

1.4 Even if there is a dispute resolution clause, that may not determine the matter, as we will see. It may not be an unequivocal submission to one particular jurisdiction, as with a non-exclusive jurisdiction clause. Even if it does appear watertight, it may still be disregarded by the court.

1.5 But it is not just in the realm of contracts that the Hong Kong courts sees cases involving international parties. There may be torts committed overseas causing a party damage in Hong Kong, or torts here causing damage to an overseas party. There may be a breach of trust committed overseas, or an act done overseas affecting land in Hong Kong. The list goes on.

1.6 We will in this chapter deal with the situation where a party, not necessarily resident in Hong Kong, but usually so, wants to sue a party not ordinarily resident in Hong Kong. Hong Kong residents enjoy many benefits: it is a very safe territory, has an excellent police force, hospitals, roads, schools and so on, all at a very low tax rate. But to enjoy those benefits residents are subject to the jurisdiction of the civil and criminal courts. Overseas parties do not, obviously, enjoy Hong Kong's benefits so they are not, ordinarily, subject to the jurisdiction of our courts.

1.7 But there are situations, set out in the Rules of the High Court (Cap 4A), where overseas parties can be brought into Hong Kong proceedings. This oft-termed 'long arm' jurisdiction, though, is against the following background:

This is what has been called an exorbitant jurisdiction. The court's basic jurisdiction is territorial. It is therefore a strong thing for the court to go outside its territory and compel a foreigner to come here to defend himself. It must therefore be exercised with great caution.¹

2. LEAVE TO SERVE OUT OF THE JURISDICTION: RULES OF THE HIGH COURT, ORDER 11 RULE 1

1.8 Order 11 rule 1 of the Rules of the High Court sets out a list of grounds where the court may grant leave to serve a writ, which will also include an originating summons where the proceedings must be brought by that method, or a Third Party Notice, on a party out of the jurisdiction.

1.9 Before we look at the rules, the procedure and the applicable law, there are some most important threshold considerations. Some of these considerations equally apply before commencing any litigation, but they are particularly relevant when suing an overseas party. Is there any point in suing the defendant wherever he may be? Does the defendant have assets in Hong Kong against which the eventual judgment may be executed? If not, does the defendant have assets elsewhere and if so, can a Hong Kong judgment be enforced without difficulty in the countries where the defendant has assets? If the defendant has assets in Hong Kong or elsewhere, will the institution of proceedings against him cause those assets to disappear? If so, it may be necessary to consider whether a Mareva injunction, freezing order or other equivalent may be available. There is nothing to prevent a

plaintiff from coupling an application under Order 11 for leave to serve out of the jurisdiction with an application for a Mareva injunction, provided, of course, there is evidence to support both.

1.10 The application for leave to issue proceedings against an overseas defendant and to serve them out of the jurisdiction takes the form of the supporting affidavit (or affirmation). It is made to the court ex parte so it is not served on the intended defendant who will most probably know nothing about it. The affidavit should exhibit the material documents which support the plaintiff's claim, for example, the contract. It is usual also to exhibit a draft Statement of Claim and for a draft order to accompany these papers. That draft order will contain the order sought – to serve the writ out of the jurisdiction – and will stipulate the time to be given to the defendant to acknowledge service. The papers are usually considered by a High Court Master and there will be no hearing unless the Master calls for one, which is unlikely unless he or she needs clarification of any issue arising from the papers or is in doubt as to whether or not leave should be given.

1.11 As it is an ex parte application in which the defendant has no say, it is of utmost importance that the defendant be treated as fairly as possible, which imposes a duty of full disclosure upon the plaintiff. Such a duty exists with any ex parte application. A failure to comply with this duty can result, and frequently does result, in the order that has been made on the ex parte application being discharged after the inter partes hearing. So what does full disclosure in this Order 11 context mean? It does not go so far as arguing the defendant's defence for him, but the court should be told what defence the defendant alleges or is likely to allege and if there are documents setting out that defence and supporting it, those should be exhibited to the affidavit in support of the Order 11 application. It does not matter very much if the court is told about the defendant's likely defence, as there is no need, at this early stage, to demonstrate that the plaintiff has a winning case, merely that he has a case (as to which, see below). What the court should be told is anything that is likely to be relevant to its decision whether or not to grant leave. So, for instance, failure to disclose a contract containing a jurisdiction clause in favour of a country other than Hong Kong would be a material non-disclosure and the order granting leave on the ex parte application would almost certainly be discharged on the defendant's inter partes application to set aside leave. As a practical matter, given how little the plaintiff need show as to the strength of the case, it is much better to over-disclose rather than under-disclose, with the risk that that course entails.

1.12 Affidavits and affirmations are statements of fact. Very often the facts to be deposed to are not in the personal knowledge of the lawyer handling the matter, but have been told to him by the client or representative of the client. Lawyers should not themselves make affidavits on the basis of second-hand facts and there are numerous cases where solicitors have been criticised for swearing affidavits deposing to facts of which they have no personal knowledge.² It is always desirable to have the person with personal knowledge of the facts swear the affidavit or affirm the affirmation. If that is not possible because that person

¹ *Wo Fung Paper v Sappi Kraft* [1988] 2 HKLR 346, [1988] HKC 10 per Hunter JA.

² See for example *UES International (HK) Ltd v Maritima Maruba SA* [2013] HKCU 2668 (unreported, HCA 632/2011, 19 November 2013) per Anthony Chan J.

is overseas and time is short, then a draft affidavit should be prepared for that person, and an undertaking given to the Court to have it sworn, notarised and filed as soon as practicable.

1.13 As for the application for leave, Order 11 r 4(1) provides as follows:

An application for the grant of leave under rule 1(1) must be supported by an affidavit stating –

- (a) the grounds on which the application is made;
- (b) that in the deponent's belief the plaintiff has a good cause of action;
- (c) in what place the defendant is, or probably may be found; and
- (d) where the application is made under rule 1(1)(c), the grounds for the deponent's belief that there is between the plaintiff and the person on whom a writ has been served a real issue which the plaintiff may reasonably ask the Court to try.

1.14 Order 11 r 4(2) adds these vital words:

No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.

1.15 The only place where this requirement can 'be made sufficiently to appear' is in the affidavit, so very careful consideration needs to be given to the drafting of the affidavit to ensure that it is sufficiently persuasive to satisfy the Court that the case is a proper one for service out. This is not always an easy task, given that affidavits are statements of evidence and should not contain argument, submission or authorities.

2.1 *The first requirement: grounds under Order 11*

1.16 The first requirement of the affidavit (which of course includes an affirmation) is to establish a good arguable case for one or more grounds for the grant of leave and the available grounds are listed in Order 11 rule 1(1). They are as follows:

- (a) relief is sought against a person domiciled or ordinarily resident within the jurisdiction;
- (b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);
- (c) the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto;
- (d) the claim is 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 within the jurisdiction, or
 - (ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or
 - (iii) is by its terms, or by implication, governed by Hong Kong law, or
 - (iv) 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;

- (e) the claim is brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, 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;
- (f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction;
- (g) the whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits) or the perpetuation of testimony relating to land so situate;
- (h) the claim is brought to construe, rectify, set aside or enforce an act, deed, will, contract, obligation or liability affecting land situate within the jurisdiction;
- (i) the claim is made for a debt secured on immovable property or is made to assert, declare or determine proprietary or possessory rights, or rights of security, in or over movable property, or to obtain authority to dispose of movable property, situate within the jurisdiction;
- (j) the claim is brought to execute the trusts of a written instrument being trusts that ought to be executed according to Hong Kong law and of which the person to be served with the writ is a trustee, or for any relief or remedy which might be obtained in any such action;
- (k) the claim is made for the administration of the estate of a person who died domiciled within the jurisdiction or for any relief or remedy which might be obtained in any such action;
- (l) the claim is brought in a probate action within the meaning of Order 76;
- (m) the claim is brought to enforce any judgment or arbitral award;
- (n) the claim is brought under the Carriage by Air Ordinance;
- (oa) the claim is made under the Mutual Legal Assistance in Criminal Matters Ordinance;
- (ob) the claim is for an order for the costs of and incidental to a dispute under section 52B(2) of the Ordinance;
- (oc) the claim is for interim relief or appointment of a receiver under section 21M(1) of the Ordinance;
- (od) the claim is for a costs order under section 52A(2) of the Ordinance against a person who is not a party to the relevant proceedings;
- (p) the claim is brought for money had and received or for an account or other relief against the defendant as constructive trustee, and the defendant's alleged liability arises out of acts committed, whether by him or otherwise, within the jurisdiction.

1.17 This list is exhaustive and there is no residual power for the Court to grant leave for a claim which does not fall within one of the grounds. Thus, for instance, it would not be possible to obtain leave to serve out of the jurisdiction for a claim for unjust enrichment.

1.18 The affidavit must make out a 'good arguable case' that the plaintiff's claim falls within one or more of these grounds. It is not necessary that the case

itself is a 'good arguable case', and this can give rise to confusion. 'Good arguable case' has been described as a 'high threshold':³

The principles and procedures governing the grant of leave for service of a writ out of the jurisdiction and of setting aside such service are prescribed in Orders 11 and 12 of the RHC and are very well settled. A plaintiff seeking to serve a writ out of the jurisdiction has to apply for leave by way of an ex parte application. He has to show firstly that he has a good arguable case that his case falls within one of the subparagraphs of Order 11 rule 1(1) so as to give the court jurisdiction to consider the application. An arguable case is not sufficient: see *Hong Kong Civil Procedure 2008*, para 11/1/8 and *A J Lucas (Hong Kong) Limited and Drilltec Gut GmbH Grossbohrund Umwelttechnik*, HCCT No 36 of 2005, per Burrell J. Though the court will not require proof to its satisfaction, it will require something better than a mere prima facie case. This is a high threshold. The court has no discretion to exercise any jurisdiction if this threshold is not achieved: see *The Brabo* [1949] AC 326. Where questions of facts are concerned, the court looks primarily at the plaintiff's case and relies on the plaintiff's duty of full and complete disclosure at the ex parte stage.

2.1.1 Some of the individual Order 11 grounds discussed

1.19 We will not discuss all the listed Order 11 grounds in this section, but only those most frequently arising in practice.

(a) *Relief is sought against a person domiciled or ordinarily resident within the jurisdiction.*

1.20 This is common-sensical. The defendant is a Hong Kong resident who just happens to be out of Hong Kong when the plaintiff wishes to issue a writ. If the matter is not urgent and if the defendant will shortly return, then best practice would be to wait until he does return and serve the writ on him in Hong Kong, then there is no scope for argument. But that course may not always be possible: the limitation period may be about to expire, the defendant may be incarcerated overseas or the plaintiff may fear imminent disappearance of assets and needs a Mareva injunction.⁴ Because the defendant is ordinarily subject to the jurisdiction of the courts of Hong Kong the Court will grant leave even though the obligation sued upon may have no connection with Hong Kong and/or may not itself fall into any of the Order 11 grounds.

1.21 This ground is most useful in a debt collection context. Debtors frequently leave Hong Kong hoping thereby to escape their debts. Even if creditors are uncertain of their current location, this ground enables them to be brought into Hong Kong proceedings. If they ignore those proceedings, the plaintiff will quickly obtain a default judgment and be able to enforce it against the debtors' assets in Hong Kong, and, with varying degrees of difficulty, elsewhere.

³ To J in *GDH Limited v Creditor Co Limited* [2008] 5 HKLRD 895. [2008] HKCU 1646 at para 16.

⁴ For a discussion of Mareva injunctions, see chapter 3. On Mareva injunctions generally, see also Mak, *Law of Injunctions in Hong Kong* (2016, Hong Kong: LexisNexis), chapter 4.

1.22 Where an intended defendant has left Hong Kong with no intention to return, for instance an expatriate whose contract has expired, it may be difficult to assert that he is 'domiciled or ordinarily resident in Hong Kong'. If leave is granted in this situation the defendant may very well successfully apply to set it aside.

(b) *An injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing).*

1.23 Until the Civil Justice Reforms were introduced in April 2009, this ground was problematic. An injunction is a remedy, not a cause of action. In *The Siskina*,⁵ the ship *Siskina* sank in Greek waters whilst on a voyage from Italy to Saudi Arabia. She was owned by a Panamanian company and managed by a Greek company. She was insured in London and her owners made a claim on the insurers. The insurance money in London was the only connection with England. The owners of cargo which had been lost with the ship sought a Mareva injunction to restrain the insurance money leaving England pending the outcome of their claim. They failed at first instance:⁶

Apart from the claim for the interim injunction there is nothing which is properly before the court. The plaintiffs have no claim to the insurance money which they seek to restrain the defendants from receiving and removing out of the jurisdiction. Indeed, for the purposes of Order 11 and for the reasons already explained, their writ contains no cause of action whatever against the defendants... In these circumstances one is simply left with a claim for an interim injunction relating to a fund which the plaintiffs cannot and do not claim as such. Accordingly, since the writ contains no cause of action against the owners, at any rate for the purpose of Order 11, it is simply strikeable out.

1.24 In the Court of Appeal the owners had more success and they succeeded by a majority:⁷

It was suggested that this course is not open to us because it would be legislation: and that we should leave the law to be amended by the Rules Committee. But see what this would mean: The ship-owning company would be able to decamp with the insurance moneys and the cargo-owners would have to whistle for any redress. To wait for the Rules Committee would be to shut the stable door after the steed had been stolen. And who knows that there will ever again be another horse in the stable? Or another ship sunk and insurance moneys here? I ask, why should the judges wait for the Rules Committee? The judges have an inherent jurisdiction to lay down the practice and procedure of the courts: and we can invoke it now to restrain the removal of these insurance moneys.

1.25 The House of Lords very firmly decided against the cargo owners:⁸

The sub-rule speaks of "the action" in which a particular kind of relief, "an injunction" is sought. This pre-supposes the existence of a cause of action on which to found "the action." A right to obtain an interlocutory injunction is not a cause of

⁵ [1979] AC 210.

⁶ [1977] 3 WLR 532 at 543 per Kerr J.

⁷ [1977] 3 WLR 532 at 554 per Lord Denning MR. Note however the strong dissenting judgment from Bridge LJ.

⁸ [1979] AC 210 at 256 per Lord Diplock.

action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.

1.26 In the past, Hong Kong and other common law jurisdictions followed *The Siskina*. Thus if there was no available cause of action in Hong Kong, an injunction was not available against a defendant overseas. The frequent practical consequence of this arose in the common situation where wrongdoing occurred overseas and the proceeds of it found their way to Hong Kong. Leave could not be obtained to sue the overseas defendant on this ground. That was remedied in the United Kingdom by the Civil Jurisdiction and Judgments Act 1982 (although the relevant part did not become effective until 1997) but remained the position in Hong Kong for a further 27 years. Of course, if there was a cause of action in Hong Kong, *The Siskina* presented no difficulty, and that cause of action would not need to fall within one of the Order 11 grounds as the application for the injunction was itself an Order 11 ground.

