons v Mildred* (1882) 9 QBD 530, Chatenay *v Brazilian Submarine Telegraph Co Ltd* [1891] 1 QB 79, *Presentaciones Musicales SA v Secunda* [1994] Ch 271, *Merrill Lynch Capital Services Inc v Municipality of Piraeus* [1997] CLC 1214, *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2004] EWHC 472 (Comm), Cresswell J (holding that the same principle applies to governmental principals as to private principals).

[98] For a recent Hong Kong case considering apparent authority in the conflict of laws context, see *Deyi Investment Ltd v Macjin Info-com Tek Ltd* [2016] 5 HKLRD 137.

[99] See Chapter 3.

[100] "Contract" in this context, as in the context of the Limitation Ordinance, has been held, for good practical reasons but with great linguistic artificiality, to include "quasi-contracts". Since such claims are restitutionary rather than contractual in nature, they are dealt with in para.5.144 below.

1. *Head (d).*[101] A claim brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which:
   (i) was made in Hong Kong;
   (ii) was made by or through an agent trading or residing within Hong Kong on behalf of a principal trading or residing out of Hong Kong;
   (iii) is by its terms, or by implication, governed by Hong Kong law; or
   (iv) contains a term to the effect that the Hong Kong court shall have jurisdiction to hear and determine any action in respect of the contract.
2. *Head (e).*[102] A claim in respect of a breach of contract committed in Hong Kong, irrespective of where the contract was made and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction.
3. *Head (h).*[103] A claim to construe, rectify, set aside or enforce a deed or contract affecting Hong Kong land.
4. *Head (i).*[104] A claim for a debt secured over land or other property in Hong Kong.

5.017 The grounds unrelated to subject matter[105] may of course also provide a basis for obtaining leave to serve out in a particular case. In an action involving more than one plaintiff against defendants out of the jurisdiction, each plaintiff must show that each claims against each defendant falls within O.11.[106]

(ii) *Head (d): claims which affect a contract or are in respect of its breach*[107]

5.018 Head (d) consists of four main alternative grounds of jurisdiction, numbered (i) to (iv), each of which requires separate analysis. In addition, the applicant must also demonstrate, to the good arguable case standard, that the elements set out in the introductory words of head (d) are met.[108] The introductory words boil down to two alternatives:

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[101] See paras.5.018–5.032.

[102] See paras.5.033–5.036.

[103] See para.5.037.

[104] See para.5.038.

[105] I.e. heads (a) (defendant domiciled/ordinarily resident in Hong Kong), (b) (injunction sought in respect of conduct in Hong Kong), (c) (necessary or proper party). See paras.3.004–3.070 for discussion of these.

[106] The principle is discussed in Chapter 3. For an example in the present context see e.g. *Inverness Corp v Magic Dreams Cosmetica Infantil SL* [1997] HKLRD 1377 (CFI), Yeung J.

[107] RHC O.11 r.1(1)(d).

[108] See Chapter 3. Thus, for example, under head (d)(i), the applicant must demonstrate, to the good arguable case standard, "not merely that, if the contract existed, it was made within the jurisdiction, but that (1) there was a contract, and (2) such contract was made within the jurisdiction" (*Seaconsar (Far East) Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, (HL), *per* Lord Goff at 454).

1. First alternative: that the claim "affects" a contract falling within categories (i) to (iv).[109]

2. Second alternative: that the claim is "to obtain relief in respect of the breach of" a contract falling within categories (i) to (iv).[110]

Both alternatives require careful analysis in borderline cases.

(iii) *Head (d) - first alternative: claims which affect a contract*

5.019 The words "enforce", "rescind", "dissolve", "annul" give little difficulty. The precise scope of the residual words "otherwise affect" has, however, led to differences of opinion in certain situations considered below. These words

> *"are clearly intended, together with the references to breaches of contract, to make a comprehensive reference to contractual claims. The language discloses no intention to exclude any category of contractual claim nor does the policy of Order 11 itself. The restrictive part of [head (d)] is that which follows [i.e. grounds (i) to (iv)] and lays down criteria which the relevant contract must satisfy… [T]he relevant words in [head (d)] are to be construed widely and… claims for a declaration, whether positive or negative, in relation to the validity, status, or enforceability of a contract fall within the category of claims covered by [head (d)]."*[111]

The following specific points arise:

1. *Where plaintiff claims a declaration that a contract is valid.* Such a claim is clearly within the rule.[112]

2. *Where plaintiff claims a negative declaration that it has no liability to defendant under the contract in question.* Such a claim is clearly within the rule.[113]

3. *Where plaintiff contends that the relevant contract has come to an end.* It has been held in England at first instance by an acknowledged authority,[114] whose decision was later endorsed by the House of Lords,[115] that such a claim is within the rule.[116]

[109] The full wording is: "the claim is brought to enforce, rescind, dissolve, annul or otherwise affect… a contract…" The controlling concept is clearly "affect".

[110] Full wording: "the claim is brought… to recover damages or to obtain other relief in respect of the breach of a contract…".

[111] *Gulf Bank KSC v Mitsubishi Heavy Industries* [1994] 1 Lloyd's Rep 323, (HC), *per* Hobhouse J, expanding upon similar opinions expressed by Kerr J in *BP Exploration (Libya) v Hunt* [1976] 1 WLR 788.

[112] "Enforce" encompasses seeking a declaration of validity: *Gulf Bank KSC v Mitsubishi Heavy Industries.*

[113] In *Transamerica Occidental Life Assurance Co Ltd v King Sound Industry Co Ltd* [2005] 1 HKLRD 125, the defendant contested the point but Stone J decided it in the plaintiff's favour.

[114] *BP Exploration (Libya) v Hunt*, above, in which Kerr J held that the words "otherwise affect" "are very wide; indeed, almost as wide as they can be", rejecting the defendant's submission that "the court is dealing with an ex-contract, a corpse and that there is therefore no longer any contract which can be 'affected'".

[115] In *Spiliada Maritime Corp v Cansulex Ltd, The Spiliada* [1987] AC 460, Lord Goff referred to the *BP Exploration (Libya) v Hunt* and said "in my opinion, Kerr J rightly granted leave to serve proceedings on Mr Hunt out of the jurisdiction". *BP* was a case of alleged discharge by frustration. In *Gulf Bank KSC v Mitsubishi Heavy Industries.* Hobhouse J rejected an invitation to depart from *BP*. In *Lungershausen v Dillon* (unrep., HCMP 1751/2002, 24 July 2003, CFI), the defendant eventually conceded the point: para.17 of Deputy Judge Muttrie's judgment (defendant's appeal on other grounds subsequently dismissed by the Court of Appeal: [2004] 1 HKLRD 881).

[116] In *Lungershausen v Dillon*, the defendant conceded the point: para.17 of Deputy Judge Muttrie's judgment.

4. *Where plaintiff contends that the relevant contract has been rescinded ab initio.* It has also been held at first instance in England that such a claim is covered.[117] It is suggested that this should be followed in Hong Kong.

5. *Where plaintiff contends that the alleged contract never came into existence.* There is no binding authority on this question in Hong Kong, but there is English first instance authority that the rule does not cover a claim for declaratory relief that a contract alleged by the defendant never came into being in the first place:[118] an understandable conceptual distinction, but an over-fine one in this context, it is suggested. The distinction between voidness and voidability is often a somewhat technical one[119] having no obvious relevance to the question of whether the court should assert jurisdiction. Moreover, if the plaintiff can show a good arguable case that the defendant has alleged a contract which, if made, would be within head (d), there would appear no good reason of substance to deny jurisdiction at the threshold: the doctrine of *forum non conveniens* is a more suitable tool for preventing abuses. It is for these reasons submitted that the word "contract" should be taken to encompass a contract alleged by either party, not merely a contract alleged by the plaintiff.

6. *Related contract cases.* Assume that the plaintiff and defendant have two contracts, X and Y, and that the plaintiff wishes to sue for breach of X, but only Y can be brought directly within one of the categories (i) to (iv) of head (d). The English Court of Appeal has held that if the alleged breach of X "directly" affects the performance of Y, then jurisdiction may be established.[120] That court was also of the *obiter* opinion that such cases are to be distinguished from ones in which the breach of X merely has an "indirect consequence or repercussion" upon Y.[121] Whilst it is submitted that the *ratio* of this decision should be followed

[117] *Insurance Corp of Ireland v Strombus Int'l Insurance Co Ltd* [1985] 2 Lloyd's Rep 138, in which the English Court of Appeal held that it "undoubtedly" had jurisdiction but that there were good discretionary reasons for declining to exercise it, having regard to the negative nature of the relief sought.

