Hong Kong Legal Principles

Important Topics for Students and Professionals

Second Edition

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Contract

This chapter is concerned with the law that governs an agreement between parties. In particular, this chapter intends to review the common law principles relating to contracts. Consequently, less emphasis is placed on contracts regulated by legislation as to form or as to content. Likewise, little emphasis is placed on contracts which are highly specialized, such as an agreement which involves matters concerning employment which are generally categorized as employment law.

The Contract chapter is organized into three general sections. The first section provides the definition of the term "contract" in general and reviews the different types of contract. The next section presents an analysis concerning the creation of a contract and its legal application to the parties. The third and final section assesses the manners in which a contract may be terminated.

I. DEFINITION

A contract is a legally binding agreement between the parties to that agreement. The term "contract" has been described as referring to one or more of the following situations:

- a series of promises or acts that constitute a legally binding agreement, *e.g.*, a promise or a set of promises which the law will enforce;
- the legal relationship that results from a series of promises or acts; or,
- the document which embodies that series of promises or acts or the performance of that series of promises or acts.[1]

1. 7(2) Halsbury's Laws of Hong Kong para. 115.002 (2007) (citations omitted) [hereinafter 7(2) Halsbury's].

Contract law is concerned with the validity and enforceability of that agreement.[2] The law of contract consists of case law which serves as precedent and which applies generally to all types of contracts. Unlike tort law, one's liability under contract law depends on promises the parties have made to each other. Through their agreement, the parties make legally binding arrangements which will govern their relationship. Enforcement of a contract is effected through the law and the courts.

The basis of contract law can also be seen as reliance: to rely on receiving some future benefits as part of an agreed exchange and to reduce uncertainties associated with the exchange. One purpose of contract law is to provide a structure within which parties can organize their relationships, particularly commercial ones, with a high degree of certainty.[3] Thus, a contract can be seen as an allocation of risk between the parties, that is, an agreement determining which party will bear the risk of any loss in the transaction.[4] For example, the parties may agree that a seller in Hong Kong will bear the risk of loss of a shipment of goods until it is delivered to the buyer's warehouse in the United States.

II. TYPES

As mentioned above, a contract is a legally binding agreement. Some of the reasons for creating a contract have been discussed. In this section, some of the various types of legally binding agreements are presented, although some of these agreements may fall into more than one category.[5]

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2. For an exhaustive discussion of the dichotomy of these two definitions of the term "contract", s*ee*, *e.g.*, 1 Chitty on Contracts para. 1–001 (H.G. Beale, *et al.* eds., 30th ed. 2008) [hereinafter Chitty].
   The Hong Kong government's Bilingual Laws Information System's *The English-Chinese Glossary of Legal Terms* [hereinafter *BLIS Glossary*] translates "legal contracts" as 合法合同 and "legally binding" as 具法律約束力. See the *BLIS Glossary* website at: *http://www.legislation.gov.hk/eng/glossary/homeglos.htm* (last visited 1 Feb. 2011).
3. Carole Chui & Derek Roebuck, Hong Kong Contracts para. 1.3 (2nd ed. 1991) [herein after Chui & Roebuck].
   See also Stephen Hall, Law of Contract in Hong Kong: Cases and Commentary 2–7 (revised 2nd ed. 2009) [hereinafter Hall].
4. Chui & Roebuck, *supra* note 3, at paras. 1.3; 2.1.
5. *See* 7(2) Halsbury's, *supra* note 1, at paras. 115.011–115.012. The Property chapter of this work will discuss contracts which must be in writing or which must be evidenced by writing.

A. Generally

A legally binding agreement may have many different forms and may have several classifications.[6] Thus, a contract may be a completely oral agreement; a completely written agreement; or, a partly oral and partly written agreement. As their classifications imply, oral contracts are legally binding verbal agreements; written contracts are legally binding agreements in writing.

Another classification places agreements which are enforceable legally into three different categories: contracts of record; simple contracts; and, contracts made by deed.[7] "Contracts of record" are not contracts in the sense in which that term is usually used but are judgments and recognizances[8] enrolled in the record of a court and in law imply an obligation arising from the entry on the record and not from any agreement between the parties.[9]

"Simple contracts" are contracts without a seal and thus require consideration. Simple contracts are all contracts other than contracts of record or contracts under seal.

> Simple contracts may be express or implied, or partly express and partly implied. Contracts are express to the extent that their terms are set out distinctly either by word of mouth or in writing. They are implied to the extent, if any, to which their terms are a necessary inference from the words or conduct of the parties.[10]

Another form of contract is known as a "contract under seal", sometimes referred to as a "contract made by deed", a "deed", or a "specialty contract".[11]

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6. CHITTY, *supra* note 2, at para. 1–067 notes that contracts:

   > may be classified in a variety of ways: according to their subject-matter; according to their parties; according to their form (whether contained in deeds or in writing, whether express or implied) or according to their effect (whether bilateral or unilateral, whether valid, void, voidable or unenforceable). (citations omitted)

   This work is not intended to examine these categories in such depth; only the more common types or categories of contract will be introduced. For a detailed discussion of the myriad of contract types, *see*, *e.g.*, *id.* at paras. 1–068 to 1–084.
7. 7(2) HALSBURY'S, *supra* note 1, at para. 115.010.
   The *BLIS Glossary*, *supra* note 2, translates "deed" as 契據.
8. The *BLIS Glossary*, *supra* note 2, translates "recognizance" as 擔保.
9. 7(2) HALSBURY'S, *supra* note 1, at para. 115.010.
10. *Id.* at para. 115.013 (citations omitted).
11. *See* the discussion of this topic in sections II.C and III.C and the accompanying footnotes. *See also* 7(2) HALSBURY'S, *supra* note 1, at para. 115.011.

A specialty contract must be signed, sealed, and delivered.[12] A specialty contract requires no consideration and has the seal of the signer attached. A contract under seal must be in writing and is conclusive between the parties when signed, sealed and delivered. Delivery is made either by actually presenting the document to the other party or by stating an intention that the deed be operative even though the deed is retained in the possession of the party that signed the deed.[13] In Hong Kong, contracts under seal are found mainly in real property transactions, government construction contracts and certain insurance contracts. One purpose of a deed is set out as follows:

> The basis of the common law of contract is bargain. A party who wants to enforce a contract must show that he or she has given consideration. If A says to B "On your twenty-first birthday, I will give you $100,000 to set you up in life" and B says "Thank you. …", there is certainly an agreement between them. But there is no contract … because B has not given anything in return for A's promise. Each party to a contract must

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The *BLIS Glossary*, *supra* note 2, translates "specialty" as 蓋印文據.

"A deed is a document which takes its effect from its formal nature." CHUI & ROEBUCK, *supra* note 3, at para. 11.1.

> At common law, contracts under seal, or specialties, were an important example of deeds and at common law a deed was an instrument which was not merely in writing, but which was sealed by the party bound thereby, and delivered by him to or for the benefit of the person to whom the liability was incurred. In no other way than by the use of this form could validity be given … At common law, all deeds were documents under seal, but not all documents under seal were and are deeds. A deed must either:
>
> (a) effect the transference of an interest, right or property;
> (b) create an obligation binding on some person or persons;
> (c) confirm some act whereby an interest, right or property has already passed.

CHITTY, *supra* note 2, at para. 1–085.

12. BLACK'S LAW DICTIONARY 1350 (7th ed. 1999) [hereinafter BLACK'S LAW DICTIONARY] defines "seal" to be an "impression or sign that has legal consequence when applied to an instrument".

13. One authority expounds upon this requirement of delivery:

> "Where a contract is to be by deed, there must be a delivery to perfect it." "Delivered", however, in this connection does not mean "handed over" to the other party. It means delivered in the old legal sense, namely, an act done so as to evince an intention to be bound. Any act of the party which shows that he intended to deliver the deed as an instrument binding on him is enough. He must make it his deed and recognise it as presently binding on him. Delivery is effective even though the grantor retains the deed in his own possession. There need be no actual transfer of possession to the other party …

CHITTY, *supra* note 2, at para. 1–093 (citations omitted).

See also BETTY M. HO, HONG KONG CONTRACT LAW 77–79 (2nd ed. 1994) (citation omitted) [hereinafter HO].

> give something (which may be a promise) to the other in exchange for what he or she gets. It is not a contract if one party takes rights without incurring corresponding duties. But consideration is not necessary if the contract is by deed.
>
> …
>
> Moreover, it is possible to make a gift … which will be binding without consideration. It is the promise which is not binding without consideration, not the transfer of property. … if the subject matter is of such a nature that delivery is not possible, such as a promise, then a deed must be used.[14]

Contracts under seal will be discussed further in section II.C.

Another form of contract is referred to as a "unilateral contract". This is a contract where one party makes a promise or several promises in return for an act, as opposed to a promise, of another party. For example, where a person makes an offer of a reward for the return of a lost item, the person making the offer (known as the "offeror") will be the only one bound by the offer. No one is obligated to conduct a search for the lost item. However, if upon learning of the offer, someone recovers and returns the lost item, that individual is entitled to the reward.[15] In this type of contract, the offeror makes a promise while the person receiving the offer (known as the "offeree") is expected to perform an act rather than to make one promise in return. Therefore, this is a:

> contract under which only one party undertakes an obligation. … It is to be noted, though, that the unilateral nature of the contract does not … mean that there is only one party, nor that there is no need for an acceptance or the provision of consideration by the other party. An example of a unilateral contract may be found in the case of an offer for a reward for the return of lost property: here, a contract is formed (at the latest) on the return of the property, this constituting the offeree's acceptance of the offer and the furnishing of consideration for the creation of the contract. Bilateral contracts comprise the exchange of a promise for a promise, *e.g.* if you promise to pay me £1,000, I promise to sell you my car.[16]

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14. CHUI & ROEBUCK, *supra* note 3, at para. 2.2.
15. 7(2) HALSBURY'S, *supra* note 1, at para. 115.048 explains that the mode of acceptance in a unilateral contract is the performance of his side of the contract by the offeree. The real distinction between bilateral and unilateral contracts lies not in the nature of the act of acceptance, but in whether there is a contract before performance of that act. In a bilateral contract there will be an executory promise by the offeree; in a unilateral contract the promise will be executed the moment it is made.
16. CHITTY, *supra* note 2, at para. 1–079.

One commonly cited example of a unilateral contract is the case of *Carlill v Carbolic Smoke Ball Co*, which is discussed in section III.B.ii.c.