1.27 Pursuant to the Civil Justice Reforms, the High Court Ordinance (Cap 4) was amended to include section 21M:

- (1) Without prejudice to section 21L(1),⁹ the Court of First Instance may by order appoint a receiver or grant other interim relief in relation to proceedings which—
 - (a) have been or are to be commenced in a place outside Hong Kong; and
 - (b) are capable of giving rise to a judgment which may be enforced in Hong Kong under any Ordinance or at common law.
- (2) An order under subsection (1) may be made either unconditionally or on such terms and conditions as the Court of First Instance thinks just.
- (3) Subsection (1) applies notwithstanding that—
 - (a) the subject matter of those proceedings would not, apart from this section, give rise to a cause of action over which the Court of First Instance would have jurisdiction; or
 - (b) the appointment of the receiver or the interim relief sought is not ancillary or incidental to any proceedings in Hong Kong.
- (4) The Court of First Instance may refuse an application for appointment of a receiver or interim relief under subsection (1) if, in the opinion of the Court, the fact that the Court has no jurisdiction apart from this section in relation to the subject matter of the proceedings concerned makes it unjust or inconvenient for the Court to grant the application.
- (5) The power to make rules of court under section 54 includes power to make rules of court for—

⁹ Section 21L(1) gives the Court of First Instance general power to grant an injunction or appoint a receiver.

- (a) the making of an application for appointment of a receiver or interim relief under subsection (1); and
 - (b) the service out of the jurisdiction of an application or order for the appointment of a receiver or for interim relief.
- (6) ...
- (7) In this section, “interim relief” (臨時濟助) includes an interlocutory injunction referred to in section 21L(3).

1.28 This section is given effect in the Rules of the High Court by Order 11 rule 1(1)(oc) so that the application for an injunction or appointment of a receiver where the section’s requirements are satisfied will fall within an Order 11 ground and entitle the plaintiff to leave. We will consider this rule later in this chapter.

1.29 Even though the position has been remedied in Hong Kong, there will still be other common law jurisdictions which continue to apply *The Siskina*. Practitioners should be aware of this possibility when instructing overseas lawyers to obtain injunctions in jurisdictions where there is no cause of action against the defendant.

- (c) *The claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto.*

1.30 This must be read in conjunction with Order 11 rule 4(1)(d):

where the application is made under rule 1(1)(c), [the affidavit must state] the grounds for the deponent’s belief that there is between the plaintiff and the person on whom a writ has been served a real issue which the plaintiff may reasonably ask the Court to try.

1.31 For example, a Hong Kong company has purchased goods from, say, a German company and on-sold them to a Mainland company. The Mainland company has not paid, alleging the goods are defective, and the German company has not been paid. The German company sues the Hong Kong company which can apply for leave to issue and serve a Third Party Notice (originating process) on the Mainland company by relying on this ground.

1.32 That is straightforward. Plainly there is a real issue between the German and Hong Kong companies. Again there is no requirement for the claim in the action to fall within an Order 11 ground.

1.33 But the courts view this ground with some caution as it gives rise to a tendency to creative litigation. Thus, ‘straw’ defendants may be sued in Hong Kong against whom there is in reality no substantive claim, simply to be able to bring into Hong Kong proceedings the ‘real’ overseas defendants. This is what happened in *Dallah Albaraka (Ireland) Ltd v Symphony Gems NV*.¹⁰

Where there is no “live” issue between the plaintiff and any of the other defendants, as is the case here, it seems to me to be hard to get home on the argument that in such circumstance the sixth and seventh defendants can be regarded as “proper parties” within

¹⁰ [2005] 3 HKLRD 703, [2005] 2 HKC 404 per Stone J.

the accepted meaning of that phrase: there are simply no "real" issues between the plaintiff and the other [conspiracy] defendants which the plaintiff may reasonably ask the court to try".

1.34 Note the disjunctive of 'necessary or proper' in the sub-rule. An overseas defendant may not be a necessary party but may still be a proper party.¹¹

1.35 The *Dallah Albaraka* decision is also instructive on the issue of material non-disclosure on the ex parte application:

The Judge was not told of the fact that the proper law of the guarantees - which was the sole cause of action asserted at that stage - was English, and that none of the parties had any connection with Hong Kong. More particularly, however, he was not told that proceedings under the guarantees had been brought, and were continuing, against the sixth and seventh defendants in Belgium for the same debt...

1.36 Stone J would not have re-granted leave to serve out on the basis of non-disclosure alone, though he did not need to do so because of his decision on jurisdiction.

(d) *The claim is 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 etc*

- (i) was made within the jurisdiction, or
- (ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or
- (iii) is by its terms, or by implication, governed by Hong Kong law, or
- (iv) 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.

1.37 This is the ground upon which practitioners are most likely to be relying in practice, the 'contract ground'. The opening words are very wide and in effect cover virtually any claim relating to a contract. Note that it has 2 distinct halves: a claim which i) affects a contract, or ii) is to obtain relief in respect of a breach of contract. For example, a claim for a declaration that a contract is valid would fall within the first half.¹² There is Australian authority which supports a claim in tort for inducement to breach of contract as falling within the second half.¹³ Of course, the contracts in both these examples must fall within one of the 4 categories (i) to (iv) set out in the rule.

1.38 The first 2 categories, 'made' within the jurisdiction or 'made by or through an agent' within the jurisdiction can be dealt with together. There is of course no difficulty when both parties are within the jurisdiction at the time of making their contract. The problems arise where one party, or both parties, is/are not. Post and

11 See *Inchcape JDH Ltd v Baltrans Exhibition & Removal Ltd & Anor* [1997] HKLRD 1278, [1997] 3 HKC 314 and the cases cited therein.

12 *Gulf Bank KSC v Mitsubishi Heavy Industries* [1994] 1 Lloyd's Rep 323

13 *South Adelaide Football Club v Fitzroy Football Club* (1988) 92 FLR 117

courier present no problem: the contract is made when the acceptance is posted or delivered to the courier service. This has been the position since the 19th century:¹⁴

The question whether a contract was made within the jurisdiction will often admit of a simple answer: if both parties are in England at the time of making it, or if it is contained in a single document signed by both parties in England, there is no difficulty. But in the case of contracts involving negotiations, where one party is abroad, the answer may be difficult to find. Sophisticated analysis may be required to decide when the last counter-offer was made into a contract by acceptance, or at what point a clear consensus was reached and by virtue of what words spoken or of what conduct. In the case of successive telephone conversations it may indeed be most artificial to ask where the contract was made: if one asked the parties, they might say they did not know - or care. The place of making a contract is usually irrelevant as regards validity, or interpretation, or enforcement. Unfortunately it remains in Order 11 as a test for purposes of jurisdiction, and courts have to do their best with it.

1.39 The House of Lords in this case was concerned with telex, but in recent years numerous means of simultaneous communication have come on the scene. The general rule concerning such instantaneous communications, for example telephone, radio, email and, presumably Facebook, Twitter, Snapchat and so on, is that the contract is made where the acceptance is received. That analysis risks becoming absurd, however, when the acceptance is received on a mobile device midway over the Pacific Ocean or on a swimming pool terrace in the Maldives. The courts have yet to decide on such a case and it remains to be seen what rule, if any, might emerge. But it may well be that the courts may shy away from deciding where the contract is made and instead look to category (iii), and to whether it can be implied that Hong Kong law is to govern the contract.

1.40 It is possible with these first 2 categories, 'made' within the jurisdiction, that the contract, though it can be sued upon in Hong Kong, has a governing law clause applying the law of a different country. The governing law will operate on questions concerning the contract itself, validity, capacity, enforceability, breach and so on, but matters become more complex in the realm of damages. Remoteness, causation and heads of damage are regarded as substantive, so the governing law applies, whereas matters of quantification are procedural and governed by the *lex fori*.¹⁵ Where the governing law would permit the award of punitive damages, it is likely that the Hong Kong court would take the view that these are penal so not truly damages, which are compensatory, and would not make such an award, though there is no direct authority on the point.

1.41 As to category (iii), if the contract is expressly governed by Hong Kong law then leave for service out should be granted. The leading Hong Kong case on the implication that Hong Kong law governs remains the Court of Appeal decision in *Century Yachts Ltd v Xiamen Celestial Yachts Ltd*.¹⁶ The plaintiff sought leave to bring proceedings against the defendant which was located in Xiamen in the People's Republic of China. The outline facts were as follows:

14 *Brinkibon Ltd v Stahag Stahl and Stahlwarenhandelsgesellschaft* [1983] 2 AC 34 per Lord Wilberforce.

15 *Boys v Chaplin* [1971] AC 356.

16 [1994] 1 HKC 331.

i) the plaintiff sought orders for the construction of yachts which were to be built by the defendant in Xiamen; ii) the plaintiff also supplied some materials to the defendant for the construction of those yachts; iii) as between the plaintiff and the purchasers of the yachts, the governing law of the contracts was Hong Kong law; no governing law was expressed in the contract(s) between the plaintiff and the defendant. Litton JA gave the leading judgment:

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.

Looking, first of all, at the larger picture. The contemplation of the parties was that the plaintiff should, in the first place, secure orders for yachts from wealthy customers either in Hong Kong or overseas. When deposits were received from these customers, 75% thereof would be credited to the defendant's account in Hong Kong. The plaintiff was to render financial assistance to the defendant by undertaking to purchase material and accessories for the yachts. Such material was unavailable in China and these purchases would be made in Hong Kong and sent to the defendant in Xiamen. These transactions would all be reflected in the accounts which were kept in Hong Kong.

Second, all communications between the parties were in English. Mr Park, the managing director of the plaintiff, is English and Mr Fuhrman, the managing director of the defendant, is American.

Third, as regards the plaintiff and its own customers, the governing law of those contracts is Hong Kong law. If, for example, there was some defect in the manufacture of the yachts, those customers would obviously have proceeded against the plaintiff in the Hong Kong courts. It would naturally have been in the contemplation of the parties that, in that event, the plaintiff would in turn bring in the defendant as a third party. In these circumstances, it would have been very odd if the plaintiff intended, as between itself and the defendant, that the governing law of the sales contracts should be that of the PRC.

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 in their minds had been directed to the question. In my judgment, there can be no doubt what Mr Park and Mr Fuhrman 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.

1.42 This case was considered more recently in *Continental Mark Ltd v Verkehrs-Club De Schweiz*¹⁷ where the decision went the other way. The plaintiff's contention that Hong Kong law should be implied was roundly rejected by the Deputy Judge:

Where under Order 11, rule 1(d)(iii) there is no express agreement as to what the governing law should be then the task of the Court is to infer their intention from all the relevant circumstances. This involves a bifocal approach ([1994] 1 HKC 331, 339A [*Century Yachts*]) engaging the large picture as well as the close focus. I have little doubt that all participants would have recognised that the assumed contract

17 [2001] 4 HKC 469.

was to be governed by Swiss law. All negotiations took place there in the German language at the defendant's office. The plaintiff's representative office was nearby in Germany. All meetings took place in Switzerland and all documents were sent there. The scooters would be shipped there. All the relevant circumstances point to Europe and not Asia. On this point too the appeal succeeds as the application of the *Century Yachts* test points assuredly to Switzerland.

1.43 The Deputy Judge's judgment was upheld on appeal.

1.44 As to category (iv), no guidance is given in the rule as to whether the jurisdiction clause must be exclusive or whether a non-exclusive jurisdiction clause will suffice. Given that the court may still decline jurisdiction under Order 11 rule 4(2) even if an Order 11 ground is made out, a non-exclusive jurisdiction clause should be sufficient to make out this ground, as the court can take account of the non-exclusivity when deciding whether the case is a proper one for service out or not. For example, it is unlikely that a court would grant leave if faced with a contract containing a non-exclusive Hong Kong jurisdiction clause and a New York governing law clause, absent other factors favouring Hong Kong.

(e) *The claim is brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, 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.*

1.45 Under this ground it is the breach of contract which is the focal point. The plaintiff must therefore demonstrate a good arguable case on breach of contract under this ground, whereas if the contract fell within a category of the preceding ground all he needs to show in relation to breach is a serious issue to be tried, a much lesser test, as discussed below. The first part of the ground is very clear, but the second part needs some explanation which can best be given by way of the decision of the House of Lords which gave rise to it. In *Johnson v Taylor*¹⁸ the Order 11 then before the court did not have the words of the second part. An overseas seller of goods by a CIF contract failed to ship those goods: that breach of contract took place out of the jurisdiction. However the plaintiff argued that there was a breach of contract under the CIF obligation by the failure to present shipping documents in England. The House of Lords rejected that argument:¹⁹

... that which was to be performed without the jurisdiction was of such a nature that its breach so destroyed the substratum of the whole contract that no performance was or could conceivably be possible of "the part of the contract" which, if matters had pursued a normal course, would have been performed in this country.

1.46 The words of the second part were added to cure the restriction which the House of Lords had imposed and therefore the buyer, were such a case to happen now, should succeed in obtaining leave. This will only apply, of course, where there are 2 or more obligations involved in performance of the contract and a breach of

18 [1920] AC 144.

19 Ibid per Lord Birkenhead LC.

an obligation out of Hong Kong renders impossible performance of an obligation in Hong Kong. So if one takes the facts of *Johnson v Taylor* but applies a simple FOB contract rather than a CIF contract, the ground would not be made out as failure to present the shipping documents would not occur within the jurisdiction and there would therefore be no failure to perform within the jurisdiction.

(f) *The claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction.*

1.47 At first glance this appears wider than the contract grounds just discussed. The tort can occur in Hong Kong and the damage be sustained elsewhere and *vice versa*. Where the tort occurs out of the jurisdiction, however, the application of this ground is limited by the 'double actionability' rule.

1.48 Where the tort occurs in Hong Kong and damage is sustained either here or elsewhere, or both, no difficulty arises and, if leave is granted and the action proceeds in Hong Kong, both liability and quantification of damages will proceed according to Hong Kong law. The fact that the damages might be more generous were they to be assessed according to the law of the jurisdiction in which they were sustained does not affect the issue.²⁰

1.49 The 'double actionability' rule requires the overseas act on which the action is based not only to be a tort in Hong Kong but also actionable in the jurisdiction where the act is committed. The rule derives originally from the judgment of Willes J in *Phillips v Eyre*²¹ which was later considered by the House of Lords in *Boys v Chaplin*²² which led to the statement of the rule in Dicey and Morris²³ as:

Rule 203 - (1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and (b) actionable according to the law of the foreign country where it was done. (2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.

1.50 The whole matter of double actionability was considered by the Privy Council in *Red Sea Insurance Co Ltd v Bouygues SA*²⁴ which was an appeal from Hong Kong and is thus binding on all our courts except the Court of Final Appeal.

(m) *The claim is brought to enforce any judgment or arbitral award.*

1.51 Hong Kong is a very friendly jurisdiction for the enforcement of foreign judgments and arbitration awards. Where the subjects of those judgments or awards are located out of Hong Kong this ground enables enforcement

20 *Metall and Rostoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391

21 (1870) LR 6 QB 1.

22 [1971] AC 356

23 *Dicey and Morris on the Conflict of Laws* (12th Edn, 1993) at pp 1487-1488. Note that the law has now been changed by statute in the UK so that the 'double actionability' rule operates only in relation to defamation.

