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THE CONFLICT OF LAWS IN HONG KONG

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DUO

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and determine any action in respect of the contract".[172] In principle, this covers an implied as well as express choice of Hong Kong jurisdiction. For a more detailed consideration of such provisions, see Chapter 3.

(xvii) *Head (e): breach of contract committed in Hong Kong*

5.039 Head (e) covers a case where

> *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.*

5.040 The following issues have arisen in respect of this head.

(xviii) *Head (e): elements*

5.041 The applicant under head (e) must demonstrate three things to the good arguable case standard: (1) the existence of a contract;[173] (2) breach; (3) Hong Kong as the place where a breach was committed. The practical consequence is that head (e) is harder to make out than head (d) in the sense that the plaintiff under head (e) will have to show a good arguable case on the merits (ie as to breach) rather than merely a serious issue to be tried.[174] That makes some practical sense, since the essence of head (e) is to give the location of the breach a jurisdictional significance in a case where the contract does is not linked to Hong Kong in a manner recognized under head (d).

(xix) *Head (e): breach by commission or omission*

5.042 The two possibilities which may amount to "committing a breach in Hong Kong" are:

(1) A positive act amounting to breach which is in fact done in Hong Kong, irrespective of whether the contract was required to have been performed in Hong Kong.

(2) A failure to perform an obligation which was required to have been performed in Hong Kong.

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[172] The Rules of the High Court say "Court of First Instance" and the Rules of the District Court say "District Court" but it is of course quite unnecessary for the contract to specify the specific court within the Hong Kong hierarchy: a formula such as "the courts of Hong Kong" is quite sufficient.

[173] The contract must be between the plaintiff and defendant. If the plaintiff denies the existence of any contract with the defendant this ground cannot be relied upon (*Finnish Marine Insurance Co Ltd v Protective National Insurance Co* [1989] 2 All ER 929. This applies equally to head (d)(ii) orders.

[174] See *Seaconsar (Far East) Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, 453 *per* Lord Goff, deriving this principle from the House of Lords' decision in *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869, and rejecting the contrary opinion of Lord Goddard CJ in *Malik v Narodni Banka Ceskoslovenska* [1946] 2 All ER 663 (CA) (Lord Goddard CJ would have assumed elements (1) and (2) in the applicant's favour). As Lord Goff noted in *Seaconsar* at 454, it follows that, under head (e) (unlike the other heads) "no separate issue will arise on the merits of the plaintiff's claim to which a lower standard of proof might be applied".

Example:

A Hong Kong based plaintiff with a liquidated contractual claim governed by Hong Kong law will often be able to rely on head (e) because of the presumptive rule of Hong Kong domestic law that, if no place of payment is provided for in the contract,[175] the debtor must make payment at the creditor's residence or place of business.[176]

If the time for performance of an obligation has not yet arrived, an anticipated breach cannot be relied upon under this head.[177]

(xx) *Head (e): breaches outside and within Hong Kong*

5.043 The words at the end of head (e) ("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") were introduced to reverse the effect of a decision of the House of Lords[178] which was considered to have unduly restricted the jurisdiction.

5.044 In *Union Bank of India v Glory Universal Group Inc* HCA1218/2019, Master C. Lee held that a contract was breached within Hong Kong within the meaning of head (e) where the defendant failed to make payment which was due to be paid into a bank account in New York which was functioning as a "nostro" bank account that is a conduit for funds in US currency to be received into the plaintiff's bank account in Hong Kong.

(xxi) *Head (h): contracts affecting land situate in Hong Kong*

5.045 This head applies to claims "brought to construe, rectify, set aside or enforce an act, deed, will, contract, obligation or liability affecting land situate within the jurisdiction". This raises the issue of when a contract "affects" land.[179] A declaration of trust concerned with land affects land.[180] Claims for rent, for possession and breach of convent to repair are also within the head,[181] as is a claim for a declaration that the defendants are trustees of the land,[182] and a claim to enforce a charging order obtained on land.[183] A claim for harbour dues does not "affect" land.[184] Nor does a royalty agreement.[185]

(xxii) *Head (i): debts secured on immovable property within the jurisdiction*

5.046 This applies to claims in each of the following circumstances:

(1) a claim for a debt secured on immovable property;

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[175] Whether expressly or by necessary implication (applying the usual domestic law principles as to implied terms).

[176] *Robey v Snaefell Co* [1887] 20 QBD 152 (CA).

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

[178] *Johnson v Taylor* [1920] AC 144.

[179] *Casey v Arnott* (1876) 2 CPD 24, applied in *Muusers v State Gov Insurance Office (Queensland)* [1980] 2 NSWLR 73.

[180] *Official Solicitor v Stype Inv (Jersey) Ltd*.

[181] *Tassell v Hallen* [1892] 1 QB 321.

[182] *A-G v Drapers Co* [1894] 1 IR 185.

[183] *Mority v Stephan* [1888] 58 LT 850.

[184] *Carlingford Harbour Commissioners v Everard & Sons Ltd* [1985] IR 50.

[185] *BHP Petroleum v Oil Basins* [1985] VR 725.

(2) a claim to assert, declare or determine proprietary or possessory rights or rights of security in or over movable property; or

(3) a claim to obtain authority to dispose of movable property situate in Hong Kong.

5.047 The property in question must be located in Hong Kong in each case.

(xxiii) *Forum conveniens in contractual cases*

5.048 *Forum conveniens* applications in contractual cases do not ordinarily raise any special issues incapable of being readily addressed by application of *Spiliada*. One practical observation is that it is relatively rare, in purely contractual disputes, for foreign governing law to be a decisive factor affecting the *Spiliada* discretion, in view of the broad similarities of substance between most legal systems nowadays on contractual issues.

3. Particular Contracts

(a) Introduction

5.049 The following paragraphs discuss a number of contractual contexts in relation to which special conflict of law rules have developed.

(b) Insurance contracts

5.050 Ordinary contractual choice of law principles apply in respect of insurance contracts with the significant qualification that there is some English authority favouring, in the absence of an express choice of law,[186] the application of the law of the jurisdiction of the insurer's head office (not branch office).[187] Whilst this has some continuing attraction in the case of life assurance, there seems to be little attraction in maintaining that approach in the case of other types of insurance: if the insurer has failed to include a choice of law clause in the policy then it would seem more appropriate for the matter to be determined as one of closest and most real connection on a case-by-case basis in the ordinary way, though the market by reference to which the insurance contract was concluded will often be a good pointer.[188]

[186] It has long been clear that the ordinary principles as to freedom of parties to agree a proper law apply in the insurance context: see the English Court of Appeal's decisions in *Anderson v Equitable Life Assurance Society of the US* (1926) 134 LT 557; *Buerger v New York Life Assurance Co* (1927) 96 LJKB 930.

[187] As to life insurance, see *Pick v Manufacturer's Life Insurance Co* [1958] 2 Lloyd's Rep 93 (HC, Diplock J) and *Rossano v Manufacturers Life Assurance Co Ltd* [1963] 2 QB 352 both referred to and apparently assumed, *obiter*, to be consistent with Hong Kong law by Rhind J in *Shanti Ramesh Ramchandani v Commissioner of Estate Duty* [1981] HKLR 85. As to general/indemnity insurance, see *Atlantic Underwriting Agencies Ltd v Cia di Assicurazione di Milano SpA* [1979] 2 Lloyd's Rep 240 and *Armadora Occidental SA v Horace Mann Insurance Co* [1977] 1 WLR 520.

[188] See *The Al Wahab* [1984] AC 50; *Cantieri Navali Riuniti SpA v NV Omne Justitia, The Stolt Marmaro* [1985] 2 Lloyd's Rep 428 (CA); *EI du Pont de Nemours v Agnew* [1988] 2 Lloyd's Rep 585 (CA); *Arkwright Mutual Insurance Co v Bryanston Insurance Co Ltd* [1990] 2 All ER 335 (HC, Potter J). Subsequent English case law must be regarded with caution in Hong Kong in view of the application of first the Rome Convention, and more recently the Rome I Regulation, in England, but not Hong Kong.