Another type of legally binding agreement is referred to as a "collateral contract".[17] This type of contract may arise in the course of negotiation of a main contract. A collateral contract is a subsidiary agreement which stands alongside the main contract, in which a party is promised something as an inducement to enter into the main contract.[18] Thus, a collateral contract arises out of, or from, another legally binding agreement, the main contract, and is related to that contract.[19]

A collateral contract takes the form of a unilateral contract, under which one party offers that if the second party enters into the main contract, the first party will promise something else to the second party. The consideration for the promise is the making of the main contract.[20] In *City & Westminster Properties v Mudd* [1958] 2 All ER 733, the tenant had been sleeping in the shop which he rented. During lease renewal negotiations, the landlord attempted to include a clause stating that the premises should not be used for lodging, dwelling or sleeping. The tenant objected, but was verbally informed that if he signed the lease, he could continue living in the basement. The landlord then attempted to rely on the contract clause to terminate the lease, claiming that the tenant breached the lease agreement by sleeping in the premises.[21] The court held that the tenant established that the oral promise made to him was part of a collateral contract. Because of the oral promise and in reliance upon it, the tenant had signed the main contract with the landlord.

17. "The word collateral in this context simply indicates a contract which exists alongside a main contract. For instance, a contract of guarantee cannot exist without something to guarantee." Chui & Roebuck, *supra* note 3, at para. 4.8.
See also Michael J. Fisher & Desmond G. Greenwood, Contract Law in Hong Kong 166–167 (2nd ed. 2011) [hereinafter Fisher & Greenwood].
18. Chui & Roebuck, *supra* note 3, at para. 9.2.6.
19. *See* 7(2) Halsbury's, *supra* note 1, at para. 115.133 which explains a collateral contract thus:

> A contract between A and B may be accompanied by a collateral contract between B and C, whereby C makes a promise to B in return for B entering into the contract with A or doing some other act for the benefit of C. Before B can succeed in an action against C for breach of C's promise, B must prove the following: (1) that C made a promise to B *animo contrahendi* [with the intent of a contracting party]; (2) in reliance on that promise, B entered into the contract with A or did the other requested act. (citations omitted)

20. Richard Stone, The Modern Law of Contract 206–207 (8th ed. 2009) [hereinafter Stone].
21. *Id.* at 251.

B. Third Party Contracts and Privity

As discussed below in the section on Consideration, the benefit or the obligation of a contract may be directed to a third party, that is, someone not a party to the contract. A situation such as this might raise enforcement difficulties due to the principle of privity of contract. "Privity" refers to being a party to a contract.

> The common law doctrine of privity of contract means that a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it.[22]

Thus, the general rule is that no one can sue or be sued on a contract to which that person is not a party. In other words, the provisions of a contract are only applicable to the parties to that contract.

As privity of contract dictates that only a party to a contract can sue or be sued on that contract, this doctrine will not allow a third party, *i.e.*, in other words, a party not involved in the legally binding contractual relationship, to sue either party to the contract. A commonly used example to demonstrate this doctrine assumes that Alan owes a debt to Bob. Alan enters into a valid contract with Calvin to pay Bob. Calvin fails to pay Bob. Under the principle of privity of contract, Bob cannot sue Calvin. Rather, Bob would need to sue Alan who would then sue Calvin.[23]

Much has been written about the purpose and application of this principle along with the recourse available to parties such as Bob. Conceptually, the privity doctrine has engendered some debate amongst legal writers.[24] This theoretical debate has carried over to the courts which have created ways to circumvent this doctrine, such as the notion of an agent, a trust, and, the application of certain land covenants. Legislation has also been

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22. CHITTY, *supra* note 2, at para. 18–003. *Id.* at para. 18–021 states further:

> The common law doctrine of privity means … that a person cannot acquire rights, or be subjected to liabilities, *arising under* a contract to which he is not a party. For example, it means that, if A promises B to pay a sum of money to C, then C cannot sue A for that sum. Similarly, if a contract between A and B contains a term purporting to exempt C from tortious liability to A, the doctrine of privity may prevent C from relying on that term in an action in tort brought against him by A. [emphasis in original]

23. FISHER & GREENWOOD, *supra* note 17, at 432–433, 446.
For a full discussion of this topic, *see*, *e.g.*, *id.* at Chapter 16 ("Privity of Contract"); CHITTY, *supra* note 2, at Chapter 18 ("Third Parties").

24. FISHER & GREENWOOD, *supra* note 17, at 431–433.

enacted in order to limit the application of the privity doctrine. For example, in the United Kingdom there is the *Contracts (Rights of Third Parties) Act* 1999. In Hong Kong there is the *Married Persons Status Ordinance* (Cap 182). Additionally, in Hong Kong, the Law Reform Commission has issued a Consultation Paper[25] in 2004 and a Report on Privity of Contract[26] in 2005 suggesting that Hong Kong consider similar legislation to that found in the UK although to date no action has been taken by the legislature.

C. Formalities/Contracts Required to be in Writing

The most common forms or types of contracts have been discussed above. However, there are other types which, although perhaps not as common as the types of legally binding agreements above, should be mentioned. For these contracts, certain formalities need to be followed as to form or content, a requirement to be in writing or in the execution.

One type of contract requiring particular formalities has been introduced earlier: a contract under seal, also known as a contract made by deed, deed or specialty contract.[27] This type of legally binding agreement takes effect through its solemn form rather than through general contract principles. Therefore, a specialty contract must be signed, sealed, and delivered.[28] One reason for requiring this form is that a contract made by deed requires no consideration and has the seal of the signer attached. A contract under seal must be in writing and is conclusive between the parties when signed, sealed and delivered. Delivery is made either by actually handing the document to the other party or by stating an intention that the deed be operative even though the deed is kept in the possession of the party signing this document.

25. The Consultation Paper may be found at the following two web sites: *http://www.hkreform.gov.hk* (last visited 1 Feb. 2011) or *http://www.hklii.hk/eng/hk/other/hklrc/cp/2004/2.html* (last visited 1 Feb. 2011). *See* Fisher & Greenwood, *supra* note 17, at 444–449 for a review of the Consultation Paper.
26. The Report may be found at the following two web sites: *http://www.hkreform.gov.hk* (last visited 1 Feb. 2011) or *http://www.hklii.hk/eng/hk/other/hklrc/reports/2005/3.html* (last visited 1 Feb. 2011).
27. *See* the discussion of this topic on "Consideration" in section III.C and the accompanying footnotes. *See also* 7(2) Halsbury's, *supra* note 1, at para. 115.011.
28. "Delivered" is defined in Chitty, *supra* note 2, at para. 1–093. *See supra* note 13; Hall, *supra* note 3, at 21. For example, the *Conveyancing and Property Ordinance* (Cap 219) sections 19 and 20, respectively, provide the legal requirements for executing a deed by an individual or by a corporation.

Earlier, a deed was explained as being a legally enforceable agreement without consideration. A contract under seal may also be used where there is consideration.

> This has traditionally been done in relation to complex contracts in the engineering and construction industries. This is probably because, by virtue [of the law], the period within which an action for breach of an obligation contained in a deed is 12 years, whereas for a "simple" contract it is only six years. The longer period is clearly an advantage in a contract where problems may not become apparent for a number of years.[29]

Another category pertains to contracts which must observe some kind of formality (usually that the agreement be written or be written in a particular way) in order to be valid. Thus, for the purposes of this section, these are referred to as "contracts required to be in writing". These are contracts which are required by law either to be in writing or to be evidenced in writing, *i.e.*, something in writing which proves the existence of the agreement. One of the most common contracts required to be in writing is a legally binding agreement that affects land, *e.g.*, purchase and sale agreements, certain leases, easements and mortgages.[30]

Examples of contracts which require both a particular formality and a particular content can be found in situations involving a power of attorney (a document which gives one person the right to act on another individual's behalf) or the employment of an apprentice. The *Powers of Attorney Ordinance* (Cap 31) requires that, under certain circumstances, a written document, such as the form set out in the Schedule, be signed and sealed in the presence of two attesting witnesses.[31] The *Apprenticeship Ordinance* (Cap 47) requires a contract of apprenticeship to be in writing and in a particular form.[32]

Other Hong Kong ordinances which require a legally binding agreement to be in writing or evidenced in writing include the following examples:

- *Arbitration Ordinance* (Cap 609);
- *Bills of Exchange Ordinance* (Cap 19);
- *Companies Ordinance* (Cap 32);
- *Contracts for Employment Outside Hong Kong Ordinance* (Cap 78);

29. STONE, *supra* note 20, at 109. This subject is discussed in terms of the *Limitation Ordinance* (Cap 347) in section VIII.D.
30. *Conveyancing and Property Ordinance*, *supra* note 28, at section 4(2).
31. *Powers of Attorney Ordinance*, at section 2(2).
32. *Apprenticeship Ordinance* (Cap 47) section 8.

- *Marine Insurance Ordinance* (Cap 329); and,
- *Money Lenders Ordinance* (Cap 163).

III. ELEMENTS

In order to have a legally binding agreement, certain requirements must be fulfilled. Those requirements are that:

- the parties must have the intention to create a legal relationship;
- the parties must be in agreement;
- the parties' agreement must be supported by consideration or be made under seal;
- the agreement's terms must be sufficiently certain to enable enforcement; and,
- the parties must have the capacity to enter into a contract.[33]

The first three requirements are presented below. The last two requirements of a contract, *i.e.*, certainty of terms and capacity, are discussed in sections IV and V respectively.

A. Intent

For an agreement to be an enforceable contract, the parties must have the intention to create a legally binding relationship. In other words, the parties to the agreement intend it to be enforceable in court. Intention is determined objectively from the circumstances, including the nature of the words used or the conduct of the party making the offer.

In business transactions, there is a presumption that the agreement is intended to be legally binding.

> Indeed, the presumption in favour of intention in commercial agreements is so strong that it is rarely challenged. The presumption will be rebutted, however where the commercial agreement clearly states that it does not create legally binding obligations.[34]

In social or domestic situations, unless the parties state otherwise, the law presumes that such agreements are not intended to be legally binding. *Wu Chiu Kuen v Chu Shui Ching* (1992) HCA 4081/1991, [1992] HKCU 29

33. *See*, *e.g.*, Charles Wild & Stuart Weinstein, Smith and Keenan's English Law: Text and Cases 288 (16th ed. 2010) [hereinafter Smith and Keenan].
34. Hall, *supra* note 3, at 310.

is an example of a social situation where the plaintiff successfully asserted the existence of an intent to create a legal relationship. The case revolved around a *mah jong* parlour patron who purportedly agreed to share any Mark Six lottery winnings with the *mah jong* parlour employee sent to purchase the tickets. The employee contributed one-half the purchase price of the tickets. The court held that the plaintiff rebutted the presumption that this was a social arrangement and found in favour of the plaintiff.[35]

In the case of *Balfour v Balfour* [1919] 2 KB 571, the court found an agreement for the payment of maintenance between spouses to be unenforceable as it was a domestic agreement. The court presumed that the parties did not intend to create any legal relationship. In the case of *Jones v Padavatton* [1969] 1 WLR 328, the court held that family agreements were dependent upon the good faith of the parties in keeping the promises made and that the parties did not intend to make binding agreements. The case of *Sun Er Jo v Lo Ching* [1996] 1 HKC 1 involved the mother suing her children, particularly one claim for the expenses incurred in raising the youngest child. The court held in relation to the plaintiff's claim for rearing expenses that:

> it was right and proper that parents bring up their children and this did not form a basis for a compensation claim. Family arrangements made between parents and children, husband and wife, or brothers and sisters were generally not legally binding, unless it was shown that they have clearly intended to enter into legal relations.[36]

B. Agreement

There must be an agreement between the parties to a contract before one party can enforce another party's promise.