24 [1995] 1 AC 190.

proceedings to be brought against them in Hong Kong. The ground will apply to a writ action to enforce a foreign judgment at common law, or an application to register a judgment under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319), or an application for leave to enforce an arbitration award as a judgment under the Arbitration Ordinance (Cap 609).

1.52 Whilst there is no need for the judgment creditor to show evidence of the existence of assets within Hong Kong he must show that there is a prospect of a real benefit from the Hong Kong proceedings. This benefit can be indirect or prospective:²⁵

[W]e accept that the court should not automatically exercise its discretion in favour of permitting service out of the jurisdiction unless it is just to do so and that it will ordinarily not be just to do so unless there is a real prospect of a legitimate benefit to the Claimant from the English proceedings. We see no reason why that benefit should not be indirect or prospective.

1.53 The judgment or arbitral award needs to be one which would be enforceable in Hong Kong. So in the case of a judgment for foreign taxes, for instance, leave might not be granted, or might be set aside at the instance of the defendant, as it would be pointless to grant leave in respect of enforcement of a judgment which could not subsequently be enforced. Similarly for an arbitration award enforcement of which would be successfully opposed, though instances of this would be rare as the grounds for opposition, as we will see, are very limited.²⁶

(oc) *The claim is for interim relief or appointment of a receiver under section 21M(1) of the Ordinance.*

1.54 An application for leave under the preceding ground is quite likely to be coupled with a claim for a Mareva injunction under this ground where the plaintiff believes there are assets in Hong Kong, and that those are likely to disappear once the overseas judgment debtor learns of the Hong Kong proceedings, unless he, or third parties on his behalf, is/are restrained from dealing with the assets by an injunction.

1.55 Section 21M(7)²⁷ clarifies that 'interim relief' includes an interlocutory injunction. It is in the context of Mareva injunctions in particular that section 21M will come into play in our courts. The Mareva injunction was refused in *The Siskina*²⁸ because there was no cause of action in the jurisdiction in which the injunction was sought. Section 21M was introduced by our Civil Justice Reforms in 2009 to cure the problem to which *The Siskina* gave rise. Thus injunctions may now be granted where there is no cause of action in Hong Kong provided that they are:²⁹

in relation to proceedings which—

- (a) have been or are to be commenced in a place outside Hong Kong; and
- (b) are capable of giving rise to a judgment which may be enforced in Hong Kong under any Ordinance or at common law.

25 *Tasarruff Meduati Sigorta Fonu v Demirel* [2007] EWCA Civ 799 per Sir Anthony Clarke MR.

26 See Chapter 4.

27 Section 21M, High Court Ordinance (Cap 4) is set out at para 1.27 above.

28 [1979] AC 210.

29 Section 21M(1), High Court Ordinance (Cap 4).

1.56 This applies:³⁰

...notwithstanding that—

- (a) the subject matter of those proceedings would not, apart from this section, give rise to a cause of action over which the Court of First Instance would have jurisdiction.

1.57 The role of the court in relation to applications for Mareva injunctions under section 21M has recently been considered by the Court of Final Appeal in *Compania Sud Americana De Vapores SA v Hin-Pro International Logistics Limited*.³¹ To obtain a Mareva injunction the plaintiff needs to establish at the time of his application a 'good arguable case' on the merits. Prior to *Hin-Pro* the courts appeared to require that there should be a good arguable case had the application been brought in Hong Kong. The Court of Appeal in *Hin-Pro* expressed this as follows:³²

... the court must ask itself whether the facts of the case warrants the grant of interim relief if substantive proceedings were brought in Hong Kong. This entails the judge hearing the application to examine the strength and arguability of an applicant's claim in the context of Hong Kong law...

1.58 In this the Court of Appeal followed its English counterpart in *Motorola Credit Corporation v Uzan (No 2)*.³³

1.59 The Court of Final Appeal disagreed. Lord Phillips of Worth Matravers NPJ delivered the judgment with which the other 4 Permanent Judges agreed and said at paragraph 53:

In summary, in section 21M proceedings the court has first to consider whether, if the plaintiff succeeds in the primary jurisdiction the resultant judgment is one that the Hong Kong court will enforce. If the answer to that is yes, the court has to form a view, on all the available material, including any findings of the foreign court itself, whether the plaintiff has a good arguable case before the foreign court and whether there is a real risk that the defendant will dissipate his assets if the Mareva is not granted.

1.60 This clarification is to be welcomed although it may well be that expert evidence will now be required from lawyers in the jurisdiction in which 'the proceedings have been or are to be commenced' on the merits of the case in that jurisdiction. Against this, however, submissions will no longer be required on the merits were the proceedings to be taking place in Hong Kong.

1.61 It is mildly amusing that two good arguable cases are now needed for a successful application under this ground. Firstly, a good arguable case that the requirements of section 21M are met should be presented, and secondly, a good arguable case in the foreign court.

30 Section 21M(3), High Court Ordinance (Cap 4).

31 (2016) 19 HKCFAR 586, [2016] HKCU 2728.

32 [2015] 2 HKLRD 458, [2015] 2 HKC 436 at para 32.

33 [2004] 1 WLR 113.

1.62 The court has a residual discretion to refuse to grant leave. Section 21M(4) provides:

The Court of First Instance may refuse an application for appointment of a receiver or interim relief under subsection (1) if, in the opinion of the Court, the fact that the Court has no jurisdiction apart from this section in relation to the subject matter of the proceedings concerned makes it unjust or inconvenient for the Court to grant the application.

1.63 This is additional to the discretion conferred by Order 11 rule 4(2).³⁴

1.64 The overseas judgment or potential judgment must be one which the Hong Kong court will enforce. So once again a judgment for foreign taxes could not be a foundation for leave under this ground.

1.65 The application for an injunction made under section 21M must be by originating summons and not by writ.³⁵

1.66 For a useful examination of the judicial process in the treatment of applications under section 21M, the judgment of Zervos J in *JSC BTA Bank v Ablyazov* is a good reference point.³⁶ In this case the plaintiff applied not only for an injunction but for the appointment of receivers over the debtor's assets in Hong Kong. This relief is also included in section 21M and is very useful where the assets frozen by the injunction may still be dissipated either by the debtor from time to time or by others having control of the assets and acting on the debtor's behalf.

1.67 The other grounds under Order 11 rule (1) are beyond the scope of this book. That is not to underestimate their importance, obviously, in the context of the cases in which they may come into play. We have selected instead the grounds that a dispute resolution lawyer in Hong Kong is likely most often to encounter in practice.

1.68 But it is noteworthy that all but two of the grounds involve some connection with Hong Kong. Either the intended defendant has some connection with Hong Kong or some act has been done or not done or is threatened to be done in Hong Kong or with consequences in Hong Kong. The exceptions are the enforcement of a foreign judgment or arbitral award (ground (m)) and the injunction in support of overseas proceedings (ground (oc)); here the person sued, the obligation or the consequences usually have no connection with Hong Kong whatsoever. Even so, there must be a belief on the part of the plaintiff that enforcement of the judgment or award will be of some or some potential benefit or that there are assets in Hong Kong to which the injunction can attach.

2.2 The second requirement: serious issue to be tried

1.69 This is expressed at Order 11 rule 4(1)(b) as:

that in the deponent's belief the plaintiff has a good cause of action...

34 Discussed below at para 1.76.

35 O 29 r 8A(1), Rules of the High Court (Cap 4A).

36 [2014] 5 HKC 209.

4.3 If A decides to sue B in Hong Kong, a Hong Kong court must decide whether Hong Kong has jurisdiction to adjudicate the matter (Question 1a) and the applicable law for the matter (Question 2a). Both questions are governed by Hong Kong's conflict of laws rules. If A prevails in the Hong Kong litigation, but B only has assets in New York to satisfy the Hong Kong judgment, it will become necessary for A to seek enforcement of the Hong Kong judgment in New York. However, the enforcement of the Hong Kong judgment in this case (Question 3a) is governed by New York's conflict of laws rules which will not be covered in this work.

4.4 In the reverse scenario where A has decided to sue B in New York, it will be the end of the litigation if B has sufficient assets in New York to satisfy the resulting New York judgment. However, in case B only has assets in Hong Kong, it will become necessary for A to enforce the New York judgment in Hong Kong. Questions 1b and 2b in the New York litigation are governed by the conflict of laws rules of New York but Question 3b, the enforcement of a New York judgment in Hong Kong, is governed by Hong Kong conflict of laws rules, and will be the focus of this chapter.

4.5 From Diagram 1, it is clear that Hong Kong courts will usually only deal with either Questions 1a and 2a, or Question 3b. In other words, it will be rare for the Hong Kong courts to deal with all three questions of conflict of laws in the same case.³ However, it may often be essential for the litigants in international disputes to deal with all six questions in order to decide the best litigation strategy. For example, New York's choice of law rules may be more favourable to A as only New York courts (but not Hong Kong courts) will apply New York's contract law to the contract under which punitive damages will be awarded in favour of A. However, assuming that B only has assets in Hong Kong and punitive damages will not be enforced in Hong Kong, it may be advisable for A to initiate the proceedings in Hong Kong instead, despite the prospect of less damages.

1.1 Enforcement regimes under Hong Kong law

4.6 There are three sets of enforcement rules in Hong Kong.

1.1.1 Mainland Judgments (Reciprocal Enforcement) Ordinance

4.7 The Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (MJREO) covers Mainland judgments resulting from an exclusive jurisdiction agreement which designates Mainland courts as the only courts to resolve disputes in connection with the specified contract.

1.1.2 Foreign Judgments (Reciprocal Enforcement) Ordinance

4.8 Judgments decided by superior courts from 15 foreign countries are capable of being registered in Hong Kong under the Foreign Judgments (Reciprocal

³ A notable exception is found in the *forum non conveniens* cases when Hong Kong courts may need to consider the prospect of enforcing the judgment of the alternative forum in Hong Kong. See Chapter 2 on challenging jurisdiction.

Enforcement) Ordinance (Cap 319) (FJREO). While this is a statutory regime, its enforcement conditions are designed intentionally to reflect those conditions under the common law regime.

1.1.3 Common law

4.9 If the foreign judgment in question does not fall under the two statutory regimes above, enforcement must then be sought under the common law rules. The common law rules are therefore the default or fallback enforcement regime.

1.2 General concepts

(a) Enforcement and recognition

4.10 All enforcement must be capable of being recognised. However, while a court must recognise every foreign judgment which it enforces, it "need not enforce every foreign judgment which it recognises".⁴

4.11 There are various scenarios in which a foreign judgment does not need to be enforced but simply recognised in Hong Kong. For example, a plaintiff who has obtained a foreign divorce decree may only want to have the divorce recognised in Hong Kong. In other words, for the divorce to be effective, there is no need to invoke the public power of the court to execute the foreign divorce decree. However, if a maintenance order is ancillary to the foreign divorce decree, it may be necessary to seek enforcement thereof to collect any default payment. In addition, a foreign judgment could be used as a defence in the form of action estoppel or issue estoppel.

(b) Action estoppel

4.12 A foreign judgment can be relied on by the defendant in foreign proceedings. If the defendant has already satisfied the foreign judgment, the plaintiff will be estopped from bringing the same cause of action against the defendant in Hong Kong.⁵ Similarly, in cases where the defendant has actually prevailed in the foreign proceedings, the plaintiff will be precluded from reasserting the same claim in Hong Kong.⁶

(c) Issue estoppel

4.13 At times, a plaintiff may bring a similar but not identical claim against a defendant. In such a case, a foreign judgment can be relied on as conclusive proof that certain issues that are common to both claims have been adjudicated to prevent the same issue from being re-litigated. This is known as issue estoppel.

⁴ Dicey, Morris & Collins, *Conflict of Laws* (15th Edn, 2016, London: Sweet and Maxwell), para 14-002.

⁵ *Black v Yates* [1991] 1 Lloyd's Rep 181.

⁶ *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2012] EWCA Civ 855.

(d) *Section 5 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance*

4.14 It used to be possible for the plaintiff to sue the defendant in Hong Kong for a second time in the hope that Hong Kong proceedings would yield a larger amount of damages than the foreign proceedings. However, this has been changed by statute. Under section 5 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46), no proceedings can be brought by a person in Hong Kong on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a foreign court, unless that judgment is not enforceable or entitled to recognition in Hong Kong.

1.3 Structure of this chapter

4.15 In this chapter, there will first be a discussion on the common law rules on enforcement, followed by specific sections regarding the FJREO and MJREO. Instead of litigating the dispute in an overseas court, it is also possible for the parties to resolve their dispute through foreign arbitration. The rules regarding the enforcement of foreign arbitral awards will be discussed at the end.

4.16 This chapter will not cover several specialised topics, including the enforcement of foreign judgments *in rem* which rarely arises in practice and the enforcement of a bankruptcy judgment where special rules apply.

2. ENFORCEMENT UNDER COMMON LAW

2.1 Why should a foreign judgment be enforced?

4.17 Foreign judgments, without being recognised or enforced by the Hong Kong courts, do not by themselves have legal effect in Hong Kong. This is because the adjudicative power of the court as displayed by judgments is an aspect of a country's sovereignty. However, foreign judgments which satisfy the conditions under Hong Kong conflict of laws rules will be given effect and be capable of being executed in Hong Kong like a domestic judgment rendered by a Hong Kong court.

4.18 Before discussing these enforcement conditions, it is appropriate to ask why the Hong Kong courts should enforce a foreign judgment at all. This question will have a bearing on the appropriateness of the enforcement conditions and thus which types of foreign judgments shall be enforced.

4.19 English courts have enforced foreign judgments since the 17th century.⁷ At first, the basis of enforcement was comity, the belief that the law of nations demands English courts to enforce foreign judgments. In return, it was hoped

⁷ Dicey, Morris & Collins, *Conflict of Laws* (15th Edn, 2016, London: Sweet and Maxwell), Vol 1, para 14-007.

that foreign courts would also enforce English judgments.⁸ In fact, this concept of reciprocity still forms the basis of the foreign judgment enforcement system of a number of countries such as China.⁹

4.20 However, the courts' perspective eventually changed from comity to a theory based on obligation. In *Schibsby v Westenholz*,¹⁰ Blackburn J set out the theory of obligation as follows:

[T]he true principle on which judgments of foreign tribunals are enforced in England is ... that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.¹¹

4.21 A deeper question is why such an obligation would arise. The answer can be found in a more modern case, which is *Adams v Cape Industries plc*.¹² At first instance, Scott J linked the obligation to enforce a foreign judgment to territorial jurisdiction. According to him, "a foreign court is entitled to take jurisdiction on a territorial basis".¹³ The obligation on the judgment debtor stemmed from his or her allegiance to the sovereignty of the foreign country which rendered the judgment. While being in the foreign country, the judgment debtor enjoyed the benefits of the protection of the foreign law. He or she must therefore be subject to and obey the judgment rendered by its courts.¹⁴ This view was not entirely accepted by the English Court of Appeal in the subsequent appeal. Slade J was of the view that comity, not in the sense of reciprocity discussed above, was the underlying reason. He believed that the duty to enforce foreign judgments "must stem from an acknowledgement that the society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant or his assets are to be found".¹⁵ This rejection of reciprocity as the basis of enforcement is clear from the enforcement conditions discussed below.