[118] *Finnish Marine Insurance Co Ltd v Protective National Insurance Co* [1990] 1 QB 1078, in which Deputy Judge Hamilton followed *Cia Naviera Micro SA v Shipley Int'l Inc, The Parouth* [1982] 2 Lloyd's Rep 351, (CA). The learned deputy judge in Finnish Marine recorded his dissatisfaction at his conclusion that the matter was outside head (d) in a case where he considered that England was plainly the forum conveniens. Contrast the view of Hobhouse J in Gulf Bank KSC, that head (d) encompasses "claims for a declaration, whether positive or negative, in relation to the validity… of a contract".

[119] Indeed, in the case of pre-contractual mistakes, the distinction can be not only technical but also significantly uncertain even in modern domestic Hong Kong law.

[120] *EF Hutton & Co (London) Ltd v Mofarrij* [1989] 1 WLR 488. Kerr LJ appears to have been influenced to give head (d) a relatively liberal interpretation by the then recent decision in *Spiliada*: "…in my view the plaintiffs just get home… It should certainly be a source of satisfaction that they can do so, particularly in the light of what counsel for the plaintiffs called 'the post-*Spiliada* world'. There can be no doubt, taking the case as a whole, that this country is the appropriate forum, and the only appropriate forum, for resolving the disputes between the plaintiffs and the defendant. It would be lamentable if the action on [contract Y] had to be brought here and, as counsel for the defendant submits, the action on [contract X] had to be brought in Greece, even though the issues and the defences open to the defendant would be the same in both places". *EF Hutton* was followed by Godfrey J in *United Links International Ltd v The Price Co* [1994] 2 HKC 617. In both *EF Hutton* and *United Links*, X was in fact a cheque allegedly given outside the jurisdiction in respect of liabilities arising under Y. The direct effect of the breach of the former on performance of the latter was therefore obvious. Indeed, it was noted in *EF Hutton* that a valid and simpler analysis is that, at least as a matter of English domestic law, it must have been an implied term of contract Y that the cheque would be honoured if it was properly presented.

[121] *Ibid.*, *per* Kerr LJ, also placing reliance on the fact that the claims in the case "fall manifestly within the spirit of O. 11" and gave some examples of hypothetical "two contract" cases which would fall outside. Ewbank J's short concurring judgment also suggests the need for a limit by stating that "if the claim on [contract X] succeeds, the claim on [contract Y] will be substantially and obviously affected". Strictly these views are *obiter*, although they can be expected to be persuasive before a Hong Kong court.

1. Introduction

This chapter discusses contexts in which a Hong Kong court will, to a greater or lesser extent, regard the law as following a person, rather than following the particular transaction in which that person is engaged. A certain tension arises from the wish, on the one hand, to respect the fact that people naturally consider their personal affairs to be governed by their "home" law, irrespective of where in the world they may be at a particular time, whilst on the other hand recognizing that the greater the scope of the personal law, the greater the prospect of bringing about juridical chaos. Thus, for example, some matters such as capacity to marry or the existence of a legal personality are truly matters for the personal law whereas matters such as capacity to contract are necessarily affected by the law with which the contract is objectively connected, rather than purely by the individual parties' personal laws. Another theme of significance in this chapter is that the law has traditionally put a high premium on simplicity in family law litigation. To give an important procedural example, it has long been established that a matrimonial court (unlike an ordinary civil court) always applies only its own laws as to divorce and ancillary relief, irrespective of the legal system with which the parties and the marriage have their closest connections.[1] The legalistic subtleties of choice of law[2] are largely[3] excluded from that particular procedural context. An unintended consequence of this, however, is that it gives a motivation for forum shopping, the judicial response to which has been to demonstrate an increased willingness in recent years to exercise control over the exercise of jurisdiction in divorce cases.[4] **7.001**

2. Personal Connecting Factors

(a) Introduction

Notions of personal linkage to a particular place are of great importance in the context of the issues discussed in this chapter and, to an extent, in the context of issues discussed in other chapters. Different personal connecting factors are of relevance in different contexts. The main ones are as follows. **7.002**

(i) *Domicile*

Domicile (or domicil) is, at heart, a simple notion: **7.003**

> *"Although many varieties of expression have been used, I believe the idea of domicil may be quite adequately expressed by the phrase – Was the place intended to be the permanent home?"*[5]

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1 See para.7.107.
2 See Chapter 2.
3 Choice of law is, however, relevant as to some questions in divorce proceedings e.g. validity of marriage.
4 See para.7.105.
5 *Winans v A-G* [1904] AC 287 (HL) *per* Lord Halsbury LC. *Winans* was a tax case, liability for English legacy duty at the relevant time being dependent on whether the testator died domiciled in England.

Although domicile is now largely defined in detail by statute in Hong Kong, an old judicial encapsulation of it – "Was the place intended to be the permanent home?" – still serves as a good introduction. This notion – which may or may not coincide with an individual's place of residence or nationality – remains of considerable significance in the Hong Kong conflict of laws.

(ii) *Residence*

7.004 Residence on its own (as opposed to "ordinary residence" or "habitual residence") has a rather limited relevance in the conflict of laws.[6] It seems that it requires more than a fleeting presence, but considerably less than domicile, ordinary residence or habitual residence. In connection with a statutory provision requiring that a party be resident in Hong Kong,[7] the Court of Appeal has held that temporarily staying in a hotel is sufficient.[8]

(iii) *Ordinary residence*

7.005 Ordinary residence is a much less exacting notion than domicile, but connotes an element of "settled purposes" which makes it somewhat harder to demonstrate than mere residence. It is of significance in various Hong Kong conflict of laws contexts: see paras.7.015–7.016 for further discussion.

(iv) *Habitual residence*

7.006 Habitual residence is of great importance in child abduction cases, and of some significance in certain other conflict of laws contexts. Whilst there appears to be a conceptual difference between "habitual residence" and "ordinary residence" it seems unlikely to be significant in the great majority of cases. See paras.7.018–7.020 for further discussion.

The above connecting factors are now discussed in more detail.

(It should be noted that *nationality* generally has no direct relevance in the Hong Kong conflict of laws,[9] in contrast to the position under certain other jurisdictions' conflict rules. It may also be noted that other personal connecting factors such as "substantial connection" come into play in certain contexts: see paras.7.086, 7.089 and 7.099).

(b) Domicile

7.007 When the first edition of this work was published, the determination of domicile in Hong Kong was predominantly based on case law. Since then, the Domicile Ordinance (Cap.596) has

[6] See e.g. para.7.103 (residence as basis of matrimonial jurisdiction) and para.9.060 (residence in connection with the statutory regime for enforcement of foreign judgments).

[7] Matrimonial Proceedings and Property Ordinance (Cap.192) s.15(1), which permits either party to a maintenance agreement to apply to court for a varying order where "each of the parties to the agreement is for the time being either domiciled or resident in Hong Kong."

[8] *de Lasala v de Lasala* (unrep., CACV 6/1976, 17 Dec 1976, CA).

[9] Indirectly, it may be one factor amongst others relevant to matters such as domicile and "closest and most real connection".

substantially modified the position as to individuals, following recommendations made by the Law Reform Commission.[10] The main features of the new regime are as follows:

1. The basic rule is that the domicile of an adult of full capacity depends upon presence in a given place coupled with an intention to make that place one's home. This rule is broadly similar to that at common law, but there are some differences of detail, discussed below.
2. As at common law:
   - everyone must have one,[11] and only one,[12] domicile, for a given purpose at a given time;[13]
   - the determination of domicile by the Hong Kong courts is a matter of Hong Kong law only.[14]
3. The standard of proof required for all facts relating to domicile is the balance of probabilities.[15]
4. For children and incapacitated adults, the Ordinance provides for the place of domicile to be that with which the person has his or her closest connection. This broad principle replaces the more mechanistic common law rules.[16]
5. The common law concepts of "domicile of origin" and "domicile of dependency" are abolished by the Ordinance. However, certain presumptions have been introduced to improve the predictability of application of the broad principle of closest connection.

(i) *Temporal application of the old and new rules on domicile*

7.008 The Ordinance provides that:

1. The domicile that an individual had at a time before 1 March 2009 is to be determined as if the Ordinance had not been enacted (s.13).

[10] See the Consultation Paper of March 2004 and Report of April 2005, both available at www.hkreform.gov.hk.

[11] Domicile Ordinance s.3(1).

[12] *Ibid.*, s.3(2).

[13] Also the position at common law: *Udny v Udny* (1869) LR 1 Sc & Div 441, *Bell v Kennedy* (1868) LR 1 Sc & Div 307, *Re Craignish* [1892] 3 Ch 180.

[14] Domicile Ordinance s.3(3). Also the position at common law: *Re Martin* [1900] P 211 (CA), accepted by the Law Reform Commission as representing the common law of Hong Kong (April 2005 Report, para.1.9).