> Agreement is usually reached by the process of offer and acceptance … the law requires that there be an offer on ascertainable terms which receives an unqualified acceptance from the person to whom it is made.[37]

Thus, at times, courts will use the offer-and-acceptance approach to determine the existence and also the terms of a contract. Some courts are willing to be flexible where the words and conduct are unclear. These courts would

35. *See id.* at 306–309 for a discussion of this case.
36. [1996] 1 HKC at 3. (Headnotes)
See discussion in HALL, *supra* note 3, at 296–304.
37. 7(2) HALSBURY'S, *supra* note 1, at para. 115.026 (citations omitted).

look at all the circumstances at the time of the agreement to determine whether a contract was formed. However, for certain particular agreements, such as contracts under seal, the identification of offer and acceptance is not necessary.[38]

Consequently, this chapter uses this offer-and-acceptance approach. The following section concentrates on an offer-and-acceptance analysis. As contracts under seal are, comparatively, less commonly encountered, this type of legally binding agreement is presented in a later section.

i. Offer

An "offer" is a promise to do, or to refrain from doing, something in the future. An offer is also a display of willingness to enter into a contract on specified terms, made in such a way that a reasonable person would understand that an acceptance will result in a legally binding agreement.[39] Consequently, once an offer is accepted, a contract exists between the parties.

The party making an offer is the "offeror", also referred to as the "promisor". The party to whom this offer is made is the "offeree", also referred to as the "promisee". An offer may be made expressly, *i.e.*, by spoken or written words. An offer may also be made impliedly, *i.e.*, by conduct of the parties or by law.

An example of an implied contract by conduct is provided in the following example. A bus arrives at one of its designated stops along its route. A person gets on the bus and pays the specified bus fare. By conduct, the individual and the bus company have entered into a legally binding agreement (exceptions to creating a legally enforceable agreement are discussed later). The agreement in this example is that the person will pay the specified fare and the bus company will convey the person to one of the designated bus stops near the person's destination.[40] No words need to be spoken or written in this example.

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38. If the contract is a formal written agreement, such as an agreement under seal, it would then be unnecessary to identify the offer and the acceptance. Contracts under seal are comparatively less frequently used and will be discussed later. Also note that the offer-and-acceptance examination by the courts sometimes remain important in determining the terms, rather than the existence, of a written contract.
See CHITTY, *supra* note 2, at para. 2–110 for a discussion of the difficulty in applying an offer-and-acceptance analysis.
39. BLACK'S LAW DICTIONARY, *supra* note 12, at 1111.
40. CHITTY, *supra* note 2, at para. 1–076.

An implied contract by law would involve contract terms imposed by statute rather than negotiated by the parties. Such terms may involve matters such as employment (anti-discrimination), consumer protection, etc.

An offer must be made with the intention that upon acceptance, the offer and acceptance shall become binding in law.

> When determining whether an offer had been made, one should identify "an expression of willingness to contract on certain terms made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed". The person effecting such expression is the offeror even though he may not have initiated the contact.
>
> It is difficult at times to determine which statements or which acts constitute an offer. It is particularly difficult where the parties are indiscriminate with the use of words. The test of an offer is the intention of an expression and not the words used.[41]

Thus, a statement will not be an offer if it is merely intended to supply information. Merely fixing a price does not imply an offer to buy or sell.

In the case of *Harvey v Facey* [1893] AC 552, Harvey sought specific performance[42] of an agreement for the sale of a property named *Bumper*

41. Ho, *supra* note 13, at 6.

42. "Specific performance" is defined as an equitable remedy whereby a court orders a party to a contract to specifically perform its obligations under the contract. This type of remedy for breach of contract is discussed later in this chapter.
Black's Law Dictionary, *supra* note 12, at 1297 defines "equitable remedy" as "a non-monetary remedy, such as an injunction or specific performance, obtained when monetary damages cannot adequately redress the injury".
Id. at 560 defines "equity" as:

> (1) Fairness; impartiality; evenhanded dealing.
> (2) The body of principles constituting what is fair and right; natural law.
> (3) The recourse to principles of justice to correct or supplement the law as applied to particular circumstances.
> (4) The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law when the two conflict.

As explained by Fisher & Greenwood, *supra* note 17, at 13:

> The maxims of equity still direct the courts in the exercise of their discretion whether or not to grant equitable relief. The principle that "he who comes to equity must come with clean hands" means that equitable remedies or "relief", will only be granted to those who have acted fairly in respect of the contract. The principle that "he who seeks equity must do equity" means that equitable relief will be granted only where the claimant is prepared to comply with the requirements of the court to do justice to the other party.

The *BLIS Glossary*, *supra* note 2, translates "equity" as 衡平法, "equitable relief" as 衡平法濟助. "Equitable remedy" is translated as 衡平法補救.

Hall Pen. The issue in this case involved the question of whether a legally binding sale and purchase agreement existed. The events transpired in the following sequence:

- Harvey telegraphs Facey, asking, "Will you sell Bumper Hall Pen? Telegraph lowest price for Bumper Hall Pen."
- Facey answers, "Lowest price for Bumper Hall Pen [would be] £900."
- Harvey responds by agreeing to buy the property for Facey's asking price of £900.

All these telegrams are duly received by Harvey and Facey so that there are no difficulties with communications.

Harvey argued that the telegraph correspondence was an implied acceptance of the first question in the first telegram. The court, however, decided that any contract must be determined from the telegrams, that Facey's response was a statement of the lowest price at which he would sell, and that the telegrams contained no implied contract to sell to the person making the inquiry.

The court held that there was no contract between these parties for the following reasons:

- The first telegram asked two questions. The first question concerned the willingness of Facey to sell the property to Harvey. The second question asked the lowest price. The word "telegraph" was addressed to only the second question.
- Facey replied to the second question only. By stating that £900 was the lowest price, Facey gave a precise answer to a precise question—the selling price.

Harvey's next telegram treated Facey's statement of a £900 sale price as an unconditional offer to sell to Harvey at that stated price.

The court found that Facey's telegram was only binding on him as to the £900 sale price and that the telegram was merely an offer to sell the property at a price of £900 because all the other terms of purchase were yet to be negotiated. Harvey's reply telegram could only be treated as an acceptance of Facey's offer to sell the property at a price of £900. Harvey's telegram was an offer to purchase the property for £900 to be accepted by Facey. Thus, the contract could only be completed if Facey had accepted Harvey's last telegram.

a. Bilateral and Unilateral Contract

An offer can be made to a particular person, a particular group of persons or to the public at large. Where it is made to a particular person or a particular group of persons, a contract is formed when the offeree accepts the offer. Such a contract is known as a "bilateral contract". Bilateral contracts thus are generally formed after negotiations have taken place resulting in a promise in exchange for another party's promise. Both parties make binding promises, and one promise is consideration for the other promise. As succinctly and simply summarized by one author:

> A bilateral contract consists of an exchange of promises. A "bilateral" offer, therefore, seeks a *promise* in return, eg Offer–"I [promise that I] will sell you my car for £500." Acceptance–"I [promise that I] will pay £500 for your car."[43]

As presented earlier, a unilateral contract involves a promise by the offeror followed by performance by the offeree, rather than an exchange of promises. Unilateral contracts may arise in advertisements of rewards, or agreements for contingency fees, *e.g.*, estate broker's contract. Where an offer is made to the public at large, a contract is formed when anyone performs the act requested in the offer. A contract thus formed is known as a unilateral contract. An offer arising from an advertisement may be an example of a unilateral contract where the offeror may be unaware of acceptance, until an offeree has performed according to the terms of the offer contained in the advertisement. In a unilateral contract only one party makes a promise; the offer is accepted by performing the requested act specified in the offer. The offeree does not make any promise(s). Compare this to a bilateral contract, where negotiations have taken place resulting in a promise in exchange for another's promise.[44]

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43. Marnah Suff, Essential Contract Law 2 (2nd ed. 1997) [hereinafter Suff].
44. *Id.*
See section III.B.*ii.c*, "Invitation to Treat", and the discussion of *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.
As presented in Ho, *supra* note 13, at 45:

> A unilateral contract is a contract whereby one party promises certain consideration to another where such other makes no counter promise and has no obligations but would be entitled to the consideration promised by the offeror if he satisfied the terms of the promise. The common example is the promise of a reward for the return of lost articles or provision of information.

Traditional theory was that the offeror may revoke the offer at any time prior to complete performance, even after the offeree has commenced performance. Today, the commonly accepted view is that the offeror cannot withdraw the offer once the offeree has started to perform the required act.[45] Further, the offeree is not required to notify the offeror of performance, unless the offeror is located at a distance and would be unaware of the performance. This notice prevents the offeror from entering a contract with another person for the same purpose.

In bilateral, or even multilateral, contract situations, an offer must be communicated to an offeree and an acceptance must be communicated to the offeror. Generally, one cannot accept an offer unless one has knowledge of the offer.[46] The offer must be directed to a party entitled to accept; others who learn of the offer are not entitled to accept.

b. Termination of Offer

An offer is terminated by:

- revocation by the offeror;
- rejection by the offeree;
- lapse of time;
- death or other incapacity of one of the parties; or,
- where the offer is conditional, failure of the condition to materialize.

The offeror can revoke or withdraw the offer at any time before acceptance is made by the offeree. If the offeror decides to revoke the offer, the notice of revocation must be communicated to the offeree before acceptance.[47] The offeror, as part of the offer, may dictate the manner through which the offeree must make acceptance.[48] The general rule is that an acceptance of an offer must be communicated to the offeror before revocation of the offer or before the offer terminates through the lapse of time or

45. FISHER & GREENWOOD, *supra* note 17, at 71–73.
See CHESHIRE, FIFOOT & FURMSTON'S LAW OF CONTRACT 75–78 (M. P. FURMSTON, ed., 15th ed. 2007) [hereinafter FURMSTON].

46. This acceptance must be made with the knowledge of the existence of the offer. The offer must be the reason for the acceptance, and there must be a "meeting of the minds" prior to performance. For example, identical offers, one to buy and one to sell, that "cross" in the mail do not create a contract if neither offer was accepted with the knowledge of its existence. CHITTY, *supra* note 2, at para. 2–027.

47. For further discussion, *see*, *e.g.*, 7(2) HALSBURY'S, *supra* note 1, at para. 115.039; CHITTY, *supra* note 2, at paras. 2–087 to 2–091.

48. For a detailed discussion, *see*, *e.g.*, 7(2) HALSBURY'S, *supra* note 1, at para. 115.054; CHITTY, *supra* note 2, at paras. 2–027 to 2–086.

otherwise. (An exception to this general rule is where there is an offer of reward.) Revocation is effective if it is communicated in a manner equal to or greater than the way the offer was publicized, even though the offeree has no knowledge of the revocation.