2.2 Enforcement conditions under common law

4.22 A foreign judgment will be enforced under common law if the plaintiff can prove that:

- (a) The foreign court which rendered the foreign judgment has 'international jurisdiction';
- (b) The foreign judgment is final and conclusive;

⁸ Ibid.

⁹ See Art 281, Civil Procedure Law of the People's Republic of China.

¹⁰ (1870) LR 6 QB 155 at 159. See also *Williams v Jones* (1845) 13 M & W 628.

¹¹ See also *Godard v Gray* (1870) LR 6 QB 139 at 148-149.

¹² [1990] Ch 433.

¹³ Ibid at 457.

¹⁴ Ibid.

¹⁵ [1990] Ch 433 at 552.

- (c) The foreign judgment is for a definite sum of money (not in the nature of tax or penalty); and
- (d) The defendant cannot prove that the foreign judgment has been impeached by one of the defences.¹⁶

2.2.1 International jurisdiction

4.23 A foreign judgment will be enforceable if the party seeking to enforce the judgment can prove that the foreign court has *in personam* jurisdiction¹⁷ over the defendant. It is important to note that this jurisdictional requirement refers not to the jurisdictional rules under the law of the foreign country (i.e. Q.1b in Diagram 1) but those under Hong Kong's own private international law rules. For example, in *Buchanan v Rucker*,¹⁸ the plaintiff obtained a default judgment against the defendant in the court of in the island of Tobago "by nailing up a copy of the declaration at the Court-House door".¹⁹ On enforcement of the judgment in England, Lord Ellenborough CJ famously said: "There is no foundation for this motion... Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?"²⁰ The distinction between the two jurisdictional rules is succinctly summarised by Lindley MR as follows:²¹

There is no doubt that the courts of this country will not enforce the decisions of foreign courts which have no jurisdiction ... over the subject matter or over the persons brought before them ... But the jurisdiction which alone is important in these matters is the competence of the court in an international sense – i.e., its territorial competence over the subject matter and over the defendant. Its competence or jurisdiction in any other issue is not regarded as material by the courts of this country.

4.24 Thus, it is not a defence by the judgment debtor to argue that the foreign court which rendered the judgment has no jurisdiction under its own jurisdictional rules. As long as the foreign court has jurisdiction in the eyes of Hong Kong's private international law rules, the foreign judgment will be enforceable.

¹⁶ See Dicey, Morris & Collins, *Conflict of Laws* (15th Edn, 2016, London: Sweet and Maxwell), Vol 1, Rule 42. A previous version of the same rule was adopted in Hong Kong: see *Chiyu Banking Corporation Ltd v Chan Tin Kwun* [1996] 2 HKLR 395 at 398, [1996] HKCU 543; *Korea Data Systems Co Ltd & Anor v Chiang Jay Tien & Anor* [2001] 3 HKC 239.

¹⁷ A discussion of *in rem* jurisdiction is beyond the scope of this book. For more on *in rem* jurisdiction generally, see *Halsbury's Laws of Hong Kong*, Maritime Law (2017 Reissue), para [250.004] onwards (note that proceedings *in rem* usually arise in an Admiralty context).

¹⁸ (1808) 103 ER 546.

¹⁹ *Ibid* at 546.

²⁰ *Ibid* at 547.

²¹ *Pemberton v Hughes* [1899] 1 Ch 781 at 791. See also *Buchanan v Rucker* (1808) 103 ER 546.

4.25 The international jurisdictional bases discussed here are also not identical to the domestic jurisdictional bases discussed in Chapters 1 and 2 (ie Q.1a in Diagram 1). They are different in two ways:

- (a) The international jurisdictional bases are narrower because they do not include the statutory jurisdictional bases provided in Order 11;²² and
- (b) The international jurisdictional bases are wider because the Hong Kong courts cannot choose to decline jurisdiction based on the doctrine of *forum non conveniens*.²³

4.26 International jurisdictional bases include a number of different categories, which are set out below.

(a) Residence or presence

4.27 A person who is resident or present in the foreign country at the time of the service of the proceedings will be regarded as being subject to the jurisdiction of that country.²⁴ This reflects the age-old link between enforcement and territorial jurisdiction as discussed at the beginning of the chapter. While the jurisdictional bases are different when Hong Kong courts serve as the enforcement court rather than the judgment rendering court, precedents in the latter regarding presence are often cited as support for the former since both have their roots in territorial jurisdiction.²⁵

(i) Individual's residence

4.28 An individual's residence in the foreign country which rendered the judgment is generally regarded as sufficient to satisfy the international jurisdictional requirement.²⁶ Since the defendant resides in the foreign country, it is reasonable to respect and give effect to the adjudicative power exercised by the court of that country. Presence, particularly temporary presence, is more problematic. While Hong Kong courts can legitimately assume domestic jurisdiction based on temporary presence, the exercise of such jurisdiction can be declined in inappropriate cases. However, as discussed, there is no application of *forum non conveniens* in enforcement cases. Despite this problem, temporary presence was upheld in *Adams v Cape Industries plc* on the basis of territorial jurisdiction.²⁷ Slade J, while acknowledging the force of the criticisms, justified the jurisdiction over the judgment debtor by stating that, "[s]o long as he remains physically present in that country, he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts".²⁸

²² See Chapter 1.

²³ See Chapter 2.

²⁴ *Adams v Cape Industries plc* [1990] Ch 433 at 467.

²⁵ *Ibid* at 468–471.

²⁶ Residence without presence is however doubted by Scott J in *Adams v Cape Industries plc*.

²⁷ [1990] Ch 433 at 519.

²⁸ *Ibid*.

4.29 In England, the Supreme Court approved this presence test “if the person against whom the judgment was given was, at the time of the proceedings were instituted, present in the foreign country”.²⁹ Canada adopted a different test for international jurisdiction under which foreign courts have international jurisdiction if they have “a real and substantial connection with the action”.³⁰ However, this Canadian approach was rejected in *Islamic Republic of Iran Shipping Lines v Phiniqua International Shipping*³¹ in Hong Kong in favour of the traditional presence test.

(ii) Corporations resident

4.30 Compared with individuals, the presence of corporations presents three additional problems. First, a corporation has no corporeal existence and is therefore capable of being present in multiple countries. This is common for multinational corporations that do business all over the world. Thus, if a corporation establishes a branch office in a country and gets sued there, will the jurisdiction requirement be satisfied based on the presence of the branch office? Second, since a corporation must act through individuals, will the presence of these individuals in the foreign country be sufficient to satisfy the jurisdiction requirement? This is regarded as the agency problem. Third, modern corporate groups do business in different countries through separately incorporated subsidiaries. As such, will the parent company be considered to be present in the foreign country because of the presence of its subsidiary? This involves the issue of piercing the corporate veil.³² All three issues were discussed in *Adams v Cape Industries plc*.³³

4.31 In that case, plaintiffs in Tyler, Texas in the United States, who claimed to suffer injury from asbestos, sued, among others, Cape, a company incorporated in England along with its subsidiaries, including NCCA, an Illinois incorporated company in charge of Cape’s marketing of asbestos in the United States. Cape and its subsidiaries participated in the first series of claims in Texas which were eventually settled (‘Tyler 1’). When another round of lawsuits were filed in Texas (‘Tyler 2’), Cape and its subsidiaries decided not to participate. In addition, to conceal Cape’s involvement in the asbestos, two new companies were incorporated. First, NCCA was liquidated and its original managing director set up his own company, CPC, to continue the same businesses of NCCA in the United States. Second, AMC, a new subsidiary of Cape with no substantial business, was set up to serve as an ‘invoice company’ for the sale of asbestos in the United States between Cape’s mining companies in South Africa and CPC. A default judgment was subsequently rendered by the Texas court against Cape in Tyler 2.

29 *Rubin v Eurofinance SA* [2012] UKSC 46, para 7.

30 *Morguard Investments Ltd v De Savoye* (1990) 76 DLR (4th) 256; *Beals v Saldanh* [2003] 3 SCR 416.

31 [2014] HKCU 1697 (unreported, HCA 2368/2012, 21 July 2014).

32 For a general discussion of the concept of piercing the corporate veil under Hong Kong company law, see Paul Kwan, *Hong Kong Corporate Law* (looseleaf service, Hong Kong: LexisNexis) at para [605] onwards.

33 [1990] Ch 433.

Branch office

4.32 Of the three issues mentioned above, branch office causes the least problems. Generally, a corporation is subject to the jurisdiction of a foreign court if it owns a place of business in the foreign country from which it carries on its own business for a substantial period of time.³⁴ It was stated in *Adams v Cape Industries plc* that:³⁵

The court will not find much difficulty in holding that a foreign corporation is present in this country if it has a fixed place of business of its own here (whether as owner, lessee or licensee) and for more than a minimal period of time has carried on its own business from such premises by its servants or agents.

4.33 However, this was not an issue in *Adams v Cape Industries plc* since Cape had no branch office in the United States.

Agent

4.34 If a corporation carries on business in a foreign country, not by setting up its own branch office but through a local individual or company as its agent, the jurisdiction requirement will be satisfied if the agent carries on the overseas corporation’s business at a fixed place of business in the foreign country for more than a minimum period of time.³⁶ It is at times difficult to decide whether the agent is conducting the agent’s own business or the corporation’s business. That must be determined on the facts.³⁷

4.35 In considering whether the branch or agent in the foreign country is carrying on the business of the overseas corporation, the Court of Appeal in *Adams v Cape Industries plc* set out a non-exhaustive list of factors:

- (a) Whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling him to act on behalf of the overseas corporation;
- (b) Whether the overseas corporation has directly reimbursed him for (a) the cost of his accommodation at the fixed place of business; and (b) the cost of his staff;
- (c) What other contributions, if any, the overseas corporation makes to the financing of the business carried on by the representative;
- (d) Whether the representative is remunerated by reference to transactions, eg, by commission, or by fixed regular payments or in some other way;
- (e) What degree of control the overseas corporation exercises over the running of the business conducted by the representative;
- (f) Whether the representative reserves (i) part of his accommodation, or (ii) part of his staff for conducting business related to the overseas corporation;

34 *Ibid* at 519.

35 *Ibid* at 524.

36 *Ibid* at 530.

37 See *Vogel v R&A Kohnstamm Ltd* [1973] QB 133 at 141.

- (g) Whether the representative displays the overseas corporation's name at his premises or on his stationery, and if so, whether he does so in such a way as to indicate that he is a representative of the overseas corporation;
- (h) What business, if any, the representative transacts as principal exclusively on his own behalf;
- (i) Whether the representative makes contracts with customers or other third parties in the name of the overseas corporation, or otherwise in such a manner as to bind it;
- (j) If so, whether the representative requires specific authority in advance before binding the overseas corporation to contractual obligations.³⁸

4.36 Although none of these factors is by itself conclusive, the court placed particular emphasis on whether the agent has "authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval" (ie under items (i) and (j) above),³⁹ describing this authority as of "great importance one way or the other".⁴⁰ It is largely on this basis that neither NAAC nor CPC was regarded as Cape's agent since neither had such authority.⁴¹

Subsidiary

4.37 If a subsidiary is not considered an agent for the parent company, presence can still be established by piercing the corporate veil of the subsidiary. However, for the court to disregard the corporate existence, the subsidiary must be a façade. Slade J quoted Lord Keith in *Woolfson v Strathclyde Regional Council* in which he stated that "it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts".⁴² In applying this principle, it was held that only AMC's corporate veil would be pierced as it was set up to conceal Cape's involvement in its operations in the United States. However, since AMC had no presence in the United States, Cape was in any case not regarded as being present in the United States.⁴³

(iii) Trading on the Internet?

4.38 Should advertising and sales through the Internet constitute presence? This issue applies to both individuals and companies. It is clear from the discussion above that trading without a fixed place of business in a foreign country does not constitute presence for a company. For example, in *Vogel v R&A Kohnstamm Ltd*,⁴⁴ the English company did not have an office in Israel and traded there through an agent which did not have authority to make contracts on its behalf

38 [1990] Ch 433 at 530-531.

39 Ibid at 531, citing *F&K Jabbour v Custodian of Israeli Absentee Property* [1954] 1 WLR 139 at 146.

40 Ibid at 531.

41 Ibid at 547-548.

42 *Woolfson v Strathclyde Regional Council* 1978 SLT 159 at 161.

43 [1990] Ch 433 at 543.

44 [1973] QB 133.

with the customers. It was held that the English company was not present in Israel. However, in today's age of the Internet, it seems that a fixed place of business is no longer essential to do business in a foreign country. The English Court of Appeal explored this issue in *Lucasfilm Ltd & Ors v Ainsworth & Anor*.⁴⁵ In that case, the defendant advertised and sold replicas of helmets which had featured in the 'Star Wars' series of movies to customers in the United States through a website. Lucasfilm sued the defendant in the United States and obtained a default judgment which it subsequently sought to enforce in England. After reiterating the territorial jurisdiction stated in *Adams v Cape Industries plc* the court refused to enforce the US judgment as it was of the opinion that the use by the defendant or his company of the website did not amount to a presence in the foreign country.

(b) Submission

4.39 As well as the territorial jurisdictional basis of residence or presence, another type of international jurisdictional basis is submission. It could be argued that both types have their roots in voluntary consent. For residence or presence, "by going to a foreign place [the judgment debtor] invests himself by tacit consent with the rights and obligations stemming from the local laws as administered by the local court: those laws including, of course, the local rules on the conflicts of law";⁴⁶ for submission, the judgment debtor consents to the foreign country's jurisdiction either by expressly contracting to submit to the foreign court or by participating in the foreign proceedings, such as appearing voluntarily as a defendant or initiating a lawsuit as a plaintiff in the foreign court.

(i) Submission by express agreement

4.40 International jurisdiction will be satisfied if the judgment debtor has expressly agreed to submit to the jurisdiction of the foreign country by designating the court or courts of that country to resolve all the disputes arising from the contract. Such a jurisdiction agreement may be exclusive or non-exclusive.⁴⁷ In *Blohn v Desser*,⁴⁸ it was held that a person could even submit to a foreign forum impliedly. In that case, the issue was whether a sleeping partner in a partnership doing business in Vienna could thereby submit to the Austrian court. By having her name registered in a public register, Diplock J held obiter that the sleeping partner impliedly agreed with the public to submit to the foreign jurisdiction in which business was conducted by the partnership. However, a long list of authorities suggests that a jurisdiction agreement must be express rather than implied.⁴⁹

45 [2010] Ch 503.

46 *Adams v Cape Industries plc* [1990] Ch 433 at 555.

47 Dicey, Morris & Collins, *Conflict of Laws* (15th Edn, 2016, London: Sweet and Maxwell), Vol 1, para 14-076, footnote 292.

48 [1962] 2 QB 116.

49 See *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670 (PC); *Emanuel v Symon* [1908] 1 KB 302; *Vogel v R&A Kohnstamm Ltd* [1973] QB 133 and *New Hampshire Insurance Co v Strabag Bau AG* [1992] 1 Lloyd's Rep 361 (CA, Eng).