[15] Domicile Ordinance s.12. At common law, there was some authority in favour of a higher standard, though it was suggested in the first edition of this work (para.7.015) that the better view was that the standard of proof at common law was the balance of probabilities in all cases, following *In the Estate of Fuld (No.3)* [1968] P 675, *Buswell v IRC* [1974] 1631. The Law Reform Commission noted that the position at common law was uncertain (April 2005 Report, para.1.34).

[16] See e.g. p 103 of the Report of April 2005: "Another major change is that relating to the domicile of children. The existing rules are essentially based on the Victorian idea of the father being the *paterfamilias*, and we believe that our proposals would more closely reflect modern realities. Lastly, the abolition of the concept of domicile of origin may also impact on some people's domicile. It is worth mentioning that the formation of the concept and its special tenacity were influenced by the desire of those resident in colonies overseas at the height of the British Empire more than a century ago to have their private and family life governed by the law of their homeland. In a different age, we question the validity of this special bias in favour of a person's first domicile, especially in the light of greatly increased mobility. We believe that the abolition of domicile of origin would make the domiciliary rules more in tune with the modern world."

2. The domicile that an individual has on or after 1 March 2009 is to be determined as if the Ordinance (other than s.13) had always been in force.[17]

3. The common law rules survive for the purpose of determining domicile after 1 March 2009 except in so far as inconsistent with Ordinance.[18] The reality is, however, that the Ordinance largely replaces the common law.[19]

An example may help. Assume that the issue to be determined arises in 2014 and is the domicile of a woman, X. X's domicile in 2008 is to be determined by reference solely to the common law rules. However, her domicile in 2011 is to determined by reference to the post-2009 regime. In practice, the statute will address most issues of relevance, but there will still be a certain number of cases in which the pre-2009 rules are relevant.

Given that pre-2009 domiciles are still relevant for some purposes, the following text first sets out the post-2009 largely (statutory) rules on each topic, followed by the pre-2009 largely (common law) rules.

(ii) *Domicile of children*

Post-2009 rules

7.009 A child[20] is domiciled in the country or territory[21] with which he or she is most closely connected.[22] Two presumptions apply:

1. Where the child's parents[23] are domiciled in the same country or territory and the child has his home with either or both of them, it is presumed that the child is most closely connected with that country or territory.

2. Where the parents are not domiciled in the same country or territory and the child has his home with one of them, but not with the other, it is presumed that the child is most closely connected with the country or territory in which the parent with whom he or she lives is domiciled.

No presumption applies if the two parents are domiciled in different places but the child lives with both.

[17] Domicile Ordinance s.14(1).

[18] Domicile Ordinance s.14(2)(a). Section 14(3) provides a non-exhaustive list of common law rules deemed inconsistent with the Ordinance. Section 14(2)(b) provides for the repeal of s.11C(2) of the Matrimonial Causes Ordinance (Cap.179).

[19] See p 96, para.4.188 of the April 2005 Report, in which the Commission indicated that it had reservations as to the desirability of an entirely statutory regime, but nevertheless considered that "the legislation should be as comprehensive as possible."

[20] Defined as "an individual who has not attained the age of 18 (whether or not the individual is married under the law of any country or territory and whether or not the individual is a parent)."

[21] "Country or territory" means "a country or territory that has its own system of law" at the relevant time: s.2(3).

[22] Domicile Ordinance s.4(1).

[23] Defined as meaning the natural parents (whether or not married to each other), parents by adoption or stepparents: s.2(1). For that purpose, adoption includes an adoption recognized as valid by the law of Hong Kong as well as an adoption under the Adoption Ordinance (Cap.290): s.2(2)(a). Sections 2(2)(b) and (c) clarify that, where a child has been adopted, the adoptive parents are the "parents" for the purpose of the Domicile Ordinance.

Pre-2009 rules

7.010 In so far as it is necessary to determine the domicile of a child before 1 March 2009, the applicable rules are more complex:

1. At birth, the child is deemed to have a domicile of origin. This may subsequently change to a domicile of dependency.

2. As to domicile of origin:

   - The domicile of origin of a legitimate child born during the father's lifetime is deemed to be the father's domicile at the time of the child's birth.[24] Where the foreign legal system makes no distinction between legitimate and illegitimate children, a child born to unmarried parents both domiciled in that place will be considered legitimate by the Hong Kong courts.[25]

   - The domicile of origin of an illegitimate child is deemed to be the mother's domicile at the time of the child's birth.[26]

   - The position of legitimate children born after the father's death, or after the parents' divorce, is unclear, but it seems most consistent with the traditional principles to treat them as having their mother's domicile at the time of birth.[27]

   - If the relevant parent's domicile at the time of birth is impossible to determine, a child's domicile of origin will, it seems, be deemed to be the first place where the child is known to have been.[28]

   - A child legitimated by the subsequent marriage of the parents may acquire a domicile of dependency thereby, but not a replacement domicile of origin.[29]

   - The position as regards adoptive and surrogate children was unresolved at common law, but it was suggested in the first edition of this work[30] that the best approach was for the relevant changes in deemed parentage to affect domicile of dependency rather than domicile of origin.

(iii) *Domicile of adults of full capacity*

Post-2009 rules

7.011 The primary rule is that an adult[31] acquires a new domicile in a country or territory if he or she is present there and intends to make a home there for an indefinite period.[32] The Hong Kong courts have enumerated the following list of factors which may be taken into account in

[24] *Udny v Udny* (1869) LR 1 Sc & Div 441 (HL).

[25] *Re Sit Yuk Cheung* (unrep., HCMP 40/1990, 24 Apr 1990, CFI), Kaplan J. The relevant place in that case was Mainland China. The common law position applicable where only one parent was domiciled in a jurisdiction which made no distinction between legitimacy and illegitimacy (e.g. Hong Kong domiciled father not married to Mainland China domiciled mother) was unresolved.

[26] *Udny v Udny*, *Re Grove* (1888) 40 Ch D 216 (CA).

[27] In reality, such a child is likely to have his or her closest connection with the mother's domicile.

[28] *Chan Chung Hing v Wong Kim Wah* [1986] HKLRD 315 (CFI) Deputy Judge Saied, *Re McKenzie* (1951) 51 SRNSW 293.

[29] This is suggested as a matter of principle. See also *Henderson v Henderson* [1967] P 77 (HC) Simon P.

[30] See para.7.009 of the first edition of this book for more detailed discussion.

[31] That is, an individual of 18 years or older: Domicile Ordinance s.2(1).

[32] Domicile Ordinance s.5(2).

determining an individual's intention whether to make a home in a particular place: (1) length of residence; (2) condition of residence, i.e. whether living in purchased property, leased property, or in furnished lodgings or a hotel; (3) marriage with a local partner; (4) whereabouts of the person's family; (5) business interests; (6) whereabouts of personal belongings; (7) whereabouts of property and investments; (8) the fact of naturalization; (9) decisions made as to the nationality of children; (10) education of children; (11) membership of clubs or religious associations; (12) place of work; (13) relationship between a person and his/her family.[33]

7.012 The lawfulness of the presence is something to be taken into account in this context, but the fact that an individual's presence in a place is unlawful does not preclude a determination that domicile has been acquired in that place.[34] By way of exception, however, an adult does not acquire a presence *in Hong Kong* unless he or she is *lawfully* present there,[35] though an exception from this exception[36] provides that, where strict adherence to the requirement of lawfulness would result in an injustice, an adult may acquire a domicile in Hong Kong even though his or her presence there is unlawful.[37]

7.013 A subsidiary rule is that, upon becoming an adult, an individual retains the domicile that he or she had immediately before becoming an adult, unless and until that domicile changes by application of the above primary rule.

7.014 Four points should be noted.

1. First, though the Ordinance itself does not expressly say so, the Law Reform Commission summarised the pre-2009 case law on intention and made clear that it should remain relevant in applying the statutory concept of intention:

> *"Under the existing Hong Kong law, declarations as to intention are considered in determining a change of domicile, but they must be weighed in terms of the persons to whom, the purposes for which, and the circumstances in which, they are made. They must further be supported and carried into effect by conduct in line with the declared expressions.*[38] *Hence, the extent to which the courts have relied on declarations of intention in deciding a person's domicile in reported cases has varied. The courts are usually suspicious of declarations which refer in terms to "domicile" because the declarant is thought unlikely to have understood the concept…*
>
> *[A] declaration on domicile should not be conclusive, but should be only one of the factors to be considered. The court should also look at the conduct of the person concerned and all the circumstances, and should not attach undue weight to a declaration. The existing law should be maintained."*[39]

2. The second point is that the intention required by the Ordinance – "to make a home there for an indefinite period" – is expressed differently from the test at common law – "to settle there permanently or indefinitely" – but the Law Reform Commission made clear that the intention of the new phrase was to reflect the substance of the common law authorities.[40]

3. The third point is that the statutory requirement of "presence" may be marginally easier[41] to show than the pre-2009 common law requirement of "actual residence", in that it is now clear that physical presence coupled with an intention to make the place one's home is enough, without having to show the additional common law element of presence as an inhabitant rather than as a casual traveller.