If an offer has been rejected by the offeree, the offer cannot be later accepted. *Lee Siu Fong Mary v Ngai Yee Chai* [2006] 1 HKC 157 is a recent case upholding this principle. In this case, Lee made loans to Ngai which were only partially repaid. Ngai offered to repay the outstanding amount over six years. Lee rejected the offer. Seven years later, Lee brought a court action to recover the outstanding amount of the loans. Ngai's defence was that Lee waited too long to take court action so that the plaintiff is now time-barred from suing. Lee's counter-argument was that Ngai's offer to repay the loans prevented the defendant from claiming this defence. The court held:

> The truth of the matter is that having rejected this offer … on 21 May 1995 there was no further offer … from the defendant for the plaintiff to accept later on. There was no evidence that the defendant had intended to leave the offer open so that it may be accepted by the plaintiff at some later time. There was also no evidence that the parties had discussed the time of repayment again after the offer was rejected by the plaintiff.
>
> An offer … is simply an expression of willingness to contract made with the intention that it is to become binding on the person making it as soon as it is accepted by the person to whom it is addressed … If the offer was rejected by the plaintiff, she could not unilaterally revive it by saying that she had later accepted it. …
>
> … the fundamental point is that there must be an offer or representation made by one party for the other party to accept or relied [*sic*] upon. The so-called representation by the defendant in this case was exactly the same offer he had made and rejected by the plaintiff. Once this was rejected then there was nothing for the plaintiff to rely upon …[49]

c. Options

An "option" is where an offeror promises to keep the offer open for a specified time and the offeree pays for this promise. This is a separate contract, known as a "collateral contract", between the promisor and the promisee

49. [2006] 1 HKC at 161.

that the offer would be kept open for that stated period of time.[50] The mere promise by an offeror to keep the offer open is not legally binding, as the offeror's promise requires consideration unless the promise is made by deed.

ii. Acceptance

"Acceptance" is the unqualified agreement to the terms made in the offer.[51] Acceptance may be communicated to the offeror orally, in writing, by conduct, or a combination of these. If the offer prescribes a certain method of acceptance, acceptance must be made in the required manner. However, an offeror cannot impose silence as the prescribed method of acceptance. Acceptance of an offer by the offeree must be by genuine consent, *i.e.*, given voluntarily and freely. Acceptance must be unequivocal and unqualified. Any form of conditional acceptance is not acceptance according to the terms of the offer and consequently is not acceptance but is either a rejection of the offer or a counter-offer.[52]

a. Postal Rule

An exception to the rules of acceptance is the Postal Rule (also known as the Mailbox Rule),[53] by which acceptance of an offer by post is deemed

50. The topic of "collateral contract" is discussed in section II.A.
BLACK'S LAW DICTIONARY, *supra* note 12, at 319 defines this term as: "A side agreement that relates to a contract … an agreement made before or at the same time as, but separately from, another contract."

51. CHITTY, *supra* note 2, at para. 2–027 (citations omitted).

52. One source notes:

> An offer cannot be accepted conditionally; the offeree has power to accept only on the terms stated in the offer and nobody else has any power of acceptance whatsoever. Thus, an attempted acceptance cannot operate as such where it is made subject to some condition, or includes some new or different term; or where the offer is only meant to be accepted by offerees jointly, and is not accepted by all of them. In each of these cases, however, the purported acceptance may amount to a counter-offer, though it will not necessarily do so.
>
> The rule that an acceptance must be unconditional does not necessarily require that there must be a precise verbal correspondence between offer and acceptance. But an acceptance must not introduce any new or different terms; nor leave any material term yet to be agreed; nor may it be made in any manner other than that prescribed in the offer.

7(2) HALSBURY'S, *supra* note 1, at para. 115.056 (citations omitted).
See also HO, *supra* note 13, at 14–16.

53. Although simple in concept, the application of the Postal Rule can become complicated when the time of an offer's acceptance or revocation is at issue, particularly where the letter is mis-directed, delayed or lost. *See* 7(2) HALSBURY'S, *supra* note 1, at paras. 115.071 to 115.081; CHITTY, *supra* note 2, at paras. 2–048 to 2–050.

to be communicated at the moment the letter containing the acceptance is posted, *i.e.*, placed in the control of the postal service.[54] This rule also applies to the use of telegrams.[55] Should the message never arrive, an agreement is nevertheless concluded provided there is no fault on the part of the promisee. An acceptance posted after a rejection (*i.e.*, the offeree had a change of mind) is not effective, until it is actually received by the offeror.

The application of the Postal Rule can become complicated when the time of acceptance or revocation of an offer is in dispute, particularly where the letter is incorrectly addressed, delayed or lost.[56]

However, the Postal Rule does not apply to an acceptance made by methods of instantaneous communication, *e.g.*, e-mail, telephone, telex or facsimile. The rationale for this distinction is that an acceptance of an offer made by such instantaneous or near instantaneous communication methods are usually acknowledged by the recipient.[57] Further, another authority posits the rationale to be that the offeree would know that the attempt to make acceptance was unsuccessful.[58] By comparison, a person who makes acceptance by post may never be aware of any loss or delay, and

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54. 7(2) HALSBURY'S, *supra* note 1, at para. 115.075 notes:

> Ordinarily, a letter is not "posted" until it is put in a Post Office letter box. Thus, the delivery of a letter to a postman outside the course of his ordinary duties is not a posting of the letter, nor will such a letter be assumed to be in the lawful custody of the Post Office as soon as the postman enters the post office. (citations omitted)

Thus, for the purposes of this rule, the acceptance of an offer must be placed in the "control of the Post Office or of one of its employees authorized to *receive* letters. Handing letters to a postman authorised to *deliver* letters is not posting." CHITTY, *supra* note 2, at para. 2–048 (emphasis in original) (citation omitted).

55. For discussion of telegrams, *see* 7(2) HALSBURY'S, *supra* note 1, at para. 115.080; CHITTY, *supra* note 2, at paras. 2–049, 2–051.

56. *See*, *e.g.*, FISHER & GREENWOOD, *supra* note 17, at 65–67; STONE, *supra* note 20, at 72–84; CHITTY, *supra* note 2, at paras. 2–058 to 2–064.

57. 7(2) HALSBURY'S, *supra* note 1, at para. 115.072 (citations omitted).
FISHER & GREENWOOD, *supra* note 17, at 65 states:

> Email may be thought of as being an instantaneous communication. However, this is not strictly the case, as a message will have to pass through at least one server to reach its target destination. The sender knows that the recipient will only check his mail inbox from time to time. This means there will usually be a delay before it is read. Similarly, with telephone answering machines, the sender knows that the message has not been instantaneously received by the offeror. … given that the courts have shown a reluctance to extend the postal rule to other areas, it is far more likely that emails and similar will be viewed as subject to the normal rules; acceptance taking effect when and where notice of acceptance is received.

58. CHITTY, *supra* note 2, at para. 2–050.

may not have the opportunity to correct the problem in time. Therefore, instantaneous communications are normally governed by the general rule that an acceptance must be actually communicated to and received by the offeror. [59]

An application of these principles is found in *Susanto-Wing Sun Co Ltd v Yung Chi Hardware Machinery Co Ltd* [1989] 2 HKC 504. This case involved two contracts for the sale of products by the defendant to the plaintiff. The defendant in Taiwan faxed each of the two agreements to the plaintiff in Hong Kong. Immediately upon receipt of each agreement, the plaintiff accepted the agreement by signing and faxing it back to the defendant.

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59. In relation to acceptance made by e-mails, *see* Hong Kong's *Electronic Transactions Ordinance* (Cap 553) which provides that acceptance by e-mail will be effective only when received, unless the parties have agreed otherwise. In particular, section 19 of this Ordinance states in full:

> (1) Unless otherwise agreed between the originator and the addressee of an electronic record, an electronic record is sent when it is accepted by an information system outside the control of the originator or of the person who sent the electronic record on behalf of the originator.
>
> (2) Unless otherwise agreed between the originator and the addressee of an electronic record, the time of receipt of an electronic record is determined as follows—
>
> (a) if the addressee has designated an information system for the purpose of receiving electronic records, receipt occurs-
>
> (i) at the time when the electronic record is accepted by the designated information system; or
>
> (ii) if the electronic record is sent to an information system of the addressee that is not the designated information system, at the time when the electronic record comes to the knowledge of the addressee;
>
> (b) if the addressee has not designated an information system, receipt occurs when the electronic record comes to the knowledge of the addressee.
>
> (3) Subsections (1) and (2) apply notwithstanding that the place where the information system is located is different from the place where the electronic record is taken to have been sent or received under subsection (4).
>
> (4) Unless otherwise agreed between the originator and the addressee, an electronic record is taken to have been—
>
> (a) sent at the place of business of the originator; and
>
> (b) received at the place of business of the addressee.
>
> (5) For the purposes of subsection (4)—
>
> (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction, or where there is no underlying transaction, the principal place of business of the originator or the addressee, as the case may be;
>
> (b) if the originator or the addressee does not have a place of business, the place of business is the place where the originator or the addressee ordinarily resides.

The court held that:

> It appears however, that the contracts were concluded in Taiwan and not in Hong Kong; because it was in Taiwan that the communication of the plaintiff's acceptance of the offer was received by the defendant. The rule relating to communications by telex is now well settled and the same rule must … apply to communications by facsimile. The general rule is that as between … [the parties] the contract, if any, is made when and where the acceptance is received … the rule to which I have referred applies to instantaneous communication between principals.[60]

The Postal Rule can be excluded by the offeror expressly or impliedly.

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(6) Where the originator and the addressee are in different time zones, time refers to Universal Standard Time.

CHITTY, *supra* note 2, at paras. 2–050 to 2–051 states:

> The posting rule does not apply to acceptances made by some "instantaneous" mode of communication, *e.g.* by telephone or by telex. The reason … is that the acceptor will often know at once that his attempt to communicate was unsuccessful, so that he has the opportunity of making a proper communication. A person who accepts by a letter which goes astray, on the other hand, may not know of the loss or delay until it is too late to make another communication. Such instantaneous communications are therefore governed by the general rule that an acceptance must be actually communicated, subject to the other exceptions to that rule stated in para. 2–047 above.
>
> It is now uncommon for acceptances to be made by telegram or telemessage dictated over the telephone and there is no authority on the question whether such an acceptance takes effect when the message is dictated by the sender or when it is communicated to the addressee. It is submitted that such an acceptance should, in accordance with the above reasoning, take effect as soon as it is dictated; for if it later goes astray, the acceptor is unlikely to have any means of knowing this fact until it is too late to make a further communication. Fax messages seem to occupy an intermediate position between postal and instantaneous communications. The sender will know at once if his message has not been received at all, or if it has been received only in part, and in such situations the mere sending of the message should not amount to an effective acceptance. It is also possible for the entire message to have been received, but in such a form as to be wholly or partly illegible. Since the sender is unlikely to know, or to have means of knowing, this at once, it is suggested that an acceptance sent by fax might well be effective in such circumstances. The same reasoning should apply to messages sent by electronic means, *e.g.* by e-mail or in the course of website trading: here again the effects of unsuccessful attempts to communicate should depend on whether the sender of the message knows (or has the means of knowing) at once of any failure in communication. (citations omitted)

See also HALL, *supra* note 3, at 35–36.