4.41 In *Adams v Cape Industries plc*,⁵⁰ Scott J rejected a jurisdiction based on the entry of a name in a commercial register and called it an “unacceptably flimsy basis”.⁵¹ Although he did suggest that a non-contractual representation might be relied on to establish jurisdiction, it must be at least a representation that the plaintiff had reasonable ground for believing it was intended to be acted upon.⁵² No such representation was found in the case as Scott J rejected the argument that Cape’s participation in the Tyler 1 lawsuit could be regarded as a representation that it would accept the jurisdiction of the same court in the Tyler 2 lawsuit.⁵³ To do so would be to “divorce a submission to the jurisdiction from the bedrock of consent that ought to underlie it”.⁵⁴

4.42 More recently, in *Vizcaya Partners v Picard*,⁵⁵ the Privy Council held that the jurisdiction agreement could be implied. According to Lord Collins, “the authorities which deny the possibility of an implied agreement...really meant that there had to be an actual agreement (or consent)”.⁵⁶ Thus, it appears that a choice of law clause could now amount to an implied agreement to submit, contrary to previous authority.

4.43 If a judgment creditor brings legal proceedings in breach of a legal jurisdiction agreement in the foreign court, the foreign judgment resulting from such a breach will not be enforceable in Hong Kong according to section 3 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance.⁵⁷ This is so notwithstanding that the foreign court may have international jurisdiction based on the presence of the judgment debtor.⁵⁸ However, section 3 only applies where (i) the judgment debtor did not bring or agree to the bringing of those proceedings in the foreign court; and (ii) did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court.⁵⁹ It is therefore subject to the voluntary submission discussed below. In determining the applicability of section 3 to a foreign judgment, the Hong Kong court is not bound by any decision of the foreign court on whether there is such a breach or voluntary submission, or the legality of the jurisdiction agreement.⁶⁰

50 [1990] Ch 433.

51 Ibid at 466.

52 Ibid.

53 Ibid at 464. See para 4.32 above for the facts of *Adams v Cape Industries plc*.

54 Ibid at 463.

55 [2016] UKPC 5.

56 Ibid at 18, para 56.

57 Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46).

58 See Dicey, Morris & Collins, *Conflict of Laws* (15th Edn, 2016, London: Sweet and Maxwell), Rule 44.

59 Section 3(2), Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46).

60 Section 3(3), Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46).

(ii) Voluntary submission

4.44 Implied consent can be derived from the judgment debtor’s voluntary submission to the foreign court. This could take a number of forms. If a party is a plaintiff in the foreign proceedings or counterclaims, that will be regarded as a submission to the foreign court’s jurisdiction.

4.45 If a defendant voluntarily appears in the foreign proceedings without contesting jurisdiction of the foreign court, then that will be a clear submission. It will also be the case if he or she has taken any step for the purpose of defending the foreign proceedings on its merits.⁶¹ While international jurisdiction is to be decided by Hong Kong conflict of laws rules, questions arise as to the extent to which foreign procedural rules on submission are relevant for determining voluntary submission. This issue was recently considered by Lord Collins in *Rubin v Eurofinance SA*.⁶² In deciding the question of submission, the court should take into account not just its own rules on submission but also the submission rules of the foreign jurisdiction, as it would be odd to conclude that there is submission to a foreign court which does not itself consider it to have been submitted to. In *Vizcaya Partners v Picard*,⁶³ it was decided that while a mere choice of law clause in favour of New York law was not as a matter of English law an agreement to submit to the jurisdiction of New York courts, the English courts should also consider whether such a clause was regarded as submission to the New York courts under New York law. In that case, however, by relying on expert evidence, it was concluded that the choice of law clause was not a submission under New York law.

4.46 However, taking into account the foreign submission rules should not be pushed too far. Thus in *Splithoff’s Bevrachtungskantoor BV v Bank of China*,⁶⁴ an English court recognised a Chinese judgment on the basis that there had been clear submission under English submission rules notwithstanding that there was no concept of submission under Chinese law.

4.47 What if the judgment debtor only challenges the jurisdictional basis of the foreign court in the foreign proceedings? Under the old common law rules, this would be considered a valid submission.⁶⁵ However, this has now been reversed by section 4 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance:

For the purposes of determining whether a judgment given by a court of an overseas country should be recognized or enforced in Hong Kong, the person against whom the judgment was given shall not be treated as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings... to contest the jurisdiction of the court.

61 *Williams & Glyn’s Bank plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438.

62 [2013] 1 AC 236.

63 [2016] UKPC 5.

64 [2015] EWHC 999 (Comm).

65 *Henry v Geoprosco Int’l Ltd* [1976] QB 726.

4.48 Similarly, appearing in the foreign court to seek a stay or to protect property seized will not be considered submission either.⁶⁶

2.2.2 'Final and conclusive'

4.49 For a foreign judgment to be enforceable, it must be 'final and conclusive'. This is a matter to be determined under Hong Kong conflict of laws rules.⁶⁷ For a judgment to be final and conclusive, the judgment creditor must show that the foreign court "conclusively, finally, and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties".⁶⁸ A foreign judgment may be final and conclusive notwithstanding that it is possible to appeal the judgment to a higher court in the foreign country: "[A] foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher court; but it must be final and unalterable in the court which pronounced it."⁶⁹ This is so even in cases where an appeal has already been filed.⁷⁰ That said, if an appeal is in fact pending in the foreign country, Hong Kong courts will usually exercise their power to stay the proceedings pending the outcome of the appeal. In addition, a default judgment which may be set aside in the foreign court that rendered it may also be final and conclusive.⁷¹

4.50 In relation to Mainland judgments, the Hong Kong courts have doubted whether they can be regarded as final and conclusive due to the review power exercisable under the adjudication supervision system by the president of the relevant people's court or the Supreme People's Court; by the Supreme People's Procuratorate; or by the parties themselves under the Civil Procedure Law of the PRC.⁷²

4.51 In *Chiyu Banking Corporation Limited v Chan Tin Kwun*,⁷³ the defendant presented a petition to the Fujian People's Procuratorate for a retrial against the judgment rendered by the Fujian Intermediate People's Court. At the time of the *Chiyu Banking* decision, the Fujian People's Procuratorate had requested the Supreme People's Procuratorate to lodge a protest while the outcome of that request was still pending. In an influential judgment, Cheung J held that the Fujian judgment was not final and conclusive. He was of the view that "the supervisory function of the Supreme People's Procuratorate and the protest system are not

66 Foreign Judgments (Restrictions on Recognition and Enforcement) Ordinance (Cap 46) s 4(b), (c).

67 *Chiyu Banking Corporation Limited v Chan Tin Kwun* [1996] 2 HKLR 395 at 398, [1996] HKCU 543.

68 *Nouvion v Freeman* (1889) 15 App Cas 1 at 9.

69 *Ibid* at 13.

70 *Scott v Pilkington* (1862) 2 B & S 11; *Colt Industries Inc v Sarlie (No 2)* [1966] 1 WLR 1287.

71 *Vanquelin v Bouard* (1863) 15 CBNS 341; *Nintendo of America Inc v Bung Enterprises Ltd* [2000] 2 HKC 629. Cf *Westpac New Zealand Ltd v Gao Hui* [2009] 4 HKC 373.

72 Civil Procedural Law of the People's Republic of China, Arts 198, 199, and 208.

73 [1996] 2 HKLR 395, [1996] HKCU 543.

simply an appeal process... If upon protest being made, rare the circumstances may be, a Chinese court has to re-try the case, then clearly it retains the power to alter its own decision".⁷⁴ Accordingly, the Fujian Intermediate People's Court's judgment was "not final and unalterable in the court which pronounced it".⁷⁵

4.52 A number of subsequent cases that involved the recognition and enforcement of Mainland judgments relied on Cheung J's judgment to hold that Mainland judgments lacked finality.⁷⁶ However, it is at least doubtful whether the existence of an adjudication supervision system would by itself automatically make any Mainland judgment not final and conclusive. In *Lee Yau Wing v Lee Shui Kwan*,⁷⁷ Cheung JA, sitting in the Court of Appeal, said that the issue whether a Mainland judgment may be rendered not final and conclusive solely by reason of the protest regime or by the regime and some factual circumstances that had not been authoritatively decided. In view of the significant public interest in the issue, the majority of the Court of Appeal held that the issue could not be decided in interlocutory proceedings.

4.53 In the recent case of *Bank of China Limited v Yang Fan*,⁷⁸ To J gave a thorough review of the issue. After a detailed analysis of the latest version of the relevant Articles in the Civil Procedure Law and authorities, including the *Chiyu* case and *Lee Yau Wing v Lee Shui Kwan*, he was of the opinion that "[t]he protest by the procuratorate [under the current regime] is just another avenue of appeal, except that it is initiated by a non-party".⁷⁹ However, he stopped short of proclaiming this as the final answer to the issue in interlocutory proceedings.⁸⁰ Having regard to the significance of the issue, it is hoped that a more definite view can be provided by the courts in the near future.

2.2.3 Money judgment not for a tax or a penalty

4.54 The third enforcement condition is that the foreign judgment must be for a definite sum of money.⁸¹ In other words, it must be a money judgment. An order granting an injunction is also not enforceable.⁸² In addition, the money judgment must not be in the nature of a tax or a penalty since it is not the function of Hong Kong courts to assist in the enforcement of another country's revenue or criminal law. Thus, if the foreign court order is in essence an order to pay tax or a

74 *Ibid* at 399.

75 *Ibid* at 399.

76 *Tan Tay Cuan v Ng Chi Hung* [2001] HKLRD (Yrbk) 195; *Lam Chit Man v Lam Chi To* [2001–2003] HKCLRT 141; *Lam Chit Man v Cheung Shun Lin* [2001–2003] HKCLRT 243.

77 [2007] 2 HKLRD 749 at 760.

78 [2016] 3 HKLRD 7, [2016] HKCU 1012.

79 *Ibid* at para 53.

80 *Ibid* at para 54.

81 *Sadler v Robins* (1808) 1 Camp 253.

82 *Westpac New Zealand Ltd v Gao Hui* [2009] 4 HKC 373.

sum payable as punishment for a crime, it is not enforceable.⁸³ However, money payable as compensation to the victim of a crime will not be subject to this rule.⁸⁴

4.55 A more difficult issue is punitive damages. English authorities suggest that punitive damages may be recoverable and do not infringe the general rule above. In *SA Consortium General Textiles v Sun and Sand Agencies Ltd*,⁸⁵ the issue arose as to whether ‘*résistance abusive*’, a head of damages under French law awardable against a defendant who has unreasonably refused to pay a plain claim, should be rejected for enforcement pursuant to the UK Foreign Judgments (Reciprocal Enforcement) Act 1933. Lord Denning thought that “[t]he word ‘penalty’ in the [1933 Act] means... a sum payable to the state by way of punishment and not a sum payable to a private individual, even though it is payable by way of exemplary damages”.⁸⁶ However, in *Hung Fung Enterprises Holdings v Agricultural Bank of China*,⁸⁷ the Hong Kong Court of Appeal found an order by a PRC court of double interest for late payment of damages to be a penalty. According to the court, the lower court was wrong to attach undue significance to the fact that the double interest was awarded to the judgment creditor in a civil litigation rather than to the state under a penal law. Instead, a penalty will be found if “the purpose of the amount ordered was not to compensate for the loss suffered but to punish the defendant and deter others from acting in the same way”.⁸⁸ In *Motorola Solutions Credit v Kemal Uzan*,⁸⁹ it was also held that “a foreign judgment for punitive damages could not be enforced by an action in Hong Kong”.

2.2.4 Effect of successful enforcement

4.56 If the three conditions above are satisfied, the foreign judgment will be *prima facie* enforceable under common law subject to the defences discussed below. This is so even if there exists factual or legal errors in the foreign judgment. It has long been established that the mistakes committed by a foreign court in law is not a defence to enforcement.⁹⁰ According to Lindley MR, “if a judgment is pronounced by a foreign court over persons within its jurisdiction and in a manner with which it is competent to deal, English courts never investigate the propriety of the proceedings ... unless they offend against English views of substantial justice”.⁹¹ Thus, Hong Kong courts cannot re-try the case on its merits in enforcement proceedings.⁹²

83 *United States of America v Inkley* [1989] QB 255.

84 *Raulin v Fischer* [1911] 2 KB 93.

85 [1978] QB 279.

86 *Ibid* at 299–300.

87 [2012] 3 HKLRD 679, [2012] HKCU 1275.

88 *Ibid* at 700, para 93.

89 [2016] HKCU 1446 (unreported, HCA 2232/2013, 17 June 2016) at para 17.

90 *Godard v Gray* (1870) LR 6 QB 139.

91 *Pemberton v Hughes* [1899] 1 Ch 781.

92 *WFM Motors v Malcolm Maydwell* [1996] 1 HKC 444.

2.2.5 Defences

(a) Fraud

4.57 The fraud must have been committed by the party seeking to enforce the judgment or by the foreign court but not by a witness in the foreign proceedings. It could cover a lie by a party which led to the foreign court wrongfully assuming jurisdiction over the defendant.⁹³

4.58 In *Abouloff v Oppenheimer*,⁹⁴ it was held that the defendant could raise the same argument that the judgment was obtained by fraud in the English court even if the allegation had been previously considered and rejected in Russia. This rule was adopted in Hong Kong in *WFM Motors v Malcolm Maydwell*.⁹⁵ It was held that “the defendant is not debarred, as a matter of law, from raising again matters already found against him. Nor is he debarred from raising matters which ought to have been but were not raised before”.⁹⁶ To establish the defence, the defendant must particularise the fraud with precision and it must “be demonstrated to a standard commensurate with the gravity of the allegations”.⁹⁷

4.59 The rule in *Abouloff v Oppenheimer* clearly conflicts with the general rule stated in paragraph 4.56 above that the judgment enforcing court cannot reopen the case on merits. It is therefore hardly surprising that it has been subject to heavy criticisms. In *AK Investment v Kyrgyz Mobil Tel Ltd*,⁹⁸ the Privy Council thought that “[a] policy which requires a Manx court to appropriate for itself the responsibility of deciding whether a foreign court was deceived, especially when the foreign court has its own procedure for setting aside judgments, is anomalous and unjustifiable”.

4.60 However, this issue has been mitigated to an extent by the court’s invocation of the doctrine of abuse of process. The courts have the inherent power to prevent any abuse of process which may be involved in an attempt to litigate matters for a second time. For the application of the doctrine, “no strict rule can be laid down; in every case the court must decide whether justice requires the further investigation of alleged fraud or requires that the plaintiff, having obtained a foreign judgment, shall no longer be frustrated in enforcing that judgment”.⁹⁹ In *Wang Hsiao Yu v Wu Cho Ching*,¹⁰⁰ the court applied this doctrine and rejected the re-examination of the fraud allegation since the Taiwanese court had examined it thoroughly and determined against the defendant after six rounds of appeals.

93 *Consolidated Contractors International Company SAL v Masri* [2011] UKPC 29.

94 (1882) 10 QBD 295.

95 [1996] 1 HKC 444.

96 *Ibid* at 542.

97 *Ibid* at 450.

98 [2011] UKPC 7.

99 *Owens Bank v Etoile Commerciale SA* [1995] 1 WLR 44 (PC). See also *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 at 251G–252A and 254E–255D.