(c) Contracts relating to gambling

5.051 Hong Kong's statutory prohibitions on gambling have a significantly different history and structure from those of England.[189] The statutory technique, so far as relevant to the question of contractual validity, is to declare certain defined activities "unlawful" and to impose criminal penalties. In the absence of any express provision in the statutes, it is suggested, in accordance with ordinary conflict of laws principles, that the statutory provisions must be regarded as extending to all contracts which are either governed by Hong Kong law (on ordinary principles) or which are entered into for the purpose of activities to be carried out in Hong Kong.[190] There is however no public policy objection to the enforcement through the Hong Kong courts of a non-Hong Kong law contract relating to activities outside Hong Kong even though the contract would have been unenforceable had the relevant activities occurred in Hong Kong or had the contract been governed by Hong Kong law.[191]

(d) Contracts relating to land

5.052 Contracts relating to immovable property need not necessarily be governed by the *lex situs*: parties are free to choose a different governing law.[192] However, in cases where the contract relates only to immovable property in a single jurisdiction it is likely that the *lex situs* will be the legal system having the closest and most real connection.[193] It is suggested that, whilst specific performance may properly be ordered by a Hong Kong court on ordinary principles in respect of contracts relating to immovables which are governed by a law other than the *lex situs*, it would be wrong to give effect to related proprietary principles, such as the equitable doctrine of conversion, other than in accordance with the *lex situs*.[194] The fact that a loan is secured on land does not necessarily mean that the loan is governed by

[189] The principal legislation in Hong Kong is the Gambling Ordinance, (Cap.148) though also see the Betting Duty Ordinance, (Cap.108) and Marine Insurance Ordinance, (Cap.329), s.4. For details, see *Betting, Gambling and Lotteries* in *Halsbury's Laws of Hong Kong*, vol 5 (2023 reissue, Lexis Nexis).

[190] The first proposition accords with Rule 229 in the 14th edition of *Dicey, Morris & Collins* (Rule 242 in the current edition). An earlier version of that rule was approved by the Court of Appeal in *Wong Hon v Sheraton Desert Inn Corp* [1995] 3 HKC 331. It is suggested that the second proposition in the text must be correct as a matter of principle: it must be contrary to Hong Kong public policy to enforce a contract governed by the law of Ruritania for the purpose of illegal gambling (or any other illegal activity) in Hong Kong. For the necessary intention to be demonstrated in such cases, see para.5.014.

[191] *Wong Hon v Sheraton Desert Inn Corp* [1995] 3 HKC 331 (CA). Also see *GNLV Corp v Wong Hoi Lam* (25 May 1992); *Las Vegas Hilton Corp v Lo Yuk Leung* (CACV 251/1997, 20 February 1998); *Rambas Marketing LLC v Chow Kam Fai David* (HCA 10190/2001, 9 July 2001, CFI) (Chung J) (referring back to the judgment of Mr Recorder Ma, SC (HCA 10190/2001, 16 May 2001); *Rambas Marketing LLC v Yeung Hang Shun* (HCA 323/2001, 13 May 2001) (Deputy Judge A Cheung).

[192] *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch 502 (CA) (reversed on different grounds: [1912] AC 52); *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382 (CA).

[193] See eg *Re de Nicols* [1900] 2 Ch 410, *British South Africa Co v De Beers Consolidated Mines Ltd.*

[194] The point has not proved significant in Hong Kong reported cases in practice. In the event that it does, arise, see *Re Courtney ex p Pollard* (1840) Mont & Ch 239; *Paget v Ede* (1874) LR 18 Eq 118; *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch 502 (reversed on different grounds: [1912] AC 52); *Re Smith* [1916] 2 Ch 206; *Re Anchor Line (Henderson Bros) Ltd* [1937] Ch 483; *Richard West and Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424; *Ward v Coffin* (1972) 27 DLR (3d) 58.

the *lex situs* though it may point in that direction in some circumstances, for example, if the loan was given for the purpose of purchasing the land.[195] On ordinary principles (see para.5.014), a contract relating to land which requires something to be done which is illegal under the *lex situs* will not be enforced: whether severability of the illegal part is possible will depend on the circumstances.

(e) Sale of goods and other contracts relating to movable property

5.053 Contracts for the sale of goods, and other contracts relating to movable property, are essentially analysed under the Hong Kong conflict of laws in the same way as any other contract. In particular, the Sale of Goods Ordinance[196] only applies to contracts the proper law of which is Hong Kong law. The following points should however be noted.

(i) *Sale of goods: proper law in the absence of express choice*

5.054 In the absence of an express choice of law, the Privy Council held in the 1920s that the *lex loci solutionis*, in other words the place of delivery of the goods, will presumptively be regarded as the proper law in an f.o.b. sale.[197] This usually (though not always) equates to the seller's residence or, at least, a place more connected with the seller than the buyer. It has been said at first instance in England that there is no similar presumption in a c.i.f. sale.[198] The discussion of proper law in sale of goods contract in Hong Kong first instance authorities has to date been inconclusive.[199] It is suggested that sale of goods is a context in which a clearer rule of, at least, presumptive application, would be of benefit; there will inevitably be a degree of arbitrariness in the particular rule chosen, but it would seem to be preferable to leaving the matter (as at present) open to argument by reference to a whole host of "closest connection" factors which, in practice, operate in favour of a defendant seeking to complicate and delay summary proceedings. Whilst other alternatives can certainly be contended for, it is suggested that there is something to be said for a simple rule, namely a presumption in favour of the law of the place of delivery in connection with all contracts for the sale or supply of goods.[200]

[195] It is suggested that this is clear as a matter of principle but also see *Re Helbert Wagg & Co* [1956] Ch 323 (HC, Upjohn J).

[196] Cap.26.

[197] Benaim v Debono [1924] AC 514 (PC).

[198] H. Glynn (Covent Garden) Ltd v Wittleder [1959] 2 Lloyds Rep 409 (Pearson J); and see, in Hong Kong, Ferromin Ltd v Nittetsu Shoji Co Ltd (HCCL 41/1998, 29 January 1999) (Stone J) (finding it unnecessary to resolve the point because all factors pointed the same way in that case), and in Australia, Mendelson-Zeller Co Inc v T&C Providores Pty Ltd [1981] 1 NSWLR 366 (c&f).

[199] Ferromin Ltd v Nittetsu Shoji Co Ltd; York Airconditioning & Refrigeration Inc v Lam Kwai Hung [1995] 2 HKLR 256 (CFI), Kaplan J, considering a number of the older English authorities, such as Jacobs v Credit Lyonnais (1884) 12 QBD 589 (CA); H. Glynn (Covent Garden) Ltd v Wittleder, above; *Re United Railways of Havana Warehouses Ltd* [1960] Ch 52 (English Court of Appeal); Offshore Int'l SA v Banco Central SA [1977] 1 WLR 399, [1976] 3 All ER 749 (English High Court, Ackner J).

[200] The matter is free from binding authority, and the source of English case law on the point has dried up since the matter is now a statutory one in England (Contracts (Applicable Law) Act 1990).

(ii) *Sale of goods: exemption clauses*

5.055 The Hong Kong legislation in respect of exemption clauses and other limitations of liability (including liability under the Sale of Goods Ordinance) does not apply in cases where "the proper law of a contract is the law of Hong Kong only by choice of the parties"; but, conversely, there are limitations on the parties availability to exclude that legislation by a choice of law clause where "the term appears to the court or arbitrator to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of" the legislation or "in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in Hong Kong, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf".[201] Irrespective of governing law, the application of this legislation is also largely excluded in the case of certain international sales contracts.[202]

(iii) *Sale of goods: proprietary questions*

5.056 A sale of goods contract may, by its express terms or by operation of law, purport to regulate the transfer of property in goods in various ways, for example by:

(1) Providing that property shall not pass to the buyer until a certain event, such as payment of the price (a simple "retention of title" clause).

(2) Providing, in addition to the above, for the seller to have a proprietary interest (eg by way of trust) in the proceeds received by the buyer in on-selling the goods, or in other products of an exchange transaction.

(3) Providing for the seller to have a floating charge over the buyer's assets.

(4) Providing for the buyer's right to claim the price from his sub-buyer to be assigned to, or held for the benefit of, the seller.

(5) Providing for property to pass at an earlier stage of the transaction (eg upon delivering to a carrier), but reserving a right for the seller to stop the goods in transit and re-assert a property interest in certain circumstances.

5.057 Different substantive laws may regard these matters very differently. In insolvency situations, the analysis of such matters even under Hong Kong domestic law may be very technical, with questions arising as to whether the transaction amounts to the creation of a security interest by a corporate buyer, requiring registration if it is to be effective. It is suggested that the proper analysis of the governing law issues is as follows:

[201] See Control of Exemption Clauses Ordinance, Cap.71, s.17 (Choice of law clauses). Sections of particular relevance to sale and supply of goods contracts include ss.7 (Negligence liability), 8 (Liability in contract), 9 (Unreasonable indemnity clauses), 10 (Guarantee' of consumer goods), 11 (Seller's liability; this limits exclusion of the implied terms under ss.14–18 of the Sale of Goods Ordinance), 12 (Miscellaneous contracts under which goods pass).

[202] For the rather intricate definition of the contracts in question, see s.16(3). For the scope of the exclusion, see s.16(1) and (2).

(1) Proprietary consequences are in all cases matters for the *lex situs*, depending upon the location of the goods at the relevant time.[203] In the more ambitious type of clause frequently encountered, an attempt is made to assert title over assets other than the goods themselves, for example, over the proceeds of onward sales or even over the resultant debts in respect of onward-sales. The effectiveness of this as a proprietary matter depends on the *lex situs* of each such asset.

