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.7.017–7.019 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.7.085, 7.088 and 7.098.)

(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 (Laws of Hong Kong, Cap.596) has substantially modified the position as to individuals,

[6] See e.g. para.7.102 (residence as basis of matrimonial jurisdiction) and para.9.059 (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".

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.[20] 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[21] is domiciled in the country or territory[22] with which he or she is most closely connected.[23] Two presumptions apply:

[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] In *Y v W* (unrep., FCMC 1847/2011, 11 Aug 2011, DC), HHJ Chu, is the first published case under considering the Domicile Ordinance. The judgment analyses the position in detail at common law, on the basis that "[i]n particular, the old common law authorities relating to the manner by which a person's intention may be ascertained continue to be applicable" (para.33). The court was invited by the respondent in that case to "consider the old law as the old law would apply at the time when W claimed to have acquired a domicile in Hong Kong" (para.35), and proceeded to analyse the petitioner's status in terms of domiciles of origin and dependency in the period prior to 2009 (paras.40 to 63), albeit then tying the analysis briefly into the Domicile Ordinance (para.64). Without seeking to question the court's conclusion on the facts of the case, it is suggested, with respect, that the court was right to have regard to the common law authorities on intention (see para.7.014) but wrong to analyse the matter in terms of the abolished concepts of domicile of origin and dependency: the pre-2009 facts should instead have been analysed on the basis that the Ordinance had always been in force (s.14(1)), and the respondent's submission at para.35 should, with respect, have been rejected. This point is important not least because, unless the correct approach is taken, the number of cases in which the technicalities of the old law have to be grappled with, as in *Y v W*, will be much greater for much longer, thereby undermining the legislature's objectives of simplification and modernisation. See also the Law Reform Commission's April 2005 report, paras.4.135, 4.182 and 4.183.

[21] 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)."

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

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

1. Where the child's parents[24] 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.

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.[25] 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.[26]

   – The domicile of origin of an illegitimate child is deemed to be the mother's domicile at the time of the child's birth.[27]

   – 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.[28]

   – 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.[29]

[24] 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 recognised 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.

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

[26] *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.

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

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

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

(b) *Court-ordered interim measures.* The AO has not adopted the (rather sketchy) provisions introduced into the Model Law in 2006[8] on this topic. However, the AO's provisions[9] appear consistent with those of the Model Law.

(c) *Court enforcement of tribunal orders.* The AO has not adopted the (rather complex) provisions introduced into the Model Law in 2006 which impose a duty on courts to enforce tribunal orders, subject to various exceptions.[10] Instead, the AO adopts a less technical approach, with enforcement being made subject to the court's leave.[11]

It should be borne in mind that the application of the AO is dependent upon the existence of an arbitration agreement which is in writing, or at least recorded in writing in one of various specified ways.[12] It should be assumed that everything in this chapter relates to such an arbitration agreement unless the contrary is specifically stated, though a purely oral arbitration agreement is in principle enforceable in Hong Kong as a matter of case law.[13]

2. Applicable Law

10.004 This section considers the approach of a Hong Kong court to the following four issues:[14]

1. Law governing an arbitration agreement (paras.10.005–10.013).
2. Procedural law applicable to an arbitration (*lex arbitri*) (paras.10.014–10.021).
3. Substantive law applicable to a dispute in arbitration (para.10.022).
4. The distinction between procedural and substantive law (para.10.023).

[8] Model Law, art.17J: see AO s.45(1).
[9] AO s.45(2). See paras.10.027–10.031.
[10] Model Law, arts.17H and 17I.
[11] AO s.61. See para.10.029(4)(c).
[12] AO s.5(1), which requires the existence of an "arbitration agreement" for the AO to apply generally. See also AO s.19 for the wide definition of "arbitration agreement," adopting UNCITRAL Model Law, art.7 (Option I) and (in s.19(2)) widening it still further.
[13] Thus, the Hong Kong court has power (although not a duty) to refer a matter to arbitration if litigation is brought in breach of an arbitration agreement at common law: see *Dicey, Morris & Collins*, para.16.082 for the English cases. It is suggested that these should be followed in Hong Kong—whilst the AO, unlike its UK equivalent, lacks an express saving provision in respect of oral arbitration agreements, the AO does not seek to render such agreements unenforceable. It is also clear that the court may enforce an arbitral award rendered pursuant to an oral agreement, applying principles discussed in paras.10.066–10.067 (though this scenario will only arise if the existence of the arbitration agreement has been disputed during the arbitration itself, since an exchange of pleadings in which the agreement is alleged and not denied will itself be taken to represent a written arbitration agreement for the purpose of the AO: see AO s.19(1), giving effect to UNCITRAL Model Law, art.7(5) (Option I)).
[14] The practical impact of these issues is felt, *inter alia*, in the contexts of the exercise of Hong Kong court jurisdiction and the enforcement of non-Hong Kong awards, considered in later sections of this chapter. However, it is not limited to those contexts.