100 Unreported, HCA 1690/1997, 4 July 2000.

(b) *Breach of natural justice*

4.61 Another defence that may be relied on by the defendant is when the foreign judgment conflicts with Hong Kong's view of substantial justice.¹⁰¹ This defence only deals with the substantial justice regarding the procedural aspect of the foreign proceedings, i.e. "the method by which the court comes to a final decision".¹⁰² This will cover, in most cases, the requirements of due notice and proper opportunity to be heard.¹⁰³ However, the defence is not limited to these two grounds and could be used potentially against any procedural defects.¹⁰⁴ Thus, in *Adams v Cape Industries plc*,¹⁰⁵ the court considered and held that there was a breach of natural justice in the US judgment as there was no proper judicial assessment of damages. It was found that in assessing the damages for the plaintiff, the US judge did not consider the medical materials relating to each individual plaintiff.¹⁰⁶ It was further noted that in considering the defence, the court should take into account "the possibility of the correction of error within the procedure of a foreign court which itself provides fair procedural rules and a fair opportunity for remedy".¹⁰⁷ In the facts of the case, however, the US judgment did not state the method by which the damages had been assessed, thereby making it impossible for Cape to make use of the procedures in the US to correct the procedural defects.¹⁰⁸

4.62 Cape also sought to argue alternatively that the size of damages for the US judgment was by itself exorbitant and therefore in breach of natural justice. However, this was rejected by Scott J as a defence on the merits.¹⁰⁹ This defence can also be used to refuse recognition to a foreign judgment where cogent evidence is produced of the lack of a fair trial.¹¹⁰ However, it must be noted that the breach of natural justice defence has rarely succeeded. While there have been other cases attempting this defence, they have usually failed,¹¹¹ with *Adams v Cape Industries plc* being the exception rather than the norm.

(c) *Public policy*

4.63 Another related defence is that the foreign judgment is against Hong Kong's public policy. At times, this defence overlaps with breach of natural justice. For example, when both defences were raised in *Adams v Cape Industries plc*, Scott J remarked that:

101 *Pemberton v Hughes* [1899] 1 Ch 781.

102 *Jacobson v Frachon* (1928) 138 LT 386 at 392.

103 [1990] Ch 433 at 564.

104 *Ibid.*

105 *Ibid.*

106 *Ibid* at 500.

107 *Ibid* at 570.

108 *Ibid* at 571.

109 *Ibid* at 502.

110 *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2012] EWCA Civ 855.

111 See eg *Nintendo of America Inc v Bung Enterprises Ltd* [2000] 2 HKC 629 at 634–636.

I should say at once that, in my judgment, natural justice and public policy cover, in the present case, the same ground. If the [US judgment] is objectionable on natural justice grounds, it is easy to conclude that it would be contrary to public policy to permit its enforcement in this country. If it is not objectionable on natural justice grounds, then, on the footing that no jurisdictional objection can be taken, I cannot see any public policy reason for not enforcing it.

4.64 Similar to the natural justice defence, there have been very few successful cases and certainly none reported in Hong Kong. In *SA Consortium Textiles v Sun and Sand Agencies*,¹¹² after holding that '*résistance abusive*' was not a penalty, Lord Denning went on to hold that it was not against English public policy to enforce a claim for exemplary damages, considering that such damages accord with the public policy in the United States and many countries in the Commonwealth.¹¹³ Even for the few successful cases in England, they were at best questionable.¹¹⁴ It may, however, be said that the public policy defence has become embedded in the Foreign Judgment (Restrictions on Recognition and Enforcement) Ordinance which precludes the enforcement of foreign judgments given in breach of a jurisdiction agreement.¹¹⁵

(d) *Conflicting judgments*

4.65 Under the principle of *res judicata*, a court will not enforce or give recognition to a foreign judgment if there has been a previous Hong Kong decision on the same matter.¹¹⁶ Similarly, if there are two conflicting foreign decisions, then the one first in time will normally be the one enforced or recognised.¹¹⁷

(e) *Recognition of foreign judgments as defence*

4.66 As discussed in paragraph 4.11 above, a foreign judgment can be utilised for action preclusion and issue preclusion. The conditions for recognition of foreign judgments have recently been restated by Lord Collins in *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd*:¹¹⁸

At common law a judgment of a foreign court of competent jurisdiction which is final and conclusive and on the merits will be conclusive in Hong Kong proceedings if the parties are the same and the issue is identical.

4.67 Thus, the foreign judgment must have: (i) international jurisdiction, (ii) be final and conclusive, (iii) be on the merits and (iv) involve the same parties as well as the same action or same issue. The first two conditions have been covered in paragraphs 4.23 and 4.49 respectively, while the latter two will be discussed in the sections below.

112 [1978] QB 279.

113 *Ibid* at 300.

114 See eg *Re Macartney* [1921] 1 Ch 522.

115 See para 4.43 above.

116 *Vervaeke v Smith* [1983] 1 AC 145.

117 *Showlag v Mansour* The Times, 29 March 1994.

118 (2012) 15 HKCFAR 569, [2013] 2 HKC 459.

application in Hong Kong.⁷ However, the common law rules still survive in other Commonwealth jurisdictions such as Australia and Canada which provide valuable authorities for the continual developments of choice of law rules in contract.⁸

2. PROPER LAW IN GENERAL

7.3 To avoid the rigidity that may be caused by a mechanical rule, common law has adopted a more flexible approach in developing the 'connecting factor'⁹ to the choice of law in contract, called the 'proper law'. It is defined as "the law which the English or other court is to apply in determining the obligations under the contract".¹⁰ The way in which the proper law of contract is to be ascertained was recently summarised by Lord Collins in *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd* as follows:¹¹

The common law rule is that the law applicable to a contract is the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.

7.4 In fact, this is a restatement of the time-honoured proper law rule of England which can be broken down into three sub-rules under Rule 180 in the 11th edition of Dicey & Morris:¹²

Sub-Rule 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.

Sub-Rule 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.

Sub-Rule 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

7 *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd* (2012) 15 HKCFAR 569, [2013] 2 HKC 459 at para 55.

8 For a general introduction of the contract choice of law regimes in Australia, see Mortensen, Garnett and Keyes, *Private International Law in Australia* (3rd Edn, Sydney: LexisNexis), p 415–442. For the Canadian regime, see Pitel and Rafferty, *Conflict of Laws* (2010, Toronto: Irwin Law), p 269–287. For examples of cases referring to precedent and academic work of Australia, see *Hong Kong Shanghai (Shipping) Ltd v The Owners of The Ships or Vessels "Cavalry"* [1987] HKLR 287, [1987] HKCU 123 (making reference to *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R 378 at 385 (SC)) and *York Airconditioning and Refrigeration Inc v Lam Kwai Hung (t/a North Sea Elect Eng Co)* [1995] 2 HKLR 256 at 265, [1995] 1 HKC 287 (making reference to *Sykes & Pryles on Australian Private International Law* (3rd Edn)).

9 See Chapter 5, para 5.5 onwards.

10 *Mount Albert Borough Council v Australian Temperance and General Mutual Life Assurance Society Ltd* [1938] AC 224, [1937] 4 All ER 206.

11 (2012) 15 HKCFAR 569, [2013] 2 HKC 459 at para 53.

12 Dicey, Morris & Collins, *Conflict of Laws* (11th Edn, 1987) Vol 2, p 1168–1196.

contract is governed by the system of law with which the transaction has its closest and most real connection.

7.5 It is important to note at the outset that while sub-rule 2 and sub-rule 3 are in theory separate steps in the process of analysis, in practice, these two steps are often merged together as they both refer to the same set of factors in deriving the proper law when there is no express choice of law.¹³ Thus, it is not uncommon to see courts adopting instead a two-stage test, ie skipping sub-rule 2 on implied choice and going straight to sub-rule 3 on closest and most real connection.¹⁴ In *Bank of India v Gobindram Naraindas Sadhwani*,¹⁵ the Hong Kong Court of Appeal insisted on going through the proper law analysis strictly according to the three-stage test.¹⁶

It is true there are cases in which the courts have proceeded directly from the first to the third stage. In those drawn to my attention ... there does not seem to me to have been any conscious or considered conclusion that the second stage does not exist. Moreover none of those cases has the authority of the House of Lords' decision in *Amin Rasheed* ... I conclude, therefore, that in determining the proper law, the three-stage test must be applied, notwithstanding that it is clear from the authorities that the line between the second and third stages is fine, that both those stages often merge and that the same result generally emerges from the application of either of the two latter stages.

7.6 However, in light of Lord Collins' judgment in *First Laser Ltd*, it is submitted that this distinction is no longer necessary:

The line between the search for the inferred intention and the search for the system of law with which the contract has its closest and most real connection is a fine one which is frequently blurred. In theory, in the absence of an express choice as the first test, the court should consider as a second test whether there are any other indications of the parties' intention, and only if there is no such indication to go on to consider the third stage ... This is largely because the tests of inferred intention and close connection merge into each, and because before the objective close connection test became fully established the test of inferred intention was in truth an objective test designed not to elicit actual intention but to impute an intention which had not been formed.¹⁷

7.7 Accordingly, in determining the proper law of a contract, the questions to ask are:

- (a) Is there an express choice of law by the parties?
- (b) If there is no express choice, which country's law has the closest and most real connection to the contract?

7.8 Each of these two questions will be examined in turn below.

13 *Ibid*, Vol 2, p 1162–1163.

14 See eg *York Airconditioning and Refrigeration Inc v Lam Kwai Hung (t/a North Sea Elect Eng Co)* [1995] 2 HKLR 256, [1995] 1 HKC 287.

15 [1988] 2 HKLR 262, [1988] HKCU 398.

16 *Ibid* at 267.

17 See *York Airconditioning and Refrigeration Inc v Lam Kwai Hung (t/a North Sea Elect Eng Co)* [1995] 2 HKLR 256 at 262, [1995] 1 HKC 287: "However, in practice, in the absence of an express choice of law clause, since the tests of inferred intention and close connection merge into one another, the courts tend to move straight to the test of close connection".

3. EXPRESS CHOICE

3.1 General principle

7.9 Regarding the first question, the general rule is that the parties can choose any country's law they please as the governing law of the contract. The rationale for this rule can be traced back to the founding principle of contract law – party autonomy – which in “English conflict rules accord to the parties to a contract a wide liberty to choose the law by which their contract is to be governed”.¹⁸ Hence, if one needs to ascertain which law governs a given contract, the starting point will certainly be to read the terms of that very contract as “the true construction of the language of the contract ... is the touchstone of legal right.”¹⁹

7.10 Under this rule, it is not the courts which decide the governing law of the contract but the parties themselves, subject to very narrowly defined exceptions.²⁰ It is only when the parties have not agreed on the choice of law or when such agreement could not be found by the court that the proper law refers to the objective circumstances of the contract.

7.11 The leading case on express choice is *R v International Trustee for the Protection of Bondholders AG*.²¹ According to Lord Atkin, “English courts 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.”²²

7.12 This statement was further refined by Lord Wright in the Privy Council's decision in *Vita Food Products Inc v Unus Shipping Co*.²³ In that case, the issue was whether a governing law clause in favour of English law in a bill of lading regarding a shipment from Newfoundland to New York was a valid choice of law. After approving the quoted passage from Lord Atkin above, Lord Wright stated the rules on express choice of law as follows:

... 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.²⁴

7.13 Thus, if the parties expressed their intention clearly in choosing a country's law as the proper law, the court shall prima facie hold that choice as valid subject to the two exceptions mentioned by Lord Wright, namely, (1) bona fide and legal, and (2) not contrary to public policy.

18 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1983] 2 All ER 884 at 888 per Lord Diplock.

19 *Lloyd v Guibert* (1865) LR 1 QB 115.

20 M Wolff, *Private International Law* (2nd Edn, 1950, Oxford: Oxford University Press), p 415.

21 [1937] AC 500, [1937] 2 All ER 164.

22 *Ibid* at 529.

23 [1939] AC 277.

24 *Ibid* at 290.

3.1.1 Bona fide and legal

7.14 Lord Wright did not define this condition in *Vita Food Products Inc v Unus Shipping Co* but he did go on to discuss whether or not it was essential for the transaction to have connection with the choice of law.²⁵ He clearly ruled that such connection between the transaction contemplated under the contract and the choice of law were not necessary, referring to how frequently English law was chosen by parties in international business transactions notwithstanding the lack of connection with English law.²⁶ Thus, according to Cheshire, what this condition presumably means is “that the parties cannot pretend to contract under one law in order to validate an agreement that clearly has its closest connection with another law”.²⁷

7.15 Although it is not necessary for the system of law chosen by the parties to have a connection with the transaction, the lack of connection may still constitute evidence that the choice of law is not bona fide.²⁸ The burden is on the party challenging the express choice to prove that it is not bona fide.²⁹

7.16 However, in *Shenzhen Development Bank Co Ltd v New Century Int'l (Holdings) Ltd*,³⁰ it was held that the defendant failed to challenge the express choice of Hong Kong law as not being bona fide. The court found no evidence to show that the plaintiff believed that the transactions were illegal under the relevant PRC law at the time the contract was made. There was thus no intention on the part of the plaintiff to evade the PRC law.

7.17 From these cases, it can be derived that the analysis of the bona fide restriction essentially involves balancing the following elements:

- (a) The connection between the express choice and the transaction; and
- (b) The existence of another system of law that has a much stronger connection with the transaction, and if so, an intention by the parties to evade that system of law.

7.18 Where there are at least some connections between the express choice and the transaction, the system of law chosen by the parties will usually be regarded as being bona fide by the courts. This is the case notwithstanding that there might be another system of law that has stronger connection with the transaction. Where there is no connection between the express choice and the transaction, the express choice is still likely to be upheld if there is not another system of law with a much stronger connection with the transaction under which there is a reason to evade its application, such as illegality under that law.

25 *Ibid* at 290-291.

26 *Ibid*.

27 Cheshire and North, *Private International Law* (11th Edn, 1987), p 454.

28 *Credit Agricole Indosuez v Shanghai Erfangji Co Ltd* [2002] HKCU 706 (unreported, HCA 14569/1999, 12 June 2002).

29 *Shenzhen Development Bank Co Ltd v New Century Int'l (Holdings) Ltd* [2002] HKCU 917 (unreported, HCA 2976/2001, 31 July 2002) at para 24.

30 [2002] HKCU 917 (unreported, HCA 2976/2001, 31 July 2002) at para 24.

3.1.2 Against public policy

7.19 There is no reported English case that successfully challenged the validity of an express choice of law on the basis of it being against public policy. There is also no such case in Hong Kong. However, this proviso was successful in *Golden Acres Ltd v Queensland Estates Pty Ltd*³¹ where the Queensland court rejected the governing law clause designating Hong Kong law:

While appreciating that public policy can be an unclear concept, generally speaking it would be contrary to public policy for the legislative intention to be stultified by parties to a contract, of which the proper law would be Queensland, selecting some other law for the purpose of avoiding the application of Queensland law.

7.20 It may be argued that the same governing law clause in this case may be challenged by the alternative proviso for being not bona fide and legal as well. Both of these provisos point to the express choice of law being chosen for the purpose of avoiding the application of the law that would have applied otherwise. Thus, the two provisos certainly overlap to an extent.