(2) The personal consequences as between the contractual parties are, however, matters for the governing law of the contract.[204] For example, if the seller exercises a security right or a right of stoppage in transit which he properly has under the law of the contract then the buyer cannot allege that this was a breach of contract. However, if the *lex situs* does not recognize the alleged right in the particular circumstances, then its exercise cannot have proprietary consequences; otherwise, third party interests would be inappropriately prejudiced. The appropriateness of this conclusion is, it is suggested, instinctively apparent in the context in which it is most likely to arise, namely where goods have been sold into Hong Kong under a contract which purports to assert more ambitious property rights than those which Hong Kong domestic law recognizes, and in which the buyer is now insolvent and the seller claims a priority. The seller's proprietary claim should be denied unless the alleged property interest is valid by virtue of the application of the rules of Hong Kong domestic law.

(3) Where the *lex fori* imposes a requirement for the public registration of certain interests in a company's assets as a condition of validity or enforceability, it is suggested that the position is that, so far as the requirement exists under Hong Kong law, these must be complied with in addition to the *lex situs*.[205] It is suggested that this is clear from the mandatory words of the statute; it is further suggested that the meaning of the relevant statutory concepts such as "charge" must be a matter only of Hong Kong law. It is important to note that the Hong Kong statutory requirements extend not only to Hong Kong companies but also to certain non-Hong Kong companies.[206] As such, they are clearly mandatory rules of the *lex fori*, not matters for the *lex incorporationis*. As regards registration requirements under foreign law, see para.7.050.

[203] This matter was thoroughly ventilated in *Glencore International AG v Metro Trading Inc (No.2)* [2001] 1 All ER (Comm) 103 (English High Court, Moore-Bick J). It is suggested that this decision also represents Hong Kong law. *Cf* the Scottish case of *Zahnrad Fabrik Passau GmbH v Terex Ltd* [1986] SLT 84, Court of Session (Outer House), which has however been rejected (and rightly so, it is respectfully suggested) as representing the English conflict of laws: *Glencore*, [23–24]; *Cheshire*, 1217–1218; *Dicey, Morris and Collins*, [33.035] See also the Scottish first instance decision in *Armour v Thyssen Edelstahlwerke AG* [1986] SLT 452, Court of Session (Outer House) reversed upon ultimate appeal, [1991] 2 AC 339, [1990] 3 All ER 481, but without reference to the conflict issues, and see Moore-Bick J's remarks upon *Armour* at para.22 of *Glencore*.

[204] It is suggested that this distinction is correct even for the right of stoppage *in transitu* arising under s.46 of the Sale of Goods Ordinance (Cap.26) or analogous foreign provisions. *Dicey, Morris and Collins* disagree at para.33.143, but *cf* *Benjamin's Sale of Goods*, 9th ed (London: Sweet & Maxwell, 2014), [26–158, 26–159].

[205] See Companies Ordinance (Cap.32), Pt III, ss.80–92. In the broadest of outlines, this imposes registration requirements in respect of "charges" created by a Hong Kong company, irrespective of where the relevant assets are situated. The effect of registration is to prevent the charge from being deemed automatically "void against the liquidator and any creditor of the company, unless [registered in due form] within 5 weeks after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section the money secured thereby shall immediately become payable".

[206] Section 92 provides for the registration requirements of Pt III to apply in respect of non-Hong Kong companies which have a place of business in Hong Kong, though only in respect of their "property in Hong Kong".

(f) Bailment

The relationship of bailor and bailee has been treated as akin to a contractual relationship for the purpose of choice of law,[207] with the relevant rights and duties depending upon the governing law as determined at the time when the bailment is created, as varied by any subsequent agreement. Thus, the incidents of the relationship do not shift with, for example, the *situs* of the goods or the residence of the parties.[208] In the absence of an express choice of law, it is suggested that the *lex loci solutionis*, which in this context means the law of the place in which the goods are to be held, should presumptively be appropriate.[209] 5.058

(g) Contracts of carriage

At common law, choice of law in relation to contracts of carriage is determined by ordinary principles—in the absence of an express or clearly implied choice, this requires application of the principle of closest and most real connection on a case-by-case basis.[210] There are, however, various important statutory provisions which override the common law in commonly encountered contexts. 5.059

(i) *Carriage by air*

The Carriage by Air Ordinance[211] provides for the 1929 Warsaw Convention[212] (as amended by the 1955 Hague Protocol[213]) to have "the force of law in relation to any carriage by air to which the amended Convention applies, irrespective of the nationality of the aircraft performing that carriage" and for certain provisions of the Guadalajara Convention[214] so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees and other persons, and subject to s.11, have the force of law in relation to any carriage by air to which the Guadalajara Convention applies, irrespective of the nationality of the aircraft performing that carriage. Without seeking to elaborate on the matter exhaustively in this work, the main features of the Convention regime as 5.060

[207] In the RHC O.11 context in which bailments have, in England, not been treated as contracts: *Co Nav Continental de Peru v Evelpis Shipping Corp, the Agia Skepi* [1992] 2 Lloyd's Rep 467 (HC, Saville J). It is respectfully suggested that this may be too narrow a view.

[208] See *Kahler v Midland Bank Ltd* [1950] AC 24; *Zivnostenska Banka National Corp v Frankman* [1950] AC 57, both decisions of the House of Lords.

[209] See the observations of Lord Macdermott in *Kahler v Midland Bank Ltd*. *Cf* the view of Lord Simonds declining to lay down any rule other than to have regard to the intention of the parties as inferred in all the circumstances, and applying the *lex loci contractus* in all the circumstances of the case, though passages in his Lordship's speech suggest that his Lordship was still undecided, at the time of *Kahler*, as to the appropriate answer to what was then the vexed question of the test for proper law in contracts; *cf* his Lordship's endorsement of the "closest and most real connection" principle soon afterwards in *Bonython v Commonwealth of Australia* [1951] AC 201.

[210] Various more mechanical rules may be derived from the older English authorities, which are not entirely consistent, but it is suggested that these should be treated with caution following the establishment of the closest and most real connection principle in later years. See the 11th ed (1987) of *Dicey*, 1270–1271, for the older English authorities, aptly summarised at para.33.250 of the 14th ed of *Dicey, Morris & Collins* as "very limited".

[211] Cap.500.

[212] Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929.

[213] Protocol to amend the Warsaw Convention signed at The Hague on 28 September 1955.

[214] Convention supplementary to the Warsaw Convention, for the unification of certain rules relating to international carriage by air performed by a person other than the contracting carrier signed at Guadalajara on 18 September 1961.

implemented in Hong Kong are as follows (it should be noted that these differ in some details from the English legislative scheme).

(1) *The different regimes*

The Ordinance implements three legal regimes:

(a) Part II and Schs.1 and 2 implement the 1929 Warsaw Convention as amended by the 1955 Hague Protocol and the 1961 Guadalajara Convention. These apply to all cases in which the flight is between countries which are party to all of these instruments. This category includes most countries in the world.

(b) Part III and Sch.3 apply in cases of "non-international carriage". This includes flights within China, flights within other countries[215] and, perhaps unexpectedly, international flights where either the starting country or the destination country is not party to the Warsaw Convention (amended or unamended).[216]

(c) Part III and Sch.4 apply in cases of international carriage in which the country of origin or destination is party to the unamended 1929 Warsaw Convention and the other country is party either to the unamended or amended Convention. In such cases, the unamended Convention applies.

The main difference between these regimes is the level at which the carrier's liability is capped (higher for Schs.1 and 2 than for Sch.3).

(2) *Governing law*

The Convention seeks to harmonise the law internationally, rather than providing for a choice of law between different laws. Its provisions apply in respect of "all international carriage[217] of persons, baggage or cargo[218] performed by aircraft for reward".[219]

(3) *Liability caps and exclusivity*

So far as personal injury is concerned, the essential feature of the Convention regime is to provide for compensation, with a reversal of burden as to fault,[220] for "bodily injury" caused by "accidents." The other side of the coin is that liability

[215] See s.13 and Sch.3 of the Ordinance. Note that the House of Lords' decision in *Holmes v Bangladesh Biman Corp* [1989] AC 1112, to the effect that an English statutory instrument applying the Convention provisions to non-international carriage outside the United Kingdom was *ultra vires* has no relevance in Hong Kong since the application of Convention-based rules to all cases is required by primary legislation. The result in *Holmes* was the claim of the English victim of an accident in a Bangladeshi domestic flight was restricted to a much lower limitation under Bangladeshi law.

[216] *Olding v Singapore Airlines Ltd* [2003] 2 HKLRD 476, HH Judge Carlson, a case concerning a passenger injured by glass in his drink on a flight from Bangkok to Hong Kong. Thailand is not a party to the Warsaw Convention. Accordingly, the court concluded that this was non-international carriage and awarded damages to the plaintiff accordingly. The matter subsequently had to be re-tried following an evidential development (2 July 2002), but the subsequent court (9 December 2002), HH Judge Muttrie was equally of the opinion that the case was one of non-international carriage.