(a) Law governing an arbitration agreement

10.005 An arbitration agreement is treated by the Hong Kong courts as a contract with a governing law, which may be different from the governing law of the main contract to which the arbitration agreement relates, and from the law of the place of arbitration. The Hong Kong court will apply the provisions of the governing law of the arbitration agreement to determine whether the agreement is materially valid[15] and, if so, what its effect is and how it should be interpreted. This can on occasion create significant issues in Hong Kong practice, because:

1. Whilst parties are at liberty to specify which law will govern their arbitration agreement, they often do not do so. Moreover, the various rules and model forms in common use internationally typically address the issues of place of arbitration and governing law of the underlying contract, but do not usually address the issue of governing law of the arbitration agreement itself.
2. Some Asian arbitration laws (including, of particular significance in Hong Kong, those of Mainland China) impose significantly many more restrictions on party autonomy than those of UNCITRAL Model Law jurisdictions such as Hong Kong. The validity of an arbitration agreement may well, therefore, turn on the question of its governing law.

10.006 The AO, following the UNCITRAL Model Law, does not address the issue of governing law in arbitration agreements comprehensively. However, it is suggested that the following propositions represent the approach which a Hong Kong court should take to determine the law applicable to the material validity, effect and interpretation of an arbitration agreement.

1. First, it is clear that, if the parties expressly choose a law to govern the arbitration agreement, their choice will be respected by a Hong Kong court even if it leads to the conclusion that the arbitration agreement is invalid under the chosen law.[16] In practice, however, choice of law provisions, specifically relating to arbitration agreements, are still relatively uncommon.
2. Secondly, it is clear that the Hong Kong court has ultimate authority[17] to determine the material validity and effect[18] of an arbitration agreement

[15] Formal validity is usually much simpler: see para.10.009.
[16] *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 (HL), *per* Lord Wilberforce; *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116 (CA).
[17] *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* [1992] 1 HKLR 40, Kaplan J; *Kenon Engineering Ltd v Nippon Kokan Koji Kabushiki Kaisha* (unrep., CACV 214-216/2003, 7 May 2004, [2004] HKEC 542) (CA); *FCCW Global Ltd v Interactive Communication Services Ltd* [2007] 1 HKLRD 309 (CA). See also the English decision, *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 which, it is suggested, should be followed in Hong Kong.
[18] Including arbitrability of the subject matter of the dispute.

insofar as the matter comes before it prior to[19] or after[20] the tribunal's award.[21]

3. Thirdly, it is clear that if the Hong Kong court is asked to rule on the material validity of an arbitration agreement after the tribunal has rendered its award, in the context of an application to enforce or[22] set aside, it is required to consider the matter by reference to either "the law to which the parties subjected it" or "(if there was no indication[23] of the law to which the arbitration agreement was subjected) under the law of" the place of arbitration.[24]

4. Fourthly, whilst the provisions just cited apply, strictly speaking, only to the determination of governing law in respect of validity issues arising post-award, it is

[19] AO s.20, giving effect to UNCITRAL Model Law, art.8(1) (court's power to find that an arbitration agreement is "null and void, inoperative or incapable of being performed" in the context of an application to refer to arbitration).

[20] See AO ss.86(1)(b), 89(2)(b) and 81(1) (the last of which adopts UNCITRAL Model Law, art.34(2)).