3.2 Certainty

7.21 For a choice of law to be regarded as an express choice, the relevant clause must be clear and unambiguous. An uncertain clause will generally be ignored as an express choice.

3.3 Non-state law

7.22 Can the parties by agreement choose a non-state law such as the *lex mercatoria*, the merchant law? There is no clear authority under Hong Kong law for this. Although there is concern about the certainty of the content of the *lex mercatoria*, it is generally accepted that such a choice should still be regarded as valid and that the court could simply interpret this kind of clause as applying the UNIDROIT Principles of International Commercial Contracts.³² It has also been suggested that a choice of law clause designating Taiwanese law as the governing law should be upheld.³³

3.4 Incorporation

7.23 Even if the parties refer to a statute of a particular country, it does not necessarily mean that they intended to apply the system of law of that country to the contract. It is possible for the parties to incorporate only that particular statute as a contractual term without setting out all the provisions therein. Thus, the parties simply refer to the statute as a 'shorthand'.³⁴

31 [1969] Qd R 378 at 385 (SC). This approach was approved by *Hong Kong Shanghai (Shipping) Ltd v The Owners of The Ships or Vessels "Cavalry"* [1987] HKLR 287, [1987] HKCU 123.

32 *Chitty on Contracts – Hong Kong Specific Contracts* (5th Edn, 2016, Hong Kong: Sweet and Maxwell), Chapter 7, para 7-003.

33 *Ibid*, note 19.

34 See *Dicey and Morris on the Conflict of Laws* (13th Edn, 1999), para 32-086.

3.5 Floating choice of law clause

7.24 Both English and Hong Kong authorities have refused to uphold a 'floating' choice of law clause. This refers to a clause stating that one of the parties can select, after the contract is made, which law will apply.³⁵ In *The Armar*,³⁶ Megaw LJ rejected such a clause:

Counsel for the defendants submits, with what seems to me to be unanswerable legal logic, that there must be a proper law of any contract – a governing law – at the time of the making of that contract ... As a matter of legal logic, I find insuperable difficulty in seeing by what system of law you are to decide what, if any, is the legal effect of an event which occurs when a contract is already in existence with no proper law: but, instead, with a "floating" non-law.³⁷

7.25 In Hong Kong, this same view was shared by the court in *Chan Chi Keung v Delmas Hong Kong Ltd*.³⁸ The rationale for this prohibition comes from the role played by a governing law in validating the existence of the contract "since the rights and obligations of contracting parties crystallise when a contract is made (subject to consensual variation thereafter) and contracts can only crystallise with reference to an existing proper law since they cannot exist in a legal vacuum".³⁹

7.26 On the other hand, a clause which provides that a different law would apply on the happening of a particular event was held valid as long as there is a pre-existing proper law.⁴⁰ In *Astro Venturoso Compania Naviera v Hellenic Shipyards SA*,⁴¹ the bill of lading in question included an English arbitration clause which provided that "if for any reason it is ruled by a competent authority that the aforesaid arbitration provision is unenforceable, then any claim and/or dispute arising as aforesaid shall be governed by Greek Law and solely decided by the competent Greek Courts of Piraeus".⁴² It was held that the said fall-back application of Greek law was acceptable. This is yet another example of party autonomy:⁴³

A conclusion that the parties should not be allowed to amend an agreement so as to change the law governing a jurisdiction agreement would be a surprising one. It is common ground that they may change a jurisdiction agreement by amendment. It is common ground that they may change the law governing their substantive rights by amendment. The governing law of a jurisdiction agreement is, like any other contractual provision, to be determined by the parties' express choice if they have made one, and in general the parties' intention will be taken to be that it is to be governed by the law applicable to the contract of which it forms part.

35 *Armar Shipping Co Ltd v Caisse Algerienne d'Assurance* [1981] 1 WLR 207 (CA, Eng). See also *Chan Chi Keung v Delmas Hong Kong* [2004] 4 HKC 28.

36 *Armar Shipping Co Ltd v Caisse Algerienne d'Assurance* [1981] 1 WLR 207 (CA, Eng).

37 *Ibid* at 215.

38 [2004] 4 HKC 28.

39 *EI Dupont de Nemours & Co and Endo Laboratories Inc v IC Agnew & Ors* [1987] 2 Lloyd's Rep 585 at 592.

40 *Ibid* ("It may, I suppose, be theoretically possible for a proper law to be retrospectively varied on exercise of a contractual option, but that does not dispense with the need for a pre-existing proper law.").

41 [1983] 1 Lloyd's Rep 12.

42 *Ibid*.

43 *Ibid* at para 19.

7.27 Similarly, it is possible to have different systems of law applying to different parts of the contract. This is known as ‘dépeçage’ in conflict of laws.

3.6 Overriding statute

7.28 Apart from the limitations imposed by common law, the legislature could also intervene to limit freedom of the parties to choose the governing law. The prime example in Hong Kong is the Control of Exemption Clauses Ordinance (Cap 71) (CECO). Section 17 of the CECO provides that a foreign choice of law clause shall have no legal effect if one party is a consumer who is habitually resident in Hong Kong and the essential steps for making the contract took place in Hong Kong. This section aims at protecting the consumers who might be taken advantage of due to lack of bargaining power because the contract is governed by foreign law. Commercial parties are protected to a lesser extent. In contracts between commercial parties, the choice of foreign law will have no effect only if the court considers the clause to have been imposed mainly to evade the CECO.

7.29 A more controversial statute is the Employment Ordinance (Cap 57). Section 70 of the Employment Ordinance nullifies any term of a contract of employment which purports to extinguish or reduce any rights, benefits or protection conferred on an employee by the Employment Ordinance. However, it is not clear whether the Employment Ordinance is an overriding statute. It was held not to be one in *HSBC v Wallace*.⁴⁴ In that case, the issue was whether the employee could pay back salary in lieu of the required notice of termination under the employment agreement according to section 7(1A) and (2) of the Employment Ordinance. The employment agreement was governed by English law and there were no equivalent rights under English law. The court held that the Employment Ordinance was not an overriding statute as it lacked specific restrictions such as section 204(1) of the UK Employment Rights Act 1996 which provides that “for the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person’s employment is the law of the United Kingdom, or of a part of the United Kingdom, or not”. In addition, the choice of law clause was found to be bona fide since it had been put in the employment contract in good faith and not as “a device artificially introduced to exclude Ordinance protection”.⁴⁵ Both the employer and the employee were British, with the employee having been recruited in London. It was also found that the employee was seconded in Hong Kong for a good reason.

7.30 However, the court in *Cantor Fitzgerald Europe v Boyer*⁴⁶ expressly disagreed with the view taken in *HSBC v Wallace* on the overriding statute. According to Reyes J., “[o]ne cannot attempt to get around the protection afforded by the Employment Ordinance to employees working here through the expedient of choosing a foreign law”. His conclusion was based on section 4 of the Employment Ordinance.⁴⁷

44 [2008] 1 HKLRD 613, [2007] HKCU 1976.

45 Ibid.

46 [2012] HKCU 478 (unreported, HCA 43/2012, 29 February 2012).

47 Ibid at para 91.

EO s.4(1) provides for the application of the EO to every employee engaged here under a contract of employment, to an employer of such employee, and to a contract of employment between such employer and employee. EO s.4(2) then carves out an exception to the wide ambit of s.4(1)... The deliberate carving out of [shipping crew’s] contracts as an exception to s.4(1) suggests that EO was intended to apply to all employments in Hong Kong, including employments governed by some law other than Hong Kong law.

7.31 Having regard to the two conflicting judgments, the issue remains unsettled in Hong Kong.

4. CLOSEST AND MOST REAL CONNECTION

7.32 It is not uncommon that the contracting parties have not thought about the governing law⁴⁸ or simply were unable to agree on it.⁴⁹ If the contract in question is made informally (for example, an oral contract made on the telephone), one would not expect to find an express choice of law clause.⁵⁰ In these cases, the court will derive the governing law by studying “every circumstance connected with the contract”.⁵¹ This exercise is similar to the *Spiliada* test discussed in Chapter 2 although the purpose here is to link the objective facts of the transaction with the system of law instead of the forum.

7.33 In most cases, the system of law that has the closest connection with the contract will be clear, particularly with the aid of a long line of authorities decided by the courts over the years.⁵² However, there are cases in which the contract is connected to multiple systems of law. For example, in *Lloyd v Guibert*,⁵³ a British person chartered a ship owned by the French defendants at a Danish West India Island for a voyage from Haiti to England. During the voyage, the ship was damaged and had to be repaired in a port in Portugal. These facts led to the potential application of French law, English law, Haitian law, Danish law and Portuguese law.

48 See *Mount Albert Borough Council v Australian Temperance and General Mutual Life Assurance Society Ltd* [1938] AC 224, [1937] 4 All ER 206; *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34, [1972] 1 All ER 451; *Bank of India v Gobindram Naraindas Sadhwani* [1988] 2 HKLR 262 at 268, [1988] HKCU 398.

49 *First National Bank of Chicago v Carroway Enterprises Ltd* [1990] 2 HKLR 10 at 14, [1990] HKCU 337 (“It would seem that the bank deliberately refrained from seeking an express stipulation that Hong Kong law would govern the contracts of guarantee because it felt that an express stipulation of that kind might be more than a Chinese corporation would be prepared to accept.”).

50 *Century Yachts Ltd v Xiamen Celestial Yacht Ltd* [1994] 1 HKLR 385 at 392, [1994] 1 HKC 331.

51 See *Mount Albert Borough Council v Australian Temperance and General Mutual Life Assurance Society Ltd* [1938] AC 224, [1937] 4 All ER 206.

52 *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34, [1972] 1 All ER 451, per Lord Denning (“This new test is all very well. It is often easy to apply”). *Bonython v Commonwealth of Australia* [1951] AC 201 at 219 (“In most cases ... an examination of these connecting ties will disclose without undue difficulty the country with which the contract is in fact most closely connected and in which it has its natural seat and centre of gravity.”).

53 *Lloyd v Guibert* (1865) LR 1 QB 115.

7.34 In such cases, the courts must weigh the various connections against each other to identify the system of law towards which the contract most strongly gravitates. Before exploring some of the commonly used factors to identify this system of law, it is useful to highlight some general principles:

- (1) Although the courts have developed a number of presumptions, none of them can be considered conclusive. This point was emphasized in *Jacobs v Credit Lyonnais*:⁵⁴

[B]ut these are only presumptions or prima facie rules that are capable of being displaced, wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction ... Stereotyped rules laid down by juridical writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity: and there can be no hard-and-fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal.

- (2) The test is not quantitative and one must resist the temptation of engaging in a factor-counting exercise. As such, "it is not uncommon to see one significant factor trumping a bigger number of less significant factors".⁵⁵
- (3) A factor regarded as determinative in one case may be thought to be less important in another. Each factor must be assessed on a case-by-case basis. Hence, "the same factors have not always prevailed, nor have they always been accorded the same weight. The classic process of weighing the factors must be followed."⁵⁶
- (4) One should not lose sight of the big picture. The presumptions are "based upon common sense, upon business convenience, and upon the comity of nations."⁵⁷ These should remain the ultimate considerations in any given case.
- (5) The courts will only consider factors that exist at the time of the contract and therefore will not consider conduct of the parties post-contract.⁵⁸

7.35 Over the following sections, a non-exhaustive list is given of factors that are often considered by the courts.

54 (1884) 12 QBD 589 at 600–601. See also *Mount Albert Borough Council v Australian Temperance and General Mutual Life Assurance Society Ltd* [1938] AC 224, [1937] 4 All ER 206 ("No doubt there are certain prima facie rules to which a court in deciding on any particular contract may turn for assistance, but they are not conclusive.")

55 *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd* [2013] 1 HKLRD 441, [2012] HKCU 1463.

56 *Bank of India v Gobindram Naraindas Sadhwani* [1988] 2 HKLR 262 at 267, [1988] HKCU 398.

57 *Jacobs v Credit Lyonnais* (1884) 12 QBD 589 at 600.

58 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1983] 2 All ER 884.

4.1 Place of performance

7.36 The place of performance has traditionally been treated as a significant factor by the courts.⁵⁹ "In the consideration of ... what is the proper law of the contract ... it is a factor, and sometimes a decisive one, that a particular place is chosen for performance."⁶⁰ The rationale for the importance attached to this factor in commercial transactions is explained by Goode:⁶¹

The place of intended performance of the contract (*lex loci solutionis*) is obviously of major importance, for the ability to perform a contract within a given State largely depends on the willingness of the law of that State to accommodate such performance, so that the *lex loci solutionis* prima facie has a close connection with the contract.

7.37 In a sale of goods transaction, it is a powerful indicator of the proper law when the place of delivery and the place of payment are both in the same country.⁶² In cases where the place of delivery and the place of payment do not coincide, the modern approach is to put more emphasis on the performance at the place of delivery. This is because "[t]he payment of money is a generalized obligation, not necessarily referable to the supply of goods at all. By contrast, the delivery obligation marks off the transaction from other transactions not involving the supply of goods."⁶³

7.38 In *S Megga Telecommunications Ltd v Etowaru Co Ltd & Toshiro Kawamoto*,⁶⁴ no place of delivery was provided in the contract. The court held that Hong Kong would be the place of delivery as it was a fundamental obligation of the Japanese supplier to make delivery to the Hong Kong purchaser. At the same time, if the place of payment is not specified in the contract, the general rule is that a debtor must seek out a creditor.⁶⁵

7.39 Different types of transactions will attach different weight on the place of payment. For example, in a loan transaction, the place of payment will serve as a strong indicator that the legal system of the place is most closely connected with the contract.⁶⁶ If a contract provides for alternative modes of performance at the choice of one of the parties, this factor will carry very little weight. For example, in *Bonython v Commonwealth of Australia*,⁶⁷ payment under the contract might be made in London as one of the four alternative modes of performance. This was regarded by the court as insignificant.

59 *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd* (2012) 15 HKCFAR 569, [2013] 2 HKC 459 at para 55 per Lord Collins: "The intended place of performance has always been of great weight at common law."

60 *Bonython v Commonwealth of Australia* [1951] AC 201. See also *Bank of India v Gobindram Naraindas Sadhwani* [1988] 2 HKLR 262 at 268, [1988] HKCU 398.

61 R M Goode, *Commercial Law* (1982, Pelican Books), p 925.

62 Dicey, Morris & Collins, *Conflict of Laws* (11th Edn, 1987), Vol 2, Rule 180 at p 1193.

63 R M Goode, *Commercial Law* (1982, Pelican Books), p 925.

64 [1995] 2 HKC 761.

65 *The First National Bank of Chicago v Carroway Enterprises Ltd* [1990] 2 HKLR 10, 14.

66 *Ibid.*

67 [1951] AC 201.

4.2 Subject matter

7.40 The subject matter of the contract has long been one of the key factors considered by the courts. In *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd*,⁶⁸ the subject matter of the contract was shares in a PRC incorporated company. Since transfer of these shares must be approved by the relevant Mainland authority, it was an influential factor in finding the PRC law as the governing law. *First Laser Ltd* was distinguished by the court in *Melvin Waxman v Li Fei Yu*⁶⁹ where the shareholders agreement at issue covered companies in the PRC, the United States and Hong Kong. Therefore, the subject matter in this case did not point to a single system of law and so was not indicative of the proper law.