[217] For the precise definition of "international carriage" see arts.1(2) and 1(3) of the Convention.

[218] With the exception of mail and postal packages: Warsaw Convention, art.2(2). However, a substantially similar substantive law regime is applied to such carriage by virtue of s.13 of the Ordinance and Sch.3.

[219] Warsaw Convention, art.1(1).

[220] Article 20 of the Convention provides that "The carrier is not liable if he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures".

for such matters is limited to relatively modest sums[221] and there is no liability for other types of personal injury. Attempts in England to argue that the Convention is not exclusive, and leaves scope for uncapped negligence actions have failed, both in international[222] and non-international[223] cases. Attempts to argue that the Convention restrictions violate human rights have also failed.[224]

(4) *Scope of the governing law*

There are some controversies as to the precise interpretation of a number of the Convention concepts which define the scope of compensation available under the Convention. The key provision concerning personal injury is art.17 of the Warsaw Convention, which provides that:

> *The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.*

The two key concepts here are "accident" and "bodily injury", both of which have received relatively narrow interpretations in the English courts: thus, bodily injury allegedly caused by the allegedly unhealthy conditions of air travel has been held not to have been caused by an "accident"[225] and mental illness resulting from an accident has been held to fall outside the scope of "bodily injury".[226] However, "accident" has been held in the USA to include deliberate wrongdoing by passengers or others, for example assaults and hijackings.[227] In the context of cargo carriage, the English Court of Appeal has held that it is permissible to define the relevant consignee and

Article 21 leaves questions such as contributory negligence or *volenti* to the *lex fori*: "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability".

[221] The relevant limitations are: (i) in cases of non-international or postal carriage: 100,000 Special Drawing Rights (SDRs) per passenger for bodily injury, 17 SDRs per kilo of registered baggage and cargo, and 332 SDRs per passenger for hand baggage; (ii) in international carriage: 125,000 francs per passenger for bodily injury, 250 francs per kilo of registered baggage and cargo, 5000 francs per passenger for hand baggage. The SDR is a basket of currencies operated by the International Monetary Fund, and the franc is the gold franc, that is "the French franc consisting of 651/2 milligrams gold of millesimal fineness 900". Hong Kong has not, in international cases, implemented the Montreal Additional Protocols Nos 1 and 2 of 1975, which provided for the gold franc caps to be replaced with SDR caps.

[222] *Sidhu v British Airways Plc, Abnett (known as Sykes) v British Airways Plc* [1997] AC 430 (HL), followed by the US Supreme Court in *El Al Israel Airlines Ltd v Tsui Yuan Tseng* (1999) 525 US 155.

[223] *Fellowes (or Herd) v Clyde Helicopters Ltd* [1997] AC 534 (HL).

[224] *Re Deep Vein Thrombosis and Air Travel Grp Litigation* [2003] 1 All ER 935 (Nelson J).

[225] *Re Deep Vein Thrombosis and Air Travel Group Litigation*, adopting the notion that an accident is an "unusual or unexpected event or happening".

[226] *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7 (HL). *Aliter* if the mental illness results from a physiological injury to the brain (*per* Lord Mackay in *Morris*), or results in a physical injury (eg in one of the cases before the House of Lords in *Morris*, a peptic ulcer).

[227] The leading cases are American: *Husserl v Swiss Air Transport Co Ltd* (1973) 485 F 2d 1240; *Day v Trans World Airlines Inc* (1975) 528 F 2d 31. Nelson J appeared, *obiter*, to assume that these cases were consistent with English law in *Deep Vein Thrombosis and Air Travel Group Litigation* [2003] 1 All ER 935. In *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7 discussed below, it appears to have been assumed that an indecent assault by one passenger upon another was an "accident", though the claim failed on the ground of an absence of "bodily injury".

consignor by contract so as, in effect, to define who has the rights of action provided for under the Convention regime.[228] As to the principles of interpretation, the English courts have deprecated reference to domestic law precedents in interpreting the Convention, and cautioned as to the non-rigorous use of *travaux préparatoires*: the principle is that "the words used should receive an objective interpretation", but it is "mistaken to interpret a convention such as the Warsaw Convention, or the various amended versions of it, as if they were intended to be historical documents frozen in time … Words have a meaning which does not change but the application of those words to the decision of any question depends on the facts and circumstances of the case in which that question arises. It is the facts and circumstances of the cases that change …" Moreover, it is wrong to adopt the analogy of exemption clauses and interpret the Convention narrowly on that basis.[229]

(5) *Jurisdiction*

Under the Warsaw Convention, an "action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination".[230] Questions of procedure are governed by the *lex fori*,[231] but there is a mandatory rule as regards limitation.[232] The Warsaw Convention provision only applies to the contracting carrier; however, the Guadalajara Convention provides that actions for damages against the "actual carrier" must be brought "before the court having jurisdiction at the place where the actual carrier is ordinarily resident or has his principal place of business".[233] The jurisdiction provisions have no application in non-international carriage cases (eg in intra-China cases) or in cases concerning carriage of mail and postal packages, in relation to which the jurisdictional rules and principles of the general law apply.[234]

(6) *Restrictions on contracting out*

"Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void".[235] This rule applies in non-international as well as international cases.[236]

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[228] *Western Digital Corp v British Airways Plc* [2001] QB 733 (CA).
[229] See *Morris v KLM Royal Dutch Airlines*, above, *per* Lord Hobhouse.
[230] Warsaw Convention, art.28(1).
[231] Warsaw Convention, art.28(2).
[232] Warsaw Convention, art.29(1): "The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped". However, determination of the "method of calculating the period of limitation" is a matter for the *lex fori*: art.29(2).
[233] Guadalajara Convention, art.VIII.
[234] As discussed in Chapter 3, eg jurisdiction as of right by service in Hong Kong, RHC O.11 and *forum conveniens*. Note also head (n) of RHC O.11 r.1(1), in respect of claims "brought under the carriage by Air Ordinance".
[235] Warsaw Convention, art.32. There is a saving in respect of certain cargo arbitration clauses. Article IX(3) of the Guadalajara Convention is to equivalent effect.
[236] By virtue of Sch.3. The references to jurisdiction are however meaningless in this context.

(ii) *Carriage by sea*

There are a number of distinct regimes in respect of cross-border carriage by sea. There are provisions of general application permitting shipowners[237] and salvors to limit their liability pursuant to the 1976 London Convention:[238] these are implemented in Pt III of the Merchant Shipping (Limitation of Shipowners' Liability) Ordinance.[239] This regime applies to domestic and international shipping cases alike.[240] In addition to this, there are separate regimes in respect of carriages of passengers and luggage internationally (modified in certain respects in relation to carriage between different regions of China),[241] and in respect of the international and regional carriage of goods. 5.061

(1) *Carriage of passengers and luggage by sea.* The 1974 Athens Convention[242] has been implemented into Hong Kong law by Pt II of the Merchant Shipping (Limitation of Shipowners' Liability) Ordinance.[243] The legislative scheme applies in respect of all sea-going vessels, including hovercraft,[244] and is broadly similar to the air carriage regime, but with various differences of detail.

(2) *Governing law.* As with the air carriage Conventions, the Convention in this context seeks to harmonise the law rather than merely provide choice of law rules. The harmonised regime only applies in cases of "international carriage".[245] However, it has recently been extended,[246] with certain modifications, to carriage of passengers and their luggage by sea between Hong Kong and Macau, or between Hong Kong and any port in Mainland China. It has no application at all to carriage within Hong Kong or to transport by sea wholly within a foreign country.[247]

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[237] The definition of "ships" in the Convention has been extended in Hong Kong by statute to cover non-seagoing as well as seagoing vessels (presumably with the Pearl River trade in mind) (s.14) and hovercraft ("any air-cushion vehicle designed to operate in or over water while so operating": s.13(a)(i)).
[238] Convention on Limitation of Liability for Maritime Claims done in London on 19 November 1976.
[239] Cap.434.
[240] Note the various exclusions in art.3 in respect of claims for salvage and general average, claims based on oil pollution or nuclear damage, and claims by the servants of salvors or shipowners.
[241] Note that the limitations permissible under Part III of the Ordinance (ie London Convention) may not derogate from those applicable under Part II (Athens Convention): s.23(1).
[242] Convention relating to the Carriage of Passengers and their Luggage by Sea, done in Athens on 13 December 1974 and the Protocol thereto done at London on 19 November 1976.
[243] Cap.434.
[244] Article 1(3) of the convention excludes "air-cushion vehicles" from the definition of "ship". However, s.4(a) of the Ordinance rejects this limitation, providing that "notwithstanding para.3 of art.1 of the Convention, 'ship' in the Convention means any seagoing vessel, and includes any air-cushion vehicle designed to operate in or over water while so operating." This seems more rational than the English legislative approach of bringing hovercraft into the carriage by air regime (see *Dicey, Morris & Collins*, [33.101]).
[245] Athens Convention, art.2(1). This is defined in art.1(9) as "any carriage in which, according to the contract of carriage, the place of departure and the place of destination are situated in two different States, or in a single State if, according to the contract of carriage or the scheduled itinerary, there is an intermediate port of call in another State". The Convention only applies where "(a) the ship is flying the flag of or is registered in a State Party to this Convention; or (b) the contract of carriage has been made in a State Party to this Convention; or (c) the place of departure or destination, according to the contract of carriage, is in a State Party to this Convention".
[246] By amendments to Cap.434 introduced by Ordinance No 1 of 2005.
[247] Contrast the scope of the Carriage by Air Ordinance: above, para.5.060.

another asset for which the first has been exchanged, or with which the first has been mixed. In short, the issue is whether, and if so in what sense, a proprietary interest may be "traced" from one asset into another, or into a mixture.

