

# THE LAW REFORM COMMISSION OF HONG KONG

## DOMICILE SUB-COMMITTEE

### CONSULTATION PAPER ON RULES FOR DETERMINING DOMICILE

#### EXECUTIVE SUMMARY

#### OVERVIEW

1. The concept of domicile is of significance in the Hong Kong legal system and plays a significant role in private international law. Despite the importance of the concept of domicile, the rules for determining a person's domicile have repeatedly been criticised as unnecessarily complicated and technical, and as sometimes leading to absurd results.

2. The Domicile Sub-committee hopes that the recommendations in this Paper will improve this complex and confusing area of common law by simplifying the concept of domicile and making the ascertainment of a person's domicile easier. In practical terms, the sub-committee does not think that the recommendations would change the domicile of many people, with the exception of married women's domicile which will no longer depend on that of their husbands. Another major change relates to the domicile of children. The existing differentiation between legitimate and illegitimate children, and the concepts of domicile of origin and domicile of dependency, have created many anomalies. This is a technical area of the law and the sub-committee believes that there is nothing controversial in the recommendations.

#### CHAPTER 1

3. A person's domicile connects him with a system of law for the purposes of determining a range of matters, principally related to his status or property. Chapter 1 first lists out the major areas of law where the concept of domicile is used to determine what system of law should govern a person's status and certain aspects of the administration of his property. In these circumstances, domicile is said to be a "connecting factor":

- (a) Legal capacity to marry
- (b) Succession to an intestate's movables
- (c) Personal capacity to make a will
- (d) Formal validity of a will
- (e) Jurisdiction of court in proceedings for divorce, etc
- (f) Jurisdiction of court in proceedings for presumption of death and dissolution of marriage
- (g) Declarations of legitimacy, etc

- (h) Recognition of overseas divorces or legal separations
- (i) Legitimation by subsequent marriage of parents
- (j) Declaration of a person's status
- (k) Service of process out of the jurisdiction
- (l) Direct application of Chinese law and custom as Hong Kong domestic law

4. Chapter 1 also discusses the existing rules for determining a person's domicile as a background to the discussion in the next chapter on the problems of the existing law. For the purposes of the discussion, a "country" means a "law district" or distinct jurisdiction (ie a "territory subject under one sovereign to one body of law"), unless the context requires otherwise.

***Domicile of origin*** (paras 1.11 – 1.14)

Every person receives at birth by the operation of law a domicile of origin which depends on the domicile of the appropriate parent at the time of his birth, but not on where he was born or where the parents live. A legitimate child born during the lifetime of his father has a domicile of origin in the country of his father's domicile at the time of his birth. A legitimate child born after his father's death, or an illegitimate child, has a domicile of origin in the country of his mother's domicile at the time of his birth.

5. ***Domicile of dependency of children*** (paras 1.15 – 1.20)

A legitimate child's domicile is, during the lifetime of his father, the same as, and changes with, his father's domicile while the domicile of an illegitimate child and of a child whose father is dead is the same as, and changes generally with, his mother's.

6. ***Domicile of adults*** (paras 1.21 – 1.27)

- On reaching eighteen years of age, a person remains domiciled in the country where he was domiciled immediately before reaching the age of eighteen. If he abandons that domicile, either he will acquire a domicile of choice or his dormant domicile of origin will revive. A person can acquire a domicile of choice by the combination of residence in a country and the intention of permanently or indefinitely residing there, but not otherwise. Mere residence without intention is not enough, and the intention must be demonstrated by actual residence.
- A domicile of choice can be abandoned by ceasing *both* to reside and to intend to reside in that country permanently or indefinitely, and not otherwise. Giving up only residence, or the intention to reside, will not result in the loss of a domicile of choice. On abandoning his domicile of choice, a person may acquire a new domicile of choice, or his domicile of origin revives.

7. ***Domicile of dependency of married women*** (paras 1.28 – 1.30)

- A married woman cannot acquire a domicile of choice by her own actions, and is dependent upon her husband. Hence, a married woman's domicile is the same as, and changes with, her husband's domicile. This rule applies even where the spouses live apart in different countries, whether or not according to a formal separation agreement, or where a wife has obtained a decree of judicial separation.
- Section 11C of the Matrimonial Causes Ordinance (Cap 179) allows a married woman to have her own independent domicile for certain limited purposes (ie the jurisdiction of court in respect of divorce, nullity, judicial separation, etc).