60. [1989] 2 HKC at 506.

b. Counter-offer

A "counter-offer" usually operates as a rejection of the original offer and the making of a new offer by the offeree. Withdrawal of the counter-offer does not revive the original offer such as to enable the offeree to accept the same. However, a request for information by the offeree is not a counter-offer. As the court explained in *Stevenson, Jaques & Co v McLean* (1880) 5 QB 346, the solicitation of information is "a mere inquiry which should have been answered and not treated as a rejection of the offer."[61] In this case, the defendant offered to sell 3,000 tonnes of iron at forty shillings per tonne. The offer remained valid until Monday. The plaintiff sent its first telegram early Monday requesting, "Please wire whether you would accept forty [shillings per tonne] for delivery over two months, or if not what is the longest limit you would accept." Receiving no reply, the plaintiff later that day sent a second telegram indicating acceptance at forty shillings cash. In the interim, the defendant had sold the goods elsewhere without informing the plaintiff until after the plaintiff had sent the second telegram. The court found that a contract existed between the plaintiff and the defendant.

c. Invitation to Treat

An "invitation to treat" is a request for an offer, *i.e.*, an invitation to make an offer.[62] An invitation to treat is a negotiating statement which does not show an offeror's intent to give an offeree the power to create a contract. For example, customers are invited to offer to buy, and traders keep to themselves the power to choose whether to accept that offer. Merely fixing a

61. (1880) 5 QB at 350.
62. One source explains:

> An invitation to treat is a mere declaration of willingness to enter into negotiations; it is not an offer, and cannot be accepted so as to form a binding contract.
>
> In practice, the formation of a contract is frequently preceded by preliminary negotiations. Some of the exchanges in these negotiations contain no declaration at all, as where one party simply asks for information. Others may amount to invitations to the recipient to make an offer, these being invitations to treat.
>
> Thus, a distinction must be drawn between those declarations which amount to offers, and those which only amount to invitations to treat. Sometimes, a particular type of declaration is, at least prima facie, put into one or the other category by statute or by common law; but in all other cases it is a question of intention. An express statement that a declaration is not an offer is effective to prevent it being an offer …

7(2) HALSBURY'S, *supra* note 1, at para. 115.028 (citations omitted).

price does not imply an offer to buy or to sell. Consequently, the display of goods by a merchant, price-lists, circulars and advertisements for goods and services are normally construed as invitations to treat.[63]

The *BLIS Glossary*, *supra* note 2, translates "common law" as 普通法 and "rules of the common law" as 普通法規則.

Similarly, CHITTY, *supra* note 2, at paras. 2–008 to 2–010 states:

> A communication by which a party is invited to make an offer is commonly called an invitation to treat. It is distinguishable from an offer primarily on the ground that it is not made with the intention that it is to become binding as soon as the person to whom it is addressed simply communicates his assent to its terms. A statement is clearly not an offer if it expressly provides that the person who makes it is *not* to be bound merely by the other party's notification of assent but only when he himself has signed the document in which the statement is contained.
>
> Apart from cases of the kind just described, the wording of a statement does not conclusively determine the distinction between an offer and an invitation to treat. Thus a statement may be an invitation to treat although it contains the word "offer"; while a statement may *be* an offer although it is expressed as an "acceptance," or although it requests the person to whom it is addressed to make an "offer." …
>
> … the distinction between offer and invitation to treat is often hard to draw, as it depends … on the intention of the person making the statement in question. (emphasis in original)

63. In the case of *Fisher v Bell* [1961] 1 QB 394 the court held that the display of a knife in the shop's window was an invitation to treat. If the display were an offer, the shopkeeper would have been in violation of the *Restriction of Offensive Weapons Act*.

A similar situation arose in the earlier case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 2 WLR 427. The facts of this case involved customers selecting goods from the shelves and going to the cashier to make payment. By the check-out was a registered pharmacist who could prevent the removal of certain drugs from the store. Boots Cash Chemists was charged under an English statute requiring a registered pharmacist to "supervise sale". The issue in this case was whether the display of goods on the shelves of this self-service store was an offer or an invitation to treat. If the display were an offer, then a customer's act of removing the goods from the shelf and placing them in the shopping basket would constitute acceptance. The sale would, therefore, take place without the requisite supervision so an offence would be committed under the statute. The court held that the display amounted only to an invitation to treat. The court reasoned that if the display of goods were an offer, a customer, upon placing the goods in the basket, could not then have a change of mind and substitute the goods for other goods without being liable to pay for the goods originally chosen. This would not be viable commercially for self-service stores as customers would be too afraid to patronize them. Moreover, in theory, the shopkeeper should be able to refuse to sell the goods when presented to the cashier since shops were places to bargain over prices. However, this view was overruled in the case of *Debenhams Retail Plc v Commissioners of Customs and Excise* [2005] EWCA Civ 892. FISHER & GREENWOOD, *supra* note 17, at 46–49. *See* HALL, *supra* note 3, at 53–55 for discussion of two similar cases in Hong Kong: *HKSAR v Wan Hon Sik* [2001] 3 HKLRD 283; and, *HKSAR v Yu Wai Chuen* [2002] 2 HKLRD 347. Further examples may be found in 7(2) HALSBURY'S, *supra* note 1, at para. 115.029; HO, *supra* note 13, at 7; FURMSTON, *supra* note 45, at 39–47; CHITTY, *supra* note 2, at paras. 2–011 to 2–024.

The distinction between an offer and an invitation to treat lies in the intention or absence of intention to be bound as soon as the addressee accepts the terms stated. The distinction is that the offeror in making an offer shows an intention to be bound. An individual issuing an invitation to treat is making an invitation to the addressee to negotiate rather than an invitation to communicate an acceptance.[64]

At times it may be difficult to distinguish an offer from an invitation to treat. In *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 a manufacturer published an advertisement during an influenza epidemic, proclaiming the virtues of its product for curing ailments. The manufacturer further stated that anyone who bought one of its smoke balls, used it as directed, and then caught influenza, would be paid £100. Mrs. Carlill bought and used a smoke ball, but nevertheless caught influenza. She claimed £100 from the company. The defendant argued that the advertisement should not be considered to be an offer which would create a contract upon acceptance. The court, however, considered that since the advertisement stated the company had deposited £1,000 in its bank in order to show its sincerity, reasonable people could consider this as indicating the promise to pay £100 was serious, and that this act created a binding obligation.

Thus, whether an advertisement constitutes an offer will depend upon its wording and its natural meaning. If an advertisement is very specific and clear, it may amount to an offer, which may be accepted without qualification. An offer in this manner may be accepted by anyone, unless there is some restricted class of persons to whom the advertisement is directed. Even then, any member of that class may accept.

However, one source notes:

> Some recent developments have had the effect of altering traditional rules, as for example as has occurred in the case of a tender. Generally, the tender process is treated as three distinct parts: the invitation to treat by the party inviting tenders, the offers from those interested and the acceptance by the invitor of one of those offers. Acceptance results in a binding contract on the terms set out in the invitation to treat. In several cases, various courts have re-categorised the invitation to treat as an offer. This means there are two possible contracts. The first is the traditional contract which arises under the tender. The second is a collateral contract under which the invitor acts as an offeror because he expressly or by implication agreed to consider all offers. Failure to do

64. Ho, *supra* note 13, at 7.

> so gives rise to action for damages for loss of chance. As a corollary, the party submitting the tender may not be able to withdraw.[65]

Similarly, in auctions, the auctioneer invites bids. Each potential buyer makes an offer by making a bid, which the auctioneer must accept when the auctioneer's hammer falls. A buyer may withdraw the offer at any time before the hammer falls.[66] If the bid is withdrawn, it does not revive an earlier bid by another buyer. Thus, the bidding must restart. At an auction, the auctioneer's invitation for bids is impliedly made "with reserve" allowing the auctioneer to remove the item for auction if a sufficient price is not bid. If, however, an auction is expressly made "without reserve", the auctioneer cannot withdraw the item unless no bid was made.[67]

A recent case demonstrates these principles as well as offering a preview of the principles reviewed in the following sections of this chapter and the Property chapter. *Hoie Sook Fong v Ismail Halima* [2009] 1 HKC 326 involved the sale of land by an auctioneer whose authority to sell the property had been revoked for advertising the property below the owner's stated minimum price, also known as the "reserve" price. The plaintiff was the successful bidder of that flat being sold by the auctioneer on behalf of the owner. The plaintiff's successful bid was HK$1.88 million while the owner had set a reserve price of HK$1.98 million. The plaintiff sought to

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65. 16 Halsbury's Laws of Hong Kong para. 230.147 (2010) (citing *Lobley Co Ltd v Tsang Yuk Kiu* [1997] 2 HKC 442; *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195; *City Polytechnic of Hong Kong v Blue Cross (Asia-Pacific) Insurance Ltd* [1994] 3 HKC 423; *City University of Hong Kong v Blue Cross (Asia-Pacific) Insurance Ltd* [2001] 1 HKC 463).

66. *Payne v Cave* (1789) 3 TR 148. In Hong Kong, auctions are regulated by two ordinances: *Sale of Goods Ordinance* (Cap 26) and *Sale of Land by Auction Ordinance* (Cap 27). Section 60 of the *Sale of Goods Ordinance* provides:

> In the case of a sale by auction—
> (a) where goods are put up for sale by auction in lots, each lot is prima facie deemed to be the subject of a separate contract of sale;
> (b) a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid;
> (c) where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer;
> (d) a sale by auction may be notified to be subject to a reserve or upset price, and a right to bid may also be reserved expressly [by] … seller.

67. For further discussion, *see*, *e.g.*, Hall, *supra* note 3, at 63–67.

enforce the purported purchase and sale agreement signed with the auctioneer at the conclusion of the bidding.

In deciding this case, the court relied upon these legal principles:

1. An agent, including an auctioneer, who sells property without or in excess of authority will be liable to the purchaser in damages for breach of the implied warranty that he possesses the authority exercised.
2. It is trite that if the authority of the auctioneer to sell a property has in fact been revoked by the vendor before the auction, the auctioneer can give the highest bidder no right to the property, even though the bidder is unaware of the revocation.
3. Where a reserve price has been fixed by the seller and the sale is subject to a reserve, the auctioneer has no authority to sell below that reserve price. If the auctioneer does so, no contract is concluded as all bids amount to conditional offers and any acceptance is similarly conditional on the reserve price being reached or exceeded.[68]

The court held that the owner revoked the auctioneer's authority to sell the property; therefore, the auctioneer did not have the capacity to enter into a purchase and sale contract with the plaintiff on the owner's behalf. The judge also found the auctioneer liable to the plaintiff in damages for the breach of warranty of authority to sell the flat. Finally, this case demonstrates that a dispute can involve overlapping fields of law, in this instance: contract, agency and conveyancing.