5.135 "Following" and "tracing" will be adopted as a shorthand for these distinct notions in what follows. This follows recent English usage,[513] but care should be taken in considering whether a particular author or judge is using the words in different senses, given that each word is linguistically capable of bearing different, and indeed the opposite, meaning.[514]

(ii) *Proprietary and personal claims*

5.136 It is important to bear in mind in what follows that rules as to the following and tracing of property are important, principally, where a person asserts a *proprietary* claim to certain assets, or a *personal* claim against another person based upon the latter having received, or acted in a particular way in relation to, assets in which the claimant asserts an interest as at the time of the relevant receipt or act.

(iii) *Following: choice of law*

5.137 Following is a straightforward concept but has caused confusion in the case law as a result of being conflated with tracing in discussion.[515] For the purpose of the conflict of laws, following is clearly to be characterised as a matter of property law, the essential issue being whether and if so to what extent the interest of a person claiming a proprietary interest in an asset was extinguished by virtue of its transfer from the control of one person to that of another. As such, property law rules as to choice of law apply to the issue of following, irrespective of whether the claim is personal or proprietary in nature, and irrespective of whether the claim is characterised as restitutionary, tortious, proprietary or something else.[516]

(iv) *Tracing: choice of law*

5.138 Choice of law as to tracing is a less straightforward matter. There has been much debate in recent years as to the nature of tracing under English law. The niceties of that debate need not be addressed for present purposes. However, the essential points are as follows:

[513] The terminology "tracing" and "following" follows that used by Lord Millett in *Foskett v McKeown* [2000] 2 WLR 1299: "[T]racing and following … are both exercises in locating assets which are or may be taken to represent an asset belonging to the purchasers and to which they assert ownership. The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old." For the origins of this terminology, see Smith, *The Law of Tracing* (Oxford University Press, 1997) and sources cited therein.

[514] Linguistically, of course, the terms "following" and "tracing" may easily be interchanged, or one may be used to encompass the other. Many examples may be given of such different usages, but in the conflicts context, see Stevens in Rose, 211–214.

[515] Stevens in Rose, 211–214, suggested, albeit rather tentatively, in 1995, the need to draw distinctions similar to those drawn in this text. Note that Stevens was writing after the first instance decision in *Macmillan Inc v Bishopsgate Inv Trust Plc (No.3)* [1996] 1 WLR 387, but before the decision on appeal, [1996] 1 WLR 387.

[516] *Macmillan Inc v Bishopsgate Inv Trust Plc (No.3)*. The salutary words of the English Court of Appeal in should be read and reflected upon by anyone having to grapple with this matter, though there is still some confusion in the subsequent literature and cases as to how those aspirations ought to be translated into practice.

(1) Tracing as understood in English and, by derivation, Hong Kong law, is a matter of identifying when a person is deemed to have a particular proprietary interest in an asset at a particular time for the purpose of his particular claim.

(2) Tracing is not a substantive cause of action or "claim". Nor is it a "remedy", at least not in the usual sense of the word.[517]

(3) The proprietary interest in question is not, in English and Hong Kong law at least, of an ordinary type.

Example: A thief sells my boat to an innocent purchaser for $1 million. I may seek to claim the boat from the purchaser on the basis that he never acquired good title. This is a matter of following, that is property law. Alternatively, however, I may elect, if I can,[518] to establish an interest in the $1 million in the thief 's hands. This is a matter of tracing.

5.139 The proprietary interests deemed to arise by the application of tracing rules are clearly not absolute: otherwise, the plaintiff 's assets would geometrically multiply as each exchange transaction would give rise to the potential for both following and tracing. The matter is looked at with hindsight, with the intermediate "interests" being notional[519] unless and insofar as a claim is mounted against those affected. Furthermore, the notional interest is more easily extinguished than an ordinary proprietary interest, and the plaintiff must at some stage elect which assets to trace his interests into (or through) for the purpose of his claim to a particular asset or as against a particular person.

(1) The notions of tracing into the product of an exchange transaction (the proceeds of selling the boat) and tracing into a mixture and out again (the bank account) are of course somewhat different. Nevertheless, for present, conflict of law purposes it is their underlying unity which is more important, namely that both are concerned with tracing an interest in the hands of a single person.

(2) Although one should take nothing for granted in the conflict of laws as to the possible content of foreign legal systems, it is inherently likely that the proprietary "interest" arising under foreign notions equivalent to tracing (whether under that name or otherwise) will be found, on analysis, to be similarly qualified to the above domestic law concept. Otherwise, the plaintiff 's absolute property rights

[517] The word "remedy" is used to describe tracing by two classes of lawyers: (i) those who misunderstand the nature of tracing and (ii) those who are using it in a sophisticated sense rather different from the ordinary lawyer's, possibly misguided, understanding. It is suggested that the second class may have contributed to the growth of the first and that as such the word should be avoided. For a short discussion of what precisely is meant by referring to tracing as a "remedy" (or, at least, a "remedial process") see Rotherham in *Hedley & Halliwell*, [4.1–4.7] (57–59), acknowledging that it "allows claimants to assert rights they already enjoy over one thing in respect of something else [but] … does not provide a final remedy in itself ". Rotherham's discussion, perceptive though it is, may however be thought simply to emphasise the potential for confusion. See also Panagopoulos, 95, referring to tracing in the conflict of laws context as a "process and not a right or remedy", but pointing that its status as a "process" should not mislead one to conclude that it is "procedural" as opposed to "substantive" in the special sense in which those words are used in the conflict of laws.

[518] Depending on the particular tracing rules under the relevant substantive law.

[519] More mystical words such as "inchoate" or "mere equities" may also be invoked according to taste.

(contracts[531]), (f) (torts),[532] (g) and (h) (land), (i) (trusts) and (p) (money had and received/ accounts/ constructive trustees)[533] should be considered for availability on a case-by-case basis.

(h) *Forum conveniens* in restitutionary cases

5.154 No legal issues requiring special remarks arise as regards *forum conveniens* and restitution.

6. Boundary Problems

(a) Introduction

5.155 This section discusses two special problems arising from the interplay of different types of obligation in the cross-border context.

(b) Influence of contractual governing laws on other obligations?

5.156 It is suggested that, where a tortious or restitutionary issue arises in connection with a contract, then the issue should ordinarily be regarded as determined by the law which governs the contract, irrespective whether that latter is determined by the principle of closest connection or by the parties' agreement. Any other rule is likely to produce anomalies and injustice. Thus:

(1) Where P and D are parties to a contract to purchase and sell, respectively, a company which is governed by the laws of Ruritania, P's claim against D for tortious misrepresentation in connection with the company's financial status should be determined according to Ruritanian law, applying the *Red Sea* principle,[534] rather than the law of the place where the misrepresentation was made.

(2) Where, in the same case, the contract is rescinded on the ground of misrepresentation, P's restitutionary claim to recover the money already paid over to D should also depend on Ruritanian law.

5.157 An exception should however be made for certain extreme cases where the contract ought not to be recognized as valid even in the limited sense necessary for its governing law to influence associated tortious and restitutionary claims.

[531] For the interpretation of "contract" to include "quasi-contractual" claims in this context, see *Bowling v Cox* [1926] AC 751; *Rousou's Trustee v Rousou* [1955] 1 WLR 545; *Re Jogia (a bankrupt)* [1988] 1 WLR 484. This is potentially a wide enough concept to cover all restitutionary claims albeit that the terms of heads (d) and (e) read somewhat artificially in their application to such claims. A new head of RHC O.11 framed in modern terminology would be preferable.

[532] This will encompass claims for restitution for wrongs based on tort.

[533] For the requirement that acts occur within the jurisdiction, see the "substantial part" test adopted by the English Court of Appeal in *Polly Peck Int'l Plc v Nadir* (17 March 1993).

[534] Ie the principle established in *Red Sea Ins Co Ltd v Bouygues SA* [1995] 1 AC 190, discussed in the part of this chapter dealing with tort.