[21] A "competence-competence" issue should be noted here. In pre-AO case law in Hong Kong it was held that, when asked to rule on validity in the context of an application to refer to arbitration, the court should refer the case, including the validity issue, to the arbitration tribunal if the court is satisfied that the defendant/applicant has shown a "*prima facie* or plainly arguable" case of validity, but refuse to refer the case to arbitration if the court is satisfied that there is no arguable case of validity. See *Star (Universal) Co Ltd v Private Company "Triple V" Inc* [1995] 2 HKLR 62 (CA), Burrell J and *PCCW Global Ltd v Interactive Communication Services Ltd* [2007] 1 HKLRD 309. In the event of a reference being made, the arbitral tribunal's ruling on validity will not be binding on the court if the latter is asked to rule again on validity at the enforcement stage. Doubtless mindful of the potential for waste of time and money inherent in that procedure, the Court of Appeal in *PCCW Global Ltd v Interactive Communication Services Ltd* indicated that it would be appropriate for the court at the referral stage to give a definitive ruling that the arbitration agreement is valid if the matter is clear, even though the court observed, para.55, that the RHC lack the specific procedure (formerly RSC O.73 r.6(2)) which in England has been used to give definitive rulings on validity. Following the commencement of the AO, the same approach will no doubt be taken, given that the statutory provisions of relevant are materially unchanged: see in particular UNCITRAL Model Law, art.8(1), to which AO s.20 gives effect in Hong Kong law. See also the decision of the UK Supreme Court as to the true (limited) effect of competence-competence in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 and the observations of Rix LJ and Gloster J in *AES Ust-Kamenogorsk Hydropower Plant LLC v Ust-Kamenogorsk Hydropower Plant JSC* [2011] 2 CLC 51 and *Excalibur Ventures LLC v Texas Keystone Inc* [2011] 2 CLC 338 respectively. It is respectfully suggested that Rix LJ's statement in *Azov* that the agreement of either both sides or the arbitral tribunal is a *sine qua non* of the court making its determination of validity first does not seem to represent Hong Kong law (although doubtless the existence or absence of such agreement is relevant in the exercise of the discretion) but that the observations of both judges as to the need to look at the economics of the matter in exercising a discretion as to whether the court should resolve the matter straightaway are relevant in Hong Kong, with the "clarity" of the issue doubtless being an important consideration tending to affect the economics.

[22] The Hong Kong court has power to set aside only if the place of arbitration is Hong Kong.

[23] On a literal reading, it is no doubt possible to adopt a wide construction of the word "indication", so as to permit reference to be made to all sorts of background and contextual material. However, as a matter of principle it is suggested that such a construction should be rejected unless it is very clear that the relevant "indications" do realistically represent the intention of the parties as objectively to be construed from the document as to the governing law of their arbitration agreement.

[24] AO ss.86(1)(b) (applicable to Hong Kong, Taiwanese and other awards the enforcement of which falls outside the New York Convention of 1958), 89(2)(b) (applicable to awards the enforcement of which falls under the Convention) and 95(2)(b) (applicable to the enforcement of Mainland awards as defined in AO s.2(1)). The wording in these sub-sections follows art.V(1)(a) of the Convention and uses the phrase "the law of the country where the award was made" to refer to the law of the place of arbitration. See also UNCITRAL Model Law, art.34(2), enacted into Hong Kong law by AO s.81(1): this authorises the Hong Kong court to set aside a Hong Kong arbitration award if the arbitration agreement is not valid "under the law to which the parties have subjected it or, failing any indication thereon, under the *law of this State*." The italicised wording is to be interpreted as a reference to Hong Kong law (AO s.8(3)(a)), again making clear (consistently with the enforcement provisions) that it is the place of arbitration which matters.

suggested that it would be absurd to apply a different governing law to questions of validity arising pre-award, or to questions of interpretation and effect. Certainly in the general contractual context, Hong Kong law adopts the same approach to these topics irrespective of when, procedurally, the issue arises,[25] and it would seem anomalous if a fragmented approach were adopted in the context of arbitration agreements.

5. Fifthly, it is suggested that an approach which focuses on place of arbitration, rather than factors relating to the main contract, is also consistent with the enactment in Hong Kong of the principle of separability:

> *"The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.*[26] *For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."*[27]

Whilst the above statutory version of the principle of separability is, read literally, only applicable by arbitral tribunals when ruling on their own jurisdiction, the Hong Kong court has also adopted the principle when addressing challenges to the validity of an arbitration agreement[28] and it is suggested that the concept also supports an independent approach to the governing law of an arbitration agreement.[29]

6. Sixthly, it is suggested that it is clearly sensible, with the legitimate expectations of business in mind, to infer that the governing law of an arbitration agreement should be that of the place of arbitration unless the parties have made clear that they are agreeing something else. Otherwise, the lamentable result may well be that the Hong Kong court decides that an arbitration agreement providing for the place of arbitration to be X, but which is invalid under the laws of X, should nevertheless be treated as valid on the ground that the arbitration agreement is governed instead by the laws of Y. Such a ruling is likely to cause confusion and to block effective dispute resolution, since the courts of X are unlikely to exercise their supervisory jurisdiction over an arbitration which they regard as unlawful, and even if the matter results in an arbitration award, it will not be enforceable in X

[25] See Chapter 5.