C. Consideration

The case of *Currie v Misa* (1875) LR 10 Ex 153 defined "consideration" as some right, interest, profit or benefit accruing to one party; or, some forbearance, detriment, loss or responsibility given, incurred or undertaken by the opposite party.[69] In other words, consideration may be a party's promise to perform some act or to refrain from performing some act. The case of *Dunlop Pneumatic Tyre Co v Selfridge & Co* [1915] AC 847 also defined "consideration" as:

68. [2009] 1 HKC at 330 (citations omitted).
69. (1875) LR 10 Ex at 162.
For examples of benefits to the promisor or detriments to the promisee, *see* 7(2) HALSBURY'S, *supra* note 1, at paras. 115.112–115.113 respectively.
The *BLIS Glossary*, *supra* note 2, translates "consideration" as 代價.

Chapter Three
Employment

This chapter considers several matters relating to employment law.[1] The first concerns the classification of a worker as an employee, for this classification governs the responsibilities and liabilities of the parties between themselves and others. The second is a review of relevant ordinances and their subsidiary regulations controlling the employer-employee relationship. Finally, this chapter proffers some general comments concerning employment contracts.

I. STATUS OF A WORKER

The status of a worker as an employee or as an independent contractor is important as this distinction determines an employer's obligations and responsibilities to those retained by the employer, and to those affected by the employee's acts. The parties in an employer-employee relationship are also affected by the application of certain ordinances,[2] the jurisdiction of

1. This work will not consider agency law, that is, the law regulating the relationship between a principal and its agent who may act on behalf of and bind the principal. For a review of agency law in Hong Kong, *see*, *e.g.*, 1(2) Halsbury's Laws of Hong Kong paras. 15.001–15.108 (2008); Betty Ho, Hong Kong Agency Law (1991). For an analysis of the impact of vicarious liability upon an agency relationship, *see*, *e.g.*, Rick Glofcheski, Tort Law in Hong Kong 439–442 (2nd ed. 2007) [hereinafter Glofcheski–Tort].
   The Hong Kong government's Bilingual Laws Information System's *The English-Chinese Glossary of Legal Terms* [hereinafter *BLIS Glossary*] translates "law of agency" as 代理法; and, "agents" as 代理人. *See* the *BLIS Glossary* website at: *http://www.legislation.gov.hk/eng/glossary/homeglos.htm* (last visited 26 Feb. 2011).
2. For example, the *Employment Ordinance* (Cap 57); the *Employees' Compensation Ordinance* (Cap 282); the *Companies Ordinance* (Cap 32); and, the *Bankruptcy Ordinance* (Cap 6) only apply to instances where an employer-employee relationship exists.

the employment regulatory agencies,[3] the higher duty of care which exists towards employees under the law of tort,[4] the existence of vicarious liability,[5] the terms of the employment contract,[6] the taxation system,[7] the operation of the Mandatory Provident Fund Schemes,[8] and, an employer's insolvency.[9]

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3. For instance, the Labour Tribunal can only hear claims relating to a contract of employment. The *Labour Tribunal Ordinance* (Cap 25) section 7 provides that the Tribunal has exclusive jurisdiction to hear the claims specified in the Schedule, which relates to employment contracts only.
   Section 7 provides:
   > (1) The tribunal shall have jurisdiction to inquire into, hear and determine the claims specified in the Schedule.
   > (2) Save as is provided in this Ordinance, no claim within the jurisdiction of the tribunal shall be actionable in any court in Hong Kong.
   > (3) Subsection (2) shall not operate to prevent the transfer of any claim to the tribunal in accordance with any rules made under section 73B of the District Court Ordinance (Cap 336).
   > (4) Subsection (2) shall not operate to prevent the transfer of any claim to the tribunal in accordance with any rules made under section 73C of the District Court Ordinance (Cap 336).
   > (5) Subsection (2) shall not operate to prevent the transfer of any claim to the tribunal in accordance with any rules made under section 73D of the District Court Ordinance (Cap 336).
   > (6) Subsection (2) shall not operate to prevent the transfer of any claim to the tribunal in accordance with any rules made under section 73E of the District Court Ordinance (Cap 336).
4. Common law requires an employer to take reasonable care for the employee's safety, whereas these duties are not normally applicable to independent contractors.
   The *BLIS Glossary*, *supra* note 1, translates "common law" as 普通法; "employee" as 僱員; and, "independent contractor" as 獨立承辦商.
5. Employers are vicariously liable for the tortious acts of their employees if these acts occur while the employees are serving in the course of their employment.
   The *BLIS Glossary*, *supra* note 1, translates "tortious act" as 侵權作為; "tort" as 侵權; and, "vicariously" as 因他人作為而.
6. Implied terms of an employment contract impose obligations upon employers and upon employees which obligations may not be owed to or by an independent contractor. *See also* the obligations imposed by the *Employment Ordinance*, *supra* note 2.
7. Different assessments and different reporting requirements are imposed upon the parties, *e.g.*, an employee is liable to pay salaries tax whereas an independent contractor is liable to pay profits tax. For details, *see* Part 3 ("Salaries Tax") and Part 4 ("Profits Tax") of the *Inland Revenue Ordinance* (Cap 112).
8. Under an employer-employee relationship, both the employer and the employee must contribute to the employee's Mandatory Provident Fund Scheme. An independent contractor is a self-employed person, and is required to contribute to the Mandatory Provident Fund Scheme. For details, *see* the *Mandatory Provident Fund Schemes Ordinance* (Cap 485).
   For example, the Hong Kong government's web site contains the following definitions:
   > **Relevant Employee:** A relevant employee means an employee aged 18 to aged below 65. A relevant employee may be a regular employee or a casual employee.

The classification of a worker as either an employee or as an independent contractor is therefore an important matter for the parties involved. Distinguishing between an employee and an independent contractor can be a difficult task.[10] This section sets out the differentiation between the

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> **Regular Employee:** A regular employee refers to any full-time and part-time worker who is aged 18 to aged below 65 employed under an employment contract for a continuous period of not less than 60 days.
> **Casual Employee:** A casual employee is an employee aged 18 to aged below 65 working in the construction or catering industries under an employment contract of less than 60 days. Industry Schemes of the MPF System are established specially for employees in the two industries.
> **Employer:** An employer means a person who has entered into a contract of employment to employ another person as his or her employee.
> **Self-Employed Person (SEP):** A self-employed person is a person aged 18 to aged below 65 whose income is derived from the production of goods or services in Hong Kong, or from trading in goods or services in or from Hong Kong. To put it simply, a self-employed person is one that works for himself or herself and is not employed as an employee. Essentially, if you are a sole proprietor, or partner of a partnership type business, you will be regarded as a self-employed person covered by the MPF System.

http://www.mpfa.org.hk/english/abt_mpfs/abt_mpfs_fms/abt_mpfs_fms_def/abt_mpfs_fms_def.html (last visited 6 Jan. 2011).

9. When an employer becomes insolvent, the unpaid wages and salary of its employees stand in priority to other debts, that is, the employees will be paid out of the employer's assets before other creditors. The contract fees for independent contractors, if unsecured, will have the lowest priority in cases of insolvency. *See*, *e.g.*, the *Bankruptcy Ordinance*, *supra* note 2, at section 38.

10. For example, in the case of *Chan Sik Pan v Wylam's Services Ltd* [2000] 1 HKLRD 687, 689 the court stated that this case "would be a mundane personal injury claim but for issues relating to employment of the plaintiff at the time of the accident." The judge continued:

> … Windsor House in Causeway Bay, was being re-fitted … The general contractor had a main sub-contractor for electrical and mechanical work. This main sub-contractor further sub-contracted the fire installation work to the first defendant. According to the first defendant, it appointed one Joe Wong trading in the name of United Company as its agent for such work. Joe Wong on behalf of the first defendant "sub-delegated" part of the work to the second defendant. The second defendant says that he sub-sub-contracted work to the third defendant and so he (the second defendant) had no relationship with the workers like the plaintiff. The third defendant says he was at the material time not a sub-sub-contractor. He (the third defendant) merely supervised the workers like the plaintiff and the work at site.
>
> The plaintiff … had no idea as to all the contractual relationships between the defendants and other superior contractors. According to him, an old friend telephoned him about work available at the site. He went and reported to the third defendant. He regarded the third defendant as the foreman. It was the third defendant who handed him wages in cash twice a month on pay day. The plaintiff had no dealing or knowledge of the other defendants until after the accident. It is undisputed fact that after the accident the first defendant filed a statutory industrial accident report (Form II) with the Labour Department.

two classifications and the guidelines for determining the actual status of a worker.[11]

A. Employee or Independent Contractor

Historically, an employer and an employee were considered to have a master-servant relationship, but today this affiliation has become commonly

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> This Form II is the form that an employer must file on every industrial accident that has occurred to a worker under his employ. After filing the report, months later, the first defendant twice reached a written agreement with the plaintiff on the amount of allowance payable under the Employees' Compensation Ordinance (Cap 282). And the allowance was paid to the plaintiff as agreed.
>
> …
>
> To complicate matters further, neither the second defendant nor the third defendant is covered by any employee compensation insurance. Only the first defendant took out compulsory employee compensation insurance; but because there is evidence that the first defendant sub-contracted work to other parties, the insurers of the first defendant deny that the plaintiff is covered by the insurance of the first defendant. …

Id. at 690–691.

For a practical guide to employment agreements, *see*, *e.g.*, DRAFTING EMPLOYMENT CONTRACTS (MICHAEL PATTERSON, ed., 1993).

11. As noted earlier in this work, frequently the fields of law, in this instance contract, tort and employment, overlap and each should not be viewed in isolation. This section is a prime example in that while discussing employment relationships in order to determine tort liability, contract matters arise:

> A point that should not be overlooked in the contract of service/independent contract determination is the intention of the parties. A contract for work, whether as servant or independent contractor, is a contract all the same. The intention of the parties in forming their legal relationship will be given due and normally considerable weight. Where the parties have entered into a written contract, the determination is, in the first instance at least, one of construction of the contract. However … it is the substance of the agreement that will be determinative, so much so that even an apparently agreed designation as independent contractor will, in appropriate circumstances, be set aside by the court …

GLOFCHESKI–TORT, *supra* note 1, at 413.