(i) *Contractual defences to tort claims*

5.158 Cases sometimes arise in which D has a complete or partial defence to P's contractual claim (by virtue of an exemption clause, or for some other reason) and P seeks to frame a substantially similar claim, arising in the context of the parties' contractual relationship in tort so as to avoid the exemption clause or to obtain some other substantive advantage. It is suggested that the proper analysis in such cases is as follows:[535]

(1) The tort claim should be assessed according to the governing law of the contract, applying the *Red Sea* principle.

(2) It is then for that governing law to determine whether an exemption clause or other alleged restriction on tortious claims based on the existence of a contract[536] is effective to bar the tort claim.

(3) In exceptional cases, the *Red Sea* exception should lead to the assessment of the tort claim under a law different from the contractual proper law, such as the *lex loci delicti*.

(4) This is subject to a public policy exception where the tort is committed in Hong Kong.

Propositions (1) and (2)

5.159 There has been no reported English or Hong Kong case law directly in point since judicial part-reform of the double actionability rule in the *Red Sea*[537] case. However, the pre-*Red Sea* English law is broadly consistent, so far as it goes, with the elements (1) and (2) of the approach proposed above.[538] After *Red Sea* it is suggested that the courts can and should reach that conclusion, in substance, notwithstanding the doctrinal complexity which may distract from recognition of this underlying substance. It is suggested that the principle that the choice of law to govern the tort issue should follow the contractual governing law is far preferable to the alternative suggestion that the *lex loci delicti* should prevail even when this may have little of substance to do with the justice of the matter.[539]

Proposition (3)

5.160 By way of exception to the usual rules in propositions (1) and (2) above, it is suggested that there will sometimes be cases where, on ordinary *Red Sea* principles, the closest

[535] The suggested latent principle of a single basic choice of law rule for obligations, namely "closest connection", may be considered relevant in this context, though it is not necessary to go quite so far to justify the propositions below.

[536] An example of such a restriction not dependent on the existence of an exemption clause would be a rule such as the English (and Hong Kong) domestic law rule in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL), which restricts tortious claims between contractual parties.

[537] See *Red Sea Ins Co Ltd v Bouygues SA*, above.

[538] See eg the opinion of Lord Denning MR in *Sayers v International Drilling Co* [1971] 1 WLR 1176 (the opinions of Cross and Stamp LJJ are not relevant for present purposes because they do not consider the employee's tortious (as opposed to contractual) claims; *Coupland v Arabian Gulf Oil Co* [1983] 1 WLR 1136, 1151.

[539] *Cf* the critique of *Sayers* in the 12th (1993) edition of *Dicey & Morris*, 1316, apparently supporting a double actionability analysis, though *cf* what is said at 1520.

located at the relevant time.[23] The most commonly encountered difficulty in applying the rule arises in relation to intangible forms of property (discussed under heading (d) below, starting at para.6.027). First, however, the scope of the *lex situs* rule and its exceptions will be discussed.

(b) Scope of the *lex situs* rule

6.011 The undoubted general rule is that the validity and precise effect of the purported change in property interests is governed by the *lex situs*, namely the law of the country in which the movable is at the time of the transaction in question.[24] This rule applies even as between the parties to a contract providing for the transfer of an asset.[25] Thus, as soon as goods enter a district with its own legal system, they are liable to be acquired, charged, disposed of, expropriated or otherwise dealt with solely as provided by the laws there in force. When they leave such a district and enter another district, they will start off in the new district subject to the same property interests as they had upon leaving the old district, but will immediately be susceptible to the new district's laws. The policy underlying the rule is simply that to depart from it significantly would be unworkable:[26]

> *[The lex situs rule] reflects the natural expectation that a transaction which is effective to transfer title to goods by the law of the country in which they are situated will vest a good title in the transferee which will be recognized generally. Any other rule would require extensive and probably fruitless enquiries into the provenance of the goods and expose the transferee to great uncertainty … The second main ground is that it reflects the practical realities of control over movables.*[27]

(i) *Stolen goods*

6.012 The *lex situs* rule applies even where its practical consequence is to facilitate the "laundering" of stolen property and other proceeds of crime, by giving effect to the laws of a place where a thief may deliberately have taken property with a view to avoiding the more stringent laws in force elsewhere.[28]

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[23] This is subject to a possible exception in respect of ships and aircraft, which may be deemed situate in their place of registration: see *Dicey, Morris & Collins*, Chapter 23, Exceptions 1 and 2 to Rule 136, at 23-057 to 23-062, for discussion of the non-Hong Kong case law.

[24] Useful reviews of the development of the English law rule may be found in *Glencore Int'l AG v Metro Trading Inc (No 2)* [2001] 1 All ER (Comm) 103 (HC) (Moore-Bick J); *Cheshire*, 1208–1215, *Dicey*, 1393–1399. See also *Cammell v Sewell* 157 ER 615, Court of Exchequer, Pollock CB (appeal dismissed: 5 H&N 728, Court of Exchequer Chamber); *Simpson v Fogo* (1863) 1 Hem & M 195 (Ch) (Page-Wood V-C); *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1966] 1 WLR 287, (CA); *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496 (HC) (Slade J).

[25] *Glencore Int'l AG v Metro Trading Inc (No 2)* [2001] 1 All ER (Comm) 103 (HC).

[26] See, eg, the observations of Slade J in *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496 (HC) (Slade J); and *Re Anziani, Herbert v Christopherson* [1930] 1 Ch 407 (Maugham J): "Business could not be carried on if that were not so".

[27] *Glencore Int'l AG v Metro Trading Inc (No 2)* [2001] 1 All ER (Comm) 103 (HC) (Moore-Bick J).

[28] There appears to be no Hong Kong authority precisely on the point, but see the English authorities, for example, *Janesich v George Attenborough & Son* (1910) 102 LT 605; *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496 (HC) (Slade J); *City of Gotha v Sotheby's (No 2)*, (9 September 1998, English High Court).

(ii) *Security and other limited interests*

6.013 The *lex situs* rule applies not only to outright sales, gifts,[29] expropriations and other complete transfers of property interests but also to limited transfers of proprietary interests such as security interests. The interaction of different interests of this sort can be theoretically problematic, but the absence of a Hong Kong authority suggests that the point has not been of any real practical significance here and it is not proposed to consider them in depth in this work.[30]

(iii) *Retention of title clauses*

6.014 Retention of title clauses in the cross-border sale of goods are discussed in Chapter 5 at paras.5.055–5.056.

(c) Exceptions from the *lex situs* rule

6.015 Whilst the *lex situs* rule appears to be only a "general rule,"[31] it would seem that the exceptions to it are exceedingly narrow. In addition to the accepted public policy exception (see paras.6.025 and 6.067), the following cases require consideration.

(i) *Goods in transit on ships and aircraft*

6.016 *Dicey, Morris & Collins* suggest that a special exception should be made in respect of goods in transit upon ships or aircraft (though not the ships and aircraft themselves), namely that:

> *If a tangible movable is in transit, and its situs is casual or not known, a transfer which is valid and effective by its applicable law will semble be valid and effective in England.*[32]

6.017 The notion of "casual" transit is said by *Dicey, Morris & Collins* to mean that this exception does not apply "when the goods have come to rest at a definite stage in the transit, as when a ship is wrecked and the cargo is saved". There appears to be no judicial authority for this proposition in England or Hong Kong[33] but it is suggested that it is acceptable and convenient. It should be noted that the principle is expressed positively, with the purpose of validating intended transactions where possible, rather than invalidating them by virtue of technical arguments. This seems appropriate.[34] The notion of "applicable law" is not

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[29] See the discussion in *Cheshire*, 1222–1223, including the special case of a *donatio mortis causa*.

[30] Discussion of the position in English law and references to the authorities and literature may conveniently be found in the section headed "Conditional sales and chattel mortgages" in *Dicey*, 1405–1409.

[31] *Bank voor Handel en Scheepvaart v Slatford* [1953] 1 QB 248, 257 (Delvin J).

[32] *Dicey*, Ch 25, Exception to Rule 142, at para 25E.016. As noted by *Dicey, Morris & Collins* (at para.25.018), there is an absence of judicial authority "probably due to the commercial practice of transferring [goods in transit] by means of documents of title such as bills of lading". (For the *situs* of goods represented by documents of title, see para.6.045).

[33] it was quoted, *obiter*, by Slade J in *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496 (HC) (Slade J), but this was in the context of consideration as to the absoluteness or otherwise of the *lex situs* rule and, as the learned judge expressly noted, the specific alleged exception was not of "any relevance on the facts of the present case".

[34] The underlying spirit is the same as that which underlies the liberal approach taken to pure formalities in contractual cases; see para.5.012(3).

as with ships, in view of the greater requirements of a substantial link with the place of registration which are, in practice, imposed in connection with the registration of aircraft. Still, the registration regime is, at bottom, designed to achieve the public goal of effective regulatory control over dangerous machinery, and there is no obvious reason for giving it any overwhelming significance in the purely private law contexts now under consideration. A further, subsidiary problem with an artificial *situs* in the case of aircraft is that the notion of a country of registration in the case of aircraft will cause further complications where a country of registration has more than one law district (eg the USA or the UK).