7.41 In *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd*,⁷⁰ the Hong Kong Court of Appeal held that Hong Kong law was the governing law of a Memorandum of Understanding because its subject matters were two debts governed by Hong Kong law. Similarly, in *China Shanshui Cement Group Ltd v Zhang Caikui*,⁷¹ the subject matter of the agreement, ie shares in a Hong Kong company (which was intended to hold substantial shares of a listed company in Hong Kong), was found to be a more important factor than the domicile and residence of the parties.⁷²

4.3 Related transactions

7.42 If the contract in question is one of a number of contracts involved in a large transaction, the governing law of the contract in question is often regarded as the same as that of the other related contracts. The prime examples are securities and guarantees created to secure debt financing transactions. In *Mount Albert Borough Council v Australian Temperance and General Mutual Life Assurance Society Ltd*,⁷³ where the security of the loan in question was governed by New Zealand law, it was held that the loan was also governed by the same law. According to the court, “[i]t seems impossible to sever this personal covenant from the mortgage provisions which secure it”.⁷⁴ On the other hand, in *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd*,⁷⁵ only two of the three secured properties were in Mainland China, while the third and most substantial one was located in Macau. It was therefore held that the location of the securities was not a conclusive factor favouring the PRC law.⁷⁶

7.43 Similar considerations apply to guarantee. In *First National Bank of Chicago v Carroway Enterprises Ltd*,⁷⁷ it was said that “in the normal way, the “most likely implication” ... is that a guarantee is governed by the same law as that which governs the primary obligation with which it is inter-related”.

68 (2012) 15 HKCFAR 569, [2013] 2 HKC 459 at para 54–56.

69 [2016] HKCU 1001 (unreported, CACV 157/2014, 20 April 2016).

70 [2013] 1 HKLRD 441 at 488, [2012] HKCU 1463.

71 [2015] HKCU 1068 (unreported, HCA 2191/2014, 13 May 2015).

72 Ibid at para 95.

73 [1938] AC 224, [1937] 4 All ER 206.

74 Ibid.

75 [2013] 1 HKLRD 441, [2012] HKCU 1463.

76 Ibid at 488.

77 [1990] 2 HKLR 10 at 14, [1990] HKCU 337.

7.44 This factor can certainly be applied beyond secured transactions. In *Century Yachts Ltd v Xiamen Celestial Yacht Ltd*,⁷⁸ Hong Kong law was held to be the governing law of the contract that provided for the manufacturing of yachts by the defendant in China. One of the reasons was the fact that the sale contracts between the Hong Kong plaintiff and the end users of the yachts were governed by Hong Kong law. The Court of Appeal explained the relevance of the related sale contracts as follows:⁷⁹

[A]s regards the plaintiff and its own customers, the governing law of those contracts is Hong Kong law. If, for example, there was some defect in the manufacture of the yachts, those customers would obviously have proceeded against the plaintiff in the Hong Kong courts. It would naturally have been in the contemplation of the parties that, in that event, the plaintiff would in turn bring in the defendant as a third party. In these circumstances, it would have been very odd if the plaintiff intended, as between itself and the defendant, that the governing law of the sales contracts should be that of the PRC.

4.4 Place of contracting / negotiation

7.45 Traditionally, the place of contracting was regarded as an important factor.⁸⁰ Normal contracting rules apply to determine the place in which the contract is concluded. For example, if the contract is concluded by instantaneous communication, the contract is presumed to be concluded at the place where the offeror receives notification of acceptance.⁸¹ However, the place of contracting has not been a significant factor in some recent cases. In *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd*, for example, it was said that the factor is “of little weight in modern circumstances”,⁸² and in *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd*, the fact that the negotiation and signing of the MOU were in the PRC was a relevant factor but not one that played a significant part in identifying the proper law.⁸³

4.5 Arbitration clause / jurisdiction clause

7.46 If a contract does not provide for an express choice of law but contains an arbitration clause, the presumption is that the law of the place of arbitration will be

78 [1994] 1 HKLR 385, [1994] 1 HKC 331.

79 Ibid at 393. See also *Re United Railways of the Havana and Regla Warehouses Ltd* [1961] AC 1007.

80 See *Peninsular and Oriental Steam Navigation Company v Shand* (1865) 3 Moo PCC NS 272 (“The general rule is, that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either subjects of the Power there ruling or as temporary residents owe it a temporary allegiance: in either case equally they must be understood to submit to the law there prevailing, and to agree to its actions upon their contract.”).

81 *Century Yachts Ltd v Xiamen Celestial Yacht Ltd* [1994] 1 HKLR 385 at 392, [1994] 1 HKC 331.

82 (2012) 15 HKCFAR 569, [2013] 2 HKC 459 at para 56.

83 [2013] 1 HKLRD 441 at 488, [2012] HKCU 1463.

“an important factor and in many cases it may be the decisive factor”.⁸⁴ The rationale is that nationals or residents of that place will normally serve as arbitrators and the parties to the contract therefore expect these local arbitrators to apply the law of that place to the disputes.⁸⁵ While it is said that it will take “compelling indications to the contrary”⁸⁶ to overturn the presumption, the mere existence of such an arbitration clause should not be regarded as conclusive. Thus, in *Compagnie Tunisienne de Navigation SA v Compagnie d’Armement Maritime SA*,⁸⁷ despite the significance given to the English arbitration clause, the proper law was ultimately held to be the law of France as it was the place where the contract was negotiated and signed, the place of performance, the place where and the currency in which the freight was to be paid, and the place where the parties resided and carried on business.

7.47 In Hong Kong, it was held in *York Airconditioning & Refrigeration Inc v Lam Kwai Hung*⁸⁸ that arbitration in China was a very strong indicator in favour of PRC law. Despite Hong Kong being the place where both parties were from, the place of contracting and negotiation and the place of performance, the court concluded that these factors did not amount to an “overwhelming combination of factors” to displace the strong presumption created by the arbitration clause. Similarly, an exclusive jurisdiction clause will be a significant though inconclusive factor for the law of the designated court to apply to the contract. It is generally assumed the parties intended that the judges in the designated jurisdiction would apply their own law.

4.6 Use of particular form or legal terminologies

7.48 In *Amin Rasheed Shipping Corporation v Kuwait Insurance Co*,⁸⁹ the court put much emphasis on the use of the Lloyds form of policy which was in the English language and required interpretation according to English rules and practice. In addition, at the time of the case, there was no indigenous law of marine insurance under the law of Kuwait, the other potential proper law in the case. It was therefore held that English law was the proper law of contract. The weight to be attached to this factor apparently depends on the particular form or terminologies adopted and the courts will examine them closely. In *First National Bank of Chicago v Carroway Enterprises Ltd*, Bokhary J stressed the importance of that exercise: “Lord Atkin in *R v International Trustee* ... considered it necessary to set out the whole of the documentation in question. In the present case ... I have, of course, read and re-read them with care.”⁹⁰

84 *Compagnie D’Armement Maritime v CIE Tuniseienne de Navigation SA* [1969] 1 WLR 449 at 584 per Lord Reid.

85 Ibid per Lord Wilberforce.

86 Ibid at 609 per Lord Diplock.

87 [1969] 1 WLR 449.

88 [1995] 2 HKLR 256, [1995] 1 HKC 287.

89 [1983] 2 All ER 884.

90 *First National Bank of Chicago v Carroway Enterprises Ltd* [1990] 2 HKLR 10 at 15, [1990] HKCU 337.

7.49 In *Bank of India v Gobindram Naraindas Sadhwani*,⁹¹ the issue was whether the guarantee at issue should be governed by Indian law or Japanese law. The plaintiff argued that the guarantee at issue was framed in the common law form and thus should be governed by Indian law. This was, however, rejected by the court as it did not accept that the guarantee was only intelligible by reference to common law and certainly not to the same degree as the Lloyds policy in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co*.⁹² Another difference from *Amin Rasheed Shipping Corporation* was that, unlike the lack of marine insurance law in Kuwait, Japan had an appropriate code on guarantee. By contrast, in *S Megga Telecommunications Ltd v Etowaru Co Ltd & Toshiro Kawamoto*,⁹³ the use of legal terminologies such as time being of essence; indemnity; and liquidated damages led to Hong Kong law being found as the proper law.

4.7 Legality

7.50 If the contract is valid under the law of country A but not under the law of country B, it has long been presumed that the law of country A should be the governing law since contracting parties are expected to prefer upholding the contract.⁹⁴ However, this is a strong but not conclusive factor. For example, in *Hung Fung Enterprises Holding Ltd v Agricultural Bank of China*,⁹⁵ it was argued that the swap agreement was only valid under Hong Kong law but not the PRC law, and thus Hong Kong law was intended by the parties to be the proper law. The court rejected this argument since all the other objective factors pointed to the PRC law as the proper law. Further, as the agreement might be unenforceable for failing to comply with the Conveyancing and Property Ordinance (Cap 219), it could not be assumed that the contract would even be valid under Hong Kong law.

4.8 Nationality and residence

7.51 The contracting parties’ nationality and/or residence is a relevant factor but it is far from determinative. This will be a weak factor when the parties are from different countries which is common for international transactions. For example, in *Amin Rasheed Shipping Corporation*, the defendants were incorporated and carried on business in Kuwait while the plaintiffs were Liberian and resident in Dubai. In *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd*,⁹⁶ the court put little weight on this factor as the parties were from Macau and Zhuhai respectively.⁹⁷

91 *Bank of India v Gobindram Naraindas Sadhwani* [1988] 2 HKLR 262, [1988] HKCU 398.

92 Ibid at 267.

93 [1995] 2 HKC 761.

94 *South African Breweries Ltd v King* [1899] 2 Ch 173 at 181.

95 [2012] 3 HKLRD 679 at 689–690, [2012] HKCU 1275.

96 *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd* [2013] 1 HKLRD 441, [2012] HKCU 1463.

97 Ibid at 488.

4.9 Language

7.52 The language in which the contract is written is a common factor considered by the courts but it will normally only be useful in combination with other factors. For some languages such as English, their use might point to a number of systems of law.⁹⁸ In *The Amara*,⁹⁹ no weight was put on the use of the English language. According to the court, “[a]mongst other considerations the English language is, if I may use the phrase, the lingua franca of commerce.”¹⁰⁰ It is submitted that a similar consideration applies to the Chinese language in certain cases as it is used in Hong Kong, Mainland China and Taiwan.

4.10 Currency

7.53 Currency is another factor that could strengthen one’s case without usually being a strong factor by itself. For example, in *The Assunzione*,¹⁰¹ the court considered it of considerable importance that the payment had to be made in Italian lire as well as the fact that the form of, and place of, payment were both in Italy.¹⁰² In *Bank of India v Gobindram Naraindas Sadhwani*,¹⁰³ it was held that the fact that the form in question was expressed in Japanese Yen was one of the factors indicative of Japanese law being the choice of the parties.

4.11 Other specific factors

7.54 For specific contracts, there are further factors to be considered. For example, the law of the flag has been a strong factor for determining the proper law in shipping contracts.¹⁰⁴

5. SCOPE OF PROPER LAW

7.55 Now that we have discussed how to determine the proper law, it is left to consider the aspects of the contract which the proper law actually governs. Generally, the proper

98 *Compagnie D’Armenment Maritime v CIE Tuniseienne de Navigation SA* [1969] 1 WLR 449 (“The contract is in the English language and in English form, but it was not argued, in my view rightly, that any great importance should be given to it”).

99 *Armar Shipping Co Ltd v Caisse Algerienne d’Assurance* [1981] 1 WLR 207 (CA, Eng).

100 See also *S Megga Telecommunications Ltd v Etowaru Co Ltd & Toshiro Kawamoto* [1995] 2 HKC 761 (“It is quite right, as the judge pointed out, that the mere fact that the contract is in English does not mean that its proper law is Hong Kong law as opposed to the law of a country which uses some other language”). Cf *Century Yachts Ltd v Xiamen Celestial Yacht Ltd* [1994] 1 HKLR 385 at 393, [1994] 1 HKC 331 (“all communications between the parties were in English”).

101 [1954] P 150.

102 See also *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1983] 2 All ER 884 (the use of pounds sterling as the money of account).

103 *Bank of India v Gobindram Naraindas Sadhwani* [1988] 2 HKLR 262 at 268, [1988] HKCU 398.

104 *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34, [1972] 1 All ER 451 (“... in a contract of charterparty, other things being equal, the law of the ship should govern”).

law governs “the validity and legality, its construction and effect, and the conditions of its discharge”¹⁰⁵ As mentioned above, the validity of a contract is governed by the proper law and thus floating choice of law is not allowed. In connection with the construction of the contract, since the governing law covers the interpretation of the contract, it makes no difference whether a choice of law clause is expressed as a contract being “governed” or “interpreted” by a system of law. It is also common for both expressions to be used in the same clause. In *Jacobs v Credit Lyonnais*,¹⁰⁶ it was held that it is the proper law, and not the law of the place of performance as such, that determines what are excuses for non-performance. Similarly, “[t]he power of legislation to affect a contract by modifying or annulling some term thereof is a question of discharge of the contract which, in general, is governed by the proper law”.¹⁰⁷

7.56 A more difficult topic is the capacity to enter into a contract. Some cases suggest that the law of domicile should be used in determining the contractual capacity of an individual.¹⁰⁸ On the other hand, it is also suggested that capacity to contract shall be governed by the proper law of the contract.¹⁰⁹ For example, in *Bodley Head v Flegon*,¹¹⁰ it was held that the issue of capacity was governed by Swiss law, the proper law of the contract, instead of Russian law which was the law of domicile of the plaintiff. The capacity of a company to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country which governs the transaction in question.¹¹¹

6. ILLEGALITY

6.1 Illegality under proper law

7.57 Since the validity of a contract is governed by the proper law, the corollary is that illegality under the proper law will invalidate the contract. This was the case in *Kahler v Midland Bank*¹¹² where under Czechoslovak law the Bohemian bank could not lawfully deliver the securities to the appellant. According to the judge, “if the proper law is the law of Czechoslovakia, I have no doubt that the defence is a valid one; for the courts of this country will not compel the performance of a contract if by its proper law performance is illegal and it follows that it must be admitted as a good defence”.¹¹³

105 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1983] 2 All ER 884.

106 (1884) 12 QBD 589.

107 *Re Helbert Wagg & Co Ltd’s Claim* [1956] Ch 323, [1956] 1 All ER 129.

108 See *Sottomayor v De Barros (No 1)* (1877) LR 3 PD 1 at 5.

109 *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240, [1958] OR 597.

110 [1972] 1 WLR 680 at 689.

111 *Joint Official Liquidators of A Company v B* [2014] 4 HKLRD 374 at 377, [2014] 5 HKC 152, approving Rule 175(i) in Dicey, Morris & Collins, *Conflict of Laws* (15th Edn, 2016, London: Sweet and Maxwell).

112 [1950] AC 24.

113 *Ibid.*