4. The fourth point to note is that the intention in question must exist at a time when the individual is physically present in the place alleged to be his or her new domicile. This is the same as the position at common law.

7.015 Some subtle differences between the pre-2009 and post-2009 positions are summarised above. There are three more substantial differences.

1. The first is that, at common law, a married woman's domicile always followed that of her husband. This "last barbarous relic of a wife's servitude"[42] applied even in the event of separation. That rule was abolished in Hong Kong in 1996 for the purpose of the matrimonial jurisdiction,[43] but may survive[44] for other purposes in so far as it is necessary to determine a married woman's domicile prior to 1 March 2009.

2. The second difference is that, at common law, the position appeared to be that a domicile of choice or dependency ceased when the individual ceased to have the requisite intention or state of dependency, with the individual then reverting to his or her domicile of origin, however artificial that might be. Under the Domicile Ordinance, a different rule is introduced, that "[w]here an individual is domiciled in a country or territory as determined in accordance with this Ordinance, he continues to be so domiciled until he acquires another domicile."[45]

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33 *Y v W* (unrep. FCMC 1847/2011, 11 August 2011), DC, HHJ Chu, approved by the Court of Appeal in *W v C* [2013] 2 HKLRD 592. These categories are derived from *Dicey Morris & Collins*, 14th edition, 6.049. For further recent consideration by the Court of Appeal see *ZC v CN* [2014] 5 HKLRD 43.

34 Domicile Ordinance, s.7.

35 Domicile Ordinance, s.6(1). Lawfulness is presumed unless the contrary is proven: s.6(2).

36 Domicile Ordinance, s.6(3).

37 The Hong Kong rule on this issue, now enshrined in statute, follows a subsidiary ground for the decision of Baker P on the extreme facts of *Puttick v A-G* [1979] 3 WLR 542, a ground overruled by the English Court of Appeal in *Mark v Mark* [2004] 3 WLR 631. As pointed out in *Mark v Mark* and by Pilkington, *Illegal residence and the acquisition of a domicile of choice* (1984) 33 ICLQ 885, domicile is simply a status not a benefit, and it seems inappropriate to treat lawfulness of residence in Hong Kong differently from the issue of lawfulness elsewhere in the world. It remains to be seen to what extent practice under s.6(3) will come to approximate the approach in *Mark v Mark*.

38 This insistence on "conduct" in addition to mere intention was perhaps most famously expressed in the Scottish case of *Ross v Ross* [1930] AC 1 (HL), *per* Lord Buckmaster ("conduct and action consistent with the declared expression.")

39 April 2005 report, paras.4.106 and 4.108, citing *Ross v Ross* [1930] AC 1 at 6-7 and *Re Steer* (1858) 3 H & N 594.

40 April 2005 report, para.4.105, citing with approval Lyons, *The Reform of the Law of Domicile* [1993] BTR 42, 50, and also emphasising a wish to avoid confusion with the Immigration Ordinance (Cap.115) concept of "settling."

41 The difference does not appear to be substantial, as acknowledged at para.1.23 of the April 2005 Report.

42 *Gray v Formosa* [1962] 3 WLR 1246 (CA) *per* Lord Denning MR.

43 Matrimonial Causes Ordinance (Cap.179) s.11C(2), which provided for a married woman's domicile to be determined "by reference to the same factors as in the case of any other individual capable for having an independent domicile." Section 11C(2) was repealed prospectively by the Domicile Ordinance, being superseded. The Law Reform Commission considered backdating the 2009 reforms to 1996 but decided to recommend against this (April 2005 Report, para.4.133). In practice, it will be an unusual case in which there is a difference in outcome under s.11C(2) and under the Domicile Ordinance.

44 The Law Reform Commission considered that the old rule could not be said to have been invalidated by the Sex Discrimination Ordinance (Cap.480) (April 2005 Report, para.4.131) but thought that it might be contrary to art.8 of the Basic Law (equality before the law) (*ibid.*, para.4.132).

45 Domicile Ordinance s.9, which goes on to specify that this is so whether the new domicile is acquired "under section 4, 5, 8 or 10."

3. The third difference is that the common law in Hong Kong seems to have been that, where an individual lived in a federal or composite country without deciding in which territory of that country to settle indefinitely, his domicile of origin revived and he or she did not acquire a new domicile of choice in any territory of that country.[46] The Domicile Ordinance changes this by providing that, where an adult is present in a country comprising two or more territories, and intends to make a home in that country for an indefinite period, but the application of the other provisions of the Ordinance does not show that he or she is domiciled in any particular territory in that country, then he or she is to be treated as domiciled in the territory with which he or she is for the time being most closely connected.[47]

(iv) *Domicile of incapacitated adults*

Pre-2009 rules

7.016 The common law position seems to have been that a person unable to form the requisite intention (i) if a child, had a domicile of origin or dependency acquired in the usual way (see para.7.010) (ii) if an adult, retained the domicile (be it of origin, dependency or choice) which he or she had at the time of becoming an adult or, if later, at the time of becoming mentally incapacitated.[48]

Post-2009 rules

7.017 An adult who lacks the capacity[49] to form the intention necessary for acquiring a domicile is domiciled in the country or territory with which he or she is for the time being most closely connected.[50] Upon capacity being restored to the individual, he or she retains the domicile held immediately before the restoration.[51]

(v) *Domicile of persons other than individuals*

7.018 The domicile of a corporation is in the jurisdiction under whose law it is incorporated. The corporation's domicile is independent of the domicile of the persons who are its members, so a company may be domiciled in Hong Kong while its shareholders have their domiciles elsewhere. A company incorporated in one jurisdiction cannot be re-incorporated elsewhere so as to have more than one domicile. Should shareholders in a

[46] April 2005 Report, para.4.171. No authority was cited for the proposition, but it seems to follow from the general principles applicable at common law.

[47] Domicile Ordinance s.10.

[48] See paras.1.32 and 1.33 of the April 2005 Report for further discussion and citations.

[49] This is a question of fact: s.8(2). The Law Reform Commission indicated that they did "not think that it is appropriate for the purposes of that inquiry to assume that, for instance, compulsory detention or guardianship automatically imply an inability to form an intention for the purposes of domicile. Such procedures have more to do with the individual's immediate circumstances and willingness to co-operate than to factors relevant to the law of domicile" (April 2005 Report, para.4.154). They also recommended against linking the Domicile Ordinance concept to that of "mental incapacity" in the Mental Health Ordinance (Cap.136) and recommended that the statutory phrasing should "cover not only the mentally incapacitated, but also persons in a comatose, vegetative or semi-vegetative state, and any other person who for one reason or another is not able to form the required intention" (April 2005 Report, para.4.156, recommendation 10). In the event, not all these possibilities are mentioned specifically in the statute, but the statutory phrase would seem to include them.

[50] Domicile Ordinance s.8(1). The statute does not contain presumptions or other guidance as to the application of the concept. The Law Reform Commission emphasised that the place where an incapacitated person is ordered by a court to reside should not be conclusive as to domicile, since it would be absurd to apply such a rule "where the individual has only minimal connections to the place of residence ordered by the court."

[51] Domicile Ordinance s.8(3).

Hong Kong company wish to re-incorporate in another jurisdiction and do so, then as a matter of Hong Kong law, two distinct corporations are created, one in Hong Kong and one in the other jurisdiction. Similarly if a non-Hong Kong corporation's shareholders purport to re-incorporate in Hong Kong under the Companies Ordinance, then what is created is a new Hong Kong company which is legally distinct from its non-Hong Kong counterpart.[52]

(c) Ordinary residence

Ordinary residence is relevant to issues such as the following in the Hong Kong conflict of laws: (i) as a condition for the exercise of the jurisdiction to compel a plaintiff to provide security for costs,[53] (ii) as an aspect of one head of long-arm jurisdiction,[54] (iii) as a factor permitting the court to make an order prohibiting certain debtors from leaving Hong Kong,[55] (iv) as a basis of bankruptcy jurisdiction,[56] (iv) as a jurisdiction-allocating factor in air transport cases,[57] (v) as a matter determining whether the Protection of Trading Interests Ordinance applies,[58] (vi) as a factor determining the application of Hong Kong anti-discrimination statutes,[59] (vii) in relation to the protection of well-known trade marks,[60] and (viii) as a condition of the court's power to make an award under the Inheritance (Provision for Family and Dependants) Ordinance.[61] The notion is also widely encountered in contexts outside the scope of this book, including in the regulatory and tax fields.[62] **7.019**

(i) *The meaning of ordinary residence*

As a general rule,[63] "'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular **7.020**

[52] *Dicey, Morris & Collins*, 13th edition, pp.1101–02.