(iii) *Goods outside national territory for other reasons*

6.022 Movable property may of course move outside national territory other than for the purpose of transit. For example, goods may be taken on to *terra nullius* (ie, in the modern world, most of Antarctica) or away from the Earth altogether. It is suggested that, ordinarily at least, transactions in, say, a national Antarctic base or other area controlled, in effect, by persons strongly connected with a particular country ought to be deemed to have their *situs* in that country, and in other cases a closest and most real connection test should apply by reference to the particular transaction.

(iv) *Goods in disputed territory*

6.023 There remain significant unresolved territorial disputes in the modern world, most of which appear to be connected with valuable resources. Which law governs transfers of property interests in movables in such territories? It is suggested that the laws of the state exercising *de facto* authority at the relevant time over the relevant territory should apply, subject to the usual possibility of exceptions being made on grounds of public policy or public international law.

(v) *A broader "closest and most real connection" exception?*

6.024 The borderline cases above tempt one to wonder whether they are merely illustrations of a broader principle whereby the *lex situs* may, in truly exceptional circumstances, be displaced by a rule of closest and most real connection. It is suggested that:

(1) This temptation should be strongly resisted in connection with ordinary transactions, even in cases where only the immediate parties appear to be affected, in view of the overriding advantage of having a rule for property transactions which is both certain and reflective of the practical realities of life and the modern state system. The English courts have robustly so held.[40]

(2) There is however much to be said for recognising an exception in respect of certain issues falling on the borderline between the law of obligations and the law of property such as tracing.[41]

[40] See, eg, *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496 (HC) (Slade J) and *Glencore Int'l AG v Metro Trading Inc (No 2)* [2001] 1 All ER (Comm) 103, in which attempts to qualify the *lex situs* were rejected. Both decisions are, with respect, plainly correct on their facts.

[41] One way of looking at this would be to say the cases in question are not within the law of property as traditionally understood, and fall instead within the law of obligations or in a *sui generis* category. Whichever conceptual route is preferred, the underlying substance is more important.

(vi) *Public policy*

6.025 It is clear that there is a residual exception for cases in which a foreign law violates the public policy of the forum.[42] See para.6.067 for discussion of this principle in connection with expropriations.

(vii) *Other exceptions?*

6.026 It appears that there are no further significant exceptions.[43] It is important that they should not be allowed to multiply: the simplicity of the *lex situs* rule reflects the amoral realities of the world, and attempts at judicial qualification other than in very narrow and well-defined contexts risk undermining security of title and causing harm going well beyond any perceived benefit in the particular case before the court.

(d) Intangible property

6.027 The *situs* of intangible property is necessarily an artificial concept. Authority is sparse, but the following rules appear to apply.[44]

(i) *Intangible immovables*

6.028 The *situs* of intangible immovables, in the sense of interests in land less than absolute ownership, is the same as that of the land to which they relate.[45]

(ii) *Contractual debts*

6.029 The analysis of debts gives rise to two problems which are closely related but which are traditionally discussed separately: (i) *situs* and (ii) a characterisation problem, namely the proper scope for the application of a proprietary, *lex situs*-based analysis in connection with debts, as opposed to treating the matter as one for the law of obligations, and applying the proper law of the contract. These issues will be discussed in turn, but their inter-relationship should be borne in mind.

The situs of contractual rights

6.030 A contractual debt has a *situs*, whether or not it is due.[46] The well-established rule is that the *situs* is the place in which it may most properly be recovered.[47] However, the application

[42] See, eg, *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496 (HC) (Slade J) and *Glencore Int'l AG v Metro Trading Inc (No 2)* [2001] 1 All ER (Comm) 103.

[43] In *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496 (Slade J), *obiter*, postulated an exception where a party does not act in good faith; this is justifiably criticised in *Cheshire*, 1213–1214, and by Moore-Bick J in *Glencore Int'l AG v Metro Trading Inc (No 2)* [2001] 1 All ER (Comm) 103. Slade J also noted that there will be an exception where a mandatory statutory provision of English law so requires, but this does not appear to be a significant point in practice (see *Cheshire*, 1214).

[44] Reference is principally made in this section to conflict of law cases but also to some tax cases. The latter need to be approached with some care, since the relevant factors explaining the decisions are often significantly different.

[45] The point can scarcely be doubted as a matter of principle. For illustrations, see *Freke v Carbery* (1873) LR 16 Eq 461, *Re Hoyles* [1911] 1 Ch 179.

[46] *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 WLR 1035, a Privy Council decision on appeal from Hong Kong in a tax case; *cf* the suggestion by Upjohn J in *Re Helbert Wagg & Co Ltd* [1956] Ch 323(HC) that a debt not yet due has no *situs*.

[47] *New York Life Ins Co v Public Trustee* [1924] 2 Ch 101 (CA); *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 2 HKLR 643.

6.040 On the authorities, it is difficult to see any real room for resolving these anomalies in a satisfactory manner. The best solution would, it is suggested, be to legislate for the equating of the *situs* of contractual debts with their proper law.

(iii) *Specialties*

6.041 By way of possible exception to the rules discussed above, there is scope for argument that debts arising pursuant to a deed (specialties) have their *situs* in the place where the deed is physically located at a particular time. In the absence of authority for this proposition in the conflict of laws,[69] however, it is suggested that no such technical exception should be recognised and that the ordinary rules as to *situs* should apply.

(iv) *Cheques and other bills of exchange*

6.042 The identification of the *situs* of a bill of exchange within the scope of the Bills of Exchange Ordinance is not usually relevant in the conflict of laws, since case law has established different principles, not dependent on *situs*, to govern the transfer of such instruments.[70] The effect of that case law is that (i) transfer of such instruments is outwith the statute, (ii) is therefore governed by the common law rule of *lex situs*, and (iii) *situs* is the place where the physical instrument is located at the time of the alleged transfer by way of negotiation. This amounts to a reversal of the pre-statutory trend to regard the validity of such transfers as a matter for the proper law.[71] For the problems that this statutory rule creates, see para.6.044.

(v) *Other negotiable instruments*

6.043 The *situs* of a negotiable instrument outside the scope of the Bills of Exchange Ordinance, such as a letter of credit, has never been definitively established by the case law. Alternatives might conceivably include:

(1) the place where the instrument is physically located at the relevant time,[72]

(2) the proper law, or

(3) the place of proper recoverability, or

(4) the place of the debtor's residence (in the same sense as in relation to contractual debts).[73]

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for, as we have already pointed out, it comprises the annulment of one debt and the creation of another". Suggestions that earlier authorities indicated a different analysis were therefore rejected by the Court of Appeal (see eg *Re Russian Bank for Foreign Trade* [1933] Ch 745 (HC) (Maugham J); *Re Banque des Marchands de Moscou (Koupetschesky) (No 1)* [1952] 1 All ER 1269 (HC) (Vaisey J); *Re Banque des Marchands de Moscou (Koupetschesky) (No 3)* [1954] 1 WLR 1108 (Ch) (Roxburgh J), described by the Court of Appeal in *Havana* as "cases of so special a character as to afford little guidance in the elucidation and application of principles of private international law in general").

[69] See *Dicey, Morris & Collins*, paras.23-032–23-035 for authorities and more detailed discussion.

[70] See paras.5.062–5.067.

[71] See cases cited in para.6.044.

[72] Favoured by *Nygh*, 741.

[73] The solution favoured, rather tentatively, by *Dicey, Morris & Collins*: para.23-039.

6.044 It is suggested that option (i), which mirrors the statutory rule in respect of cheques,[74] would create too much uncertainty in the broader sphere of negotiable instruments for it to be commercially acceptable: the problem is that one cannot know, from looking at a document, where it was at the relevant time. Option (ii) would have been attractive but it seems too late now to adopt it in view of the different path taken by the case law as to *situs*.[75] Option (iii) would be consistent with the approach taken in relation to ordinary, non-negotiable contractual debts; it is suggested that this is probably the most appropriate choice on the current state of the case law, except for negotiable shares.[76] In many cases, of course, as with contractual debts, the result of applying it will be the more specific rule represented by option (iv): nevertheless, it would seem wrong to lay down option (iv) as an absolute rule. Authority is sparse, but it is suggested that this approach is broadly consistent with a decision of the English Court of Appeal in relation to a letter of credit in which a particular place was specified for payment. It was held that the debt had its *situs* in that place.[77] It is suggested that this proposition is best regarded as a specific application of the principle that the *situs* is the place of proper recoverability.[78] It is, moreover, suggested that letters of credit and other negotiable instruments are not radically different from ordinary debts:[79] in both cases, it is suggested, the *situs* is the place of proper recoverability, it is simply the application of that principle in these different contexts which is somewhat different.