[26] This first sentence represents the principle of competence-competence. The second and third sentences of this quotation represent the principle of separability.

[27] AO s.34(1), giving effect to UNCITRAL Model Law, art.16(1). One consequence of separability is neatly captured by Lord Hope's observation that there must be "direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity of the main agreement will not do". *Fili Shipping Co Ltd v Premium Nafta Products Ltd* [2007] Bus LR 1719 (HL).

[28] *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* [1992] 1 HKLR 40, Kaplan J. In that case, the court specifically rejected (para.70) the submission that separability does not apply when validity is in issue.

[29] Strictly speaking, the separability provision in the AO applies to Hong Kong arbitrations only (see AO s.3), but it is suggested that it would be appropriate for the Hong Kong courts to recognise the principle more widely given (i) its increasing international acceptance (ii) the usual presumption that foreign law is the same as Hong Kong law unless the contrary is proved.

or in Hong Kong or elsewhere, since the arbitration agreement will be invalid under the law of the place of arbitration.[30] If the parties themselves have expressly contracted for this, then it could be said that they only have themselves to blame, but if they have not, then the court should not impose such an outcome.

10.007 Applying these propositions, it is suggested that the analysis of various scenarios should be as follows.[31]

1. *If the contract lacks a choice of law clause but identifies a place of arbitration*, then the Hong Kong court should conclude that the arbitration agreement is governed by the law of the place of arbitration.[32] This follows from the principles suggested in para.10.006 above.

2. *If the contract contains a choice of law clause and identifies a place of arbitration*, then the Hong Kong court should conclude that the arbitration agreement is governed by the law of the place of arbitration. This also follows from para.10.006 above.[33]

3. *If the contract contains a choice of law clause but fails to identify a place of arbitration*, then the Hong Kong court should leave the arbitral tribunal to exercise its authority to determine what the place of arbitration is[34] then, if asked to do so, rule that the arbitration agreement is governed by the law of that place once the tribunal has ruled. This also follows from para.10.006. Procedurally, if the point arises in the context of an application to refer to arbitration and the court is satisfied that it will be arguable before the arbitral tribunal[35] that X should be the place of arbitration and that, if so, the agreement will be valid, then the court should clearly refer the matter to arbitration.

4. *If the contract is silent as to choice of law and place of arbitration*, then the Hong Kong court should similarly follow the arbitral tribunal's ruling as to the place of arbitration. This follows *a fortiori* from proposition (3) above.

5. *If the contract specifies a procedural law, but not a place of arbitration*, then the Hong Kong court should treat the governing law of the arbitration agreement as being the same as the procedural law.[36] This analysis should ordinarily be the same irrespective of whether the contract contains a more general choice of law clause and (if it does) irrespective of whether that law is the same as the procedural law.

6. *If the contract fails to specify a procedural law and a place of arbitration, and the arbitral tribunal has not ruled and will not rule on the matter of the place of arbitration*,[37] then the court should, in the absence of any other indication as to the parties' implicit intentions, adopt the following approach:

   (a) decide whether there is any basis for concluding that the tribunal has implicitly determined a place of arbitration and, if so, apply the law of that place as the governing law of the arbitration agreement;