8. ***Domicile of dependency of the mentally incapacitated*** (paras 1.31 – 1.33)

- The general rule is that a mentally incapacitated person who is regarded as a dependent person for the purposes of the law of domicile cannot acquire a domicile of choice by his own actions, but retains the domicile which he had when he was first legally regarded as mentally incapacitated for so long as he remains in that condition. The rationale is that acquisition and abandonment of a domicile of choice require the exercise of will, and a mentally incapacitated person is unable to exercise *any* will.
- There is, however, an exception to this general rule. The domicile of a person who is born mentally incapacitated or becomes mentally incapacitated while he is a dependent child is determined, while he remains mentally incapacitated, as if he continued to be a dependent child.

9. ***Burden and standard of proof*** (para 1.34)

The burden of proving a change of domicile rests with the person alleging such a change. Where the change is from a domicile of origin to a domicile of choice, the older case law indicates that the standard of proof is more onerous than the balance of probabilities applied in other civil cases. More recent cases, however, prefer the balance of probabilities as the standard of proof. The position appears to be uncertain.

## **CHAPTER 2**

10. Chapter 2 highlights the problems of the existing law with some illustrations.

***Domicile of origin*** (paras 2.2 – 2.5)

- it is doubtful whether there is a need to have, or any advantage in having, two separate sets of concepts and rules for children: (a) domicile of origin, which determines domicile at birth; and (b) domicile of dependency, which determines domicile during childhood;
- a domicile of origin is ascribed to every person at birth by operation of law. It reflects the domicile of the relevant parent at the time of birth, and where a child is born or where his parents live is irrelevant. Therefore, the same domicile of origin can be passed on from generation to generation even though few members of the family have actually lived in the country of their domicile;

- the concept of revival of domicile of origin has been much criticised since it may render a person domiciled in a country with which he has only a stale or tenuous connection, or even which he has never visited;
- there are also a number of matters which remain unsettled in respect of domicile of origin, such as the domicile of origin of a foundling, of an adopted child, of a legitimate child who was born after the divorce of his parents and that of a posthumous child;

11. ***Domicile of dependency of children*** (paras 2.6 – 2.9)

- the existing rules differentiate between legitimate and illegitimate children, and can lead to some strange results;
- it is also difficult to justify in principle why the domicile of a child depends on whether his parents are married or not;
- the existing law cannot satisfactorily deal with the situation where a child's parents die (his domicile of dependency from the parents then cannot be changed), or where he is fostered or taken into the care of a local authority (the child's domicile will then continue to follow his parent's even though he is taken into the care of a local authority or lives with a third person);
- some matters concerning the domicile of dependency of children are uncertain, such as the domicile of a legitimated child and that of an adopted child;

12. ***Domicile of adults*** (paras 2.10 – 2.12)

- the existing rules are artificial: an existing domicile persists long after any connection with the country in question has ended;
- they also lead to uncertainty: it is hard to decide a person's domicile because of the inherent difficulty of ascertaining his intention;

13. ***Domicile of dependency of married women*** (paras 2.13 – 2.17)

- the common law rule on the domicile of married women seems to contravene article 15(4) of the Convention on the Elimination of All Forms of Discrimination against Women;
- it is questionable whether this rule satisfies article 22 of section 8 of the Hong Kong Bill of Rights Ordinance (Cap 383) and articles 39 and 25 of the Basic Law;
- this rule has long been criticised and Lord Denning said that it was "the last barbarous relic of a wife's servitude";

14. ***Domicile of dependency of the mentally incapacitated*** (paras 2.18 – 2.19)

- the existing law freezes the domicile of a mentally incapacitated person at the time of the onset of his mental incapacity, even though there are subsequent changes in circumstances, such as when he makes his permanent home in another country;

- where a person is born mentally incapacitated or becomes so while he is a dependent child, his domicile of dependency as a child continues while he remains mentally incapacitated. This is still the case even if he no longer lives as part of the family or if his parents' legal duty to care for him no longer exists;

15. ***Burden and standard of proof*** (paras 2.20 – 2.22)

- the historical reason for the special tenacity of the domicile of origin has little relevance to Hong Kong's current circumstances;
- it is difficult to justify imposing a higher standard of proof when the change is from a domicile of origin to a domicile of choice than that applied when the change is from one domicile of choice to another;

16. ***Domicile in a federal or composite state*** (para 2.23)

- where a person wishes to abandon his existing domicile by living in a federal or composite state, but without deciding in which country of that state to reside permanently or indefinitely, he will not acquire a new domicile in any country of that state under the existing law.

### **CHAPTER 3**

17. This chapter discusses other "connecting factors" employed in Hong Kong and considers whether any of them should replace domicile as a general connecting factor. Apart from domicile, the more common connecting factors are habitual residence, nationality and ordinary residence. It also considers other possible options.