[53] See Chapter 12.

[54] RHC O.11 r.1(1)(a) ("relief is sought against a person domiciled or ordinarily resident within the jurisdiction"). See para.3.038.

[55] High Court Ordinance (Cap.4) s.21B(3)(b)(iii), District Court Ordinance (Cap.336), s.52E(3)(b)(iii).

[56] Bankruptcy Ordinance (Cap.6) s.4(1)(c) ("at any time in the period of 3 years ending with [the day of the bankruptcy petition] has been ordinarily resident, or has had a place of residence, in Hong Kong.") See para.8.032 and *Re Kok Hui Pan, ex p Wing Lung Bank Ltd* [2002] 3 HKLRD 20 (CFI), Kwan J.

[57] Article 28(1) of the Warsaw Convention and art.VIII of the Guadalajara Convention, both implemented in Hong Kong by the Carriage by Air Ordinance (Cap.500). See para.5.057.

[58] See Protection of Trading Interests Ordinance (Cap.471) s.8(3).

[59] Sex Discrimination Ordinance (Cap.480) ss.14(2), 41(3)(b), Family Status Discrimination Ordinance (Cap.527), ss.10(2), 29(3)(b), Disability Discrimination Ordinance (Cap.487) ss.14(2), 40(3)(b). These provisions extend certain aspects of Hong Kong anti-discrimination law in respect of incidents occurring on "aircraft or dynamically supported craft registered in Hong Kong and operated by a person who has his principal place of business, or is ordinarily resident, in Hong Kong."

[60] Trade Marks Ordinance (Cap.559) s.4(1)(a).

[61] Inheritance (Provision for Family and Dependants) Ordinance (Cap.481) s.3(1) of which provides that it applies where a person "dies (a) domiciled in Hong Kong; or (b) having been ordinarily resident in Hong Kong at any time in the 3 years immediately preceding his death."

[62] These may prove to be of indirect relevance in the conflict of laws context. For example, a plaintiff who claims to be ordinarily resident in one place for tax purposes may face embarrassment in claiming to be ordinarily resident somewhere else for the purpose of security of costs.

[63] Lord Scarman in *R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309 (HL), said, *obiter*, approving certain English Court of Appeal decisions, that, by way of exception from the ordinary rule, the words "ordinary residence" in the context of an immigration statute will be interpreted more restrictively so as to require lawful ordinary residence. The Hong Kong Court of Appeal has followed this approach in the Immigration Ordinance case of *In re Lee Ka Ming (a minor)* [1991] 1 HKC 153. Immigration cases generally must be treated with particular caution as a source of guidance in interpreting connecting factors for the purpose of conflict of laws, though, as Kaplan J has

order of his life for the time being, whether of short or of long duration."[64] A fuller judicial exposition of the position is as follows:

> *"(1) Ordinary residen[ce] is not a term of art in English law.*
>
> *(2) In their natural and ordinary meaning the words 'ordinarily resident' mean 'that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration.' The significance of the adverb 'habitually' is that it recalls two necessary features mentioned by Viscount Sumner in Lysaght,[65] namely residence adopted voluntarily and for settled purpose.*
>
> *(3) The decision in each of the decided cases depended upon its own particular facts and such dicta as can be culled from the reported judgments must be read with that in mind.*
>
> *(4) A person could be ordinarily resident in two countries at the same time.[66] This is a significant feature of the words 'ordinary meaning for it is an important factor distinguishing ordinary residen[ce] from domicile.*
>
> *(5) Unless it can be shown that the statutory framework or the legal context in which the words are used required a different meaning, 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether or short or long duration.*

suggested in *Re Sit Yuk Cheung* (unrep., HCMP 40/1990, 24 Apr 1990, CFI), it seems right in principle to say that unless there is some specific reason to infer a different legislative intention, words in an immigration statute should be interpreted by applying private international law notions (in that case, an immigration statute referred to "legitimate" children; the court determined legitimacy according to the laws of the child's domicile of origin).

64 *R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309, *per* Lord Scarman. The ordinary rule as stated by Lord Scarman has been applied in Hong Kong in the context of (i) security for costs: *Li Koon Wah v Chan Hoi Wah Wallace* (unrep., HCA 13412/1998, 17 Nov 1999, CFI) in which Cheung J held that a Canadian passport holder of Hong Kong origin who spent "a large proportion of his time in Hong Kong" but only "two to three months in Canada each year" was ordinarily resident in Hong Kong, even though his wife lived in Canada; (ii) bankruptcy: (*Ng Kok Hui Pan ex p Wing Lung Bank Ltd* [2002] 3 HKLRD 20 (CFI)) in which Kwan J held that an individual with a Hong Kong identity card, employed by a Hong Kong company for which he travelled to Hong Kong on business, paying tax in Hong Kong and with several Hong Kong credit cards and bank accounts, was not ordinarily resident in Hong Kong "at any time in the period of 3 years" prior to the petition in circumstances in view of the facts that he never had a place of residence in Hong Kong and had only spent "186 days and 53 nights" in Hong Kong over those 3 years; two English cases decided in favour of the petitioner were followed albeit distinguished on their facts (correctly, it is respectfully suggested): *In re Charles Bright* (1901) 18 TLR 37 and (1903) 19 TLR 203 and *In re Brauch ex p Brittanic Securities & Investments* [1978] 1 Ch 316 (CA); (iii) eligibility for political office: (*Lau San Ching v Apollonia Liu*, [1995] 5 HKPLR 23 (CFI)), Cheung J: 42 year old individual who lived all his life in Hong Kong apart from a 10 year spell of imprisonment between the ages of 28 and 38 in Mainland China for "counter-revolutionary sedition" held to have remained ordinarily resident in Hong Kong at all times, (iv) the constitutional eligibility condition for right of abode in Hong Kong of 7 years' continuous ordinary residence (*Sun Jie v Registration of Persons Tribunal* (unrep., HCAL 186/2002, 16 Aug 2004, CFI), A. Cheung J: individual lawfully ordinarily resided in Hong Kong for 6 years and 4 months on an employment visa until his job and visa came to an end; he then made two short visits to Hong Kong during the next 4 months, acquired a Nauru passport and married a Hong Kong permanent resident. The immigration department appears to have been sceptical of his Nauru passport and of the bona fides of the marriage and rejected his application for a dependent visa; however, he stayed in Hong Kong on a visitor's visa for the next 9 months; he was held to have been continuously ordinarily resident in Hong Kong for 7 years); (v) O.11, r.1(1)(a) (*Shanghai Land Holdings Ltd v Chau Ching Ngai* [2004] 3 HKC 573.

65 *IRC v Lysaght* [1928] AC 234 (HL).

66 A proposition confirmed by Lord Scarman in *R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309, citing *Rre Norris* (1888) 4 TLR 452.

> *(6) One exception is that if a man's presence in a particular place or country is unlawful, e.g. in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence.[67]*
>
> *(7) There are two, and no more than two, respects in which the mind of the person is important in determining ordinary residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment may[68] be so overwhelming a factor as to negative the will[69] to be where one is.*
>
> *(8) The legal advantage of adopting the natural and ordinary meaning is that it results in the proof of ordinary residence which is ultimately a question of fact depending more upon the evidence or matters susceptible of objective proof than upon evidence as to state of mind. If there can be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose.*
>
> *(9) The 'real home' test is wholly inconsistent with the natural and ordinary meaning of the words as construed by the House of Lords in the two tax cases,[70] it is an unhappy echo of domicile."*[71]

(i) However, the requirement of "settled purposes" is far less rigorous than the subjective element in the definition of domicile:

> *"The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the 'propositus' intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."*[72]

67 This proposition was omitted by Barma J when, in the bankruptcy case of *Re Wong Lei Kwan Joanne* [2009] 3 HKLRD 173, he relied upon Cheung J's summary. It would seem desirable in principle in the bankruptcy context to allow ordinary residence to be established irrespective of the lawfulness of the individual's presence. The contrary view taken in *R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309 was in the context of an individual seeking to claim ordinary residence in order to claim a financial benefit.

68 The word "may" deserves emphasis. It is suggested that if an individual has been voluntarily ordinarily resident in Hong Kong for many years, and is then imprisoned in Hong Kong for a number of years, then that imprisonment will not ordinarily interrupt his or her ordinary residence in Hong Kong, at least outside the immigration context, in which a specially narrow interpretation of the concept has been adopted (see below).