[30] But see *Klöckner Pentaplast GmbH & Co KG v Advance Technology (HK) Co Ltd* [2011] 4 HKLRD 262, Saunders J; also see *Klöckner Pentaplast GMBH & Co KG v Advance Technology (HK) Co Ltd* (unrep., HCA 1526/2010, 9 Sept 2011, [2011] HKEC 1218), Saunders J (refusing leave to appeal) and *Klöckner Pentaplast GmbH & Co KG v Advance Technology (HK) Co Ltd* (unrep., HCMP 1836/2011, 19 Oct 2011, [2011] HKEC 1401), Tang VP (refusing a renewed application for leave to appeal). In that case, Saunders J decided that the governing law of the arbitration agreement was German law rather than Chinese law in circumstances where the main contract had a German choice of law clause and the arbitration agreement specified a Shanghai seat but lacked a governing law provision, also placing reliance on two other factors as supporting the same conclusion (requirement of German nationality for arbitral chairman and presence of choice of law and arbitration in the same clause). The result was that the matter was referred to arbitration even though, as the judge recognised, the arbitration agreement was not valid under Chinese law. It is suggested, with respect, that the court's analysis and conclusion were wrong; the court seems to have been led to them by an assumption that it could reliably follow the summary in *Dicey, Morris & Collins* (para.16.017) of some relatively old English decisions to the effect that "If there is an express choice of law to govern the contract as a whole, the arbitration agreement will also normally be governed by that law … whether or not the seat of the arbitration is stipulated…" That approach dates from the period prior to the Arbitration Act 1996, when English law was very far from having an arbitral regime anything like that of the UNCITRAL Model Law. For example, in the first case cited by *Dicey, Morris & Collins*, para.16.017, *Int'l Tank and Pipe SAK v Kuwait Aviation Fuelling Co KSC* [1975] QB 224, it was common ground that it was possible for "the proper law of a contract and the law governing the procedure in an arbitration" to be different but it seems to have been assumed without argument that the proper law of the contract was also the proper law of its arbitration clause, without any hint of separability. Similarly in the second case, *Qatar Petroleum Producing Authority and Qatar General Petroleum Corp v Shell Internationale Petroleum Maatschappij NVand Whessoe Ltd* [1983] 2 Lloyd's Rep 35 (CA). [Irrespective of the status in English law today of these and later decisions to similar effect, it is suggested that these should not be followed in Hong Kong. In this regard, two recent English High Court decisions, *Sulamérica Cia. Nacional de Seguros S.A. v Enesa Engenharia S.A.* [2012] EWHC 42 (Comm) and *Abuja International Hotels Limited v Meridien SAS* [2012] EWHC 87 (Comm), have considered the proper law of the arbitration agreement in the absence of express agreement, and support the view that it will usually be the law of the place of arbitration. As *Dicey, Morris & Collins* note, para.16.021, "an arbitration agreement is severable from the contract of which it forms a part and is normally more closely connected with the country of the seat than with any other country".

[31] Two clarifications: (1) references in this para to a "choice of law clause" are to such a clause which applies to the relevant contract generally, rather than being specific to the arbitration agreement, (2) references to contracts which identify a place of arbitration include those which do so indirectly, by specifying a process for identifying such a place, or by adopting rules which identify a place or specify a process for its identification.

[32] This follows from the above propositions. In *Klöckner Pentaplast GMBH & Co KG v Advance Technology (HK) Co Ltd* (unrep., HCA 1526/2010, 9 Sept 2011, [2011] HKEC 1218), Saunders J accepted, on the basis of English authority, that the "usual rule" was "that if there is no stipulation as to the law of the arbitration agreement that law would normally be the law of the seat of the arbitration", albeit holding that this was not so where the main contract contained a choice of law clause.

[33] But it is, of course, contrary to the *Klöckner Pentaplast GMBH & Co KG v Advance Technology (HK) Co Ltd* decision.

[34] AO s.48, incorporating UNCITRAL Model Law, art.20(1). Where the parties have agreed to ICC arbitration, such authority is given, under the ICC rules, to the ICC court rather than to the arbitral tribunal. This aspect of the parties' agreement will, of course, be respected under Hong Kong law.

[35] And the starting point is that it will be highly arguable, given that the tribunal's discretion under the Model Law is, in the eyes of a Hong Kong court, a wide one, but there may be circumstances in which the agreement or other considerations (e.g. anticipation of how a legal system connected with a party or with the case may view the matter) limit their discretion.

[36] See *XL Insurance Ltd v Owens Corning* [2001] CP Rep 22 for an example of such a provision—contract provided for New York law but provided for arbitration to be subject to the English Arbitration Act. The court concluded that the arbitration agreement was to be treated as governed by English law. In theory, a choice of procedural law is not quite the same as a choice of place of arbitration, but in reality they are so interlinked that the choice of the former will tend to imply the latter in the absence of specific indications that something else was intended.

[37] The most obvious example will be if the tribunal has completed its function and issued its final award, rendering itself *functus officio* but without making a rule as to the place of performance.