***Recommendation 1***

***Domicile should be retained as a general connecting factor, but the existing rules for determining a person's domicile should be modified as recommended in this Paper.***

### **CHAPTER 4**

18. This chapter examines the law in other jurisdictions (Australia, Canada (Manitoba), India, Ireland, Malaysia, New Zealand, Singapore, South Africa and the United Kingdom), and considers some possible options for reform before making recommendations.

19. ***Domicile of origin and domicile of dependency of children*** (paras 4.2 – 4.49)

There are three options:

- (a) maintain the status quo

The effect of this option would be to keep the concepts of domicile of origin and domicile of dependency and the differentiation between legitimate and illegitimate children. This is still basically the position in India, Malaysia and Singapore;

- (b) supplement the existing common law with statutory provisions

The scope of the supplementary statutory provisions could be to amend the major common law principles or it could be restricted to filling gaps in the common law (as in Australia, Ireland and the United Kingdom). These three jurisdictions have maintained the concepts of domicile of origin and domicile of dependency, and the differentiation between legitimate and illegitimate children;

- (c) replace the major common law rules with statutory provisions

The gist is to discard the concepts of domicile of origin and domicile of dependency and the differentiation between legitimate and illegitimate children (as in Manitoba, New Zealand and South Africa). The English and Scottish Law Commissions' joint report recommended the adoption of provisions similar to those in South Africa.

### ***Recommendation 2***

***The concept of domicile of origin and that of domicile of dependency should be discarded.***

### ***Recommendation 3***

***There should be no differentiation between legitimate and illegitimate children in determining their domicile.***

### ***Recommendation 4***

***The following rules for determining a child's domicile should be adopted:***

- (a) ***a child's domicile should be in the country with which he is most closely connected;***
- (b) ***where a child's parents have their domicile in the same country and the child has his home with either or both of them, he is presumed to be most closely connected with that country, unless the contrary is proved;***
- (c) ***where a child's parents are not domiciled in the same country and the child has his home with only one of them, he is presumed to be most closely connected with the country where the parent with whom he has his home is domiciled, unless the contrary is proved;***
- (d) ***"parents" includes adoptive parents of a child.***

## **20. *Domicile of adults* (paras 4.50 – 4.108)**

Recommendations are made in respect of the following matters:

- (a) who is capable of acquiring a domicile of choice

In all of the jurisdictions discussed, any person who is not mentally incapacitated may acquire a domicile of his choice once he attains the age of majority. In some jurisdictions (Australia, Ireland, New Zealand and the United Kingdom), marrying under that age also enables a minor to obtain an independent domicile. In other jurisdictions, marrying under the age of majority is irrelevant and the English and Scottish Law Commissions also

made a recommendation to that effect.

**Recommendation 5**

***Any person who is not mentally incapacitated may acquire a domicile of his choice once he attains the age of 18.***

- (b) the act required to acquire a domicile of choice

Different jurisdictions have different requirements. There are three categories: “presence” in the country concerned (Australia, New Zealand, South Africa and the English and Scottish Law Commissions); “residence” in the country concerned (Hong Kong, India, Ireland, Malaysia, Singapore and the United Kingdom); and having a “principal home” in the country concerned (Manitoba).

**Recommendation 6**

***The act necessary for a person of full age and capacity to acquire a domicile should be presence in the country concerned. To acquire a domicile in Hong Kong, lawful presence in Hong Kong is required, and a person’s presence is presumed to be lawful, unless and until the contrary is established. To acquire a domicile outside Hong Kong, whether or not the presence is lawful by the laws of that country is one of the factors to be considered by the Hong Kong courts.***

- (c) the intention required to acquire a domicile of choice

In Hong Kong, the present intention required for acquiring a domicile of choice is the intention to reside in the country concerned permanently or indefinitely. This is the same as that in India, Ireland, Malaysia, Manitoba, Singapore and the United Kingdom. In Australia, however, the requirement is that the person intends to make his home in the country in question indefinitely, while that in New Zealand is to intend to live there indefinitely. In South Africa, it is the intention to settle there indefinitely, an approach recommended by the English and Scottish Law Commissions.

**Recommendation 7**

***The requisite intention for a person of full age and capacity to acquire a domicile should be that the individual intends to make a home in the country concerned for an indefinite period.***

- (d) whether the doctrine of revival of domicile of origin should be replaced by another concept

The jurisdictions which have abolished the doctrine of domicile of origin (Australia, India, Manitoba, New Zealand and South Africa) have adopted the continuance rule: a person’s domicile continues until he acquires another one. The English and Scottish Law Commissions also recommended the continuance rule.