69 The report of the Hong Kong case says "view" but this is a typographical error for "will" in *Shah*.

70 I.e. *Lysaght* and *Levene v IRC* [1928] AC 217 (HL).

71 *Lau San Ching v Apollonia Liu* (unrep., HCMP 3215/1994, 22 Feb 1995, [1995] HKLY 556), Cheung J, summarising Lord Scarman's speech in *R v Barnet, ex p Shah*. In common with Barma J in *Re Wong Lei Kwan Joanne* [2009] 3 HKLRD 173, point 6 has been omitted, as the proposition which it contained (requirement for lawfulness of residence) was not supported by the authorities.

72 *Akbarali v Brent LBC* [1983] 2 AC 309, *per* Lord Scarman.

(ii) The question of the ordinary residence of children only rarely arises in the conflict of laws context, but it is suggested that usually a dependent child's ordinary residence will follow that of the parent with whom it resides.[73]

(iii) The question of the ordinary residence of companies tends to arise most often in connection with security for costs and is discussed in that context in paras.12.027–12.030.

(iv) It should be noted that the notion of ordinary residence in the Basic Law[74] has been interpreted so as to deny the right of abode to individuals who have been imprisoned at some point during the seven years' ordinary residence relied upon to support their application for permanent residence. It is suggested that this interpretation, which in the case of a long-term Hong Kong resident involves giving "ordinary residence" a much narrower meaning than the ordinary linguistic one, is clearly based on special constitutional considerations which are not applicable in the conflict of laws contexts.[75]

(d) Habitual residence

7.021 This notion is principally encountered in the Hong Kong conflict of laws[76] in the context of (i) child abduction;[77] (ii) certain parentage, legitimacy and matrimonial issues;[78] (iii) certain statutory restrictions upon contractual choice of law clauses,[79] (iv) the formal validity of wills[80] and (v) certain jurisdictional issues in shipping collision

[73] The Hong Kong Court of Appeal (reversing Bokhary J) held in *Lee Ka Ming* [1991] 1 HKC 153, that a child *en ventre sa mère* is not ordinarily resident in Hong Kong, or anywhere else.

[74] Article 24.

[75] In the conflict of laws context, it is suggested that a person who is imprisoned in the place where he was ordinarily resident immediately prior to imprisonment should normally be regarded as remaining ordinarily resident there during the imprisonment. Cf the unanimous decision of the Court of Final Appeal in the context of the constitutional right of abode: *Fateh Muhammad v Commissioner of Registration* ([2001] 4 HKCFAR 278; see also *Prem Singh v Director of Immigration* [2003] 6 HKCFAR 26). However, the narrow interpretation of the notion of ordinary residence in *Fateh Muhammad* appears clearly to be an exceptional one adopted for special reasons indicated in the judgment: Bokhary PJ made clear that he would have reached a different conclusion had the question been one of ordinary residence for tax purposes, and it is submitted that the same should be true for conflict of law purposes. In *Cheung Cheong v A-G* [1987] HKLR 356 (CFI), Power J held, in a pre-Basic Law right of abode context, that a Chinese citizen who spent 2 years and 9 months in Hong Kong, immediately following which he was imprisoned for 5 years on the Chinese Mainland, had been ordinarily resident in Hong Kong for the entire period of 7 years and 9 months, applying *Shah*. For conflict of laws purposes, it is suggested that both Cheung and Muhammad would have been regarded as ordinarily resident in Hong Kong during their respective imprisonments. See also *Asif Ali v Director of Immigration* (unrep., CACV 87/2010, 28 Jun 2011), in which the Court of Appeal distinguished *Fateh Muhammad* in the context of an individual who was detained in custody pending trial.

[76] Its importance in the Hong Kong conflicts of law is essentially in areas where Hong Kong legislation has followed UK legislation influenced by civil law notions.

[77] Child Abduction and Custody Ordinance (Cap.512) s.1, giving effect in Hong Kong law to the Convention on the Civil Aspects of International Child Abduction.

[78] Parent and Child Ordinance (Cap.429) ss.6 and 12, Matrimonial Causes Ordinance (Cap.179) ss.3, 4, 6, 56 and 58.

[79] Control of Exemption Clauses Ordinance (Cap.71) s.17, Unconscionable Contracts Ordinance (Cap.458) s.7.

[80] Wills Ordinance (Cap.30) s.24.

cases.[81] Outside the scope of this book, it has some significance in public law[82] and arbitration[83] contexts.

(i) *The meaning of habitual residence*

7.022 "Habitual residence" was deliberately not defined by Convention or statute, with a view to rendering it a less technical concept than domicile. Some judges have repeatedly indicated that, by contrast with the detailed rules which have evolved in relation to the concept of domicile, habitual residence "should not be treated as a term of art with some special meaning."[84] Nevertheless, this aspiration is in tension with the fact that the case law has developed certain guiding principles. In particular, the Court of Appeal[85] has summarised the meaning of habitual residence in the child abduction context as follows:

> *"(1) The question whether a person is or is not habitually resident in a particular country is a question of fact. The concept of habitual residence is not an artificial legal construct.*
>
> *(2) While it is not necessary for a person to remain continuously present in a particular country in order for him to retain residence there it is not possible for a person to acquire residence in one country while remaining throughout physically present in another.*
>
> *(3) Where both parents have joint parental responsibility, neither of them can unilaterally change the habitual residence of the child by removing the child wrongfully and in breach of the other party's rights.*
>
> *(4) The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves.*
>
> *(5) Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration. All that the law requires for a 'settled purpose' is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.*
>
> *(6) Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention."*

[81] High Court Ordinance (Cap.4) ss.12B and 12C; RHC O.75 r.4.

[82] For example, Immigration Ordinance (Cap.115) s.2 and sch.1 and under certain statutory orders implementing international extradition conventions (Fugitive Offenders (Internationally Protected Persons and Hostages) Order and Fugitive Offenders (Drugs) Order, both made under Cap.530).

[83] As an aspect of the definition of "international arbitration" under Arbitration Ordinance (Cap.341), sch.5, adopting art.1(4) of the UNICTRAL Model Law on International Commercial Arbitration.

[84] *B v B* (unrep., HCMP 1874/1999, 20 April 1999, CFI), *per* Stock J, citing the House of Lords' decision in *In re J (a minor)* [1990] 2 AC 562 (also rep sub nom *C v S* [1990] 2 All ER 961). See to similar effect *D v G* [2002] 1 HKLRD 52, CA, *per* Cheung JA and *LM v HTS* [2001] 2 HKLRD 377 (CFI), *per* Hartmann J.

[85] *BLW v BWL* [2007] 2 HKLRD 193, *per* Cheung JA with whom Yuen JA and Sakhrani J agreed. The principles enunciated are based on English case law (internal citations omitted above).

7.023 Some additional points to note are:

(i) Some decisions have tended to minimise the temporal[86] and mental[87] elements, evidently influenced by the practical consideration that, in the child abduction context, a finding of no habitual residence disapplies the scheme of judicial protection.[88]

(ii) The mental element in the judicial glosses is artificial where the question is the habitual residence of a young child, and in practice the pragmatic judicial approach has been to ignore it. Thus, whilst it has been said that a child's habitual residence is not to be equated automatically with the habitual residence of one or both parents,[89] it appears that ordinarily a child is likely to be held habitually resident in the place of habitual residence of the parent with whom the child in fact resides, unless the parents expressly or implicitly agree otherwise.[90] This will not be so, for example, in a case where both parents lawfully have custody of the child yet one of them unilaterally takes the child away to live somewhere else, even if there is no court order prohibiting that.[91] Where the parents are separated, it seems that the habitual residence of the child will be that of the primary caregiver.[92]

(iii) In short, therefore, it seems that a person, child or otherwise, will ordinarily be considered as habitually resident in the place where he or she is in fact living (as opposed to, for example, holidaying or travelling on business or attending

[86] "All that the law requires for a 'settled purpose' is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled." *LM v HTS* [2001] 2 HKLRD 377, and *N v O* [1999] 1 HKLRD 68 (CFI), also *per* Hartmann J, following *Re B* [1993] 1 FLR 993 (HC), Waite J. Furthermore, "provided there was a settled intent, the period of habitation need not to be too long.... In the [English and US] cases to which I have referred, a period of approximately one month was considered sufficient to establish habitual residence. But one month is not to be taken as some 'guideline' figure. There is no such arbitrary indicator. All will depend on the facts of the case." *LM v HTS*, *per* Hartmann J. For an example concerning a "peripatetic" parent see also *AC v AS* (unrep., HCMP 4266/2001, 24 Oct 2001, [2002] HKEC 146), Deputy Judge Lam.