Likewise, 10(2) HALSBURY'S LAWS OF HONG KONG para. 145.001 (2009) [hereinafter 10(2) HALSBURY'S] notes that the:

> legal basis of employment remains the contractual relationship between the employer and the employee. The contract of employment is important in itself, in that it may give rise to a common law or equitable action for its enforcement or for damages for its breach but it is equally important in areas of statutory employment law because the expressions 'employee', 'employer' and 'contract of employment' are defined by reference to the contractual relationship between the parties as recognized at common law. (citations omitted)

See 10(2) HALSBURY'S, *supra*, at paras. 145.019–145.026 for a review of the formalities of an employment contract and paras. 145.027–145.033 concerning the terms of employment.

known as an employer-employee relationship. In this relationship, the employee undertakes to provide labour or services in exchange for regular remuneration by the employer. This relationship is created by a contract *of* service through which the employer retains the worker. Employees dedicate themselves exclusively to their employer's business for the duration of the employment contract.[12]

An independent contractor is retained under a contract *for* services, *e.g.*, for the provision of a particular service. The independent contractor is employed from outside the employer's organization for the purpose of producing a specific result, for which the independent contractor is generally paid a lump sum fee. The independent contractor's performance of the assigned task need not be supervised by the employer. Generally, there is no obligation upon the independent contractor to provide services exclusively to the employer.[13]

B. Criteria for Determining Status

Several criteria are used to distinguish between an employee and an independent contractor. Nevertheless, despite these indicators, ascertaining the parties' relationship can be complicated. At times, it is difficult to draw a distinction between an employee and an independent contractor. For example, chauffeurs, ships' captains, or staff reporters on a newspaper are generally considered to be employees. Yet taxi drivers, ship's pilots, or newspaper columnists who contribute regular articles may be independent contractors.[14]

Several court cases demonstrate the difficulty in determining whether a worker is an employee or is an independent contractor. The first of these cases is *Mersey Docks & Harbour Board v Coggins & Griffith* [1947] AC 1. The court used the control test to ascertain the employment relationship between the parties. According to this test, there is an employer-employee relationship if an employer exercises control over what a worker can do and how that work is done. An independent contractor relationship exists where an employer assigns a task to a person but does not determine the manner in which the work is executed. The control test is whether the

12. *See* Hong Kong Employment Law Manual (Michael Downey, gen. ed., 2010) [hereinafter Downey] §§A.7–A.12 ("Who Is An Employee?") and §§A.13–A.15 ("Who Is An Employer?"). *See also* Employment Law and Practice in Hong Kong para. 2.005 (Rick Glofcheski, *et al.* eds., 2010) [hereinafter Glofcheski–Employment].
13. *See*, *e.g.*, Glofcheski–Employment, *supra* note 12, at paras. 2.006, 2.010.
14. *Stevenson, Jordan & Harrison v McDonald & Evans* [1952] 1 TLR 101, 111.

employer has the right of ultimate control in instances where the nature of a person's work is too technical or skilful for an employer to exercise day-to-day control.[15]

The second case is *Stevenson, Jordan & Harrison v McDonald & Evans* [1952] 1 TLR 101, where the court used the integration test, also known as the organization test, to determine the parties' relationship.

> His Lordship pointed out that under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.[16]

Thus, under a contract of service, the person is employed as part of the business organization; under a contract for services, the worker is not integrated into the business but is only supplementary thereto.

In the third case, *Wong Po-Sin v New Universal Paper Co Ltd* [1973] HKLR 59, 72–73, the court provided factors to be considered in ascertaining the type of employment relationship between the parties:

- Selection: if an employer has the power or the right to select the individual to work for the employer, whether the selection is made personally by the employer or through the hiring party's agent, the relationship is likely to be that of a master-servant.

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15. For further discussion of the control test, *see*, *e.g.*, GLOFCHESKI–EMPLOYMENT, *supra* note 12, at para. 2.015.

16. KRISHNAN ARJUNAN & ABDUL MAJID BIN NABI BAKSH, BUSINESS LAW IN HONG KONG 561–562 (2nd ed. 2009) [hereinafter ARJUNAN & NABI BAKSH].
As noted by one authority:

> Subsequently, the "organisation" approach came to be preferred by the courts, partly as a response to changes in management and organisational structures. Many workers in more advanced work settings exercised a high degree of independence and judgment in their work, but nonetheless did not enjoy the kind of managerial autonomy and self-determination associated with true independent contractors. Under the organisation approach, a contract of service would be found if the work was done as "part and parcel of the employer's organisation" subject perhaps to control of the employer as to when and where, although not necessarily as to how, the work would be done. … This approach, although a helpful addendum to the control approach, ran the risk of including too many, for example, subcontractors repeatedly employed on the employer's building sites.

GLOFCHESKI–EMPLOYMENT, *supra* note 12, at para. 2.016 (citations omitted). *See also* GLOFCHESKI–TORT, *supra* note 1, at 409.

- Power of dismissal: if an employer has the power to dismiss a person, this power is more likely to indicate an employer-employee relationship.
- Remuneration: if a worker is paid periodic wages or a salary which is calculated by reference to piece work or time worked, the relationship is likely to be that of an employer-employee. If a worker is paid a commission or a lump sum, that person is more likely to be considered to be an independent contractor.
- Performance: if at least part of the work is performed by the individual alone or independently, *i.e.*, if a worker could delegate the entire performance of work to another person, this would indicate the existence of a contract for services.
- Exclusive services: an employer may require the exclusive services of its employees. A person is thus likely to be an employee if while at work there is only one employer. If an individual simultaneously works for several employers, that person is likely to be an independent contractor.
- Place of work: if an individual's services are to be performed at the employer's premises rather than at the worker's premises, the individual is more likely to be an employee.
- Where a person's services cannot be considered to be conducted as part of an independent business would suggest the status of an employee rather than an independent contractor.
- Supply of equipment: the obligation to provide tools or equipment for a worker indicates an employer-employee relationship whereas an independent contractor would provide its own tools.
- Hours of work: if the employer determines the working hours, the worker is likely to be an employee. If the individual determines the working hours, the worker is likely to be an independent contractor.
- Type of work: where the worker is engaged generally without reference to any particular task or outcome, the relationship is more likely to be that of an employer-employee.[17]

17. To this list, one might add another factor: internal rules such as a personnel manual. If the worker is subjected to the internal rules of the business organization, then that person is likely to be an employee.
For another, but similar, list of factors or guidelines, *see* GLOFCHESKI–EMPLOYMENT, *supra* note 12, at paras. 2.021–2.041; 10(2) HALSBURY'S, *supra* note 11, at para. 145.003; DMITRI M.A. HUBBARD, HONG KONG EMPLOYMENT LAW 32 (2009) [hereinafter HUBBARD].

The classification which the parties give to their relationship may also be a factor which courts may consider in establishing the employment relationship. The parties' contract might contain terms which would indicate the intention to create either a contract of service or a contract for services. However, the classification is not conclusive unless the labelling indicates the parties' genuine intention at the time of making the contract.

> Although a term in a written contract will carry considerable weight in the court's determination of the plaintiff's status, it will not be conclusive. The court will look to the substance of the arrangement, and have close regard to the circumstances of the making of the contract. The court will not enforce a sham contract, particularly where the sole purpose appears to be the employer's avoidance of liabilities.[18]

Whether part-time interviewers of a company were employees of that company was the issue in the case of *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173. The judge introduced the economic reality test: whether the person engaged to perform services will be performing these services as a person in business on his/her own account. The Hong Kong Court of Appeal in *Wong Man-luen v Hong Kong Wah Tung Stevedore Co* [1971] HKLR 390 followed the decision in *Market Investigations*. Control of the individual, although a factor, was not decisive. The fundamental test was whether a person was performing the services as a "person in business on his own account" and thus under a contract for services. The status of being in business on one's own account implies the possibility of loss as well as profit in the enterprise.

These criteria do not provide definitive determinations; the criteria serve merely as guidelines. A court needs to consider all the relevant factors,

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18. GLOFCHESKI–TORT, *supra* note 1, at 349. *See*, *e.g.*, GLOFCHESKI–EMPLOYMENT, *supra* note 12, at paras. 2.004, 2.039–2.041.
In the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 512, the court stated that whether:

> the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract … it is irrelevant that the parties have declared it to be something else … If it were doubtful what rights and duties the parties wished to provide for, a declaration of this kind might help in resolving the doubt and fixing them in the sense required to give effect to that intention.

See also the Hong Kong case *Young and Woods Ltd v West* [1980] IRLR 201. However, note that the matter remains unsettled as two Privy Council cases each came to a different conclusion. *See* the cases of *Lee Ting Sang v Chung Chi-keung* [1990] 2 AC 374; *Cheng Yuen v Royal Hong Kong Golf Club* [1997] 2 HKC 426. *See also* the case of *Poon Chau Nam v Yim Siu Cheung* [2007] 1 HKLRD 951; ARJUNAN & NABI BAKSH, *supra* note 16, at 566–572.

including the totality of the facts of each particular case.[19] Courts emphasize that there is no comprehensive list of factors and that this list excludes other considerations or indicia.[20] Ascertaining a worker's employment status cannot be made by compiling a checklist or by tallying the factors falling in one category or the other.[21]

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19. As noted by one authority:

> Today, the courts are inclined toward a more flexible, pragmatic approach in characterising the relationship as one of contract of service or independent contract. The court will look into the substance of the relationship, taking into consideration the peculiarities of the work and the realities of the workplace, even to the point where apparent "agreements" between worker and employer, purporting to designate the relationship as one of independent contract, will be disregarded. Control is probably in most cases still the single most important consideration, but the court will look at all the circumstances of the relationship between defendant and worker in deciding this issue. … Particular attention will be paid to economic considerations, such as the worker's opportunity to control the rate of income or profit by virtue of his/her own efforts. The relevant question becomes: Is the worker a businessperson? Is the worker in business on his/her own account?

GLOFCHESKI–TORT, *supra* note 1, at 409–410.
GLOFCHESKI–EMPLOYMENT, *supra* note 12, at para. 2.027 provides clarification of "being in business on one's own account":

> Financial risk and the prospect of profit is an often misunderstood head. It does not normally include a piece-worker's opportunity to increase his income by working harder. Nor should it be understood as meaning that a worker with management responsibilities is self-employed. It means expending one's own energies and putting one's own financial resources as risk in the business enterprise, with the possibility of financially benefitting of suffering from one's own management decisions. (citations omitted)

In determining whether a worker is an employee or an independent contractor, another authority opines:

> There is no single test for determining whether a person is an employee. The test which used to be considered adequate, that is to say the control test, can no longer be considered sufficient, especially in the case of the employment of highly skilled individuals. The control test is now only one of the particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but is likewise only one of the relevant factors, for the modern approach is to examine all the features of their relationship against the background of the indicia of employment with a view to deciding whether, as a matter of overall impression, the relationship was one of employment.

10(2) HALSBURY'S, *supra* note 11, at para. 145.003 (citations omitted).