**Recommendation 8**

***The domicile a person has at any time should continue until he***

***acquires a different one, whether by choice or by operation of law.***

21. ***Domicile of dependency of married women*** (paras 4.109 – 4.129)

Only two of the jurisdictions which this chapter has examined retain the common law rule imposing a domicile of dependency on married women: India and Malaysia. All the other jurisdictions have abolished the rule.

***Recommendation 9***

***The domicile of dependency of married women should be abolished.***

22. ***Domicile of the mentally incapacitated*** (paras 4.130 – 4.150)

- The rules for determining the domicile of the mentally incapacitated are the same in Australia, Ireland, Malaysia, Singapore, the United Kingdom and Hong Kong. The dividing line is whether the person concerned becomes mentally incapacitated before or after the age of majority. In Manitoba, the dividing line is whether the person in question becomes mentally incompetent at birth or at any time after birth. In New Zealand, the domicile a person has immediately before becoming capable of having an independent domicile continues until he acquires an independent domicile. This rule applies to a person whether he becomes mentally incapacitated before or after reaching the age of majority.
- The position in South Africa is relatively simpler. A mentally incapacitated person is domiciled at the place with which he is most closely connected. The English and Scottish Law Commissions also proposed a change to this effect. Finally, in India, the domicile of an insane person follows another person's domicile, but it is not always clear who "another person" is.

***Recommendation 10***

***The Sub-committee recommends that:***

- (a) upon reaching the age of majority, a mentally incapacitated person should be domiciled in the country with which he is most closely connected;***
- (b) a mentally incapacitated adult, on recovery of his capacity, should retain the domicile which he last held before his recovery;***
- (c) the relevant provision should be phrased so as to cover not only the mentally incapacitated, but also persons in a comatose, vegetative or semi-vegetative state, and any other person who for one reason or another is not able to form the required intention.***

23. ***Standard of proof*** (paras 4.151 – 4.156)

In Australia, New Zealand and South Africa, there is now no difference in the standard of proof whether the domicile to be displaced is a domicile of origin or not. There is no specific statutory provision on this in the remaining jurisdictions. It is likely that the common law rules still apply in these jurisdictions.

### **Recommendation 11**

***The normal civil standard of proof on a balance of probabilities should apply in all disputes about domicile.***

#### 24. **Domicile in federal or composite states** (paras 4.157 – 4.166)

In Australia, a person who has acquired a domicile in a union (as defined in the Domicile Act 1982) as a whole will be allocated a domicile in a particular country (a state, province or territory) within the union with which he has the closest connection. There are similar provisions in New Zealand. The English and Scottish Law Commissions also proposed changes modelled on the Australian provision. The remaining jurisdictions examined have no specific provision on this.

### **Recommendation 12**

***A person who is present in a federal or composite state and intends to make his home there indefinitely should, if not held to be domiciled in any law district within that state under the general rules, have his domicile in the law district with which he is for the time being most closely connected.***

#### 25. **Transitional provisions** (paras 4.167 – 4.176)

- How should the new rules operate in relation to a person's domicile before and after such rules come into effect? The question is whether or not the new rules should have retrospective effect.
- If the new rules do not have retrospective effect, there is one further question. How should the transitional provisions be phrased? Four alternative approaches have been adopted overseas. One is that followed in Australia and New Zealand; a second is the approach taken in South Africa; while the third is that proposed by the English and Scottish Law Commissions and the final option is the provision in Manitoba.

### **Recommendation 13**

***The Sub-committee recommends that:***

- (a) the recommended legislation should not have retrospective effect;***
- (b) a person's domicile at any time before the commencement date of the recommended legislation should be determined as if the legislation had not been passed;***
- (c) his domicile at any time after that date should be determined as if the recommended legislation had always been in force.***

#### 26. **Codification** (paras 4.177 – 4.183)

The final question is whether the reform of the rules for determining a person's domicile should take the form of a complete code or not. Of the jurisdictions considered in the Sub-committee's consultation paper, only Australia, Manitoba, New Zealand and South Africa have a general statute on domicile. Of these, only the legislation in Manitoba is intended to codify the law of domicile for all purposes

of the law of Manitoba. The English and Scottish Law Commissions also considered the matter and concluded that the legislation should not seek to provide a fully comprehensive code, or to redefine all terms or concepts currently in use.

***Recommendation 14***

***The Sub-committee recommends:***

- (a) that the recommended legislation on the rules for determining natural persons' domicile should be as comprehensive as possible;***
- (b) that the recommended legislation should set out the following general rules on domicile:***
- no person can be without a domicile;***
  - no person can at the same time for the same purpose have more than one domicile;***
  - for the purposes of a Hong Kong rule of the conflict of laws, the question of where a person is domiciled is determined according to Hong Kong law;***
- (c) a saving provision for the existing common law rules which are not inconsistent with the new statutory rules.***