(vi) *Bills of lading*

6.045 Pledges of a document of title, such as a bill of lading, are clearly governed by the law of the *situs* of the document.[80] However, the House of Lords in a Scottish case has held that the transfer of property in the underlying goods represented by such a document is governed by the law of the *situs* of the goods, not that of the document.[81] In a later English appeal, Lord Pearce suggested *obiter*:

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[74] See para.6.042.

[75] It is of interest to note that the English case law prior to the Bills of Exchange Act 1882 referred to the proper law of the bill in deciding questions as to transfer: see *Trimby v Vignier* (1834) 1 Bing NC 151; *Lebel v Tucker* (1867) LR 3 QB 77 (English High Court) (Lush J); *Re Marseilles Extension Ry and Land Co* (1885) 30 Ch D 598 (HC) (Pearson J).

[76] Shares are discussed in paras.6.049–6.050.

[77] *Power Curber Int'l Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233 (HC) (Lord Denning MR). Griffiths LJ appears to have been of the same opinion, though it is expressed somewhat enigmatically.

[78] It is of interest in this regard to note that the third member of the Court of Appeal in *Power Curber Int'l Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233 (Waterhouse J) was doubtful of the majority's decision as to *lex situs*, but started from the premise that "A debt is generally to be looked on as situate in the country where it is properly recoverable or can be enforced". Waterhouse J then preferred to apply that principle with reference to the place of residence of the debtor, rather than to the place of payment. Since the debtor in that case appeared not to have had any place of residence in the place specified for payment in the letter of credit, Waterhouse J would, it seems, not have regarded the *situs* as being at that place. The difference between the majority and minority views in *Power Curber* therefore appears to be limited to that relevant narrow point (as to which it is suggested that the majority was right).

[79] In *Power Curber Int'l Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233, Lord Denning MR said: "A debt under a letter of credit is different from ordinary debts. They may be situate where the debtor is resident. But a debt under a letter of credit is situate in the place where it is in fact payable against documents." It is suggested that this is only the case where the instrument specifies the place for payment against documents.

[80] See *North-Western Bank Ltd v Poynter, Son and Macdonalds* [1895] AC 56 (Scotland, HL). See to similar effect the position in respect of share certificates: paras.6.049–6.050.

[81] *Inglis v Robertson* [1898] AC 616 (Scotland, HL). In that case, the documents were in England and the goods were in Scotland. Lord Watson drew the following distinction: "In my opinion, the right so created, whether in England or in Scotland, will give the pledgee a right to retain the *ipsa corpora* of the documents of title until his advance is repaid. The

of evidence that the *situs* courts would apply a law other than the *lex situs*, it will be presumed that they would apply the *lex situs*.[143]

- It is suggested that the same approach should be taken in respect of tangible movables.
- Capacity to assign intangibles ought also to be governed by the *lex situs*, it is suggested, again subject to the *renvoi* rule discussed above. English judicial suggestions that the matter may be governed by the *lex domicilii*[144] or the *lex loci actus*[145] were made prior to the development of the modern case law to the effect that validity of such assignments is governed by the *lex situs* (see para.6.023); as such, it is suggested that they should not be followed.[146]

(iii) *Contracts in respect of property*

7.046 In the event that A executes a document intended to transfer a proprietary interest to B and the transfer fails for want of capacity under the *lex situs*, is it possible to enforce the transaction as a contract[147] on the basis that the person who lacked capacity under the *lex situs* had capacity according to (1) the law with which the contract had its closest connection[148] or (2) his or her personal law? In the case of a contract relating to an immovable, the English Court of Appeal held a century ago that, if the foreign *lex situs* invalidates a contract relating to the immovable for want of capacity, then the English court will not give effect to the contract.[149] It is suggested that this should not be followed if similar cases arise in Hong Kong.[150] It is one thing to say, understandably, that capacity to create, take or dispose of a property interest itself is a matter solely for the *lex situs*; however, where there is personal jurisdiction over a person who has promised to create, take or dispose of such an interest and who clearly had capacity under the law with which the contract has its closest connection, or under his own personal law,[151] then the contract should be enforced either

[143] In accordance with the principle discussed in paras.2.087–2.100.

[144] *Lee v Abdy* (1886) 17 QBD 309 was decided on the basis that the subject matter of the assignment (an insurance policy) had no *situs*, contrary to the modern rule: see para.6.030. The transaction was upheld on the basis that the assignor lacked capacity both under his domicile and under the law of the place of "contracting," by which appears to be meant "acting," ie the place in which the assignment was executed. In *Republica de Guatemala v Nuñez* [1927] 1 KB 669, a number of alternative theories may be derived from the Court of Appeal's opinions: *lex domicilii* of both parties (Bankes LJ), perhaps *lex domicilii* of both parties or perhaps the *lex loci actus* (Scrutton LJ), perhaps *lex situs* or perhaps *lex domicilii* of both parties (Lawrence LJ).

[145] One of Scrutton LJ's alternatives in *Nuñez*. Also see *Re Anziani* [1930] 1 Ch 407 (Maugham J).

[146] For further discussion, see *Cheshire*, 1230–1232 and *Nygh*, 762–766.

[147] Assuming that it is possible to treat it as a contract according to the law which has the closest and most real connection with the transaction. Thus, for example, a failed conveyance for consideration may relatively easily be treated as a contract in Hong Kong domestic law, whereas a failed gift will not be perfected by treating it as a contract.

[148] A contract the sole subject matter of which is land in a particular jurisdiction will, it is suggested, almost certainly be most closely connected with the *lex situs*. More complex situations, such as where the subject matter does not relate purely to land, or where it relates to land in more than one jurisdiction, will have to be assessed on a case-by-case basis, having regard to the overall closest links of the contract. For a court to analyse a single contract as, in effect, a number of different contracts governed by different laws will almost never be appropriate unless the parties clearly turned their minds to this and agreed it, expressly or implicitly.

[149] *Bank of Africa Ltd v Cohen* [1909] 2 Ch 129.

[150] For further criticism of *Bank of Africa Ltd v Cohen* case, see eg *Cheshire*, 1202–1203, *Dicey, Morris & Collins*, paras.24.074–24.077.

[151] For the relevant notion of personal law, see para.7.044.

specifically (where possible) or by way of a money award, whether by way of damages or for unjust enrichment.

(iv) *Non-contractual wrongdoing*

7.047 In Hong Kong domestic law, the notion of "capacity" to commit a tort or other wrongdoing[152] is a misnomer: age and mental capability go to matters such as whether any relevant state of mind was formed, or whether there was a breach of a duty to act reasonably.[153] Other legal systems may express the matter in terms of capacity, for example by asking whether the person has capacity to do wrong (in Latin, *doli capax*). It is suggested that such matters ought to be regarded as entirely ones for the law with which the alleged tort has its closest connection, which will usually be the *lex loci delicti*. It would seem wrong to hold a person liable more broadly in reliance on a personal law in such a context; conversely, it would seem wrong to restrict liability artificially by applying the double actionability rule.

(v) *Marriage*

7.048 Capacity to marry or to contract a pre-nuptial settlement is a matter for each party's ante-nuptial domicile: this matter is discussed at para.7.118.

(vi) *Succession*

7.049 For capacity to make a will, see paras.8.012–8.013.

(vii) *Changes in capacity*

7.050 It is suggested that foreign retrospective changes in capacity should not be recognized.[154] However, in so far as they affect property interests then they should be given effect according to usual property law principles, applying the *lex situs* rule.[155]

(g) Capacity: persons other than individuals

7.051 The question of capacity of individuals has been discussed at paras.7.043–7.050. For bodies corporate, including state entities,[156] it has been said in England[157] that the rule is that for the body to be regarded as having capacity by an English court, it is necessary to demonstrate capacity under both (i) the law from which the body derives its legal

[152] For example, a crime which is not actionable as a tort but which gives rise to a duty of restitution.

[153] See eg *Gorely v Codd* [1967] 1 WLR 19; *Buckpitt v Oates* [1968] 1 All ER 1145; *Mullin v Richards* [1998] 1 WLR 1304; *McHale v Watson* (1966) 115 CLR 199.

[154] By way of contrast with the recognition of foreign expropriations of property sited abroad (see paras.6.036 *et seq*) or foreign retrospective cancellations or variations in respect of tort (see para.5.094). To recognize foreign retrospective interference with capacity would in effect be to open the door to expropriation regardless of *situs*.

[155] See Chapter 6 for discussion of the *lex situs* rule.

[156] *Janred Properties Ltd v Ente Nazionale Italiano per il Turismo (ENIT)* [1989] 2 All ER 444 (CA), a case concerning an Italian state entity.

[157] This derives from a long-standing rule in *Dicey, Morris & Collins* (Rule 162(1) in the 14th edition) that "The capacity of a corporation 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."