[87] *LM v HTS*, *per* Hartmann J: "A settled intention, I believe, may be for reasons which in themselves lack an *achieved* (and therefore settled) result. For example, a couple may move to a new country in the hope that the move will shore up an otherwise problematic marriage or that one of the parties by finding new work, will be able to enhance his or her career. In such circumstances, habitual residence may still be established even if the goal is not finally achieved." (citing with approval the decision of Waite J in *Re B*, emphasising that '[a] settled purpose is not something to be searched for under a microscope. If it is there at all it will stand out clearly as a matter of general impression." In *Re B* itself, habitual residence of a child in Germany was established even though husband and wife agreed to live there with the child only as "a limited sojourn... as a platform from which to agree, if they could, a future pattern of life and work which would not clash with the misgivings which each of them felt about living permanently in the other's home country.")

[88] *Re F* [1992] 1 FLR 548, *per* Butler-Sloss LJ, followed by Hartmann J in *LM v HTS* (also in the Australian case of *Department of Health and Community Services, State Central Authority v Casse* (1095) FLC 92-629).

[89] *Re M* [1996] 1 FLR 887, *per* Millett J, cited with approval by Hartmann J in *LM v HTS* [2001] 2 HKLRD 377, who nevertheless went on to point out that "[o]f course, when a child is in the physical custody of its parents who are living together, inevitably (unless the facts otherwise dictate) the child's habitual residence will be that of the parents. Where that is the case, neither parent can unilaterally change the habitual residence of the child by removing the child wrongfully and in breach of the other parent's rights: that is the very mischief the convention aims to avoid."

[90] *LM v HTS*, and *N v O* [1999] 1 HKLRD 68 (CFI), Hartmann J, following *Re B* [1993] 1 FLR 993: "The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court." See also *BLW v BWL*.

[91] See e.g. *B v B* (unrep., HCMP 1874/1999, 20 April 1999), CFI.

[92] See, *N v O*, and *LM v HTS*. In *AC v AS* (unrep., HCMP 4266/2001, 24 Oct 2001, CFI), Deputy Judge Lam, the point was common ground.

boarding school[93]), temporarily or permanently, even if the residence is within an enclave which has little or nothing in common, culturally, with that place.[94]

(iv) Particularly in the child abduction context, it seems that regard will readily be had to case law in other jurisdictions since "international consensus is to be preferred in respect of internationally binding conventions."[95]

3. Recognition, Capacity and Related Issues

(a) Recognition: individuals

7.024 The legal personality of any individual, irrespective of nationality or domicile, is of course fully recognized for all purposes by a Hong Kong court. Indeed, such personality would be recognized even if the individual's domicile or national law for some reason did not recognize it.[96]

(b) Recognition: persons other than individuals

7.025 The recognition of persons other than individual human beings is in some respects a complicated matter, though as will be seen a rather liberal approach is taken and such doubts as exist arise only in the occasional marginal case.

(i) *Non-Hong Kong companies*

7.026 Three situations must be distinguished:

(i) *Ordinary case*. Where a foreign company is incorporated under the laws of a state recognized as such by the Central Government of the People's Republic of China[97] and where there is no possible issue as to the constitutionality of the government of the foreign state, the legal personality of the foreign company will be recognized without question in the Hong Kong courts.[98] This is so irrespective of whether the foreign body corporate is incorporated by some formal process of registration or

[93] See *Re A (a minor)* [1995] 1 FLR 767 (HC), Hale J.

[94] *Re A (a minor)* [1996] 1 WLR 25 (HC), in which Cazalet J held that children living on a US military base in Iceland with their American father and British mother were habitually resident in Iceland.

[95] *LM v HTS*, *per* Hartmann J. The Court of Appeal in *BLW v BWL*, also approved this practice.

[96] It is suggested that this is clear at common law in any event (see e.g. *Somersett*'s case (1772) 20 St Tr 1) but it is made express by art.13 of the Hong Kong Bill of Rights (Bill of Rights Ordinance (Cap.383 s.8): "Everyone shall have the right to recognition everywhere as a person before the law." See also art.10 for the principle of equality before courts and tribunals. These statutory provisions are based upon the International Covenant on Civil and Political Rights. Hong Kong law tolerated certain types of servile status until relatively late in the twentieth century, but these are now matters of legal history only: see Miners, "The attempts to abolish the *mui tsai* system in Hong Kong 1917–41" in Faure (ed), *Hong Kong: A Reader In Social History* (Oxford University Press, 2003), Watson, "Wives, concubines and maids: servitude and kinship in the Hong Kong region, 1900–1940" in Watson and Watson, *Village Life In Hong Kong: Politics, Gender And Ritual In The New Territories* (Chinese University Press, 2004), Jaschok, *Concubines And Bondservants: The Social History Of A Chinese Custom* (Zed Press, 1988).

[97] In cases of dispute, the Hong Kong Chief Executive may be requested to certify pursuant to art.19 of the Basic Law whether the foreign state in question is recognized as such by the Chinese Central Government. A company incorporated in Mainland China or Macau will, of course, also be recognized.

[98] So many examples could be given that the point is beyond serious argument.

similar or whether its legal personality arises informally.[99] It is suggested that where, as is common in certain "off-shore" jurisdictions, the law provides for a company incorporated in jurisdiction X to be "continued"in jurisdiction Y and henceforth deemed to be incorporated in jurisdiction Y, then the court should (i) treat the company as domiciled in jurisdiction Y in a case where the laws of jurisdiction X recognize the continuation,[100] but (ii) in other cases, should regard the company as still incorporated in jurisdiction X, with jurisdiction Y having created a separate legal entity. Where, in situation (ii), a dispute arises as to the company's (or companies') property then this should be resolved on the basis that such property belongs to the company as existing under law X except in so far as the *lex situs* of each asset is proven to provide otherwise;[101] as to liabilities, it is probably appropriate to hold both legal persons jointly and severally liable; the inherent scope which such arrangements have to create confusion should not be permitted to prejudice creditors.

(ii) *Unrecognized states*. Statute[102] provides that where

> *"a question arises as to whether a body, which purports to have or which appears to have lost corporate status under the laws of a territory outside Hong Kong which is not at that time a recognized State,[103] should or should not be regarded as having legal personality as a body corporate under the law of Hong Kong"*[104]

then, provided that "it appears that the laws of that territory are at that time applied by a settled court system in that territory"[105] then "that question and any other material question relating to the body shall be determined (and account shall be taken of those laws) as if that territory were a recognized State." This statute came into effect (retrospectively[106]) in 1993: its main practical significance lies in making clear that the Hong Kong courts will recognize the legal personality of companies established under the laws of a nearby unrecognized state, the Republic of China, which exercises *de facto* authority over the island of

[99] See *Von Hellfeld v Rechnitzer* [1914] 1 Ch 748, *Oxnard Financing SA v Rahn* [1998] 1 WLR 1465 both decisions of the English Court of Appeal.

[100] See *Hughes v Hannover Rückversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497 (CA) and the discussion of "multiple incorporation" in Smart at pp.354–357.

[101] Thus, for example, property with its *situs* in Y will presumably be regarded by the law of Y as owned by the company created under the laws of Y. The ownership of property with its *situs* in a third jurisdiction, Z, will depend on whether the laws of Z recognize the extinction of the company's personality under the laws of X and its replacement with a creature governed by the laws of Y. In the absence of proof that Z recognizes the extinction, it seems appropriate to presume that it does not.

[102] Foreign Corporations Ordinance (Cap.437), s.2.

[103] "Recognized state" is defined by Cap.437, s.2(2)(a) as "a territory which is recognized by Her Majesty's Government in the United Kingdom as a State." After 1997, the reference to Her Majesty's Government in the United Kingdom must be interpreted as a reference to the Central People's Government of the People's Republic of China: see Interpretation and General Clauses Ordinance (Cap.1), s.2A(3) and sch.8, para.1(b).

[104] Foreign Corporations Ordinance (Cap.437), s.2(1)(a).

[105] Foreign Corporations Ordinance (Cap.437), s.2(1)(b).

[106] Foreign Corporations Ordinance (Cap.437), s.2(3).

Taiwan.[107] The statute probably reflects, at least approximately, the common law position in any event.[108]

(iii) *Disputed governments*. It is understood that Chinese Central Government policy is ordinarily to recognize governments as well as states.[109] Occasionally, however, following a *coup d'état* or amidst a civil war, questions may arise as to the recognition by a Hong Kong court of attempts by the new "government" to take control of, or to pass laws to permit it or persons favoured by it, to take over control of companies already established. In cases where the Chinese Central Government has not given unequivocal recognition to the "new" government, the Hong Kong courts will have to identify as a matter of fact whether the alleged "government" is to be treated as the government. It is likely that regard will be had to the following factors:

> *"(a) whether it is the constitutional government of the state; (b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state; (c) whether [the Chinese Central People's Government]*[110] *has any dealings with it and if so what is the nature of those dealings; and (d) in marginal cases, the extent of international recognition that it has as the government of the state."*[111]

In relation to point (a), it has been said that "there is no room for more than one government at a time nor for separate *de jure* and *de facto* governments in respect of the same state"[112] and that "a loss of control by a constitutional government may not immediately deprive it of its status, whereas an insurgent regime will require to establish control before it can exist as a government." In relation to point (b), evidence of a breakdown of law and order will be relevant.[113] In relation to point (c), it seems likely that where the Chinese Central Government deals with the group in question "on a normal government to government basis as the government of the relevant foreign state, it is unlikely in the extreme that

[107] See in this regard *Taiwan Via Versand Ltd v Commodore Electronics Ltd* (unrep., HCA 6231/1993, 25 Nov 1993), in which Patrick Chan J applied the Foreign Corporations Ordinance to permit a Taiwanese company to sue in the Hong Kong court. Moreover, his Lordship was prepared, in the special case of Taiwan, to take judicial notice of the matters specified in s.2(1)(b).