20. GLOFCHESKI–EMPLOYMENT, *supra* note 12, at para. 2.017.
21. *Id.*

> it is impossible to *define* a contract of service in the sense of stating a number of conditions which are both necessary to, and sufficient for, the existence of such a contract.[22]

After the decision in *Wong Sai-yee v Kong Kwan* [1988] 1 HKLR 367, the Court of Appeal seems to emphasize the following criteria as the more important of the many tests for ascertaining contracts of service:

- the power of control, as distinct from the actual exercise in fact of control;
- the "part and parcel of the organization" test;
- the financial risk, if any, of the worker; and,
- as a corollary of the financial risk aspect, any indicia as to whether the worker was carrying on business for his/her own account.[23]

Courts presently adopt a pragmatic test of considering all features of the particular relationship in determining the parties' employment relationship. Some Hong Kong court cases follow the approach in *Wong Po-sin v New Universal Paper* of examining all the indicia as a whole rather than applying any particular test.[24] However, other court decisions, such as *Lee Ting Sang v Chung Chi-keung* [1990] 2 AC 374, PC and *Chan Shui Man v Tsang Hing Shan* [1991] 2 HKC 243, CA, suggest that the economic reality test used in the *Market Investigations* case represents the correct current approach. The economic reality test contributes to the task of distinguishing between employees with contracts of service and independent contractors with contracts for services. In the circumstances of individuals carrying on a profession or vocation, the courts will review the extent to which an individual relies upon a particular paymaster for the financial exploitation of the worker's talents.[25] Since the importance to be given to the various factors depends on the facts of each case, the approach is therefore flexible, but vague.

The case of *Cheng Yuen v Royal Hong Kong Golf Club* [1997] 2 HKC 426 is an example illustrating the difficulty in classifying a worker's status. The golf club assigned a number, a locker and a uniform to the plaintiff caddie. He could work when he wished. However, the plaintiff caddie went to the

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22. P.S. Atiyah, Vicarious Liability in the Law of Torts 38 (1967) [hereinafter Atiyah] (approved in *Construction Industry Training Board v Labour Force Ltd* [1970] 3 All ER 220, 226).
23. G.R. McCormick, *Employees' Compensation: Employee or Independent Contractor*, 21 HKLJ 109, 111 (1991).
24. *See* the cases of *Poon Chau Nam v Yim Siu Cheung*, *supra* note 18; *Li Chung-i v Li Man-yuen* [1991] 2 HKLR 138; *Wong Sai-yee v Kong Kwan* [1988] 1 HKLR 367.
25. *Hall v Lorimer* [1994] 1 All ER 250.

club daily where he offered his services to golfers. The golf club did not guarantee that the caddie would receive any work, although it was agreed that he would average two rounds a day. At the end of each day he was paid in cash by the club. The club then debited the member concerned who repaid the club.

The Labour Tribunal determined that the golf club exercised control over the caddie by providing him a uniform, giving instructions as to his duties and the disciplinary power to reduce a caddie in grade or to dismiss him. The club benefited indirectly from the payment and collection of fees paid to the caddie. These factors outweighed the inference to be drawn from the fact that he did not receive benefits normally provided by an employer to an employee, *e.g.*, insurance coverage, holidays, sick leave, and, pension scheme. The Labour Tribunal concluded that the caddie was an employee of the golf club.

Ultimately, the Privy Council determined the arrangement between the parties to be a licence by the club to allow the caddie to offer his services on terms dictated by the administrative convenience of the club and its members. The controls were merely the club's administrative measures. There was no obligation between the parties such that the club would employ the caddie and that he would work for the club in return for a wage. On the contrary, the individual golfers were responsible for the caddie's fees; although as a convenience the club collected the fees and paid them to the caddie. It was the golfers who instructed the caddie as to his tasks during the round of golf. Therefore, the Privy Council held the caddie to be an independent contractor rather than a club employee. Lord Hoffmann dissented from the majority opinion, stating that the caddie, though not under continuous employment, ought to be considered a casual employee rather than an independent contractor as the caddie could claim payment from the golf club even if the golfer did not pay the club.

In the case of *Wong Ki v Shun Tak Electrical Mechanical and Engineering (Hong Kong) Co Ltd* [2009] HKEC 595, the court, in deciding whether the injured plaintiff was an independent contractor or an employee, stated:

> 7. The parties in this case, as laymen, have expressed confusion and bewilderment over the question of when a worker is, in law, an employee, and when he is an independent contractor. They may get some comfort from the fact that often, lawyers are just as confused, and that the question cannot be easily answered by the courts.
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> 8. The modern approach to the question whether a person is an employee, as adopted in the case of *Poon Chau Nam* [v. *Yim Siu Cheung* (2007) 10 HKCFAR 156] itself, is to examine all the

> features of their relationship against the background of the indicia of employment with a view to deciding whether, as a matter of overall impression, the relationship was one of employment, bearing in mind the purpose for which the question is asked.
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> …
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> 42. The authorities are clear that it is for the court and not the parties to evaluate the facts and determine the legal relationship between them, such that the parties' own description of their relationship is not determinative (Chan Kwok Kin v. Kwok Kwan Hing [1991] HKLR 631).

The case of *Leung Suk Fong Peggy v Prudential Assurance Co Ltd* [2011] HKEC 1297 involved the issue of whether the defendant insurer's engagement of the plaintiff amounted to an employer/employee relationship. The court determined the plaintiff's status to be an independent contractor upon an analysis of the following criteria:

- extent of control;
- prospect of profit return and risk of loss;
- integral part of the organization;
- provision of equipment;
- incidence of taxation and insurance;
- the parties' view of the relationship; and,
- the traditional structure of the particular trade.

Distinguishing between an employee and an independent contractor is also important as an employer has liability for certain acts committed by its employees. This accountability rests upon one of two bases. The first basis upon which an employer might be found liable is for the breach of a non-delegable duty owed to an employee. This personal duty imposes upon an employer the obligation to take reasonable care for the employee's safety.[26] An employer ought to undertake precautions which a reasonable employer would assume in order to ensure that the employee is not exposed to unreasonable risks. The second basis of employer liability might arise under the head of vicarious responsibility to another party for the employee's negligence. The two following sections review these liabilities in the above order.

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26. *See*, *e.g.*, 10(2) HALSBURY'S, *supra* note 11, at paras. 145.051–145.053 (employers' obligations for employees' safety), 145.589–145.595 (compensation for injuries and employers' bankruptcy) and citations contained in those two sections. Vicarious liability and non-delegable duties are also discussed in the Tort chapter, sections V.A and V.C respectively. Vicarious liability is discussed in this chapter's section II.C. Non-delegable duties are discussed in this chapter's section II.D.

Chapter Four
Property

This chapter is concerned with property, its definition and the general principles of property law. Both personal and real property will be examined. The chapter consists of two major sections: The first section focuses both on personal and on real property. This discussion regarding real property includes a review of freehold and leasehold estates, and co-ownership. Subsequently, the second section focuses on land-related issues, such as fixtures, adverse possession, servitudes and mortgages. These issues are followed by a detailed reference to conveyancing: the process of creation and transfer of interests in real property. This chapter concludes with an overview of the new land registration system under development in Hong Kong.

In preparing this work, it is assumed that the reader has some knowledge of contract law as most transactions concerning property involve legally binding agreements.

I. PROPERTY GENERALLY

This section is the introduction to property in general. Here the matters relating to property are reviewed: definition of property; ownership of property; acquisition and disposition of property; and, some general rules about property. Later, the detailed aspects of what is commonly known as real estate are reviewed.

The definition of "property" used in this chapter is: title to, or, rights of, ownership in goods or other valuables. "Title" means one's right to property, or the evidence of that right to property. "Ownership" means the complete and the exclusive right to control property, subject to law.[1]

1. For a general introduction to personal property, *see*, *e.g.*, Bruce Welling, Property in Things in the Common Law System (1996); Michael Bridge, Personal Property Law (3rd ed. 2002); Sarah Worthington, Personal Property Law: Text and Materials (2000); Simon Gleeson, Personal Property Law (1997).

In Hong Kong, the *Interpretation and General Clauses Ordinance* (Cap 1) provides the following definitions:

> "immovable property" (不動產) means –
>
> (a) land, whether covered by water or not;
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> (b) any estate, right, interest or easement in or over any land; and
>
> (c) things attached to land or permanently fastened to anything attached to land;
>
> "movable property" (動產) means property of every description except immovable property;
>
> "property" (財產) includes –
>
> (a) money, goods, choses in action and land;
>
> (b) and obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition.[2]

The concept of property includes the notion of ownership or title. Ownership involves certain rights.[3] Someone who owns property has the following rights:

- to use the property
- to enjoy the property aesthetically (*e.g.*, works of art)
- to destroy the property
- to dispose of the property
  - by gift
  - by succession,[4]
  - through a testamentary document known as a will made by the testator[5] or by intestacy,[6] through the probate court's application of the laws of intestate succession[7]

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2. *Interpretation and General Clauses Ordinance* (Cap 1) section 3.
   The *Official Solicitor Ordinance* (Cap 416) section 2(6) translates "property vested in" as 轉歸予… 的財產.
3. *See* 20 HALSBURY'S LAWS OF HONG KONG para. 295.027 (2010) [hereinafter 20 HALSBURY'S].
4. L.B. CURZON & P.H. RICHARDS, THE LONGMAN DICTIONARY OF LAW 560 (7th ed. 2007) [hereinafter CURZON] defines "succession" as:
   (1) The order in which persons succeed to property, or some title.
   (2) Term applied to the estate of a deceased person.
   (3) Process of becoming entitled to property of a deceased by the operation of law or will.
5. *Wills Ordinance* (Cap 30) section 2 provides: "'will' (遺囑) includes a codicil and any other testamentary instrument or act, and 'testator' (立遺囑人) shall be construed accordingly."

  - by sale
  - by abandonment[8]

These rights of ownership of property may be acquired through one of the following methods:

- original, *i.e.*, taking possession of property which has never been owned[9]
- taking property which has been abandoned by the original owner
- creation or invention, *i.e.*, creating property such as when a carpenter creates a piece of furniture from raw materials[10]
- derivatively:
  - by sale/purchase of the property
  - by gift of the property
- succession: either in accordance with a will or the laws of intestacy if the person died without a will

Note that some methods of disposing of property by one person may also be the manner through which property is obtained by another person. For example, property may be disposed of by gift and can be acquired by gift. The sale of property by the original owner may result in the purchase of the same property by a new owner. As a final example, a person may come into ownership of property abandoned by the original owner.

With ownership comes the right of control. However, ownership and possession may be exercised independently. Property may thus be controlled by a person who exercises fewer rights than an owner, but who nonetheless may control access to and use of the property. This person has possession of the property. This concept of possession of personal property is discussed immediately below. Real property is discussed in section II below.

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6. *See generally Intestates' Estates Ordinance* (Cap 73). *Id.* at section 2(1) translates "intestate" as 無遺囑者.
7. The Hong Kong Government's *Bilingual Laws Information System's English-Chinese Glossary of Legal Terms* [hereinafter *BLIS Glossary*] translates the term "succession" as 死亡繼承. *See http://www.legislation.gov.hk/eng/glossary/homeglos.htm* (last visited 26 Feb. 2011).
   See also the Law Reform Commission of Hong Kong, Report on Law of Wills, Intestate Succession and Provision for Deceased Persons' Families and Dependents (Topic 15) (1990).
8. "Abandonment of goods takes place when possession of them is quitted voluntarily without any intention of transferring them to another." 20 HALSBURY'S, *supra* note 3, at para. 295.025.
9. Defined as "occupancy". *See id.* at para. 295.036.
10. *See also id.* at para. 295.037.

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