[108] *Taiwan Via Versand Ltd*, in which Patrick Chan J indicated, *obiter*, that he would have reached the same conclusion at common law, following English *dicta* in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 AC 853 (HL) *Hesperides Hotels v Aegean Holidays Ltd* [1978] 1 QB 205 (CA) and *GUR v Trust Bank of Africa* [1987] 1 QB 599 (CA).

[109] Contrast the practice adopted by the British Government since 1980 of only recognizing states, not governments, leaving the status of a government as something for the courts to "infer."

[110] Words substituted for "Her Majesty's Government" in the original.

[111] *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA, The Mary* [1993] QB 54, Hobhouse J, followed in *Sierra Leone Telecommunications Co Ltd v Barclays Bank Plc* [1998] 2 All ER 821, Cresswell J, who also called attention to the test of "exercising administrative control" in *The Arantzazu Mendi* [1939] AC 256 (HL).

[112] The qualification "of the same state" is significant: if one *soi disant* "state" claims sovereignty over part of the territory also claimed by a recognized state (as was the case in Yugoslavia for part of the 1990s, and as remains the case within China itself) then the possibility arises of recognition of the former "state's" companies according to the principles in subpara.(ii) above. It appears to be otherwise if both competing powers claim to be the "government" of the same state but, as a matter of practice, each control different parts of the state territory.

[113] See e.g. the *Sierra Leone* and *Somalia* cases, for examples.

the inference that the foreign government is the government of that state will be capable of being rebutted."[114] Indeed, in a case where the Chinese Central Government has expressly recognized a foreign government it would seem clear that a Hong Kong court cannot go behind this. In cases where the Chinese Central Government has not expressly recognized any particular government for the time being in respect of a particular state, then it is a matter of fact for the court to determine, in the absence of any conclusive certification which the Hong Kong Government may give,[115] the basis on which the Chinese Central Government is dealing with the group in question.

(ii) *Partnerships distinct from the partners*

7.027 The notion of a partnership distinct in law from its partners is unknown to Hong Kong domestic law, in contrast to many foreign legal systems which regard even a general partnership as having a separate legal personality. Such entities must clearly, as a matter of principle, be recognized by a Hong Kong court on the same basis as any other body corporate.[116] The distinction between a partnership which is a separate entity and a limited company is, for this purpose, a distinction in name only.

(iii) *Unrecognized foreign states*

7.028 It appears to be the case that foreign states not recognized as such by the Chinese Government[117] cannot sue or be sued in a Hong Kong court.[118] This contrasts with the position of foreign companies established under the laws of such states (see para.7.026).

[114] *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA, The Mary*; the passage was also quoted with approval in *Sierra Leone Telecommunications Co Ltd v Barclays Bank Plc* [1998] 2 All ER 821.

[115] Pursuant to art.19 of the Basic Law.

[116] Moreover, the Foreign Corporations Ordinance, discussed above, is wide enough to cover LLPs formed under the law of an unrecognized state.

[117] Recognition can be certified by the Chief Executive under art.19. It seems clear from the words of art.19 that such certification will be conclusive before a Hong Kong court, just as a similar certification of the Governor was conclusive prior to 1997 (as to conclusiveness, see e.g. *Carl-Zeiss Stiftung v Rayner and Keeler Ltd (No.2)* [1967] 1 AC 853.

[118] This was the position prior to 1997 by virtue of English authorities such as *City of Berne v Bank of England* 32 ER 636, *GUR Corp v Trust Bank of Africa Ltd* [1987] 1 QB 599, decisions cited with approval, *obiter*, in the *Chen Li Hung* case considered in Chapter 9. In the *GUR Corp* case, the "Republic of Ciskei" (an apartheid-era "Bantustan") was, however, permitted to sue notwithstanding that it was not recognized by the British Government because the latter did recognize the Republic of South Africa as exercising jurisdiction over Ciskei's territory, and Ciskei derived its existence and powers from South African legislation. Similarly see *Carl-Zeiss Stiftung v Rayner and Keeler Ltd (No.2)* [1967] 1 AC 853 (HL), in which the laws of the unrecognized German Democratic Republic affecting control of a German body corporate were recognized by the English courts on the basis that it was a public entity authorised to legislate by the USSR, which the British Government recognized as having *de jure* sovereignty over Eastern Germany. Crucially, the House of Lords held (differing from the Court of Appeal) that it made no difference that the USSR regarded the GDR as an independent sovereign state. It should also be noted that the case effectively turned on the interpretation of the British Government's certificate of recognition. At the time of writing, there is no Hong Kong or central legislation applicable to Hong Kong in respect of the matter (see art.18 of the Basic Law for this possibility). It therefore appears appropriate to continue to apply the common law in accordance with art.8 of the Basic Law.

(iv) *Entities existing only under public international law*

7.029 In England it has been decided, not without controversy, that an entity which exists as a legal person only on the plane of international law, is not recognized as a legal person in the eyes of an English court,[119] though it will be recognized in so far as the *lex fori*[120] or foreign law[121] confers personality upon it. However, once recognition has been conferred by domestic law,[122] internal constitutional issues will be resolved by reference to the treaty which creates an international organisation, even if these treaty provisions are not incorporated into any domestic law.[123]

(v) *Miscellaneous entities existing under foreign law*

7.030 The English Court of Appeal[124] has been prepared to recognize the legal personality of a temple[125] under Indian law and to permit it to sue in the English court:

> *"The question whether a foreigner can be a party to proceedings in the English courts is one to be determined by English law (as the lex fori). In the case of an individual no difficulty usually arises. And the same can be said of foreign legal persons which would be recognized as such by our own law, the most obvious example being a foreign trading company. It could not be seriously suggested that such a company could not sue in the English courts to recover property of which it was the owner by the law of the country of its incorporation.*
>
> *The novel question which arises is whether a foreign legal person which would not be recognized as a legal person by our own law can sue in the English*

[119] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL).

[120] As in *JH Rayner* in which it was held that English subordinate legislation under the International Organisations Act had that effect. In Hong Kong, subordinate legislation ensures the recognition in a Hong Kong court of the European Communities: see para.3 of the Schedule to the International Organisations (Privileges and Immunities) (Office of the Commission of the European Communities) Order made under Cap.558, providing for the EC, the ECSC and EURATOM each to "have legal personality" in Hong Kong, including "capacity to conclude contracts, to acquire and dispose of immovable and movable property as necessary for the effective fulfilment of their duties… and to conduct legal proceedings." Subordinate legislation also provides for the legal personality of the various international organisations listed in, para.4.091: see the various Orders made under the International Organisations and Diplomatic Privileges Ordinance (Cap.190) s.1(a) of which provides for the designated organisations to have "the legal capacities of a body corporate."

[121] As in *Arab Monetary Fund v Hashim (No.3)* [1991] 2 AC 114, in which it was held that the AMF, although originally established by international treaty, could be recognized because (and solely because) of domestic legal personality conferred upon it by the law of one of the parties to the treaty (namely, the UAE).

[122] Note in this regard that domestic law must have "created" the entity, rather than merely "recognizing" its existence: *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL) *per* Lord Lowry, citing *Banque Internationale de Commerce de Petrograd v Goukassow* [1923] 2 KB 682 (CA) (reversed on other grounds: [1925] AC 150).

[123] *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] QB 282.

[124] *Bumper Development Corp v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362. See also the Privy Council's decision in *Pramatha Nath Mullick v Pradyumma Kumar Mullick* (1925) LR 52 Ind App 245, and (in Australia) the *obiter* observations of Dixon J in *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 and (in New Zealand) the *obiter* observations of Baragwanath J in *Khyentse Rinpoche Lama v Hope* (unrep., CIV-2004-404-1363, 10 Mar 2005).

[125] A question was also raised as to the legal personality of a *lingam* associated with the temple but in view of the court's conclusion that the temple had personality it was found unnecessary to determine whether the *lingam* also enjoyed such personality before an English court.